SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

----------X

PENNY F. HART,

Plaintiff,

Index No. 156732/2016

-against-

THOMAS V. CAPPA,

DECISION & ORDER
Mot. Seq. Nos. 005 & 006

Defendant.

----------X

DAVID B. COHEN, J.:

Plaintiff Penny F. Hart (Hart) moves for an order: (1) granting her summary judgment on her affirmative claims; (2) directing the sale of the parties' jointly owned apartment, and setting the matter for a damages inquest to determine how the proceeds should be divided; (3) granting her summary judgment dismissing defendant's counterclaims; and (4) awarding her such other and further relief as the court deems appropriate (Motion Seq. No. 005). Defendant Thomas V. Cappa (Cappa) opposes, and plaintiff replies. Plaintiff also moves for an order: (1) striking, as forgeries, exhibits G-K in Cappa's affidavit submitted in opposition to Hart's motion for summary judgment; (2) striking Cappa's pleadings as a sanction for Cappa's fraud on the court; (3) awarding Hart her costs and attorneys' fees in connection with her motion for summary judgment and the instant motion; and (4) granting Hart such other and further relief as the court deems appropriate (Mot. Seq. No. 006). Cappa opposes and Hart replies. The motions are consolidated for decision.

BACKGROUND

By summons and complaint dated August 11, 2016, plaintiff asserts two causes of action and seeks judgment against defendant for partition and sale of a co-op apartment, for an accounting ancillary to such partition and sale, and for a declaration that the parties may retain gifts received during the course of their relationship (NYSCEF Doc. No. 1, complaint).

Following service and filing of defendant's verified answer and 15 counterclaims dated September 14, 2016 (NYSCEF Doc. No. 2), plaintiff filed and served her amended complaint dated September 27, 2016, asserting four cause of actions and additional or different allegations (NYSCEF Doc. No. 4, amended complaint).

In her amended complaint, plaintiff alleges that "[a]t one point, Plaintiff and Defendant were romantically involved, and although not ever intending to marry, Defendant asked that Plaintiff wear an 'engagement style' ring to signify that she was 'off the market'. Plaintiff agreed" (*id.* ¶4). "Plaintiff called off the relationship and returned Defendant's ring" (*id.* ¶5). The court notes that in the complaint, plaintiff alleged that the parties "in fact were engaged to be married" (complaint, ¶4), and she "called off the engagement and returned Defendant's engagement ring" (*id.* ¶5).

Plaintiff alleges that: "During their romantic involvement", she and defendant "acquired a cooperative apartment" at 383 Grand Street, New York, New York (the Co-op) as "joint tenants with rights of survivorship" (amended complaint, ¶6), and attaches as exhibit A the Co-op's "stock certificate and proprietary lease" (*id.* ¶7). "Their relationship having ended and Defendant having made various vicious slanders against Plaintiff and otherwise wronged Plaintiff, Plaintiff no longer wishes to be tied to Defendant in any way" (*id.* ¶8), and she asked defendant to "buy out her interest" in the Co-op or agree to sell the Co-op and split the proceeds (*id.* ¶9). He refused to agree to either option, and demanded that she return gifts he gave her during their relationship (*id.* ¶11). "Thus, to finally sever the remaining ties between the parties," she brings the action seeking partition of the Co-op, "both equitably and pursuant to Section 901 of the Real Property and Procedures Law [RPAPL]" (*id.* ¶12), and for a declaration that the gifts defendant gave her are hers to keep (*id.* ¶13). Alternatively, "to the extent the fact finder determines that

gifts made by the parties were made in contemplation of marriage and must be returned, Plaintiff seeks the return of the cash and other gifts she made to Defendant during the relationship" (*id.* ¶14).

In her first cause of action for partition and sale of the Co-op, she alleges that: she is the owner of an "undivided one-half share" of the Co-op and defendant is the owner of an "undivided" one-half share of the Co-op (*id.* ¶¶ 15-16); "[d]uring their relationship, Defendant resided in" the Co-op while she "was free to enter and use" the Co-op "as and when she choose" (*id.* ¶17); their relationship "has suffered a breakdown impinging on their ability to enjoy peacefully their occupancy rights" to the Co-op (*id.* ¶18); and the Co-op's physical partition would unduly prejudice the parties" (*id.* ¶19). She alleges that she is, therefore, entitled to partition and sale of the Co-op (*id.* ¶20).

In her second cause of action seeking declaratory judgment, plaintiff alleges that during their relationship, she and defendant "exchanged various gifts, for birthdays, holidays, and other reasons" (*id.* ¶23). She "made clear" to defendant and defendant "understood" that she would not marry him (*id.* ¶¶24-25). "Nevertheless, Defendant asked Plaintiff to wear an 'engagement style ring' to signal that she was 'off the market'" (*id.* ¶26). Plaintiff returned the ring to defendant after their relationship ended (*id.* ¶27), and defendant "has since argued that Plaintiff must return to Defendant various other gifts that he gave her throughout the course of the parties' relationship" (*id.* ¶28). Plaintiff alleges that she "is entitled to a declaration that she may retain all other gifts Defendant made to her in the course of their relationship" (*id.* ¶28).

For her third cause of action, labeled as "Rescission Under Civil Rights Law Section 80-b," plaintiff alleges as follows: "In the alternative, and to the extent that the finder of fact concludes that the gifts exchanged by the parties during the relationship were given in

contemplation of marriage, Plaintiff is entitled to the return of cash and other gifts she made to the Defendant during this period" (*id.* ¶31). She alleges that during the relationship she gave defendant "at least $1,169,849.69 in cash and checks to, among other things, pay his living expenses, including the carrying charges for the Co-op apartment" (*id.* ¶32), and "provided Defendant with other gifts, the value of which will be proven at trial" (*id.* ¶33). "Thus, to the extent that gifts exchanged between the parties are recoverable under Section 80-b of the Civil Rights Law, Plaintiff is entitled to a judgment in an amount to be proven at trial, but at least $1,169,849.69 (*id.* ¶34).

As a fourth cause of action in conversion, the amended complaint alleges that: during the parties' relationship, she "deposited roughly $825,000 in a Vanguard retirement account currently held in Defendant's name" (the Vanguard account) (*id.* ¶36); she did not intend these deposits as a gift but rather the account was to be used to fund their mutual retirement (*id.* ¶37); despite demand, defendant has refused to return these funds; she is entitled to judgment of $825,000, plus statutory interest from the date on which defendant refused her demand to return to her the funds (*id.* ¶38).

In his verified answer and counterclaims to the amended complaint and counterclaims dated October 14, 2016 (answer) (NYSCEF Doc. No. 6), defendant denies the allegations except admits certain allegations to the extent indicated, and asserts affirmative defenses and counterclaims. The allegations that were denied but admitted to the extent indicated include: plaintiff returned the engagement ring (*id.* ¶¶5, 27); plaintiff attached a copy of the current stock certificate and proprietary lease to the Co-op but defendant denies that she has an ownership interest in the Co-op (*id.* ¶7); defendant admits that he resided in the Co-op during the relationship with plaintiff, but denies that she was free to enter and use the Co-op "as and when

she choose nor was Plaintiff ever given keys or access to the Co-op" (*id.* ¶18). Additionally, defendant: admits that the relationship between the parties suffered a breakdown but otherwise denies all other allegations set forth in paragraph 19 of the amended complaint (*id.* ¶19); admits that a physical partition of the Co-op would unduly prejudice him, but otherwise denies the allegations in paragraph 20 of the amended complaint (*id.* ¶20); and denies the allegations of paragraph 24 of the amended complaint, and asserts that the parties sought in vitro fertilization on four occasions in contemplation of the marriage taking place (*id.* ¶24).

The affirmative defenses include: failure to state a cause of action; plaintiff is not entitled to her requested relief based on unclean hands and because defendant "expended large sums to renovate, repair and maintain" the Co-op "without any financial aid or other assistance from Plaintiff" (*id.* at 5); plaintiff is not entitled to the equitable relief of partition because there is an adequate remedy at law and the parties agreed he could reside in the Co-op for the rest of his life (*id.* at 5, 6); unjust enrichment; estoppel; and waiver. He additionally asserts that plaintiff is not entitled to her requested relief because: he has resided exclusively at the Co-op from 2002 until present and the relief would unduly prejudice him (*id.* at 5); and plaintiff is in breach of a contract with him and she holds title in trust for him (*id.* at 6).

Defendant's factual allegations related to the counterclaims, by way of background, include the following. In or about 2002, defendant and plaintiff commenced a romantic relationship (*id.* ¶43), and he believed that they were in a committed and exclusive relationship (*id.* ¶45) . In or about 2003, he asked plaintiff "to be engaged to him and gave her an engagement ring which she readily accepted," with the ring valued at over $50,000 (*id.* ¶46).

Over the course of the parties' long term relationship and engagement, on or about 2006, he loaned her $850,000, which she promised to repay at the compound interest rate of 6 percent

(the Loan) (*id.* ¶¶47, 62). After they were engaged, he loaned her the money "for her attorneys' fees in connection with litigation involving Plaintiff and her now ex-husband and extensive civil litigation involving her mother, father and brother over the ownership of the family held insurance business" (*id.* ¶47).

"[B]elieving he was in a committed and exclusive relationship" with plaintiff, he financially and emotionally supported her during her separation and divorce, financially and emotionally supported plaintiff's three children, who in 2003 were six, eight and nine years old, and acted as a parent to them (*id.* ¶¶48-50).

