SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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MALI FUKS,

Plaintiff,

- v -

RAKIA ASSOCIATES,

Defendant.

INDEX NO. 122768/1996

MOTION DATE 01/31/2023

MOTION SEQ. NO. 028 (Action No. 1 – 122768/1996)

Action No. 1

DECISION + ORDER ON MOTION

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RUTH SHOMRON,

Plaintiff,

-against-

DAYRA FUKS,

Defendant.

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Index No. 102882/2002

Action No. 2

The following e-filed documents, listed by NYSCEF document number (Motion 028, Index No. 122768/1996) 4, 5, 6, 20, 21, 22, 23, 24, 25, 31, 32, 33, 34, 35, 98, 99, 103, 107, 111

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

This case rivals the long running dispute in Charles Dickens' novel, *Bleak House*, and will end no better. This case, *Fuks v Rakia Assocs.* (Action No. 1) and its companion action, *Shomron v Fuks* (Index No. 102882/2002) (Action No. 2), have been pending since 1996. On September 25, 2006, Judge Stackhouse, presumably as a JHO, presided over a trial in Action No. 2 in which he ruled in Ruth Shomron's (Shomron) favor on her claim for recission of four apartment sales. Judge Stackhouse found that Mali Fuks (Fuks) had duped Shomron into selling the apartments (*see* 13 Misc3d 1228 [A]). He ordered the sales rescinded and the purchase price refunded. He also ordered the partnership, R&L Realty Associates (R&L), dissolved and the

assets distributed "**equitably**." Finally, Judge Stackhouse imposed a constructive trust upon defendants for the rent and profits from the rental of the four apartments and named "R&L Realty Associates" as the recipient of that constructive trust (13 Misc3d 1228 at *4).

This decision set off all sorts of motion practice to vacate and renew in front of Judge Friedman. Ultimately, the Appellate Division, First Department affirmed (*see* 147 AD3d 685 [2017]).

Subsequently, a Special Referee conducted a trial that resulted in the Report underlying this motion (EDOC 9 [Special Referee's Report]). The Special Referee's trial was held to determine all issues in Action No. 1 and was an effort to distribute the assets of R&L "equitably" per Judge Stackhouse's order in Action No. 2.

The court already decided Motions 26 and 27 to confirm parts and disapprove parts of the special referee's 84-page report, after a **7-YEAR inquest**. However, the parties previously failed to provide the court with the record from that inquest. Instead of finding waiver, the Appellate Division reversed this court's decision on those motions (*see* 211 AD3d 467 [2022]). The court now renders a decision having taken into consideration the hearing transcripts and other evidence before the Referee, including all prior decisions, exhibits, memoranda of law, affidavits, charts, calculations, and emails.

Although the parties asked for and agreed to a Special Referee for trial, this was not the sort of case that was appropriate for a Special Referee, largely due to its complexity, deliberately confusing advocacy, and the lack of authority to enforce deadlines. Both sides have unduly complicated and prolonged these proceedings for reasons unknown. Indeed, this court feels the same way Judge Friedman did when she remarked way back on February 24, 2010, "I have never seen a case like this that has proved so intractable. This case has been pending since 1996. It has gone to arbitration which failed after years . . . one begins to wonder if there is any interest in resolving this case" [EDOC 14]).

The court also notes that Shomron has gone out of her way to conflate issues and confuse the court. The brief on this motion is a rambling 34 pages that lack a table of contents and table of authorities. This brief pales in comparison to the 45-page post-trial brief that also lacks a table of contents and table of authorities. One wonders if this was done on purpose to obfuscate as it

is in total violation of the rules of the Commercial Division, this Part, and common sense. This was in addition to purposeful omissions and misrepresentation of the record that could only have been designed to take advantage of a judge who is new to a case that has been pending for almost 30 years.