In 2004, believing he was in a committed and exclusive relationship with plaintiff, defendant purchased the Co-op from his mother and placed it in plaintiff's name to be held in trust for him (*id.* ¶52). Plaintiff did not contribute to the Co-op's purchase price (*id.* ¶53), and from on or about 2004 to the present, he renovated, repaired and maintained the Co-op, at a cost in excess of $900,000 (*id.* ¶54). Since the Co-op's purchase to date, he maintained his residence at the Co-op (*id.* ¶55), he has exclusively resided there (*id.* ¶56), and he has been its exclusive occupant (*id.* ¶58). At no time since the Co-op's purchase has plaintiff contributed to any renovations, repairs, or maintenance (*id.* ¶57). Defendant alleges that from the Co-op's purchase until "April of 2012, when the parties relationship ended," plaintiff never resided at the Co-op, did not have keys or access to the Co-op, rarely stayed overnight, and she has not been in the Co-op since the end of the relationship (*id.* ¶59).

Defendant alleges that from "time to time over the long-term relationship and engagement of the parties and in contemplation of having children together," he provided plaintiff with "numerous pieces of extravagant jewelry," including 14 items which he identifies and describes, expending more than $500,000 (the Jewelry) (*id.* ¶61).

Defendant further alleges that in or about 2010, plaintiff sold her prior residence at 500 East 83rd Street (the 500 E83 Apt.) and purchased Apartment 12APE at 200 East End Avenue, New York, New York for approximately $2.2 million dollars (the 200 EE Apt.), where she has resided since April 2011 (*id.* ¶60). The 200 EE Apt. has a 3200 square feet interior and a 2500 square feet exterior and is currently worth $6.5 million dollars (*id.*). Over "the term of the long-term romantic relationship and engagement of the parties" (*id.* ¶63), defendant performed and managed a complete renovation of the 200 EE Apt., which increased the value by more than $4 million dollars (*id*). "In exchange, Plaintiff agreed to pay Defendant 20% of the increase in value of the apartment" (*id.)*.

Additionally, defendant alleges that over "the long-term romantic relationship and engagement of the parties" (*id.* ¶64), he performed and managed a complete renovation of the triplex apartment owned by plaintiff, located at 530 East 72nd Street, New York, New York (the 530 E72 Apt.) (*id.*). "In exchange for Defendant's renovation and management of" the 530 E72 Apt., "Plaintiff agreed to pay Defendant a 20% share of the proceeds from the sale of the apartment" (*id.*). The 530 E72 Apt. was sold in the Spring of 2015 (*id.*). "Plaintiff concealed the sale" from defendant "in an attempt to avoid paying" him his share of the sale price (*id*). He is owed $340,000 by plaintiff, and plaintiff reneged on the agreement (*id*).

He further alleges that over "the long-term romantic relationship and engagement of the parties," in or about 2012, plaintiff paid $538,000 to an identified law firm of which $178,000 belonged to defendant, to bring a lawsuit (*id.* ¶65). Unknown to him, the lawsuit was meritless (*id.*), and plaintiff informed him that the lawsuit was dismissed by the court (*id*). He "came to learn after" making the payments to the law firm that plaintiff was "simultaneously having a sexual affair" with the law firm's principal partner who had brought the meritless lawsuit (*id*).

Plaintiff refused to repay him the full amount that he loaned her (*id.* ¶66). Defendant alleges that over the term of their relationship and engagement which he believed was a committed and exclusive relationship, plaintiff had "numerous sexual affairs" (*id.* ¶67). Defendant alleges that that in or about 2012, the parties ended their relationship as a result of his becoming aware of plaintiff's numerous affairs as well as her drug use (*id.* ¶68).

Defendant also asserts 15 counterclaims, of which 7 remain following the court's decision and order dated January 9, 2018 and filed March 6, 2018 (the dismissal motion order) (NYSCEF Doc. No. 69). In that decision and order on plaintiff's motion to dismiss and to strike (Mot. Seq. 001), the court denied that part of the motion seeking to dismiss the 1st, 2nd and 3rd counterclaims for failure to state a cause of action as they were barred under the statute of frauds and statute of limitations. The court: (1) granted plaintiff's motion to dismiss only to the extent of dismissing the 2nd, 3rd, 5th, 8th, 11th, 12th, 14th, and 15th counterclaims, finding that these counts were duplicative; and 2) denied plaintiff's motion to strike certain portions of the answer that contain scandalous and prejudicial allegations. The remaining counterclaims have not been renumbered, and therefore they are referenced in this decision and order as originally numbered in the answer.

The 1st counterclaim seeks the imposition of a constructive trust with respect to the Co-op. Prior to his purchase of the Co-op in 2003 and while the parties were in a romantic relationship and defendant believed he was in a committed and exclusive relationship with plaintiff, plaintiff was aware and agreed to hold the Co-op in defendant's name, and based in reliance on her promise he purchased the Co-op and placed it in plaintiff's sole name (*id.* ¶¶69-73). From 2003 until the present, in reliance on plaintiff's promise, he renovated, repaired and maintained the Co-op at a cost in excess of $900,000 (*id.* ¶74). After he "became aware of

Plaintiff's multiple affairs during their engagement," he demanded that plaintiff transfer ownership to him as agreed, and she refused (*id.* ¶¶75-76). On or about September 24, 2013, plaintiff transferred one-half ownership of the Co-op to him as a joint tenant with right of survivorship, "which truly was still owned solely by Defendant" (*id.* ¶77), and she promised him that although she refused to place ownership in his name solely, "he could continue to reside there for the rest of his life" (*id.* ¶78). As a result of plaintiff's conduct, she has been unjustly enriched at his expense (*id.* ¶79). He asserts that plaintiff "should be required to disgorge her alleged ownership of the "Co-op "which she unjustly obtained," plaintiff's request for a partition should be denied, and a constructive trust should be imposed for his benefit (*id.* ¶80).

The 4th counterclaim asserts a cause of action pursuant to Civil Rights Law (CRL) 80-b. He alleges that: he gave plaintiff the Jewelry in contemplation of marriage and on condition of the marriage, which did not and will not occur; he demanded the return of the Jewelry or its value and plaintiff refused; he is entitled to recovery of the Jewelry or its value (*id.* ¶¶92-96).

In the 6th counterclaim, defendant asserts a cause of action for fraud with respect to the Jewelry, alleging, inter alia, that over the long-term romantic relationship and engagement of the parties, plaintiff made the described false representations and omissions that she was in a committed and exclusive relationship with him, and he provided her with the Jewelry "in contemplation, reliance, and on condition of said representations and omissions" (*id.* ¶¶106,107). She made these false representations to defendant and carried out her scheme with intent to defraud and deceive him so that he would provide her with "numerous and extravagant jewelry, although "all the while" she was having "numerous sexual affairs" (*id.* ¶¶106-108). He justifiably relied upon her misrepresentations and omissions, he was damaged thereby, and he

would not have provided her with the Jewelry but for her fraudulent and deceptive scheme (*id.* ¶¶109-111).

Defendant asserts his 7th and 9th counterclaims in connection with the Loan. His 7th counterclaim asserts a cause of action for breach of contract. He alleges that the parties "agreed that the Plaintiff would repay Defendant the $850,000 loan to the Plaintiff for her attorneys' fees in connection with litigation involving Plaintiff and her now ex-husband and extensive civil litigation involving her mother, father and brother over the family held insurance business at a compound interest rate of 6%" (*id.* ¶113). He further alleges that: he performed pursuant to the agreement and loaned her the $850,000; he demanded payment from plaintiff and she refused to pay the interest due; plaintiff is in breach of the agreement; and he is entitled to judgment in the amount of $363,000, representing the interest owed him on the Loan (*id.* ¶¶112-116).

In his 9th counterclaim, defendant asserts a cause of action in fraud. He alleges that: plaintiff made false representations and omissions over their long-term romantic relationship and engagement; in reliance thereon he lent her the $850,000; plaintiff made the false representations and omissions and carried out the scheme to obtain the Loan with intent to deceive defendant; he justifiably relied upon her misrepresentations and omissions that she was in a committed and exclusive relationship with him; he was damaged by his justified reliance; he would not have lent her the monies if "he knew of her infidelity to their engagement but for" her fraudulent and deceptive scheme; he is owed compound interest on the loan and the return of the legal fees paid to the law firm (*id.* ¶¶126-132).

The 10th counterclaim is for breach of contract in connection with the 200 EE Apt. He alleges that: in accordance with the parties' agreement, he performed the renovations at a cost of $600,000 which increased the apartment's value by $4 million dollars; he has demanded and is

entitled to, but plaintiff has failed to pay him, $800,000, representing the 20% increase in value, with interest until paid (*id.* ¶¶133-138).

Defendant asserts in the 13th counterclaim a cause of action for breach of contract in connection with the 530 E72 Apt. He alleges, inter alia, that: he performed and managed a complete renovation of the 530 E72 Apt., for which plaintiff agreed to pay him a 20% share of the proceeds of the apartment's sale; defendant performed under the agreement; the apartment was sold in the Spring of 2015 at a $1.7 million profit; defendant has demanded payment from plaintiff and plaintiff has refused and has failed to make the payment as agreed; defendant is entitled to $340,000, representing his share of the profit from the sale of the 530 E72 Apt.(*id.* ¶¶150-157).

By reply dated November 26, 2018 (reply) (NYSCEF Doc. No. 107), plaintiff admits certain allegations, denies certain allegations except to the extent admitted, and otherwise denies the allegations in the counterclaims. The allegations plaintiff admits include: from the time the Co-op was purchased until the present, defendant has maintained his residence at and exclusively resided in the Co-op (reply, ¶¶55-56); upon the termination of the parties' relationship, defendant demanded that plaintiff transfer all ownership interest to him and she refused (*id.* ¶84); the marriage did not occur nor will occur (*id.* ¶¶94, 99); defendant demanded the return of the jewelry or its value and plaintiff refused (*id.* ¶¶95, 102); defendant demanded payment for the 200 EE Apt. and 530 E72 Apt. and she refused (*id.* ¶¶136, 155).

The allegations that plaintiff denies except to the extent stated or as admitted include: she told defendant he was her soul mate (reply, ¶51); defendant participated in renovating the Co-op (*id.* ¶54); she has not been in the Co-op since their relationship ended (*id.* ¶59); defendant from time to time bought her jewelry with money she provided (*id.* ¶61); defendant oversaw the

renovations of the 200 EE Apt. and the 530 E72 Apt. (*id.* ¶¶63, 64, 134); defendant broke up with her in 2012 (*id.* ¶68); she admits the parties were in a romantic relationship (*id.* ¶70); she added defendant to the Co-op as a joint tenant with rights of survivorship (*id.* ¶77). While otherwise denying the allegations with respect to ¶78 of the counterclaim (which asserted that plaintiff promised him that although she refused the Co-op's ownership in his name solely he could continue to reside in the Co-op for the rest of his life), plaintiff "admits that she told Defendant that she did not intend to ever evict him" from the Co-op (*id.* ¶78).

Plaintiff also asserts five affirmative defenses. She asserts that his claims are barred, in whole or part, by: the statute of limitations; laches; waiver and estoppel; accord and satisfaction; and defendant's unclean hands (*id.* ¶¶169-173).

The Note of Issue

On September 11, 2019, plaintiff filed a note of issue and certificate of readiness for trial (COR) (NYSCEF Doc. No. 181). The COR contains a check in the box indicating that discovery proceedings now known to be necessary are completed. The COR also states that there are no outstanding requests for discovery, and the case is ready for trial.

Plaintiff's Motion for Summary Judgment (Mot. Seq. No. 005)

Plaintiff's Papers in Support of Summary Judgment Motion

Plaintiff asserts that she is entitled to summary judgment in her favor on her claims relating to partition of the Co-op and recovery of sums deposited into the parties' joint Vanguard account. The supporting papers do not address her second cause of action for declaratory judgment or her fourth cause of action. Plaintiff also asserts that she is entitled to summary judgment dismissing defendant's counterclaims. The court notes that plaintiff did not address

that part of the 9th counterclaim seeking return of $178,000 that defendant alleges he paid for legal fees in 2012. The court follows plaintiff's order in addressing the moving papers.

The Co-op: The Partition Claim and the 1st Counterclaim (Constructive Trust)

Plaintiff Hart asserts that the "undisputed evidence" demonstrates that she is entitled to summary judgment on her claim for partition of the Co-op, of which she is the co-owner (NYSCEF Doc. No. 128, Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment [Supporting Memorandum of Law], at 1). Additionally, "because Hart indisputably contributed to the purchase" of the Co-op, "she cannot be unjustly enriched by its partition and sale, foreclosing Cappa's claim for imposition of a constructive trust" (*id*). Her contentions as to her partition claim are set forth in the Supporting Memorandum of Law, with references to the exhibits which are attached to her attorney's affirmation (NYSCEF Doc. No. 114, Affirmation of Akiva M. Cohen, Esq. [Cohen Aff.]). As noted in more detail below, the referenced exhibits include copies of certain pages of her and defendant's deposition testimonies, one bank check and various other documents.

In her supporting memorandum of law, plaintiff asserts that the parties first met and began dating in 2004, and while the parties were dating, they jointly purchased Apartment M2004 at 383 Grand Street (unit M2004), where Cappa had been residing, from Cappa's mother. "In connection with that purchase, Hart wrote Cappa's mother a $300,000.00 check out of her own funds" (Supporting Memorandum of Law, at 2). The court notes that the check, attached as exhibit 6 to the Cohen Aff., is an official bank check in the amount of $302,071.30, dated September 20, 2007, payable to Cappa's mother with the remitter being Penny Hart (NYSCEF Doc. No. 120). She further states "[t]hat purchase was made in connection with the settlement of a lawsuit Cappa had brought against his family members, which Hart had paid for, and because

Hart was contributing to the purchase of M2204, Hart also executed that settlement agreement though she was not a party to the lawsuit" (*id.*).

Plaintiff states that she also purchased Apartment M2003 at 583 Grand Street [unit M2003) for roughly $750,000, made the down payments, funded the balance with a mortgage on the apartment, made the mortgage payments, and "funded the subsequent construction that combined the two units into a single apartment" namely, the Co-op (Supporting Memorandum of Law at 2). The court notes that these statements are supported by references to her deposition testimony, but not supporting documents attached as exhibits. She also states that she "often paid the maintenance on unit M2004" (*id.* 2-3). The supporting reference is to her deposition testimony; supporting documents are not attached as exhibits. She asserts that she was listed as the sole owner of the Co-op until September 2013, when "she had the share certificates amended to add Cappa as a joint tenant with rights of survivorship" (*id.* at 2-3), and she references the copies of the Co-op 's proprietary lease and share certificate dated September 24, 2013, listing her and Thomas V. Cappa as joint tenants with right of survivorship (NYSCEF Doc. Nos. 122 and 123, Cohen Aff., exhibits 8, 9).

She contends that to establish her right to the Co-op's partition and sale, she need only demonstrate her ownership and right to possession of the Co-op, and the shares and proprietary lease, which list her and Cappa as co-owners, are sufficient to make her prima facie case. She further asserts that "the evidence confirms" that she was the source of 75% of the funds for the Co-op, as she provided 50% of the purchase funds for unit M2004 and was the sole payor on the M2003 mortgage (*id.* at 5). Plaintiff asserts that the documentary evidence showing her payments for ownership of the Co-op: (1) "conclusively rebut[s] Cappa's allegation that Hart was only a nominal purchaser and that he funded the purchase of both units;" and (2) "prevents

the imposition of the constructive trust sought by Cappa as his only defense to partition", as regardless of whether other elements of this claim are present, "she cannot be unjustly enriched by receiving her fair share of its sale" (*id.* at 6).

Plaintiff additionally asserts that "partition rather than sale is not a viable option here," as the Co-op is a single apartment and again dividing the Co-op into its constituent units would require significant work and she would not be able to recover her share of the value without a sale (*id.*).

The Vanguard Account

With respect to her claim regarding the Vanguard account, plaintiff relies on her supporting memorandum of law and referenced exhibits annexed to the Cohen Aff, She also relies on the two page affidavit of her accountant, Larry Maietta (Maietta Aff.) (NYSCEF Doc. No. 114).

Plaintiff asserts that the "undisputed evidence" establishes that: (1) the parties shared a joint retirement account, into which she deposited over a million dollars and on which she paid taxes; (2) after their breakup, they transferred the joint assets, slightly more than 22,000 shares worth over one million dollars, into an account in defendant's sole name; (3) defendant "acknowledged at his deposition that the transfer was not a gift;" (4) the account transfer documents she signed "specifically note that the transfer was not a gift;" (5) defendant's refusal to provide her with access to her funds is wrongful; and (6) she is entitled to judgment awarding her the current value of half of the transferred shares (Supporting Memorandum of Law, at 5).

She asserts that in or about 2006, defendant Cappa added her name to his Vanguard account, and she began depositing her own money, a total of $1,039,516.00 over the years, into the account. She paid taxes on income from the account when Cappa provided the relevant

information to her accountant. "In August 2014, after the parties had broken up and at Cappa's insistence", she "signed a change of ownership form for the Vanguard account solely for purposes of allowing Cappa to manage the account without requiring her permission or signature" (*id.* at 3). Plaintiff also points to defendant's deposition testimony that the transfer occurred after the parties broke up, as defendant acknowledged "that the parties broke up for the final time in late 2013 or January 2014" (*id.* at 7). "Consistent with her understanding that the document was merely procedural, and was not changing her ownership interest in the funds, the Change of Ownership form recited that it was not a gift to Cappa" (*id.*). "Since then, however, Cappa has denied Hart access to her funds, claiming the funds belonged entirely to him" (*id*).

Plaintiff asserts that based on these facts and contrary to defendant Cappa's claim that she never had an interest in the Vanguard account and that her deposits were of funds he gave her, he has converted the transferred funds (*id.* at 6-7). She asserts that "there is simply no evidence at all that Hart's deposits were made as a conduit for Cappa" (*id.* at 7). She also asserts that his deposition testimony is contrary to this claim, as he testified that: Hart had money and he did not; he required a payment plan to make the $25,000 restitution payment he owed when he was released from prison; when he claimed he loaned Hart $850,000 in 2004, he described it as almost every dollar he had (*id.*). Accordingly, she asserts that Cappa's own sworn testimony shows that he could not have provided her "with over $1,000,000 in cash to make the deposits into Vanguard that are a matter of record, and his claim is a lie" (*id.*).

Further, she asserts that, in any event, "even were Cappa telling the truth, it would be irrelevant," because as a matter of law, they shared undivided 50% interests in the funds in their joint account regardless of whose funds were deposited (*id.* at 7-8). Cappa could not revoke her interest, and the documents she signed that transferred the full sum to an account in his sole

name specifically provided that the transfer was not a gift, "confirming Hart's testimony that the transfer was for convenience and that Cappa was operating as a trustee of the funds in the transfer account" (*id.* at 8).

The Maietta Aff. states that: in October 2015 Ms. Hart asked him to review "her tax filings to determine the amount of income from her joint Vanguard account with Mr. Cappa that had been included in her tax filings;" he reviewed her tax filings back to 2009; and the email attached as exhibit 1, generated in the regular course of business, "accurately reports the income she had reported relating to the Vanguard account in those years" (Maietta Aff. ¶2). The attached exhibit consists of a number of emails between Hart and Maietta, with "Vanguard" listed in the subject line, including an email from Maietta to Hart setting forth the income amounts reported for years 2009 through 2013 (NYSCEF Doc. No. 113). The Marietta Aff. and the email do not specifically identify the account at Vanguard by account number or other distinguishing information.

The court's review of the exhibits referenced in the supporting memorandum of law includes the following. The exhibits include copies of: (1) certain pages of plaintiff's and defendant's deposition transcripts (NYSCEF Doc. Nos 118, 121, Cohen Aff., exhibits 4,7); (2) her checks made payable to "Vanguard" in various amounts and bearing various dates in 2005, 2006 and 2008 with several completed Vanguard purchase forms, mostly noting account number 09980168610 (NYSCEF Doc. No. 125, Cohen Aff., exhibit 11); and (3) two documents titled "Vanguard Change of Ownership of Nonretirement Shares," signed on November 12, 2005, for two accounts, one listing the account number as 9974340185 and the other as 09966638096, one listing the current owner information as "Ellen Cappa-Penny Hart" and one listing the current owner information as Thomas V. Cappa, Penny F. Hart and Ellen Cappa, and both listing the

new account owner information as Thomas V. Cappa and Penny F. Hart (NYSCEF Doc. No. 124, Cohen Aff., exhibit 10).