The Report of the Special Referee is over 80 pages long. In Action No. 1, the Special Referee rejected Shomron's accounting, holding that it was "inaccurate and incomplete" (Report pg. 85). The Special Referee reviewed several schedules in Shomron's "accounting" and specifically found hundreds of incorrect or incomplete entries about income, loans, and expenses. Even after all the time this case has been pending, Shomron is unable or unwilling to account for hundreds of thousands of dollars. This does not reflect well on Shomron's credibility. The Special Referee also found that Shomron breached her fiduciary duties to Fuks by engaging in active misconduct, as delineated on pages 74-76 of the Report. This also does not reflect well on Shomron's credibility.

In Motion Seq. No. 28, the Shomron defendants (Rakia Associates, 2701 Broadway Associates, Ruth Shomron, Estate of Howard Simon, and Larry Goldstein) move for what effectively would be a do-over of the proceedings before the Special Referee. As far as the court can discern, Shomron seeks for the court to set aside the following aspects of the Report:

1. The Referee found that Shomron was entitled to a constructive trust in the amount of $1,158,316.66. Shomron wants this amount increased to $1,596,154.25.

2. The Referee found in paragraphs 105-107 that loans to R&L from Shomron herself, as well as Harry Sloan, 2701 Broadway, Moti Zilber, Michael Kaplan, Kahn, Helfman and defendant Rakia Associates were "valid and enforceable." Shomron wants the Report modified to declare that R&L is entitled to repay: (1) Shomron the sum of $598,905.27 plus interest at a rate of 10% per annum, (2) 2701 Broadway Associates the sum of $67,373.51 with interest at the rate of 10% per annum; (3) Rakia Associates the sum of $13,444.62 with interest at the rate of 10% per annum; (4) Harry Sloan the sum of $13,444.62 with interest at the rate of 10% per annum; (5) the Estate of Michael Kaplan the sum of $95,000 with interest at the rate of 13% per annum; and (6) Moti Zilber the sum of $4,000 with interest at the rate of 10% per annum, or, alternatively, remanding the

eighth counterclaim to the Special Referee to issue a new report on the amount to be repaid for each loan.

3. Shomron wants the court to reject that part of the Referee's Report that found Shomron's accounting to be "substantially and significantly" inaccurate and incomplete.

4. Shomron wants the court to reject that part of the Referee's Report that found Shomron had breached her fiduciary duty to Fuks and awarding judgement to Fuks in the amount of $375,000.

5. Shomron wants the court to reject that part of the Referee's report that dismissed Shomron's fourth affirmative defense in Action No. 1 for statute of limitations.

6. Shomron wants this court to modify the Referee's Report by issuing a judgment in favor of Shomron and against Fuks on Shomron's seventh counterclaim in Action No. 1 involving allegations that Fuks derailed the successful conversion of property to cooperative ownership.

7. Shomron wants the court to reject that part of the Referee's Report that found in Action No. 1 "that the Ninth, Tenth, Eleventh and Twelfth counterclaims are moot" and granting the relief sought in those counterclaims.

8. Shomron wants the court to reject that part of the Referee's Report that found the Action No. 1 counterclaim for abuse of process with respect to the arbitration proceeding was without merit.

9. Shomron wants the court to modify the Referee's Report to award attorneys' fees for the successful prosecution of Action No. 2 that resulted in the return of four cooperative apartments to the partnership that Fuks fraudulently acquired from the partnership.

DISCUSSION

1. Increasing the Amount of the Constructive Trust

This issue dealt with the amount of rent and profits Fuks received on the four apartments mentioned earlier (see background, *supra* [discussing Action No. 2]; *see also* 13 Misc3d 1228 [A]), that Judge Stackhouse determined must be held for the benefit of R&L. The Referee held

that Shomron's forensic accountant, Alfred Pruskowski, was entirely credible and agreed with his calculations. In particular, the Referee agreed with Pruskowski's conclusions that the total expenses at issue were $437,837.59 and that the profits were $662,628.85. The Referee also agreed with Mr Pruskowki's interest calculation of $933,525.40. However, it would appear from Pl Exs. 3 and 4 in Action No. 2 that the Referee mistakenly believed the $662,628.85 represented gross, rather than net profits. According to Exhibits 3 and 4, this number was what remained after subtraction of expenses (i.e., net profit). Therefore, the court modifies the Report to impose a constructive trust in favor of R&L in the amount $1,596,154.25, plus the $933,525.40 that Pruskowski calculated, plus statutory interest on $662,628.85 from January 1, 2018 (the date after Pruskowski's interest calculation stopped). The court also makes abundantly clear that this constructive trust, asserted as it was in a derivative action, is for the benefit of R&L, NOT Shomron individually, as Judge Stackhouse ruled so long ago.