Additionally, plaintiff relies on a copy of a document bearing the Vanguard name titled "Change of Ownership Form" (NYSCEF Doc. No. 126, Cohen Aff., exhibit 12, at 1). The document states that the form is to be used "to change ownership or transfer nonretirement assets to a different account owner," and bears plaintiff's signature date of August 8, 2014 (*id*). The document lists Thomas V. Cappa as the owner and Penny F. Hart as the joint owner of account number 099800168610, and provides for the transferring of the shares to the existing Vanguard account listing Thomas V. Cappa as the owner and the account number of 88072192052. Under the heading "Reason for transfer," the instructions state: "Check one. If you don't check a box, we'll treat the transfer as a gift," and a checkmark is located in the box by the entry "This isn't a gift and isn't due to death" (*id.* at 3). The amount of the transfer is not set forth.

The Agreements Concerning Renovations of the 530 E72 Apt. and 200 EE Apt. (10th & 13th Counterclaims)

Plaintiff argues that the court "should dismiss Counts 10 and 13 of Cappa's counterclaims relating to his renovations of apartments owned by Hart, because the parties' deposition testimony confirms that there was no enforceable contract between them" (Supporting Memorandum of Law at 8-9).

In the supporting memorandum of law, plaintiff contends that there was no agreement between the parties as to either the 530 E72 Apt. or the 200 EE Apt. for a number of reasons. As to the 530 E72 Apt. there was no consideration or intent to be bound, as she suggested giving 20% of the profit gratuitously, out of appreciation for his efforts. She contends that defendant agreed at his deposition that the 20% was not in consideration for his work, but was a gratuitous offer from plaintiff, citing the following question and answer:

> Q. And the same thing on 72nd Street . . . you would have done it anyway but she said she wanted to give you money?
>
> A. Yeah."

(Cohen Aff., exhibit 7 at 104:25-105:9). She further asserts that even were there consideration, they had a different understanding of the calculation of profit and what shared expenses would be factored into that calculation. Therefore, there was no meeting of the minds on this material and essential term, thus precluding the formation of an enforceable contract.

The supporting memorandum of law further states that as to the 200 EE Apt., plaintiff "denied ever agreeing or offering to give Cappa a percentage of the 'savings' on the renovations (indeed, there would be no way to calculate such savings)", citing her affidavit and its accompanying exhibit 1. She also refers to defendant's deposition testimony, stating that he testified "that any such agreement was gratuitous and had no impact on his decision to work on the apartment" (citing defendant's deposition testimony at 103:23-104:24).

In her supporting affidavit addressing these two counterclaims, plaintiff asserts that as she testified to at her deposition, she "never agreed to pay [defendant] to renovate the apartments –at least, not in the sense of 'agreement' meaning a contract" (NYSCEF Doc. No. 109, Supporting Affidavit of Penny F. Hart (Hart Supporting Aff.), ¶2). Cappa "helped coordinate and oversee the renovations" at the 530 E72 Apt. as her "boyfriend and romantic partner," and "seeing the good job he was doing (after he had already been working at it)" she told him that she "wanted to give him 20% of any profit [she] made on the sale of the apartment" (*id.*). She further states that it is clear from his "post-break-up email demanding only to be paid in *quantum meruit*," that he "always understood that there was no contract between us on either the 72nd Street or 89th Street" (*id*), referring to a four paged email dated March 14, 2016, attached to her affidavit as exhibit 1 (the March 14, 2016 email).

The court's review of that email includes the following. It has as its subject line the following words in bold font: **"Settlement for Negation[sic] Purposes Only"**, and contains at the bottom of each page, in capital letters, the word "CONFIDENTIAL" (NYSCEF Doc. No. 110). That email sets forth by subject matter or category various issues in dispute between the parties and defendant's statements, positions and proposals on those issues.

Plaintiff further contends in her affidavit that "[a]side from that being a gift in the same spirit of relationship as his help to me with the apartments, and not as a *quid pro quo* for the work he was doing, [she] now understand[s] that [they] had very different conceptions of how 'profit' would be calculated" (*id.*). She "viewed it as the profit over and above what [she] could have earned from a more standard investment" and defendant "appeared to as well", referring to his email to her dated April 19, 2015 with the subject line "Closing on 72nd,), which is attached to her affidavit as exhibit 2 (the April 2015 email) (NYSCEF Doc. No. 111). She states that although defendant claims in his deposition testimony that he never believed the investment factor should have been factored it, that was her intent at the time.

The court's review of the April 2015 email includes the following. It stated: "Just playing with some numbers??? Did I miss anything? Not sure why it is going to take a few months for me to get my end of the deal. I even gave you some fluff in these numbers" (*id.*). The email continued to state: "If you ever find another deal and want me to do the work for 20% of the profit just let me know" (*id*). It listed various categories with dollar values, including in the middle of the list the following reference: "Lost Investment Income: Say 3% for four years, $200,000" (id). That reference is preceded and followed by references with dollar values under the categories of sale price, purchase price, construction, broker fee, carrying charges, closing costs, a credit for an insurance check for the floors, and "Balance: $513,000 Profit" (*id.*). The

April 2015 email concluded by stating: "I have $102,600 coming at closing. When do I get the check. I can use it. You netted $411,000" (*id.*).

The Loans (7th and 9th Counterclaims)

The Supporting Memorandum of Law asserts that the two counterclaims relating to the Loan are time-barred under the applicable statute of limitations and, accordingly, must be dismissed. Counterclaim 7, asserting breach of contract, is time barred as a six year statute of limitations applies to the alleged loan made in 2006, which is not evidenced by a note and with no pre-set payment date, and the counterclaim was not brought until 2016. Similarly, the fraud claim asserted in 9th counterclaim is time barred, as it was not brought within six years of the fraud or two years of its discovery, whichever is later, and the loan was made in 2006, Cappa testified that he was aware of Hart's infidelity as of 2012, and Cappa did not assert a claim for the alleged nonpayment of the Loan until 2016.

The Jewelry (4th and 6th Counterclaims)

Plaintiff similarly contends that the counterclaims "seeking return of gifts given during the parties' relationship, are time-barred" (Supporting Memorandum of Law at 11). She asserts that the fourth counterclaim, pursuant to CRL Section 80-b, is for recovery of chattels and is subject to a three year statute of limitations, citing CPLR 214 [3]). She asserts that based on defendant's deposition testimony that the parties broke up in 2012, the cause of action accrued in 2012 and this 2016 counterclaim is time-barred.

Plaintiff additionally contends that the sixth cause of action in fraud seeking return of "gifts" is time-barred, as the "only evidence produced" by defendant is dated prior to 2010 ( referencing exhibit 13), and, accordingly, any alleged fraud occurred more than six years prior to

his filing of the counterclaims and more than two years from his discovery of plaintiff's alleged infidelity (Supporting Memorandum of Law at 11).

The court's review of the referenced exhibit is as follows. exhibit 13 consists of two appraisals and one valuation certificate (NYSCEF Doc. No. 127, Cohen Aff., exhibit 13). Plaintiff's name is listed on all three documents. One appraisal, dated July 26, 2005, concerns a "Lady's platinum and diamond engagement ring," appraised at $22,350.00. The second appraisal, dated December 22, 2007, also concerns "Lady's custom handmade Platinum and diamond engagement ring," appraised at $51,000 (*id.*). The two appraisals contain both similar and different descriptions of the item(s). The third document is a valuation certificate for "insurance purposes in the Republic of South Africa" and concerns a "Stainless Steel and Black Caucciu Link Bracelet-Imported for Lorraine Efune (PTY) Ltd., with an approximate retail replacement value of R2 290.00" (*id.*). The court notes that these items of jewelry are not included in the items of Jewelry described in Paragraph 61 of the answer that comprise defendant's 4th and sixth counterclaims.

Defendant's Opposing Papers to the Summary Judgment Motion

Defendant argues that plaintiff has failed to meet her prima facie burden of demonstrating that there are no remaining material issues of fact and failed to show that she is entitled to judgment as a matter of law. In so asserting, he relies on his affidavit (NYSCEF Doc. No 131, Affidavit of Thomas V. Cappa (the Cappa Aff.), accompanying exhibits, and his attorney's affirmation (NYSCEF Doc. No. 151, affirmation of Mary Margaret Looby [Looby Aff.]). Defendant also submits a memorandum of law, which does not contain page numbering (NYSCEF Doc. No. 152, Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment [opposing memorandum of law]).

His exhibits include copies of: his and plaintiff's complete deposition testimonies; various emails, letters, an unsigned contract of sale and the stipulation of settlement regarding Unit M2004, bearing various dates in 2007 (exhibit F); Vanguard change of ownership forms signed November 12, 2005 and August 8, 2014; Vanguard Portfolio Summary dated December 31, 2006 (NYSCEF Doc. No. 148, exhibit Q); various invoices and documents relating to his renovation of the Co-op; and various documents and emails regarding $1,013,155 in total construction expenses and the calculation of profit for the 530 E72 Apt (NYSCEF Doc. No. 149, exhibit R).

Defendant also attaches as exhibits copies of other documents containing the following titles, descriptions or references: (i) with respect to the Co-op, documents entitled "Ownership Agreement of Trust," dated July 2013 (NYSCEF Doc. No. 138, exhibit G), and "Assignment of Lease, dated July 2013 (NYSCEF Doc. No. 139, exhibit H); (ii) with respect to a loan of $850,0000, documents entitled "Security Agreement," dated December 3, 2013 (NYSCEF Doc. No. 140, exhibit I), and "Promissory Note," dated December 3, 2013 (NYSCEF Doc. No. 141, exhibit J); and (iii) a letter dated December 2013 from plaintiff to defendant, with her signature followed by his signature under the notation "Agreed and accepted," setting forth an agreement between them and containing references to a promissory note from TD Bank, N.A. dated October 25, 2013 a related security agreement with TD Bank, and the Co-op (NYSCEF Doc. No. 142, exhibit K, the "Letter Agreement") (collectively, Exs. G-K).

Defendant first requests that the court disregard plaintiff 's improper attachment to her affidavit of an exhibit of an email exchange between him and plaintiff, as the email states in its subject line, in bold lettering, that is it "Settlement for Negotiation Purposes Only," and defendant asks that plaintiff and her counsel be admonished for the email's use (Looby Aff ¶2).

The Co-op: The Partition Claim and the 1st Counterclaim (Constructive Trust)

Defendant asserts that: he placed the Co-op, which he purchased from his mother, in plaintiff's name to be held in trust for him; at no time did plaintiff contribute to the Co-op's purchase price, maintenance, repairs or renovations; from 2004 to the present, he renovated, repaired and maintained the Co-op, the costs of which are now $900,000; from purchase until the present, he maintained his residence and exclusively resided at the Co-op; plaintiff never resided at the Co-op, did not have keys or access to it, and rarely stayed overnight (Cappa Aff. ¶20).

Defendant asserts that he learned in 2012, after plaintiff paid $538,000, of which he paid $178,000. to a law firm to bring a lawsuit against a company in which he and plaintiff held an interest, that plaintiff was having a sexual affair with the lawyer (*id.* ¶23). He also discovered that during their long-term relationship and engagement, to which he was committed and exclusive and believed plaintiff was as well, she had numerous affairs and was using drugs (*id.*). "As a result," he "ultimately terminated" his relationship with plaintiff, "and that is when the trouble with the Plaintiff commenced" (*id.*).

He demanded that plaintiff transfer the Co-op ownership to him as previously agreed, and she refused (*id.* ¶23). On or about September 24, 2013, she "finally transferred" one-half ownership of the Co-op to him as a joint tenant with right of survivorship (*id*). She "promised" him that "although she refused to place ownership solely in his name, [he] could continue to reside there for the rest of his life" (*id.*) He asserts that she knew the Co-op was his, "that's why she executed" the ownership agreement of trust (exhibit G), the assignment of lease (exhibit H), the security agreement (exhibit I), and the Promissory Note (exhibit J) (*id*). Additionally, plaintiff wrote him a letter, dated December 2, 2013 (Exhibit K), "clearly indicating that she

received 'all' of the proceeds from a loan made by TD Bank, which was secured" by the Co-op (*id.*).

Defendant states that as he previously informed the court, when he first met plaintiff he had just been released from prison (*id.* ¶24). While plaintiff was involved with the litigation with her husband and family members, he "was the one funding her life, paying for living expenses, loaning her money for her attorney fees, and taking care of her children like they were [his] own" (*id.*). Throughout this time they "were also working closely as partners in various business ventures," although he was the "'silent' business partner" as his name was not on anything, as plaintiff knew that his "past precluded him from obtaining credit and getting approved on business loans or financing," and "accordingly, she placed everything in her name" (*id*). He "was in love and trusted her" and so "was not concerned with this, especially in light of the promises" they made to one another (*id*).

He purchased the Co-op from his mother and put it in plaintiff's name, as he would have been unable to obtain Co-op approval due to his prison record (*id.* ¶25). In support of his assertion that he paid for the Co-op and it belongs to him, he points to an email plaintiff sent him, contained in exhibit F, which had his handwriting on it since he was determining how much money was needed at the closing after he was given his credits toward the purchase price (*id.*). To avoid litigation in connection with plaintiff's failure to place the Co-op in his own name, "under the terms of Plaintiff's agreement", he would live out his lifetime in the Co-op, and plaintiff would become the owner only if he died before her (*id.* ¶26). While not what he wanted, he "did not have any other choice under the circumstances" (*id.*). He asserts that if plaintiff did not agree for him to live in the Co-op for the rest of his life, "she never would have placed the property in September 2013 as 'joint tenants with right of survivorship,' especially considering

that [they] were no longer together as a couple" (*id.*). He asserts that plaintiff, having agreed to permit him to reside in the Co-op for life, cannot now inequitably dispossess him.

Accordingly, defendant asserts that plaintiff has not demonstrated that she is entitled to summary judgment on her partition claim. She also has not shown that she is entitled to dismissal of his counterclaim, as he established the elements for a constructive trust (Looby Aff. ¶3).

The Jewelry (4th and 6th Counterclaims)

Defendant further asserts the following. Over the course of their long-term relationship and engagement, he provided plaintiff with jewelry worth over $500,000, and, as he did in his answer, he details the items of Jewelry (*id.* ¶21). He asserts that the Jewelry must be returned to him, as he and plaintiff "were engaged despite her lies," she referred to him as her fiancée, "[they] went through in vitro fertilization," and they "had a Japanese wedding" (*id.* ¶32). He states that "[w]hile it is true that [he is] unaware of the dates of purchase, [he] know[s] that the Plaintiff has a State Farm rider to her policy, which she admitted she had;" and that the rider lists the dates and value of the Jewelry (*id.* ¶¶21, 32). Although a document demand was served on plaintiff for production of the rider, plaintiff refused to produce it as it would bolster his claim, and plaintiff "should not be rewarded for such conduct" (*id.*).

He contends that his causes of action are timely, as he did not learn about plaintiff's affair with her lawyer until 2012 and, as testified to by plaintiff at her deposition, while the parties broke up periodically, they continued their relationship until 2014 (Looby Aff. ¶32). Defendant argues that plaintiff has not demonstrated she is entitled to summary judgment, and he met his burden and produced sufficient evidence to raise questions of fact as to timeliness and whether the statute of limitations was tolled or revived.

The Agreements Concerning Renovations of the 530 E72 Apt. and 200 EE Apt. (10th & 13th Counterclaims)

Defendant asserts that in or about 2011, he "performed and managed a complete renovation to" the 200 EE Apt., which increased its value by $4 million and, "[i]n exchange" and before he performed the work, plaintiff agreed to pay him 20% of the increase in the apartment's value (*id.* ¶22). Around that same time, he also "performed and managed a complete renovation" of the 530 E72 Apt., and, in exchange, plaintiff agreed to pay him, before he performed the work, a 20% share of the proceeds of its sale (*id.*). He states that "[t]his is the type of relationship we had-it was love mixed in with business" (*id.*). Plaintiff sold the 530 E72 Apt. in the Spring of 2015, but "concealed the sale" "in an attempt" to avoid paying him his share of the sale price, "which comes out to approximately $340,000" (*id.*). In further support of his claim that plaintiff entered into an agreement to pay him 20 % of the profit from the sale of the 530 E72 Apt., he points to the emails attached as exhibit B. He further states that they did have an express agreement, and although he "would have done some work for her," it doesn't change the fact that she told him she would pay him before he did the work and "he relied on her word" as they "were engaged" (*id.* ¶31).

Defendant argues that as disputed facts requiring a trial remain, plaintiff's motion should be denied.

The Vanguard Account

Defendant further asserts that plaintiff "knows that the Vanguard account" is in his name and is his sole property, "and that is why she took her name off the account" (*id.* ¶30). He asserts that the facts establish that the Vanguard account is his property. She admitted at her deposition that: she never had a Vanguard account in her own name, he managed the account prior to her removal of the account; and she never discussed anything with him about the Vanguard account before or after the transfer (*id.*). She further "admitted that she never asked him for the return of

the account" (*id.*). "Plaintiff further testified that removing her name from the Vanguard account was part of what she considered 'house-cleaning' after she and the Defendant broke-up for the final time in 2014" (opposing memorandum of law). The supporting page and line references to plaintiff's deposition transcript are set forth in the Looby Aff., ¶4, and Part III of the opposing memorandum of law. He also asserts that the reason she asked her accountant for how much she paid on the Vanguard account was "not because she co-owned it but because upon information and belief, she wanted" defendant to "reimburse her for the tax she believed she wrongly paid" (Cappa Aff. ¶30).

Defendant argues that plaintiff has failed to establish the elements for her conversion claim relating to the Vanguard account. As she failed to make a prima facie showing of her entitlement to summary judgment, her motion should be denied.

Loan

Defendant asserts that in 2006, after the parties were engaged, he loaned plaintiff $850,000, which she promised to repay at the compound interest rate of 6%, and that he had taken out these monies from his Vanguard account by redeeming $850,000, referencing exhibit Q (Cappa Aff. ¶19). He loaned her the monies for "her attorneys' fees in connection with litigation involving Plaintiff and her now ex-husband and extensive civil litigation involving her mother, father, and brother over the ownership of the family-held multi-million dollar insurance business" (*id.*). He asserts that, as he testified at his deposition, the money he loaned her was partially paid, thereby extending the statute of limitations (*id.* ¶32). In addition to his affidavit, defendant relies on his deposition testimony, pointing to specific page and line references (Looby Aff. ¶ 6; opposing memorandum of law). Moreover, as testified to by plaintiff at her deposition,

while the parties broke up periodically, they continued their relationship and did not finally break up until 2014 (Looby Aff. ¶32).

Accordingly, defendant argues that plaintiff has failed to demonstrate that defendant's counterclaims for the Loan are untimely, and summary judgment should be denied.

Plaintiff's Reply Papers

In reply, plaintiff submits an affirmation from Len Breslow, Esq. (NYSCEF Doc. No. 155, Affirmation of Len Breslow, Esq. [the Breslow Aff.]), an affirmation from her attorney (NYSCEF Doc. No. 158, Reply Affirmation of Akiva M. Cohen [Cohen Reply Aff.]), and a Memorandum of Law in Reply (NYSCEF Doc. No. 154, the Reply Memorandum).