2. The Eighth Counterclaim Loans in Action No. 1

In the eighth counterclaim in Action 1, Shomron alleged that, in order to operate the various premises, R&L obtained loans from: Salon, 2701 Broadway, Helfman, Zilber, Rakia, Kaplan, Kahn, and Shomron herself, bearing interest rates of 10% (Doc 11 [Answer with Counterclaims, Action No. 1], ¶ 112). The Referee found that such loans were valid and enforceable and that Shomron was therefore entitled to a declaratory judgment. However, the Referee did not issue judgment as to the amounts of those loans. This may have been because all the eighth counterclaim asks for is a declaration that the loans are valid and should be repaid (*id.* ¶¶ 111-116; *see id.* at pg. 25 [Answer's "Wherefore" paragraph (e)]). Shomron has received this declaration. Therefore, the court confirms that part of the Report declaring that these various loans were valid.

The trouble is the Referee never determined amounts for these loans and the court has no idea where the amounts Shomron advocates for are coming from. This is particularly troubling given that, with the exception of Mr. Sloan's loan, the Referee found the amounts set forth on the schedule of loans to be "substantially incorrect," "substantially inaccurate," or, at best, "partially correct." Therefore, the court confirms the part of report that found the loans valid, declares that Shomron can pay back Harry Sloan the sum of $13,444.62 with interest at the rate of 10% per

annum, and otherwise schedules an additional hearing to determine the amounts due on the balance of the remaining loans.

This hearing will be before this court, not before a Special Referee. The court reminds Shomron that she has the burden of proof on the amount of these loans. Given the inaccurate and incomplete accounting she has produced, it may be impossible to carry that burden. No new evidence will be allowed at the hearing on these loans whatsoever.

3. That part of the Referee's Report that found Shomron's accounting to be "substantially and significantly" inaccurate and incomplete

This part of the motion just seeks a do-over. The Referee heard from the witnesses, assessed credibility, and determined:

> "Upon consideration of all the testimony presented, the considered credibility to be afforded the witnesses, and review of all documents admitted into evidence, I find as to Action No. 1 that the certified accounting submitted by Ms. Shomron to Ms. Fuks is substantially and significantly inaccurate and incomplete"

(Report, pg. 84).

The Referee heard from witnesses and reviewed several schedules. He found hundreds of incorrect or incomplete entries about the income, expense assets, and liabilities of R&L. Indeed, after litigating since 1996, Shomron is unable to account for hundreds of thousands of dollars. Shomron has kept terrible records and is now suffering the consequences.

The Referee also found, after considering the testimony, that Shomron had superior involvement with R&L to Fuks and therefore more responsibility for keeping records (Report, pg. 75). The court will not disturb these findings made after consideration of witness testimony and weighing of evidence (*see Bank of Am. N.A., v Greenfield*, 203 AD3d 1003 [2d Dept 2022]).

4. That part of the Referee's report that found Shomron had breached her fiduciary duty to Fuks and awarding judgment in the amount of $375,000

The court confirms the award of $375,00 for breach of fiduciary duty. In this case, the Referee found that Ms. Shomron's accounting was "substantially and significantly inaccurate and incomplete" (Report, pg. 73). He also found that Ms. Shomron engaged in certain activities as Fuks' partner that constituted direct misconduct towards her. This included not telling Fuks that she (Shomron) was using one of R&L's sub-accounts for petty cash, purposefully entering

certain expenses that R&L actually paid as income, using R&L funds to pay her personal expenses without telling Fuks and failing to file tax returns. As mentioned earlier, the court also found that Shomron had more involvement with R&L and a greater responsibility for record keeping. Therefore, the Referee properly determined that Shomron breached her fiduciary duties to Fuks.

Knowing that this determination is unlikely to be overturned, as it is based on witness credibility and the weighing of the evidence, Shomron resorts to quibbling with the $375,000 amount. Shomron contends that even if the finding of misconduct remains, the damages amount of $375,000 makes no sense. Shomron is wrong. First, Shomron should not be allowed to benefit from her utter failure to keep proper financial records, which make it difficult to ascertain the exact amounts she pilfered from the company (*see Wolf v Rand*, 258 AD2d 401, 402–03, [1st Dept 1999] [court afforded "significant leeway" in awarding damages for breach of fiduciary duty, especially "[w]hen a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated" [citations omitted]).

Shomron conceded $201,631.00 in damages during the appeal on the first decision and order confirming the Referee's Report (*see* Appeal Reply Brief for Defendant-Appellant dated September 23, 2022, pg. 8 [stating that "the alleged incidents of misconduct purportedly engaged in by Shomron, . . . only add up to $201,631.00," not $375,000]). The difference of less than $125,000 certainly falls under the "significant leeway" to which the Report deserves, especially considering Shomron's utter failure to maintain proper accounting records. Moreover, Shomron forgets the $125,000 that Fuks paid for her partnership share as well as thousands of dollars in periodic payments that Shomron demanded (*see* Decision, pgs. 7-11). Therefore, the Referee's calculation is well-supported in the record. It actually could have been higher.

5. Statute of Limitations

In paragraph 102 of the Report, the Referee dismissed Shomron's fourth affirmative defense that had alleged that Fuks' claims are barred by the statute of limitations, erroneously believing that the issue had been resolved in Judge Stackhouse's decision on September 27, 2006. This was incorrect. It was Mali Fuks' statute of limitations defense the court said did not apply, not Shomron's.

Shomron argues that the three-year statute of limitations applies and that, therefore, any alleged breach of fiduciary duty by Shomron prior to December 30, 1993 is time barred. However, Shomron never discusses when the cause of action accrued. It is axiomatic that a breach of fiduciary duty that sounds in fraud, as is the case here, has a six-year statute of limitations period, or two years from the discovery of the misconduct (*see Kaufman v Cohen*, 307 AD2d 113, 119, 122-123 [1st Dept 2003] [noting that "a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period" and the "discovery accrual rule also applies to fraud-based breach of fiduciary duty claims"]; *see also Gerschel v Christensen*, 143 AD3d 555, 557 [1st Dept 2016] ["Where an allegation of fraud is essential to a breach of fiduciary duty claim, the statute of limitations is six years, and the discovery accrual rule . . . applies."] [citations and internal quotation marks omitted]). Nor did Shomron argue statute of limitations in her post-trial brief to the Referee, essentially waiving the issue.[1] Finally, the Special Referee found plenty of instances of misconduct post-dating 1993. Thus, the issue of statute of limitations is just another of Shomron's baseless arguments.

6. Dismissal of Shomron's 7th Counterclaim

Shomron asks this court to modify the report of the Referee to grant judgment on Shomron's 7th counterclaim for breach of fiduciary duty for allegedly "derailing" an apartment building's conversion to co-op, by failing to contribute her pro rata share of funds to R&L. Shomron **fails to mention** that the Referee actually disposed of this counterclaim in an April 26, 2018 decision on Fuks' CPLR 4401 motion at the close of Shomron's case. Shomron never supplied this CPLR 4401 decision to the court and it is not e-filed. Rather, Shomron misleadingly refers to Judge Stackhouse's decision as if it were some foregone conclusion on this issue. This is wrong. Judge Stackhouse specifically did NOT rule on Shomron's seventh counterclaim: "the equitable division of R&L Realty's assets, shall await and be subject to the entry of a final judgment resolving the remaining claims of all the parties in Action no 1."

In the April 26, 2018 decision (that the court had to obtain independently), the Referee went through a detailed analysis of the partnership agreement and the course of dealing between the parties. The Referee stated:

[1] As far as the court can tell. The brief is: (1) not e-filed and (2) difficult to navigate without a table of contents.