Plaintiff's counsel asserts that the documents annexed to the Cappa Aff. were not produced in discovery (Cohen Reply Aff. ¶2). He also asserts that he conducted a search of New York's UCC filings and "none reflect any security interest held by Cappa in property owned by Hart" (*id.* ¶3). Mr. Breslow states that he drafted, at defendant's request, a "mortgage repayment letter' for defendant and Hart (Breslow Aff. ¶2). He attaches to his affirmation two exhibits. exhibit 1 (NYSCEF Doc. No. 156) is the version of the document that he drafted (Breslow Aff. ¶2), and exhibit 2 (NYSCEF Doc. No. 157) is a copy of the email that he received from defendant on December 2, 2013 (Breslow Aff. ¶3).

Plaintiff contends that she demonstrated in her moving papers that she is entitled to summary judgment because there are no issues of fact requiring a trial on her affirmative claims or defendant's counterclaims. She asserts that defendant failed to defeat this showing, as his affidavit and exhibits fail to raise issues of fact material to the claims before the court, and his memorandum of law did not dispute the law cited in plaintiff's supporting memorandum of law.

She argues that as to her partition claim, defendant's affidavit "does not deny that Hart owns the proprietary shares and is a party to the proprietary lease, giving her both ownership and right to possession" (Reply Memorandum at 1). She asserts that defendant's argument that he and plaintiff are joint tenants with right of survivorship does not defeat plaintiff's right to partition, and his other assertions either are legally irrelevant or flatly contradicted by documentary evidence. Additionally, defendant "simply ignores the evidence submitted by Hart, which conclusively establishes that she significantly contributed to the purchase of the Co-op Apartment, precluding any unjust enrichment from its partition and sale"(*id.* at 2-3). She further asserts that in the absence of unjust enrichment, the requirements for a constructive trust are not met, and his counterclaim should be dismissed.

In a 17 line footnote to the Reply Memorandum, plaintiff addresses defendant's Exs. G-K. Relying on the Cohen Reply Aff. and the Breslow Aff. filed with the reply and on the motion to strike and its supporting papers, including the affidavits of plaintiff and of a handwriting examiner (motion seq. no. 006), plaintiff asserts that these documents were not produced during discovery and are forgeries (*id.* at 2 fn 2). The court notes that plaintiff does not set forth when the documents were demanded, or point to a particular document request or a demand made at the deposition calling for production of these particular, or category of, documents. Plaintiff additionally asserts that these purported documents, as applicable: contain unexecuted notary lines; vary from the documents drafted; are not supported by other evidence; contain gibberish; do not identify the consideration for the agreement(s); contradict defendant's claim that plaintiff was holding the property in trust for defendant. She argues that "even were the court to consider any of the forged documents that appeared for the first time in opposition to this motions, those

documents-and particularly the latest-dated of the parties 'agreement,' which Cappa indisputably signed-further confirm Hart's ownership and entitlement to partition" (*id.*).

As to her claim for conversion of the Vanguard account, plaintiff asserts that defendant failed to provide a basis to deny summary judgment. He does not deny that she deposited over $1,000,000 to the account during the parties' relationship and does not deny that plaintiff paid taxes on her share of the account's income. He also does not claim that plaintiff intended the change in account ownership as a gift to him. Defendant only continues to argue by conclusory assertion that plaintiff never owned the account because it was all his money. Plaintiff asserts that defendant's conclusory claim is insufficient to raise an issue of fact requiring a trial.

Plaintiff additionally argues that defendant's papers fail to defeat her showing as: she "testified clearly that she intended only to remove her name from the account for convenience" (*id.* ¶4); she had a prior interest in the Vanguard account; the change of ownership form that both plaintiff and defendant signed "expressly represented that Hart was not gifting her interest in the account to Cappa" (*id.*); and defendant has not alleged that he paid consideration.

Plaintiff asserts that defendant has failed to defeat her showing of entitlement to dismissal of the counterclaims concerning the renovations of the 200 EE Apt. and the 530 E72 Apt., as his own deposition testimony established that there was no enforceable contract and he does not recant or address that testimony in his papers. She argues that in light of the testimony, defendant's conclusory assertion that he performed the renovations in exchange for the alleged agreements to pay is a sham that should not be considered on summary judgment. She additionally asserts that defendant fails to explain why, if he had the agreements with plaintiff, he demanded payment only after the parties broke up and asserted only a quantum meruit right to payment. Plaintiff also asserts that defendant fails to address how an agreement can be found to

exist if there is a failure to reach a mutual understanding of the calculation of profit for purposes of the alleged agreement, and the absence of a written contract here requires the court to parse out the intentions and conduct of the parties in a relationship.

With respect to the counterclaims for the Loan, plaintiff argues that defendant's assertion that plaintiff made partial payments, thereby tolling the statute of limitations, fails to defeat plaintiff's showing that these claims are time barred. She contends that absent an acknowledgement that monies are due and an intent to make those disputed payments, a partial payment does not toll the statute of limitations, and defendant fails to identify any of these accompanying circumstances.

Plaintiff further argues that defendant has failed to defeat her showing that the counterclaims for return of the Jewelry are time barred. There is no dispute that the parties broke up for the first time in 2012, thereby triggering the three year statute of limitations under CRL 80-b, and there is no basis for arguing that the parties' reconciliation tolled the statute, as defendant does not argue that he was somehow misled by the reconciliation or that plaintiff prevented him from filing a timely suit.

Similarly, she asserts that defendant's fraud claim for the return of the Jewelry is time barred. Defendant has not identified any gifts made within the six years prior to filing the counterclaim and affirmatively alleges that he became aware of the purported fraud in 2012. She therefore argues that the counterclaim is untimely, as defendant filed his fraud counterclaim more than six years after he gave plaintiff the Jewelry, and more than two years after he discovered the fraud.

Legal Standards

The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). "On a summary judgment motion, facts must be 'viewed in the light most favorable to the non-moving party'" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The role of the court in determining the "drastic remedy" of summary judgment is "issue - finding," not "issue - determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks and citations omitted]).

Analysis

Prior to addressing the particular claims or counterclaims for which plaintiff seeks summary judgment, the court notes the following. It is undisputed that the parties were in a long-term romantic relationship, although plaintiff disputes that they were engaged and defendant asserts that they were engaged. The factual and legal disputes, which are intertwined and interwoven, are viewed within this framework. Plaintiff asserts that the court should not consider

defendant's Exs. G-K as they were not produced during discovery and they are not authentic. As the court does not require these documents to make its determination on the summary judgment motion, and without ruling on plaintiff's request, it will not consider them. The court also does not consider the March 14, 2016 email attached to the Hart Supporting Aff. as exhibit 1 or the references in her papers to the email, as the email is labeled for settlement purposes only.

The Co-op: The Partition Claim and the 1st Counterclaim (Constructive Trust)

As under these circumstances the claim for partition and the counterclaim for constructive trust are intertwined, the court considers these issues together.

"Pursuant to both the common law and statute, a party, jointly owning property with another, may as a matter of right, seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property" (*Manganiello v Lipman*, 74 AD3d 667 [1st Dept 2010] [citations omitted]). "The right to seek partition, however, is not absolute and may be precluded where the equities so demand" (*id.*). "Although the right to partition is governed by statute (RPAPL 901 *et seq.*), and is absolute in the absence of countervailing conditions, such issues as the interests of the parties and whether partition may be had without great prejudice should first be determined" (*Grossman v Baker*, 182 AD2d 1119, 1119 [4th Dept 1992] [internal citations omitted]). "An accounting is a 'necessary incident' of a partition action, and may be had as a matter of right before entry of an interlocutory or final judgment to ensure that the parties' rights are fixed in such manner that a decree 'may work full and complete justice between [them]'" (*id.* [internal citations omitted]).

Partition is "inappropriate in advance of a determination as to whether it would cause the owners' great prejudice and prior to an accounting to determine the parties' respective interests in the property" (*Ranninger v Pevsner*, 306 AD2d 20, 20 [1st Dept 2003] [internal quotation

marks and citations omitted]. Denial of a summary judgment motion seeking a partition and sale of a jointly held property is appropriate, as such relief is premature where a party seeks that "equities arising out of unequal contributions or receipts to be determined at an accounting and paid out of the sale proceeds" in that "[t]he parties' respective rights and interests in the property, and the adjustment of any equities, must be determined before, not after, a sale" (*Sampson v Delaney*, 34 AD3d 349, 349 [1st Dept 2006] [internal citation omitted]).

On her moving papers for summary judgment for her claim for partition and sale of the Co-op, plaintiff has not demonstrated her entitlement to the requested relief of an order directing the sale of the parties' jointly owned apartment, and setting the matter for a damages inquest to determine how the proceeds should be divided upon partition and sale. Here, material and genuine issues of disputed fact exist, including those related to the parties' rights and interests, whether great prejudice will result to defendant, the countervailing conditions, and the various equities involved. These and other factual issues must be determined by the fact finder prior to the sale and partition. Under these disputed facts and circumstances, and contrary to plaintiff's contention, she has not established her absolute right to the relief she seeks by virtue of her being listed as a joint tenant with right of survivorship on the Co-op's share certificate and proprietary lease.

The genuine issues of material disputed facts include the circumstances surrounding the purchase of the Co-op, whether the Co-op was to be held by plaintiff in trust for defendant, whether plaintiff used her own or defendant's monies to purchase the Co-op, whether she paid maintenance or made other financial contributions to the Co-op, defendant's $900,000 renovation of the Co-op, and her promise to defendant that he could remain in the Co-op for life. Additionally, issues of material fact remain with respect to whether great prejudice will result to

defendant in the event partition and sale is granted, particularly as it is not disputed that the Co-op has been his exclusive residence over these many years and plaintiff has never resided in the Co-op. Further, issues of material fact requiring resolution by the fact finder at trial arise from defendant's counterclaim for a constructive trust.

The four elements for the imposition of a constructive trust are: a confidential or fiduciary relationship; a promise; a transfer in reliance; and unjust enrichment (*Poupis v Brown*, 90 AD3d 881, 882 [2d Dept 2011]). Additionally, "a constructive trust may be imposed [w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*id.* [internal quotation marks and citations omitted]).

Here, on these papers, plaintiff failed to meet her prima facie burden that there are no issues of fact in dispute and that she is entitled to dismissal of this counterclaim as a matter of law. Her moving papers demonstrate that the facts are very much in dispute. To the extent she met her prima facie burden, defendant defeated that showing. The disputed facts include whether defendant purchased the Co-op and ownership was placed in plaintiff's name to be held in trust for him, whether the funds used by plaintiff to purchase the apartment were given to her by defendant, the promise made by plaintiff to defendant in 2013 following the placement of the Co-op in plaintiff's and defendant's joint ownership with right of survivorship, and whether plaintiff would otherwise be unjustly enriched under these circumstances, including by reason of defendant having expended more than $900,000 to renovate the Co-op, this last factual assertion not disputed by plaintiff in these papers. On this claim, as in all the other claims and counterclaims, the conflicting papers present triable factual issues and stark credibility questions that cannot be determined on this summary judgment motion.

Plaintiff's motion for summary judgment on her partition claim and for dismissal of the first counterclaim for a constructive trust is denied.

The Vanguard Account

"Conversion is the 'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights'" (*State of New York v Seventh Regiment Fund,* 98 NY2d 249, 259 [2002], quoting *Vigilant Ins. Co. of Am. v Housing Auth. of City* of *El Paso, Tex*, 87 NY2d 36, 43 [1995]). "The tort of conversion is established when one who owns and has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]).

Here, plaintiff has failed to meet her prima facie burden. She failed to establish that there are no remaining material issues of disputed fact and that she is entitled to judgment as a matter of law. Contrary to her assertion, she did not establish that facts are not in dispute with respect to the requisite elements for her conversion claim. Her assertion that Cappa was operating as a trustee of the transferred funds is not supported by a plain reading of any documentary evidence, and she does not assert that the transfer was not voluntary. To the extent she claims that she did not intend for the transfer to defendant to result in her loss of monies in the Vanguard account, this assertion on this record presents questions of fact. To the extent she met her prima facie burden, defendant defeated that showing by admissible evidence, including plaintiff's deposition testimony that the transfer of the account was for housekeeping purposes and that she did not demand the return of the transferred funds, as well as defendant's affidavit regarding the account and the circumstances surrounding the transfer. Plaintiff failed to rebut defendant's showing of the existence of material facts in dispute.

Genuine material issues of disputed fact requiring a trial remain. Plaintiff's motion for summary judgment on this claim is denied.

The Jewelry (4th and 6th Counterclaims)

The parties agree that the three year statute of limitations applicable to an action to recover chattel under CPLR 214 (3) applies to an action pursuant to CRL 80-b. Contrary to plaintiff's claim that the action is time barred because the parties first broke up in 2012 and defendant did not bring his counterclaim until 2016, there is record evidence that the parties continued their relationship and did not break up for a final time until 2014, and, accordingly, assuming without finding that the cause of action accrued when the parties broke up, plaintiff has not demonstrated that this claim is barred by the three year statute of limitations.

In any event, under CPLR 214 (3), the date of accrual in a replevin action depends on whether the current possessor acquired the property in good faith or in bad faith (*Swain v Brown*, 135 AD3d 629, 631 [1st Dept 2016]). An action against a current possessor who acquired the property in good faith accrues once the true owner makes a demand and that demand is refused (*id.*). This analysis applies as well in a claim pursuant to CRL 80-b (*McQuade v Safian*, 64 Misc 3d 475, 477 [Dist Ct of Suffolk County, 4th District, 2019]. Here, although plaintiff alleges in her amended complaint that defendant demanded the return of the Jewelry, she failed to set forth, either in her amended complaint or her motion papers, the date(s) of that demand. Accordingly, she failed to meet her prima facie burden of proof that there are no remaining issues of material disputed fact and that she is entitled to judgment dismissing this counterclaim as untimely as a matter of law.

With respect to defendant's 6th counterclaim seeking the return of the Jewelry under the alternative cause of action in fraud, here too plaintiff fails to demonstrate in her moving papers

that the claim is untimely. The parties do not dispute that the statute of limitations pursuant to CPLR 213 (8) governs, although they dispute its application to these facts.

CPLR 213 (8) provides that in an action for fraud, "the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it."

In her moving papers, plaintiff failed to set forth the dates on which defendant gave her the Jewelry. Contrary to her contention, on this summary judgment motion, it is her burden, not defendant's, to make a prima facie showing that there are no disputed facts as to the dates when defendant gave her the Jewelry and that these dates are more than six years prior to the filing of the counterclaim. This she did not do. Her reliance on the appraisals is misplaced, as the three items of jewelry described in the appraisals are not those set forth within the counterclaim. The court need not and does not reach the parties' other arguments regarding the accrual of the claim.

Plaintiff's motion for summary judgment dismissing the fourth and sixth counterclaims is denied.

Agreements On Renovations of the 530 E72 Apt. and 200 EE Apt. (10th and 13th Counterclaims

Plaintiff failed in her moving papers to meet her prima facie burden of demonstrating that there are no remaining disputed issues of fact and she is entitled to dismissal of the 10th and 13th counterclaims as a matter of law. Her denial that she agreed to pay defendant for his renovation work on the 530 E72 Apt. and the 200 EE Apt., her assertion that the defendant's work on the 530 E72 Apt. was gratuitous, her argument that she had a different understanding of the calculation of profit and, therefore, an enforceable agreement was not formed, are issues of disputed fact requiring a trial. Additionally, and contrary to plaintiff's argument, the cited lines

of defendant's deposition testimony do not equate to an admission that his work was gratuitous, particularly when viewed in context and within the entire deposition. To the extent she met her prima facie burden, defendant demonstrated that material genuine issues of fact remain, and plaintiff failed to defeat that showing in her reply papers.

Plaintiff's motion for summary judgment dismissing the defendant's 10th and 11th counterclaims is denied.

The Loan (7th and 9th Counterclaims)

Plaintiff seeks summary judgment dismissing the two counterclaims seeking repayment of the Loan as time barred. She asserts that both the 7th counterclaim, sounding in contract, and the 9th counterclaim, sounding in tort, are untimely pursuant to the respective applicable statute of limitations of six years, as defendant alleges he made the $800,000 loan to plaintiff in 2006, and did not file his counterclaim until 2016. In determining this part of the motion, and as noted previously, the court views this action and these counterclaims within the circumstances of the parties' long-term relationship and, albeit contested, engagement, and the interwoven nature of the claims.

"In contract cases, the cause of action accrues and the Statute of Limitations begins to run from the time of the breach" (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 (1979) [internal citations omitted]). While plaintiff asserts that this claim is untimely because it was made in 2006 and the counterclaim was not filed until 2016, plaintiff fails to set forth undisputed facts demonstrating that the statute of limitations began to run when the Loan was made. Her conclusory assertion that the statute of limitations began in 2006, without more, is insufficient. The court cannot determine from plaintiff's moving papers the terms of the Loan, including when payments were due, and therefore cannot determine when the breach occurred

and the claim accrued. Accordingly, plaintiff has not set forth undisputed facts to support her assertion that the counterclaim for the Loan is time barred and that she is entitled to dismissal as a matter of law.

To the extent plaintiff met her prima facie burden, defendant defeated it. As asserted in defendant's opposing papers and counterclaims, defendant asserts that he provided the Loan to plaintiff in connection with litigation involving her and her now ex-husband and extensive civil litigation involving her mother, father, and brother over the ownership of the family-held multi-million dollar insurance. This assertion as to the nature and circumstance of the Loan indicates that the Loan was not due when made, and presents a conflicting issue of fact as to plaintiff's assertion that the claim for repayment of the Loan accrued the day the Loan was made. Further, defendant asserts that plaintiff made partial payments, thereby creating an issue of fact as to whether the statute of limitations was tolled (*see Lew Morris Demolition Co., Inc. v Board of Educ. of City of N.Y.* 40 NY2d 516 [1976]). Evidence of payments is further supported by the amended complaint's allegations that only interest is now due. Moreover, defendant demanded the repayment of the interest due under the Loan after the parties broke up in 2012 or 2014, not in 2006 when the Loan was made. In her reply papers, plaintiff has not defeated this showing.

As the court's role on a summary judgment motion is issue finding, and not issue determination, and as the facts must be viewed in the light most favorable to the non-moving party, the court denies plaintiff's motion to dismiss the 7th counterclaim as time barred.

A cause of action based upon fraud must be commenced within "the greater of six years from the date the cause of action accrued," or two years after the date the fraud was discovered or could with reasonable diligence have been discovered (CPLR 213 [8]). Plaintiff alleges that the cause of action for fraud as alleged in the 9th counterclaim accrued in 2006, when the Loan

was made, and therefore is time barred as the counterclaim was not filed until 2016. Plaintiff also asserts that the discovery rule does not extend the statute of limitations, as defendant learned of plaintiff's alleged sexual affair in 2012, but did not file his counterclaim until 2016, more than four years later, and the parties' again getting together until 2014 did not serve to toll the statute.

As movant, it was plaintiff's burden to demonstrate that there are no remaining issues of disputed fact and that she is entitled to summary judgment motion as a matter of law. This she has failed to do, as issues of fact remain as to when this fraud claim accrued. The parties' papers offer conflicting facts that bear on the issue of timeliness of the claim, requiring resolution at trial. Accordingly, plaintiff's motion to dismiss the 9th counterclaim is denied.

Plaintiff's motion for summary judgment is denied in its entirety.

Plaintiff's Motion to Strike and for Sanctions (Motion Seq. 006)

Plaintiff also moves for an order: (1) striking, as forgeries, Exs. G-K in Cappa's affidavit submitted in opposition to plaintiff's motion for summary judgment; (2) striking Cappa's pleadings as a sanction for Cappa's fraud on the court; (3) awarding Hart her costs and attorneys' fees in connection with her motion for summary judgment and the instant motion; and (4) granting Hart such other and further relief as the court deems appropriate (Mot. Seq. No. 006). Cappa opposes and Hart replies.

In support of her motion, plaintiff submits her affidavit (NYSCEF Doc. No. 160, Affidavit of Penny Hart in Support [Hart Aff.]), the affirmation of her counsel (NYSCEF Doc. No. 165, Affirmation of Akiva M. Cohen [the Cohen Aff.]), and Supporting Memorandum of Law (NYSCEF Doc. No. 176, Supporting Memorandum). Plaintiff also submits an affidavit of Sharon Ottinger, an "Expert Document Examiner," dated July 18, 2019, accompanied by her affidavit, titled "Questioned Document Examiner Letter of Opinion", sworn to on July 19, 2019

and labeled exhibit A, and her curriculum vitae, labeled exhibit B (NYSCEF Doc. Nos.161, 162,163, the Ottinger Letter of Opinion).

Plaintiff states that she "reviewed the purported 'agreements'" that defendant attached as Exs. G-K in his affidavit opposing her motion, that she "did not execute **any** of those documents, and [her] 'signatures' on them are forged" (Hart Aff. ¶2). She further asserts that "[s]eparate and apart from knowing that [she] did not sign those documents, that was immediately apparent when [she] looked at the supposed 'signatures;' that is simply not how [she] signs [her] name" (*id.*).

Plaintiff's counsel asserts the documents annexed to the Cappa Aff. as Exs. G-K were not produced in discovery (Cohen Aff. ¶2). The court notes that copies of the document or other demands, so-ordered stipulations, or post deposition demands calling for or referencing the production of these documents are not attached. Counsel asserts that "[s]imple visual inspection of the 'signatures' on Exhibits G-K, and comparison of those signatures to authenticated documents, makes clear that the signatures on Exhibits G-K were forged" (*id.* ¶3), and he attaches various documents as exhibits. In the Supporting Memorandum of Law, plaintiff argues that as defendant's fraud is clearly established, the court should strike Exs. G-K as forgeries, strike Cappa's pleadings, and sanction defendant for the costs of plaintiff's summary judgment motion and the motion to strike.

The Ottinger Letter of Opinion states that she examined 11 known signatures of Penny Hart and the documents "Ownership Agreement of Trust" and "Security Agreement." She noticed 6 discrepancies in the signatures, which she details. She concludes that "[b]ased upon a thorough analysis of these items, and from an application of accepted forensic document

examination tools, principles, and techniques, it is [her]professional expert opinion that Penny Hart did not author the questioned signatures" (the Ottinger Letter of Opinion at 4).

In his opposing affidavit, defendant states that he adamantly denies that he did anything improper, as plaintiff led him to believe that she signed all of the documents contained in Exs. G-K (NYSCEF Doc. No. 182, Affidavit in Opposition of Thomas V. Cappa [Cappa Opposing Aff.] ¶2). He states that it was customary for the parties to leave documents to sign on the other's desk, and that after numerous demands, "the documents were left on [his] desk with her signature on them" (*id.* ¶2). He "assumed that she signed them-but if she did not, [he] believe[s] she must have given someone permission to sign them and place them on [his] desk" (*id.*) Defendant sates that it is possible that plaintiff's assistant signed the documents and his counsel would like to depose her.

Defendant states that plaintiff did not tell him that she did not sign the documents, but as he was informed that they were not notarized and therefore not legally binding, he continued to demand that she transfer the property to him (*id.* ¶3). Defendant also points out that the Ottinger Letter of Opinion does not state that Hart's signatures on the Security Agreement, the Promissory Note, and the Letter Agreement were forged. Defendant further asserts that Exs. G-K should not be stricken as plaintiff has copies in her possession and failed to produce these and other demanded documents.

Defendant further argues, by way of defendant's counsel's affirmation, that the motion should be denied as: (1) plaintiff herself has these documents; (2) plaintiff filed a note of issue, although she told him at the September 4, 2019, that there were discovery matters that needed to be completed; (3) plaintiff is not prejudiced; and (4) defendant has not committed a fraud upon the court and should not be sanctioned (NYSCEF Doc. No. 186, Affirmation of Mary Margaret

Looby, Esq.). Additionally, even plaintiff's handwriting expert did not opine that the other documents are forgeries, defendant's counsel is not a handwriting expert and cannot address the exhibits not referenced in the expert's opinion, and it was plaintiff who left the signed documents on his desk. Additionally, defendant argues that there is no basis to award sanctions or costs as defendant believed the documents plaintiff gave him contained her signature.

Plaintiff replies in her affidavit that she did not authorize someone else to sign in her name (NYSCEF Doc. No. 188, Reply Affidavit of Penny Hart). She asserts that her company has a stamp of her signature that her "staff uses on the rare occasions" when she is out of the office and she "need[s] to authorize someone to sign [her] name to a document" (*id.* ¶3), and had she authorized someone to sign her name, the signatures would match her stamp signature, which she used on a blank sheet of paper and attached as exhibit A.

In plaintiff's reply memorandum of law, plaintiff argues that plaintiff "conclusively established that five purported 'contracts' submitted by Cappa in opposition to summary judgment were forgeries" (NYSCE Doc. No. 187, Reply Memorandum at 1), and that defendant's affirmation "effectively concedes the forgery" (*id.*). Plaintiff asserts that she established in her Supporting Memorandum that the court "may not consider the challenged documents if the preponderance of the evidence establishes that they were forged" (*id.* at 2), and plaintiff met that burden. Plaintiff further argues that defendant provides no explanation for his failure to produce Exs. G-K during discovery or in his prior filings, "supporting the obvious conclusion: that he had not yet created them until after Hart filed for summary judgment" (*id.* at 3). Plaintiff asserts that as the documents have not been authenticated, they cannot be considered in the summary judgment motion.

Plaintiff additionally argues that: defendant's claim that he believed plaintiff signed the documents is "belied by the visual obviousness of the forgeries, particularly the 'P' in 'Penny' on Exhibit K" (*id.* at 6); the stamp signature used by plaintiff "looks precisely like Hart's actual signature and nothing like the forged signatures" (*id.*), and "[n]obody with any familiarity with Hart's signature could possibly have looked at the forgeries and believed them to be genuine" (*id.*). Plaintiff further argues that "it strains credulity to believe" that after the appearance of the documents on Cappa's desk he never called or emailed her" (*id*). Additionally, plaintiff asserts that sanctions are appropriate as defendant fails to withdraw the documents, continues to assert that plaintiff's signatures appear on the documents, and maintains that the documents not specifically examined by Ottinger are genuine "despite the 'signatures' on those documents sharing the same obvious defects as his other forgeries" (*id.* at 7). Plaintiff further argues that the court "may disregard Cappa's sham affidavit" (*id.*).

The motion is decided as follows. As to that branch of the motion seeking to strike Exs. G-K as forgeries, the court finds that it cannot determine this issue on these motion papers, and refers it to the trial court for resolution. This issue also goes hand in hand with the determination of whether defendant committed a fraud on the court by submitting these documents and, if so, the appropriate sanction. "Fraud on the court involves willful conduct that is deceitful and obstructionistic, which injects misrepresentations and false information into the judicial process 'so serious that it undermines . . .the integrity of the proceeding'" (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]) (quoting *Baba-Ali v State of New York,* 19 NY3d 627, 634 [2012]. "[T]o demonstrate fraud on the court, the nonoffending party must establish by clear and convincing evidence that the offending party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action" (*CDR Creances*

*S.A.A.*, 23 NY3d at 320 [internal quotation marks and citations omitted]). "A court must be persuaded that the fraudulent conduct, which may include proof of fabrication of evidence, perjury, and falsification of documents concern issues that are central to the truth-finding process" (*id.* at 320-321 [internal quotation marks and citations omitted]). "[O]nce a court concludes that clear and convincing evidence establishes fraud on the court, it may strike a pleading and enter a default judgment" (*id.* at 321). "We caution that dismissal is an extreme remedy that 'must be exercised with restraint and discretion" (*id.* quoting *Chambers v NASCO, Inc.*, 501 US 32, 44 [1991]). Where dismissal is not appropriate, "the court may impose other remedies including awarding attorney fees, awarding other reasonable costs incurred, or precluding testimony" (*CDR Creances S.A.A.*, 23 NY3d at 322).

Here, the court cannot determine on these motion papers whether defendant committed a fraud on the court by submitting Exs. G-K, and, if he did so, the appropriate sanction. Accordingly, this branch of the motion for sanctions based on the alleged fraud is referred to the trial court for resolution, including plaintiff's request for costs and attorney's fees in connection with the instant motion (motion seq. No. 006).

The court denies that branch of plaintiff's motion seeking costs and attorneys' fees in connection with the summary judgment motion (motion seq. No. 005), as plaintiff filed the motion prior the defendant's submission of Exs. G-K. Plaintiff has failed to demonstrate in her papers that she is entitled to such relief, as under the American Rule, an award for costs and attorneys' fees is not authorized absent an agreement between the parties, statute or court rule (*see Baker v Health Mgt. Sys.*, 98 NY2d 80, 88 [2002]). The motion is denied in part and referred to the trial court as indicated.

Accordingly, it is

ORDERED that plaintiff's motion seeking summary judgment (Motion Seq. No. 005), is denied; and it is further

ORDERED that plaintiff's motion to strike and for other relief (Motion Seq. No. 006) is denied in part as indicated and otherwise referred to the trial court for determination; and it is further

ORDERED that defendant shall serve a copy of this Decision and Order upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119).

This constitutes the Decision and Order of the Court.

Dated: June 30, 2020

DAVID B. COHEN, J.S.C.

HON. DAVID B. COHEN