> "there is no evidence that Ms. Shomron followed any of the procedures set forth in Sections 5.06 and 5.07 of the parties' partnership agreement during R&L's efforts to convert to cooperative ownership, including the sending of a Cash Call Notice or Deficiency Notice to Ms. Fuks before purportedly making a 'loan' to her in the 'aggregate' amount of any alleged deficiency. Moreover, there is no evidence that Ms. Shomron followed such procedures at any other time during Ms. Fuks' partnership in R&L"

(CPLR 4401 Decision, pg. 12).

Thus, the Referee dismissed Shomron's seventh counterclaim for failure of proof. Shomron never explains why this decision was wrong. Indeed, Shomron never mentions the CPLR 4401 Decision at all, and certainly did not move to vacate it. Accordingly, Shomron has not carried her burden on this motion to have the court modify that part of the Referee's decision to enter judgment on the seventh counterclaim in Action No. 1 that the Referee previously dismissed.

7. <u>That part of the Referee's report that found in Action No. 1 "that the Ninth, Tenth, Eleventh and Twelfth counterclaims are moot," and Shomron's request to grant the relief sought in those counterclaims</u>

In typical confusing fashion, Shomron asks the court to modify the Report's decision regarding the ninth through twelfth counterclaims, but then only discusses the eleventh and twelfth counterclaims involving amounts defendant Goldstein and defendant Simon are allegedly entitled to for having withdrawn from R&L (*see* Memorandum of Law [EDOC 6] in Action No. 1, pgs. 26-27). Unlike the loans discussed in point 2 above, the Referee did not make a finding on this issue, apparently believing that Goldstein and Simon were former defendants. It is unclear from the record whether these defendants are former or not.

There is also a good deal of confusion in the record about whether sums allegedly owed to Goldstein and Simon were a need to repay a capital contribution or to repay a loan. Shomron has changed the characterization of the amounts owed back and forth as it suits her needs. In front of Judge Stackhouse, they were capital contributions, in front of the Referee they were loans. Now, on this motion, we are back to capital contributions.

In any event, neither Goldstein, nor anyone from Simon's estate, testified. Shomron relies on the Partnership documents[2] (Pls Exs. 31, 31A, B, and C) that appear to anticipate refunding Goldstein and Simon's capital contributions from distributions (*see* Pls Ex. 31A in Action No. 1, ¶ 4 ["Larry D. Goldstein shall receive one-third (1/3) of any future distributions until such time that his capital contribution to the Partnership of $165,450.00 is repaid in full."]; *see also* Pl Ex. 31C in Action No. 1 [containing a similar provision with respect to Simon]). Shomron claims that the capital contributions have not been repaid.

However characterized, the Referee rejected the amounts owed to or repaid to Goldstein as inaccurate:

> "deposits and/or payments made to Goldstein during the period of January 1989 through March 9, 1990. I find that such deposits and/or payments are inaccurate as to the following entries: January 9, 1989, April 17, 1989, June 20, 1989, September 6, 1989, September 21, 1989, October 4, 1989, February 5, 1990 and December 22, 1990"

(Referee Report, ¶ 82).

Shomron never identifies what is left after these amounts are subtracted. The Referee also found "inaccurate" most of Shomron's proof with respect to Simon's "capital contributions" (Referee Report, p.72, ¶ 83).

Shomron never explains why the Referee's finding is wrong. She merely claims that Fuks "denies that Goldstein is entitled to receive $165,450.00 . . . and denies knowledge or information sufficient to form a belief as to whether Simon is entitled to receive $280,450.00" (Memorandum of Law in Support, pg. 27). However, it is not Fuks who has the burden of proof on this issue. It is Shomron's burden.

Only Shomron testified about the amounts allegedly owed. Given that the Referee specifically found that the amounts Shomron recorded for these loans/capital contributions were inaccurate, that the overall accounting was "substantially and significantly inaccurate and incomplete," that Fuks had long accused Shomron of using sham accounting to pocket money from R&L, and that Fuks prevailed on her breach of fiduciary duty claim which incorporated

[2] Shomron refers to the Partnership documents, totaling over 50 pages, as all the proof necessary for judgment on this claim, but never directs the court to any particular provision.

these accusations, the record supports disregarding Shomron's testimony about these capital contributions/loans under the doctrine *in falsus unum, in falsus omnibus*. Therefore, the failure of Goldstein or anyone from Simon's estate to testify is fatal. Shomron has thus failed to carry her burden as to amounts owed to Goldstein and Simon.

8. Abuse of Process

At some point in the long history of this case, the parties agreed to binding arbitration. It did not work out. The Referee's Report found the counterclaim for abuse of process with respect to the arbitration proceeding was without merit. Shomron asks the court to reject that aspect of the Report.

This is the height of hypocrisy. Both parties have abused the court process for decades to a degree this court has never seen. Neither seem to care about the court's time or that their endless vendetta against each other has used up resources that could have been spent on other litigations. It confounds the court that Shomron first moved to disapprove the Report of the Referee without providing the record to the judge, who was new to the case. Then, after losing the motion, appealing the decision and somehow managing to supply that missing record to the Appellate Division. Further, movants here misrepresented by omission what Judge Stackhouse ordered and failed to include the Referee's fulsome decision on Fuks' CPLR 4401 motion to make it look like the Referee had no reason to dismiss Shomron's seventh counterclaim. And even further, the court finds it disingenuous how Shomron, defendant in in Action No. 1, continues changing the nature of an alleged debt as it suits the needs of the case at that moment. While we are on the subject, the court warns that continuing to omit inconvenient facts, procedural or otherwise, to this court, will result in sanctions. This conduct is all the more egregious because Shomron has had the same attorney in this dispute from the first day (*see* Reply Aff., pg. 5).

In any event, Shomron has not carried her burden to prove abuse of process. The gravamen of her claim now is that Fuks abused the process by suing the first arbitrator, William Spiro, serving him with a summons with notice in the middle of the arbitration (Mem. in Support [EDOC 6], Action No. 1, pg. 27). The parties mutually agreed to end the arbitration and return to court.

It is difficult to understand how merely commencing an action against an arbitrator by summons with notice is an abuse of process with respect to Shomron (*see e.g. Place v Ciccotelli*, 121 AD3d 1378, 1380 [3d Dept 2014]). Mr. Spiro did not testify before the Referee, and, although a new arbitrator was appointed, Shomron herself chose not to continue, but instead to return to court. Accordingly, the Referee's decision that the abuse of process claim was without merit was correct.

9. Attorneys' Fees

Shomron wants the Referee's report modified to reflect an award of attorneys' fees for the successful prosecution of Action No. 2 that resulted in the return of four cooperative apartments to the partnership, as reflected in Judge Stackhouse's decision. This issue was not part of the reference to the Referee and therefore the Referee had no jurisdiction to decide it. Accordingly, the court denies that part of the motion seeking a modification to include attorneys' fees, without prejudice to a separate motion for REASONABLE attorney's fees and limited to those fees incurred prosecuting the constructive trust claim.

Accordingly, it is

ORDERED THAT the court modifies the Referee's Report to increase the amount of the constructive trust in favor of R&L to $1,596,154.25, comprised of $662,628.85 net profit plus $933,525.40 in statutory interest; and it is further

ORDERED THAT, with respect to the constructive trust cause of action in Action No. 2, the Clerk is directed to calculate statutory interest on $662,628.85 from 1/1/2018; and it is further

ORDERED, ADJUDGED, and DECLARED THAT the loans from Salon, 2701 Broadway, Zilber, Rakia, Kaplan, Kahn, and Ms. Shomron, identified at pages 78-79 of the Referee's Report, are valid and enforceable, and Shomron can pay back Harry Sloan the sum of $13,444.62 with interest at the rate of 10% per annum, however it is further **ORDERED** that the parties are to appear in person for an inquest to determine the remaining amounts, if any, on the Eighth counterclaim loans, on May 10, 2023 at 10:00 am; and it is further

ORDERED THAT Shomron's request to modify the report to impose attorneys' fees is denied without prejudice to making a motion for same within 30 days of the e-filed date of this decision and order, otherwise waived; and it is further

ORDERED THAT the Report is otherwise confirmed as modified.

4/10/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE