SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ROSEMARIE A. HERMAN, individually, as beneficiary of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990, and ROSEMARIE A. HERMAN as Natural Guardian for GAVIN I. ESMAIL and JESSE A. ESMAIL, individually, as beneficiaries of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990,

Plaintiffs,

-against-

36 GRAMERCY PK. REALTY ASSOCS., LLC, COSMOPOLITAN PROP. ACQUISITION CO., LLC, MMANN LLC, MANN MANAGEMENT, INC., d/b/a, MANN REALTY ASSOCS., MAURICE A. MANN, "ABC CO. # 1" through "ABC CO. #10", the last ten entities being fictitious and unknown to the Plaintiffs, the entities intended being the entities, if any, involved in the acts or omissions described in the Complaint, and JOHN DOE #1 through JOHN DOE #10, the last ten names being fictitious and unknown to the Plaintiffs, the persons intended being the Persons, if any, involved in the acts or omissions described in the Complaint,

Defendants.

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36 GRAMERCY PARK REALTY ASSOCIATES, LLC; COSMOPOLITAN PROPERTY ACQUISITION COMPANY, LLC; MMANN LLC; MANN MANAGEMENT, INC., d/b/a, MANN REALTY ASSOCIATES, and MAURICE A. MANN,

Third-Party Plaintiffs,

-against-

ARDENT INVESTMENTS, LLC, and J. MAURICE HERMAN,

Third-Party Defendants.

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36 GRAMERCY PARK REALTY ASSOCIATES, LLC;
320 E. 22ND REALTY ASSOCIATES, LLC;
10 W. 74TH STREET REALTY ASSOCIATES, LLC;
150 W. 82ND STREET REALTY ASSOCIATES, LLC;
425 E. 76TH STREET REALTY ASSOCIATES, LLC;
COSMOPOLITAN PROPERTY ACQUISITION COMPANY, LLC;

DECISION & ORDER

Index No.: 652700/12

Action 1

Index No. 654067/12

Action 2

MMANN LLC; MANN MANAGEMENT, INC. d/b/a MANN REALTY ASSOCIATES; and MAURICE A. MANN;

Plaintiffs,

-against-

ROSEMARIE A. HERMAN, individually, and in any representative capacity she asserts,

Defendant.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequence 008 in Action 1 and Motion Sequence 002 in Action 2 are consolidated for disposition. The papers in both actions are identical. Dkt 302. [1]

Plaintiffs Rosemarie Herman (Rosemarie),[2] individually, and as co-trustee of the trust created by her father, Harold Herman (Harold), as Grantor, under a trust indenture, dated March 1, 1990 (Trust), and as mother and natural guardian of her sons, Gavin and Jesse Esmail (collectively, Sons), who are remaindermen of the Trust (collectively, Sons, with Rosemarie, Plaintiffs), moves for partial summary judgment. She seeks the following: 1) on the portion of the first cause of action in Action 1, to quiet title to condominiums that were unsold as of November 19, 2012 (Unsold Condominiums) in the premises known as Gramercy Park East, New York, New York (the Property); and 2) dismissal of Defendants' affirmative defenses in Action 1. Action 1, Motion Sequence 008. In Action 2, Plaintiffs move for summary judgment dismissing all of Defendants' claims and defenses relating to the Property. Action 2, Motion Sequence 002. Defendants in Action 1 and the Plaintiffs in Action 2 (for simplicity referred to

[1] References to "Dkt" filed by a number refer to documents filed in the New York State Courts Electronic Filing System in this action and related actions, which are described below. Where no action is designated, the reference is to documents filed in Action 1.

[2] Members of the Herman family will be referred to by their first names to avoid confusion.

herein collectively as Defendants) oppose both motions.[3] For the reasons that follow, the motions are granted.[4]

These actions are two of several related cases brought by Rosemarie contesting the 1998 sale by her former trustee, Michael Offit, of her two trusts' interests in six valuable Manhattan apartment buildings that she and her brother, Julian Maurice Herman (Maurice), inherited from their father.[5] The Property was one of those apartment buildings. Rosemarie's verified complaint in Action 1 (VC) alleges, *inter alia*, that: Gramercy Realty converted the apartment building at the Property to a condominium, although it did not have good title to it, and sold some of the apartments. Plaintiffs seek a partial judgment declaring that Rosemarie, as Trustee of the Trust at issue in this case, has record title to fifty percent of the Unsold Condominiums, although one hundred percent of the Property was purportedly conveyed to Gramercy Realty's predecessor, Cosmopolitan, pursuant to a 2002 contract, which closed in 2003 (2002

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[3] Defendants are 36 Gramercy Park Realty Associates, LLC (Gramercy Realty), Cosmopolitan Property Acquisition Company, LLC (Cosmopolitan), MMann, LLC (Mann LLC), Mann Management, Inc., d/b/a, Mann Realty Associates (Mann Management), and Maurice A. Mann (Mann).

[4] These motions were filed in April 2016. Dkt 229 & Action 2 Dkt 79. At the time, document discovery was completed, but depositions had not been taken. Dkt 203, 1/26/16 Stipulation (depositions to commence 30 days after court rules on Main Action Motion Sequence 028 to preclude Maurice from participating in damages trial); & Main Action, Dkt 1444, 5/2/16 Decision on Motion 028.

[5] The related actions are *Herman v Herman*, Index No. 650205/2011 (Main Action); *Herman v Pound West Trading Corp.*, Index No. 652698/2012, two accounting proceedings by Offit, both entitled *Matter of Offit*, Index Nos. 150332/2012 and 150335/2012; and *Offit v Herman*, 651471/2011. The Main Action was brought by Rosemarie, to contest the 1998 sale of her two trusts' interests in six limited liability companies, each of which owned, or in the case of Property purported to own, a Manhattan apartment building. In the Main Action, a default judgment was entered against Maurice, as a sanction for failure to provide discovery. *Herman v Herman*, 2015 NY Slip Op 31205(U) (Sup Ct NY Co July 13, 2015), 2015 NY Misc LEXIS 2447 (nor), *affirmed*, 134 AD3d 442 (1st Dept 2015).

Transaction).[6] In Action 2, a portion of Defendants' first cause of action seeks a declaratory judgment that Gramercy Realty has clear legal title to the Condominiums it owns at the Property. Action Verified 2 Complaint (Mann VC), Action 2, Dkt 246, ¶¶ 53, 54 & 57.

Defendants' affirmative defenses in Action 1 that relate to the Property, numbered here as in their answer are: 1) failure to state a claim; 3) Defendants acted in good faith; 4) waiver, laches, equitable estoppel, res judicata, collateral estoppel and/or entire controversy doctrine; 5) statute of limitations; 6) ratification; 8) unclean hands; 9) consent; 10) ratification by acceptance of distributions; 11) bona fide purchaser for value; 12) no deed transferring the Property to Rosemarie or the Trust. Defendants make no argument with respect to the following affirmative defenses in Action 1: failure to state a claim, waiver, laches, res judicata, collateral estoppel, and entire controversy, and those affirmative defenses are dismissed as abandoned with respect to the prong of Plaintiffs' first cause of action to quiet title to the Unsold Condominiums.

I. Background

The facts relating to these actions are set forth at length in this court's decision on Defendants' motion to dismiss in Action 1 (Dismissal Decision, dated 4/2/14 & entered 4/3/14, Dkt 109)[7] and the decision of the Appellate Division that modified it, *Herman v 36 Gramercy Park Realty Assoc., LLC*, 131 AD3d 422 (1st Dept 2015). The reader's familiarity with those decisions is assumed. This motion concerns only one of the trusts, which was created by Rosemarie's father in 1990 and owned the Property. The other trust was created by Rosemarie in 1991 (1991 Trust) and owned half of the other five buildings.

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[6] In addition to the quiet title claim, the VC alleges that Defendants conspired with Rosemarie's trustee, to commit various torts as alleged in the Main Action complaint. VC, ¶¶ 211 & 219.
[7] The Dismissal Decision is reported at *Herman v Property Park Realty Assoc.*, 2014 NY Slip Op. 30872(U); 2014 NY Misc LEXIS 1578; and 2014 WL 1324544 (nor).

Prior to March 1, 1990, the Property was owned by Rosemarie's father, Harold. The Trust was created by an inter vivos indenture, between Harold, as grantor, and Maurice, as trustee, which was acknowledged by them on March 1, 1990 (Indenture). Dkt 14.[8] The Indenture defined the term "Trustees" as Maurice, as Trustee, "together with any co-Trustee or successor trustee, in office." *Id*, p 1. The only asset of the Trust was the Property. *Id*, 1st Whereas Clause & Schedule A. On the first page of the Indenture, Harold said that he was transferring and conveying title to the Property to his "Trustees" to hold pursuant to its terms, and Maurice acknowledged receipt.[9]

Harold delivered the Property to the Trust. The Indenture was recorded on March 16, 1990, and properly indexed against the Property by its section, block and lot numbers: 3, 872 and 21, respectively. Dkt 14. Simultaneously with the Indenture, Harold, d/b/a Mayfair York Co., conveyed the Property to Maurice, as trustee of the Trust, by a deed acknowledged March 1, 1990 (1990 Deed). The 1990 Deed was recorded and properly indexed against the Property on March 16, 1990, the same day as the Indenture. Dkt 15. Although there was a deed from Harold, pursuant to the Real Property Law (RPL) §290(3), the Indenture was a conveyance of the Property to the Trustees, who acknowledged receipt, because it conveyed in writing an estate

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[8] The Indenture was refiled with the motion as Dkt 233.

[9] The exact language of the conveyance was:

> NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, ***the Grantor herewith transfers and conveys to the Trustees*** the property described in Schedule A hereto annexed, ***receipt of which is acknowledged by the Trustees, and the Trustees agree to hold the trust estate, in trust for the following uses and purposes and subject to the terms and conditions herein set forth***.... [emphasis added]

Dkt 14.

in real property, was acknowledged in the form of a deed, and was recorded and indexed against the Property.[10]

The Indenture permitted Maurice, while he was still a Trustee, to designate any individual to act as his co-trustee, or to succeed him as trustee. Indenture, Dkt 14, Art 11 (A) & (B)(1). He could resign by delivering a written notice to Harold, while he was alive, and at any time after his death, by giving notice to the income beneficiaries. *Id*, Art 11 (A). To qualify as a co-trustee or successor trustee, the individual designated was required to deliver a signed ***and acknowledged*** acceptance of the Trust to the designator (Harold, provided that he was not incapacitated) and each adult income beneficiary. *Id.*[11] The income beneficiary was Harold. On April 12, 1990, Maurice designated Rosemarie as co-trustee of the Trust, and she accepted the designation in a document that she, Maurice and Harold, the adult income beneficiary, acknowledged and recorded on May 22, 1990 (Designation). Dkt 16.[12] The Designation was properly indexed against the Property. *Id.* The parties do not argue that, at the time of the

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[10] RPL §290(3) provides:

> ***The term "conveyance" includes every written instrument, by which any estate or interest in real property is created, transferred***, mortgaged or assigned, or ***by which the title to any real property may be affected,*** including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property. [emphasis added]

[11] Article 11 (B)(2) provides, in pertinent part, that "any co-Trustee or successor trustee designated pursuant to this Paragraph (B)(1) ***shall qualify as such by written acceptance of the trust signed and acknowledged by the person so designated*** and delivered to the designor ... and to each income beneficiary."

[12] The 1990 Deed, Designation and Mayfair Deed were refiled with this motion as Dkt 234, 235 & 237, respectively.

Designation, Harold was incapacitated. As of May 22, 1990, the record title of the Property was altered to reflect that the Trust now had two Trustees, Rosemarie and Maurice.

As the Indenture was recorded, the mandated disposition of the Trust corpus could have been found by anyone who inspected the title. The Indenture provided that the Trust would terminate upon the earlier of Harold's death or March 1, 1997. Dkt 14, Art 1(C). It is undisputed that Harold was alive on March 1, 1997. Thus, the Indenture mandated that, subject to the provisions of Article Second:

> ***the Trustees shall pay the principal of the trust, as the same shall then consist***, in equal shares to such of the Grantor's children J. Maurice Herman and Rosemarie A. Herman, as shall be living at such termination ....

Dkt 14, Art 1(E) [emphasis added]. Article Second mandated that after the termination of the Trust for Harold, Maurice was to receive his half of the trust outright. If Rosemarie were alive, the Trustees named in the Indenture were to set aside Rosemarie's half in a separate trust for her life, and pay her the net income, and, in the Trustees' discretion, apply all or part of the principal for her benefit (Springing Trust). A springing trust, sometimes referred to as a shifting trust, is an express trust providing that, upon a specified contingency, it may operate in favor of an additional or substituted beneficiary. TRUST, *Black's Law Dictionary* (10th ed. 2014); *In re Johnson*, 170 NY 139, 144 (1902) (five separate trusts "springing" from original estate).

Here, the Indenture provided that Rosemarie would be the substituted beneficiary in whose favor the Trust would operate, if she were alive on March 1, 1997:

> if any share of the trust shall become payable to the Grantor's daughter, Rosemarie A. Herman, ***such share shall*** (as opposing to being paid outright to the Grantor's said daughter) ***be set aside and held by the Trustees in a separate trust for the benefit of the Grantor's said daughter, for the following uses and purposes and on the following terms and conditions:***

> A. The Trustees shall manage, invest and reinvest such trust fund and shall collect and receive the income thereof and shall pay the net income to the Grantor's daughter, ROSEMARIE A. HERMAN, or shall apply the same for her benefit in quarter-annual or more frequent installments as the Trustees may determine, during her lifetime.
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> B. In addition, the Trustees are empowered to pay to the Grantor's said daughter, or to apply for her benefit, at any time and from time to time during the term of the trust, such part or all of the principal of the trust as the Trustees, in their absolute and sole discretion, may deem necessary or advisable for any reason whatsoever and in the best interests of the Grantor's said daughter ....

Id, Art 2.

Upon Rosemarie's death, Harold directed in Article Second (C) that the remaining principal of the Trust be paid to Rosemarie's living issue per stirpes, or if she had none, to Harold's issue per stirpes.[13] Article 11(C) of the Trust disqualified a Trustee, who was also a beneficiary, from acting as Trustee for the purpose of making a discretionary application of principal for his or her own benefit, or for the purpose of discharging his or her legal obligations. *Id*, Art 11(C).[14]

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[13] Article 2(C) provides:

> Upon the death of the Grantor's said daughter, the principal of the trust, as the same shall consist, shall be paid to the issue of the Grantor's said daughter living at her death in equal shares per stirpes, or if there be no such issue, to the issue of the Grantor then living, in equal shares per stirpes.

[14] Article 11(C) provides:

> During the time that any Trustee acting hereunder is also a beneficiary of a trust herein created, such Trustee shall be disqualified from acting as, and shall not be deemed to be, a Trustee for the purpose of (1) making any discretionary payment or application of income or principal from such trust to or for the

There is no dispute that the terms of the Springing Trust are contained in the Indenture. Although Defendants seek to draw a distinction between the Trustees of the Trust and the Springing Trust, the Indenture conclusively establishes that as of March 1, 1997, the Trustees, as defined by the Indenture, were the same as the Trustees of the Springing Trust. They were Rosemarie and Maurice. Then too, in 1997, Maurice was a contingent beneficiary of the remainder of the Springing Trust, because the Indenture directed the Trustees, upon Rosemarie's death, to pay the remainder of the Springing Trust to Rosemarie's then living issue per stirpes, or if there were none, then to the living of issue of Harold, per stirpes. *Id*, Art 2(C). It is undisputed that Rosemarie and Maurice are the only children of Harold, who is now deceased, Rosemarie's Sons were born in 2005 and 2008, and Maurice has no children. Thus, in 1997, Maurice, would have been the contingent beneficiary of the Springing Trust if Rosemarie had died.[15]

On March 2, 1997, the day after the Trust for Harold expired by its terms, Maurice wrote letters to Harold, Rosemarie and Offit stating that he had resigned as Trustee "of the Rosemarie A. Herman trust created on March 1, 1997," a reference to Rosemarie's Springing Trust which arose on that date, and that he was appointing Offit as his successor, "as per the terms of the Trust," a reference to Art 11(B)(1) of the Indenture, which permitted Maurice to designate his successor. Dkt 253. On March 3, 1997, Offit wrote letters to Maurice and Rosemarie, who was

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> benefit of himself or herself or for the purpose of discharging his or her legal obligations....

[15] A beneficiary is the person for whose benefit the trustee holds the trust property. Bogert, Bogert & Hesss, *The Law of Trusts and Trustees*, Ch. 1, §1, Thomson Reuters, September 2016 Update. A beneficiary of a trust may have a contingent, future interest. *Id*, Ch. 11, §181; *see also*, Surrogate's Court Procedure Act, §103 (8) & (19) (defining "beneficiary" as a person entitled to any part or all of an estate and an "estate" as including the property of a trust). Here, Maurice's contingent interest in the remainder made him a beneficiary of the Springing Trust.

now the adult income beneficiary, accepting the position as successor trustee of the Springing Trust (Offit Acceptance). Dkt 253. The parties do not argue that the Offit Acceptance was ineffective, although it was not acknowledged by Offit, as required by Article 11 of the Indenture. [16]

In 1997, Rosemarie was never the sole Trustee and sole beneficiary of the Springing Trust. There was always a co-trustee: Maurice, until March 2, 1997, and then Offit, and Maurice had a beneficial interest in the remainder of the Trust and the Springing Trust. Despite the fact that Maurice had resigned, and Rosemarie and Offit were co-trustees, on April 24, 1997, *Maurice alone* purported to convey the Property to a New York limited liability company, Mayfair York LLC (Mayfair). The deed was recorded in the New York City Office of the City Register, on June 19, 1997, at Reel 2468 Page 0245 (Mayfair Deed), and properly indexed against the Property. Dkt 18.[17] Neither Rosemarie nor Offit signed the Mayfair Deed. *Id.* Consequently, as of June 19, 1997, anyone who examined the City Register would have found that Rosemarie was a co-trustee of the Trust, but the Mayfair Deed was signed only by Maurice. This is the break in the chain that undergirds Plaintiffs' cause of action to quiet title.

The Mayfair operating agreement (Mayfair OA), dated March 4, 1997, reflected that Mayfair had two members each owning fifty percent: Maurice and the "Rosemarie A. Herman Trust". Dkt 238. The Mayfair OA was signed by Maurice and by Offit, as Trustee of the "Rosemarie A. Herman Trust". The Mayfair OA provided that Maurice was its manager and that

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[16] On June 4, 2013, After the Main Action was commenced, Offit resigned as trustee. Main Action, Dkt 465. He has settled with Plaintiffs. On July 16, 2016, in the Main Action, Ariel E. Belen, was appointed temporary Trustee. Main Action, Dkt 564. However, the temporary Trustee is not permitted or required to take part in the actions at issue in this decision (Action 1 and 2). *Id.*, Decretal ¶5.

[17] The Mayfair Deed also was filed as Dkt 237 with the motion in Action 1.

he had exclusive power and authority over the operations and assets of the company, including the power to dispose of its assets. *Id*, §6.1(a). Maurice could be removed as manager only by death or if he ceased to be a member. *Id*; §6.1(e).

The transfer to Mayfair was not in Rosemarie's best interest. It gave control of Mayfair to Maurice, who was no longer her Trustee. Absent the purported conveyance, the Trust's interest in the Property would have been controlled by Offit and Rosemarie, as co-trustees, and equals of Maurice. No money changed hands. While Defendants contend that Rosemarie was disqualified, pursuant to Article 11 of the Indenture from joining in the Mayfair Deed because it was a discretionary distribution of principal for her benefit, the opposite is true. It was a discretionary distribution of principal for Maurice's benefit, i.e., to give him exclusive control.

Defendants also claim that Maurice had discretion to sell the Property in order to wind up the Trust. They point to Article Ninth of the Indenture, which gave the Trustees power to sell the Property:

> NINTH: A. In the administration of any property ... at any time forming part of the trust estate, ... the ***Trustees***, ... shall, ***except as provided in this Agreement***, have the following powers to be exercised in their absolute discretion, ***primarily in the interest of the beneficiary***... :
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> 2. To sell, transfer, exchange, convert or otherwise dispose of, or grant options with respect to such property, at public or private sale, ... in such manner, at such time or times, for such purposes, for such prices and upon such terms, credits and conditions as the Trustees may deem advisable. [emphasis added]

However, Maurice was not a Trustee at the time of the Mayfair Deed. The decision to transfer title to Mayfair was not a sale, and it was not a transaction "primarily in the interest of the beneficiary," Rosemarie. The transfer to Mayfair benefitted Maurice by giving him exclusive control of the only asset in the Springing Trust, of which he was the only living remainderman.

According to Defendants, Offit was never a Trustee of the Trust, only the Springing Trust, which never obtained title to the Property by deed, but only a fifty percent membership interest in Mayfair. Defendants' 6/2/16 Memorandum of Law, Dkt 269, p 3. Defendants' circular reasoning assumes that the conveyance of the Trust's interest in the Property to Mayfair was valid without Rosemarie's signature, after Maurice had resigned and appointed Offit. One must ignore those facts to conclude that Offit was Trustee only when the corpus was an interest in Mayfair. Furthermore, by definition, the Indenture made no distinction between the Trustees of the Trust and of the Springing Trust.

In the 1998 Transaction, Offit alone as Trustee of the 1990 Trust and of the second trust, without Rosemarie, as co-trustee, purportedly sold its fifty percent of Mayfair, together with half of five other limited liability companies owned by Rosemarie's other trust, to Consolidated, an entity wholly owned by Maurice. VC, ¶¶73-84; 1998 Transaction Contract, Dkt 20, §§ 1 & 2, & Schedule A. Consolidated paid $8,000,000 for half of the six limited liability companies that owned the six buildings Harold had left to his children. *Id.* The Property, which fronts on Gramercy Park, was sold for $1,280,000, payable by $480,000 in cash and a promissory note in the amount of $800,000 (Note). *Id.* The 1998 Transaction was effective on December 31, 1998. *Id.* Offit, as Trustee, Maurice and Consolidated signed a separate agreement, also dated December 31, 1998, in which they agreed to keep the 1998 Transaction confidential, with no exception for disclosure to Rosemarie. Main Action, Dkt 358. Later, Maurice formed Ardent, a limited liability company that he wholly-owns, to which he supposedly re-conveyed Consolidated' s fifty percent of Mayfair, which it had bought from the Trust.

Notably, the 1998 Transaction Contract did not mention the Springing Trust. It described the Seller as Offit as Trustee of the Trust and of the 1991 Trust. Dkt 20. Defendants contend,

inconsistently, that in 1997 Offit was the Trustee of the Springing Trust only and lacked title to convey Rosemarie's half of the Property held by the Trust to Mayfair, yet he could sell half of Mayfair in 1998 as Trustee of the Trust.

Four years later, pursuant to a November 1, 2002 contract of sale (Contract, Action 2, Dkt 52 & 53),[18] Ardent and Maurice purported to sell to Defendant Cosmopolitan one hundred percent of the membership interests in Mayfair, as well as four other LLCs (a defined term in the Contract). Action 2, Dkt 52, §1.1.[19] The purchase price for the five LLCs was approximately $100,000,000. *Id*, §2.1. Cosmopolitan paid $25,626,000 for Mayfair. Action 2, Dkt 53, Schedule B, Herman Bates 003357. The 2002 Transaction closing took place on January 2, 2003. VC & Answer, ¶99 in each. Defendant Maurice Mann is an owner and principal of the purchaser, Cosmopolitan, and the other entity Defendants. 6/1/16 Mann Affidavit, Dkt 270. At the closing, Mayfair conveyed the Property to Mann's entity, Defendant Gramercy Realty.[20] Affidavit of Maurice Mann, sworn to on 11/26/12, Dkt 61, ¶16; *see also*, Mann VC, Action 2 Dkt 1, ¶19; VC ¶¶ 19 & 109; Answer, ¶109.

The provisions of the Contract make clear that Mann knew that Ardent's title to half of Mayfair was essential to transfer the Property. In the §1.1 of the Contract, Maurice and Ardent agreed to sell one hundred percent of Mayfair to Cosmopolitan:

> ***Sellers shall sell ... all of Sellers' right, title and interest in and to their membership interests, which constitutes one hundred***

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[18] The Contract was filed in Action 1 as Dkt 191 and the schedules thereto were filed in Action 1 as Dkt 22.

[19] The sixth building that Maurice and Rosemarie inherited from Harold, which is located at 952 Fifth Avenue, and which was held in the name of Windsor Plaza, LLC, an entity controlled by Maurice, was not sold to Cosmopolitan. Maurice lives in the penthouse, and Offit had an apartment in the building.

[20] Defendant Mann LLC is the manager of Gramercy Realty. Complaint, ¶¶ 109 & 115; Answer ¶115. Defendant Mann Management is the property manager of the Property. Complaint, ¶117; Answer, ¶117.

> ***percent (100%) of the membership interests*** (collectively, the "Interests") ***in,*** and all rights to receive distributions, profits and any revenue from, Avon Bard LLC, Keystone Management LLC, ***Mayfair York LLC***, Merit Management LLC and Primrose Management LLC, each a New York limited liability company (***the "LLC***s"). It is expressly understood and acknowledged by Purchaser that Purchaser shall have no right under this Contract or otherwise to purchase, and Sellers shall have no obligation under this Contract or otherwise to sell, less than all of Sellers' Interests in all of the LLC's. [emphasis added]

Action 2, Dkt 52.

In §4.1 of the Contract, Maurice and Ardent made the following contractual representations and warranties as of the Escrow Date, September 20, 2002:[21]

> (c) Del LLC [Ardent][22] has the requisite power and authority to execute and deliver, and will have as of the Closing the power and authority to perform its obligations under, this Contract and each other agreement or instrument contemplated hereby to which Del LLC is a party and to consummate the transactions contemplated hereby and thereby. This Contract is, and as of the Closing each other agreement or instrument contemplated hereby to which Del LLC and Herman will be a party will have been, duly authorized, executed and delivered by Del LLC and Herman, and will be the legal, valid and binding obligation of Del LLC and Herman, enforceable against Del LLC and Herman in accordance with its terms ....
>
> (g) Del LLC [Ardent] is the holder of a 50% membership interest in each LLC [including Mayfair] and Herman is the holder of a 50% membership interest in each LLC, and together Del LLC and Herman own one hundred percent (100%) of the membership interests in each LLC [including Mayfair], and there are no other members in the LLCs other than Del LLC and Herman, and, except as set forth on Schedule 4.l(g), each such membership interest is free and clear of all Liens.
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> (j) Each LLC [including Mayfair] has all requisite power and authority under the NYLLCL [New York Limited Liability Company Law] to own and operate the Property identified as being

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[21] The Escrow Date was defined in §2.1(a) of the Contract. Action 2, Dkt 52.
[22] Ardent is defined as Del LLC on page 1 of the Contract. Action 2, Dkt 52.

> owned by it on Schedule 4.1(j), including the buildings relating thereto.

Action 2, Dkt 52. Schedule 4.1(j) of the Contract, mentioned in warranty 4.1(j), listed Mayfair as the owner of the Property. Action 2, Dkt 53 at Bates Herman 003363.

The Contract documents included a release by the 1990 Trust created by Harold, notably not the Springing Trust. Part of the Contract was an Escrow Agreement, a defined term, dated September 20, 2002, among Ardent, Maurice, Cosmopolitan and the law firm, Loeb & Loeb LLP, as Escrow Agent (Loeb). Action 2, Dkt 52, Contract §2.1(a), Herman Bates 003302. The Escrow Agreement required Loeb to hold in escrow a release from the Trust (Release), releasing, *inter alia*, all claims against Ardent and Consolidated arising from the 1998 Transaction or relating to Mayfair. Action 2, Dkt 53, Herman Bates 003563-003568. The record contains the executed copy, signed by Offit as Trustee of the Trust, ***not the Springing Trust***. *Id.*[23] The Release defines the 1998 Transaction as an agreement among the Trust, The Rosemarie A. Herman Trust, and Consolidated; the Springing Trust was not mentioned. *Id*, & compare Action 2 Dkt 20, 1998 Transaction Contract, with 1991 Trust Indenture created by Rosemarie, as Grantor, Main Action, Dkt 206.[24] If Offit was not the Trustee of the Trust, as Defendants contend, the Release would have been useless.

Mann's affidavit admits that the Release was a negotiated term of the 2002 Transaction. Mann Aff, ¶¶ 10 & 11. Dkt 270. His affidavit also avers that he negotiated a provision providing for indemnification by Maurice and Ardent. *Id.*

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[23] The Release also is annexed to the Mann Aff as Action 2, Dkt 273.

[24] A separate release was signed by Offit as Trustee of the 1991 Rosemarie A. Herman Trust, by which he purported to release Ardent and Consolidated from all claims relating to the 1998 Transaction or related to the LLCs ***other than Mayfair***. Action 2, Dkt 53, Herman Bates 003575.

As part of the 2002 Transaction, Cosmopolitan was to receive an assignment from Ardent of its supposed interest in Mayfair. The Sellers, Ardent and Maurice, agreed to deliver at the closing an assignment and assumption agreement in the form annexed to the Contract as Exhibit A, which assigned Ardent's ostensible half interest in Mayfair to Cosmopolitan (Assignment). Contract, §8.1(a), Action 2, Dkt 52, Herman Bates 003332; & Action 2, Dkt 53, Bates 003348 (Exhibit A to Contract). In the Assignment, Cosmopolitan agreed to assume Ardent's obligations under the Mayfair OA. Contract, §8.2(b), Action 2, Dkt 52, Herman Bates 003334. Ardent and Cosmopolitan executed the Assignment. Action 2, Dkt 53, Herman Bates 003454. *Id.* Mann signed it on behalf of Cosmopolitan, as sole member of Mann LLC. *Id.*

Schedule 4.1(g) of the Contract is a list of the liens on the LLCs' membership interests referred to in Contract representation 4.1(g). It disclosed that on July 16, 2002, Ardent and Consolidated entered into the Assignment, pursuant to which Ardent assumed Consolidated's obligations under a Nonnegotiable Nonrecourse Promissory Note dated December 31, 1998, in the amount of $800,000 issued by Consolidated to the Trust, ***not the Springing Trust***, with respect to Mayfair. Dkt 22 at Bates Herman 003362. Apparently, this is the Note given by Maurice's entity, Consolidated, as part of the consideration for the sale of the Trust's interest in Mayfair in the 1998 Transaction.

Mann admits that the Contract required Ardent and Maurice to deliver insurable title to the Property, and that Cosmopolitan's lender, Roslyn Savings Bank, obtained a title policy. Mann Aff, ¶¶ 12 & 13. Dkt 270. Mann authenticated the title policy issued by Lawyers Title Insurance Corporation, dated June 2, 2003 (Title Policy), which was annexed to his opposing

affidavit. *Id.*[25] On November 11, 2002, the Title Policy omitted the following exception concerning the Mayfair Deed:

> 12. Deed in Reel 2468 page 245 into certified owner [Mayfair] was executed by a trustee for no consideration. Therefore, proof is required that harold [sic] Herman, the beneficiary under the trust, consented to the transfer of the property for no consideration.

Dkt 274, Bates MM00381.[26] The Reel and page identify this as a reference to the Mayfair Deed. Compare Dkt 274, Bates MM00381 & Dkt 18 (refiled as Dkt 237). However, at the time of the Mayfair Deed, which was executed in April 1997 and recorded in June of that year, Rosemarie, not Harold, was the beneficiary. Compare Indenture, Dkt 14 & Mayfair Deed, Dkt 18. This would have been apparent from the recorded Indenture. Mann's affidavit admits that the Title Policy contained no exception based on Rosemarie's status as a Trustee. Mann Aff, Dkt 270, ¶14. It would have been apparent from the recorded Designation that Rosemarie was a Trustee. Dkt 16.

After the 2002 Transaction, a condominium plan for the Property was declared effective in 2010. Action 2, Dkt 25 & 61. The court takes judicial notice of the declaration of effectiveness, reflected in the Automated City Register Information System (ACRIS), which New York City's Office of the Register uses to record and maintain official documents relating

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[25] The Title Policy erroneously describes the source of Mayfair's title to the Property by referring to a deed from Maurice, "as Trustee under agreement with Harold Herman dated March 1, 1997." Title Policy, Dkt 274. However, the Indenture, was dated March 1, 1990. Dkt 14.

[26] The alleged mark-up of the Title Policy and the results of a computer inquiry by the title insurer, submitted by Plaintiffs' attorney, Craig Avedesian, are not signed documents and were not properly authenticated. 4/18/16 Craig Avedesian Affirmation, Dkt 230, ¶¶ 8 & 9, & Exhibits 7 & 8, Dkt 251 & 252. The attorney's affirmation did not say he had personal knowledge of the authenticity of these documents. The fact that the title insurer produced them is not sufficient to authenticate them. Therefore, they are not evidence and cannot be considered in support of Plaintiffs' motion for summary judgment. CPLR 3212.

to real estate. Action 2, Dkt 61.[27] *See Matter of LaSonde v Seabrook*, 89 AD3d 132, 137 (1st Dept 2011) (court has discretion to take judicial notice of material derived from official government web sites).

The parties sharply dispute whether Rosemarie knew about the 1998 Transaction and the Mayfair Deed.[28] However, Plaintiffs' position is that it is irrelevant because the recorded title to the Property revealed that she was a co-trustee and, as a matter of law, she had to join in the Mayfair Deed or ratify it in writing.

The Mann Defendants admit that they never had contact with Rosemarie or Offit before signing the Contract, or before the 2002 Transaction closed. 6/1/16 Mann Affidavit, Dkt 270, ¶¶ 6, 16, 18, & 20. Mann avers that after the closing, Mann Management or Defendants' counsel communicated with Rosemarie about ordinary maintenance of her apartment. *Id*, ¶20.

Mann attaches to his affidavit two notices allegedly received by Rosemarie on January 2 and 8, 2003, announcing a change in the Property's management and ownership (each a Notice,

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[27] See http://a836-acris.nyc.gov/CP/CoverPage/AboutAcris.

[28] Rosemarie claims that Maurice and Offit hid the 1998 Transaction from her. VC, ¶91. Her affidavit avers that she did not learn of the Mayfair Deed and the 1998 Transaction until 2010. 4/18/16 Affidavit of Rosemarie Herman, Dkt 265, ¶¶3 & 4. Plaintiffs submit an affidavit by Offit admitting that he concealed the 1998 Transaction from Rosemarie, at Maurice's instruction. 12/23/14 Michael Offit Affidavit, Dkt 264, ¶¶18 & 19. Defendants point to evidence from which it could be inferred that Rosemarie knew that the Springing Trust no longer owned the Property and half of the other buildings. They rely on various documents, which include the list of assets on two pre-nuptial agreements wherein Rosemarie was represented by well-regarded counsel and which she signed; correspondence from Offit describing the Trusts' holdings; and notices allegedly sent to tenants at the Property. These documents raise an issue of fact but do not conclusively establish that Rosemarie knew that the Trust's half of the Property was sold. Defendants also allege that the 1999 tax return that Rosemarie signed ***would have*** shown that the Trust no longer held the Property, but they do not attach the return. This is because the return is not available. During the course of discovery, it became apparent Rosemarie, her accountants and the IRS do not have it. There is no direct admission by Rosemarie, or affidavit by anyone, saying that she was aware of the 1998 Transaction or the Mayfair Deed. Neither Rosemarie, nor the attorneys who prepared her prenuptial agreements, have been deposed.

collectively, Notices). *Id*, ¶¶ 21 & 22. But, Mann's affidavit concerning the Notices is not evidence that Rosemarie received them. Mann says that the first Notice addressed to all tenants was delivered by Cosmopolitan and the Property's former manager, AJ Clark, by putting it under the tenants' doors. Mann does not say that it was placed under Rosemarie's door, or that he personally was involved in distributing the first Notice. *Id*, ¶21. Mann further avers that Mann Management put the second Notice under the tenants' doors, including Rosemarie's "in accord with [Mann Management's] standard business practices at that time." *Id*, ¶22. Again, this falls short of first hand, evidentiary proof that the second Notice was delivered to Rosemarie. In Defendants' answers to interrogatories, they identified Janet Scimeca as the person who delivered tenant notices to Rosemarie. Defendants' 11/24/14 Supplemental Responses to Plaintiffs' Interrogatories, Dkt 301. Defendants have not submitted an affidavit from Ms. Scimeca.

The Appellate Division has ruled on the appeal from the Dismissal Decision that there was a question of fact as to whether Defendants were bona fide purchasers for value:

> Based on the 2002 contract provision stating that defendants had been provided the documents they requested in connection with the challenged 2002 contract, and their knowledge that a 1998 transaction mentioned in that contract involved property held by a trust, there is an issue of fact as to whether they were on notice of any unauthorized transfer by a trustee, and, as a result, whether they were bona fide purchasers of the properties pursuant to the 2002 contract.

Id, at 423.

II. Discussion

A. Standard of Review

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is

upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). The motion must be "supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." CPLR 3212(b). A failure to make such a prima facie showing requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). A movant cannot prevail on summary judgment by pointing to gaps in the other side's proof, but must demonstrate affirmatively the merits of a claim or defense. *River Ridge Living Ctr., LLC v ADL Data Sys., Inc.*, 98 AD3d 724, 726 (NY 2d Dept 2012). However, a defendant moving for summary judgment does not have to prove a negative on an issue as to which he does not bear the burden of proof. *Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 570 (1st Dept 2010). The evidence submitted on the motion for summary judgment must be examined in the light most favorable to the parties opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997).

On a summary judgment motion, once the movant has laid bare its proof, the opposing party is compelled to do the same. *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 (1st Dept 2011). A failure to contradict facts is an admission. *Costello Associates, Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept 1984), *appeal dismissed*, 62 NY2d 942 (1984). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, *supra*, at 562. Nor can summary judgment be defeated by the "shadowy semblance of an issue." *Jeffcoat v Andrade*, 205 AD2d 374, 375 (1st Dept 1994). One opposing a motion for summary judgment must produce evidentiary proof in

admissible form sufficient to require a trial of material questions of fact on which he rests his claim, or must demonstrate acceptable excuse for his failure to offer admissible evidence. *Id.* Upon the completion of the court's examination of all of the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

If it appears from the affidavits submitted in opposition to a summary judgment motion that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion, or order a continuance to permit affidavits to be obtained or disclosure to be had. CPLR 3212(f). Where such facts are in the possession of the non-moving party and discovery has not taken place, the motion should be denied as premature. *Ohara v New School*, 118 AD3d 480 (1st Dept 2014; *Uddin v City of New York*, 52 AD3d 422 (1st Dept 2008). A motion for summary judgment should not be denied for lack of disclosure unless the party opposing the motion identifies the needed disclosure. *Auerback v Bennett*, 47 NY2d 619, 636 (1979). "To speculate that something might be caught on a fishing expedition provides no basis to postpone decision on summary judgment...." *Id.*

A ruling on a motion to dismiss, pursuant to CPLR 3211, that the plaintiff has stated a claim, is not law of the case for purposes of summary judgment, pursuant to CPLR 3212. *Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 349 (1st Dept 2006); *RXR WWP Owner LLC v WWP Sponsor, LLC*, 145 AD3d 494 (1st Dept 2016). The scope of review differs on the two motions. *Id.*

B. Elements of a Cause of Action to Quiet Title

Real Actions & Proceedings Law (RPAPL) §1501(1) provides:

> Where a person claims an estate or interest in real property; or where he claims such estate or interest as executor or administrator

> of a deceased person; ... such person ... may maintain an action against any other person, known or unknown, ... to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make ....

RPAPL §1515 provides, inter alia, that the complaint must state the nature of the plaintiff's estate or interest, how it was acquired, that the defendant claims an interest adverse to plaintiff's, and describe the property. The complaint should demand a judgment "that the defendant and every person claiming under him be barred from all claim to an estate or interest in the property described in the complaint, or that possession be awarded the plaintiff, or it may combine two or more of said demands with other demands for appropriate relief." RPAPL §1521(1).

The Unsold Condominiums are real property. The Condominium Act provides that each unit in a condominium, together with its common interest, constitutes real property. Real Property Law, Art 9B, §339-g.

C. Maurice Lacked Title to Convey the Trust's Interest in the Property to Mayfair

The Estates, Powers and Trusts Law provides that an express trust vests in the trustee the legal estate, subject ***only to the execution of the trust***. Estates Powers and Trusts Law (EPTL)§ 7-2.1(a). Where a successor trustee is appointed, unless the trust instrument provides otherwise, the successor has the same powers and duties as the original fiduciary:

> A successor or substitute fiduciary, to succeed to all of the powers, duties and discretion of the original fiduciary, with respect to the estate or trust, as were given to the original fiduciary, unless the exercise of such powers, duties or discretion of the original fiduciary are expressly prohibited by the will, deed or other instrument to any successor or substituted fiduciary. ...

EPTL § 11-1.1(b)(12). The Indenture here contained no contrary edict.

Where successor trustees are in office, they hold title to trust property, with full power of disposition, even if the property is held in the name of the former trustee. *Cooper v Illinois C.R. Co.*, 38 AD 22 (1st Dept 1899). Moreover, where there are two trustees, they must act in unison to dispose of property, unless the trust instrument provides otherwise:

> EPTL §10-10.7 provides:
>
> Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power ... by the terms of such instrument, or by statute, or arising by operation of law, may be exercised by a majority of such fiduciaries, or by a majority of survivor fiduciaries, or by the survivor fiduciary. ***Such a power conferred upon or surviving to two such fiduciaries may be exercised jointly by both such fiduciaries*** or by the survivor fiduciary, ***unless contrary to the express terms of the instrument creating the power.*** *Id.* [emphasis supplied][29]

The Indenture had no contrary provision.

Trustees must act jointly when taking an action that requires the exercise of discretion, while purely ministerial acts, such as collecting assets or depositing estate funds in a bank, does not require joint action. *Cooper v Illinois C.R. Co.*, *supra* at 28. Any act which changes or

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[29] *See also Cooper v Illinois C.R. Co.*, *supra*, (powers of trustees held jointly, in the absence of a contrary statute or trust instrument); *Zimmerman v Pokart*, 242 AD2d 202, 203 (1st Dept 1997) ("Cofiduciaries are, of course, regarded in law as one entity."); *Bogert's Trusts and Trustees*, September 2016 Update, © 2016 Thomson Reuters, Ch. 27, §554, p 1 (cases unanimous that rights of beneficiary are not affected by exercise of power by one of two trustees without the joinder of co-trustee and attempt at securing delegation of authority; legal estate in trust property not affected by unilateral action by one trustee); 3-46 Warren's Heaton on Surrogate's Court Practice §46.05(7)(a) (2017). In the usual case, the trustees are joint tenants of real property, hold their powers as a group, and only can exercise their powers jointly. *Bogert's*, *supra*. Co-trustees form one collective trustee. *Id.* Where there are two trustees, the elimination of one leaves the other fully able to take control of the trust res, and a successor trustee takes office automatically pursuant to the terms of the original instrument. Powell-Rohan, *Powell on Real Property*, Vol 6, §421.30[3], Matthew Bender & Co., Inc., a member of the LexisNexis Group, ©2009.

affects the character of the trust investment calls for the exercise of discretion and must be performed by trustees jointly.[30]

The rule of joint action is an equitable doctrine designed to prevent fraud on trusts. *Fritz v City Trust*, *supra*. In *Fritz*, the Court of Appeals held that a purchaser who took an interest in real estate from two of three trustees did not obtain title and could be held liable to the trust:

> [A]***s plaintiffs took the bond and mortgage, knowing that it was trust property, without the concurrence of all of the trustees, they are bound to make good any loss resulting to the estate from the transaction. ... [A] modification of the rule in respect to the duties of trustees in this regard would open the way to fraud, which it is the policy of the law to prevent. The plaintiffs could get no larger equity in the bond and mortgage than the amount which the estate received, without the concurrence of all of the trustees, and we do not see how [the trustee who did not agree] can be said to have ratified the transaction ....*** While he may have been negligent in not seeking to restore the property, ***this cannot give the plaintiffs rights as against the trust estate;*** .... If people will deal with trust property, disregarding the law, they must abide the result when they appeal to equity, which has a tender regard for trust estates, and will not permit them to be dissipated through an invasion of the rules intended to guard them against the carelessness or dishonesty of individuals.

Id. A purchaser who failed to investigate the trustees' authority was required to make good the trust's loss. *Id.* Similarly, in *Cooper v Illinois C.R. Co.*, 38 AD 22 (1st Dept 1899), a purchaser of bonds acquired no title because two successor trustees had title to them, and the corporation

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[30] *55 Gans Judgment LLC v Romanoff*, 123 AD3d 452 (1st Dept 2014), appeal dismissed 26 NY3d (2015) *supra* (co-trustees must join in discretionary decision to appeal); *Brennan v Wilson*, 71 NY 502 (1877) (trustees must unite in deed of lands); *Cooper v Illinois C.R. Co.*, *supra* at 29 (one of several trustees cannot sell or otherwise dispose of trust property); *Fritz v City Trust Co. of New York*, 72 AD 532, 535 (2d Dept 1902), *affirmed*, 173 NY 622 (1903); *Guerin v Smith*, 2012 NY Misc LEXIS; 2012 NY Slip Op 33082(U) (Sup Ct Suffolk Co 2012) (contract to sell real property must be signed by both trustees); *In re Estate of Jacobs*, 127 Misc2d 1020, 1022 (Sur Ct NY Co 1985)(agreement of co-trustees required to select charitable institution to receive remainder of trust principal, or court would appoint third to break deadlock).

permitted them to be transferred on the authority of one. The *Cooper* Court held that the corporation that transferred the bonds should have inquired as to the trustee's title and could be held liable to the beneficiary for causing the loss of the bonds.

Defendants assert that joint action was not required to transfer the Property to Mayfair. They claim that Maurice remained trustee of the Trust because he resigned only as Trustee of the Springing Trust, and that he retained the power to sell the Property to Mayfair as part of winding up the Trust. This is a bizarre construction of the Indenture, which defined the "Trustees" for the successive estates it created as one and the same. No distinction is made between the Trustees for Harold and the Trustees for Rosemarie. Nor does this argument account for the absence of Rosemarie, the co-trustee of both trusts, from the transaction. Defendants' logic has several other flaws.

First, the Indenture provided that the Trust ***for Harold*** terminated on March 1, 1997, and directed ***the Trustees, defined to include co-trustees and successors,*** to distribute half of the principal "***as the same shall then consist***" in equal shares to Maurice and Rosemarie, but to hold Rosemarie's share in ***separate trust for Rosemarie***. Indenture Art 1 & 2. Harold's Indenture did not appoint different Trustees for Rosemarie, and Harold did not direct the Trustees to wind up if he were alive on March 1, 1997. The Trustees were to continue serving, hold Rosemarie's half, and distribute half outright to Maurice. Second, on March 1, 1997, ***the principal then consisted of the Property*** held by the Trustees, ***not a limited liability company interest***. Maurice's transfer to Mayfair violated the Indenture's directive to distribute the Property as it then consisted. An act of a trustee in contravention of the trust instrument is void, unless authorized by another provision of law. EPTL §7-2.4[31]; *see also*, 3-46 Warren's Heaton on Surrogate's Court Practice

[31] EPTL §7-2.4 provides:

§46.05(4)(b) (2017). There is no other applicable legal provision. Third, the power of the Trustees to sell was limited in the Indenture by the phrase "***primarily in the interest of the beneficiary***". Indenture Art 9(A). The Mayfair Deed, coupled with the Mayfair OA, purported to transfer all control over the Trust's only asset to Maurice, which was a benefit to him alone. It was a discretionary act, not a ministerial one, because it was a change that affected the character of the ownership interest, and, as such, it required concurrence of the co-trustee. *Fritz v City Trust*, *supra*; *Cooper v Illinois C.R. Co.*, *supra*; *55 Gans Judgment LLC v Romanoff*, *supra*; *In re Estate of Jacobs*, *supra*; *In re Gurein*, *supra*; EPTL §10-10.7. Fourth, the transfer to Mayfair was not a sale.

In the same vein, Defendants urge that Offit was never the Trustee of the Trust and only had title as successor trustee to an interest in Mayfair, pursuant to the Mayfair OA. However, Offit became Maurice's successor before the Mayfair Deed. As a result, he and Rosemarie were co-trustees when Maurice purported to convey the Property. In addition, Offit had no authority to bind the Trust to the Mayfair OA without his co-trustee, Rosemarie.

Defendants raise the red herring that Rosemarie could not sign the Mayfair Deed pursuant to Article Eleventh of the Indenture because it was a discretionary distribution of principal to herself as beneficiary of the Springing Trust. This argument implies that Maurice ***had to*** convey the Property in order to wind up the Trust. As just noted, Maurice did not have to, and should not have, conveyed he Property to Mayfair without Rosemarie. Whether or not Rosemarie ***could*** sign the Mayfair Deed is irrelevant. The fact is that she did not.

If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.

Another spurious contention presented by Defendants is that Rosemarie and Offit never received title to the Property because there was no deed conveying it to them. This is based on the fallacious assumption that title to real property cannot pass to a co-trustee or successor appointed after delivery of the corpus to the original trustee, except by a second deed. Defendants cite no authority that so holds, and the court's independent research found none. [32] An express trust vests the legal estate in the trustee, subject ***only to the execution of the trust.*** EPTL §7-2.1(a). While delivery by the grantor of the trust res is required to establish the trust, once established, newly appointed trustees have title.

In *Cooper v Illinois*, the court rejected the claim that the two successor trustees had no title because the bonds were registered only in the name of a deceased trustee. *Cooper v Illinois C.R. Co.*, *supra*. Where a will creating a trust directed co-trustees "or their successor or successors" to hold real property, a successor could be appointed following the death of one trustee without a conveyance. *In re Phipps' Will*, 2 NY2d 105, 108-109 (1956); *see also*, Powell-Rohan, *Powell on Real Property*, Vol 6, §421.30[3], Matthew Bender & Co., Inc., a member of

[32] Defendants' opposing brief cited the following authorities, none of which support the proposition that after the grantor delivers the corpus to the trustee, a further delivery is required to give title to subsequent co-trustees or successor trustees. *Maurice v Maurice*, 39 Misc3d 1205(A) (Sup. Ct., Kings Co., 2013) (deed invalid because it did not contain description of property); EPTL 7-2.1 (express trust vests title of estate in trustee); *Kirschbaum v Elizabeth Ortman Trust of 1977*, 3 Misc3d 1110(A), 1110A (Sup. Ct. NY Co 2004) (trustees have legal title and must act jointly to sell real property); *Matter of Doman*, 68 AD3d 862, 863 (2d Dept 2009) (trust not invalid because property delivered by grantor six months after trust created); *Brown v Spohr*, 180 NY 201 (1904) (trust property must be delivered to trustees to create trust - no mention of co-trustees or successors); *Farjeon v Fulton Sec. Co.*, 225 AD 541, 545 (1st Dept 1929) (plaintiff was creditor, not beneficiary of trust comprised of his debtor's obligations to third-party); *In re Marine Midland Bank*, 127 AD2d 999 (4th Dept 1987) (trustee held liable for failure to collect tax refund before statute of limitations expired); *Aloisio v Aloisio*, 2006 NY Misc LEXIS 2492 (Sup Ct Nassau Co 2006), 236 NYLJ. 46 (nor) (purported indenture not conveyance of property, but contract to secure debt). Memorandum of Law in Opposition (Ds' Memo), Dkt 269, pp 12-13. Defendants' reliance on these authorities was misplaced.

the LexisNexis Group, ©2009. The rule Defendants advocate is nonsensical because in many cases, the grantor is no longer alive to convey assets to a trust when a co-trustee or successor is appointed.

Here, Rosemarie acquired title to the Property when she accepted the Trust in the Designation, which was authorized and acknowledged pursuant to the terms of the Indenture. The Indenture created an express Trust, which contemplated that Maurice could appoint a co-trustee to hold the Property, first for the benefit of Harold, and afterward for the benefit of Rosemarie for her life. Indenture, Art 1 & 2. Harold delivered the Property to Maurice as Trustee by way of the 1990 Deed. The Indenture contemplated that the Trust would continue if Maurice resigned, in the hands of co-trustees and/or successor trustees that he appointed. Indenture, Art 11. No conveyance was necessary to vest the co-trustee, Rosemarie, with title to the Property. EPTL §7-2.1; *In re Phipps' Will*, *supra*; *Cooper v Illinois C.R. Co.*, *supra*. Likewise, no conveyance was necessary to vest Offit with title.

The Mayfair Deed did not convey the Trust's fifty percent interest in the Property to Mayfair. A deed made by one without title is void and cannot convey an interest in real estate. *Faison v Lewis*, 25 NY3d 220, 226 (2015); citing 2-15 Warren's Weed, New York Real Property §15.09; *Barnard v Campbell*, 55 NY 456, 461 (1874) ("The general rule of law is undoubted that no one can transfer a better title than he himself possesses."); *Kraker v Roll*, 100 AD2d 424 (2d Dept 1984).

Upon expiration of the 1990 Trust, pursuant to its terms, Maurice, individually, and the Springing Trust became tenants in common of 36 Gramercy. A conveyance to two or more persons is presumed to be a tenancy in common. EPTL §6-2.2 ("A disposition of property to

two or more persons creates in them a tenancy in common...."); 7-50 *Powell on Real Property* §50.02.[33]

In sum, the Mayfair Deed did not convey title to half of the Property to Mayfair. When the Mayfair Deed was executed and recorded, title was held by Rosemarie as co-trustee and Offit as successor trustee. Maurice did not have title because he had resigned.

D. Cosmopolitan was not a Bona Fide Purchaser for Value (BFP)

Real Property Law (RPL) §291 provides that a conveyance that is unrecorded is void as to a purchaser who buys the same property in good faith, for valuable consideration and records the conveyance.[34] A conveyance is defined as "every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected," with certain exceptions not applicable here. RPL §290.

The purpose of the recording statute was "to establish a public record which would furnish potential purchasers with notice, or at least 'constructive notice', of previous conveyances and encumbrances that might affect their interests." *Andy Associates, Inc. v Bankers Trust Co.*, 49 NY2d 13, 20 (1979). A purchaser has no cause for complaint when his

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[33] The Dismissal Decision ruled that Maurice was estopped to deny that he had conveyed his individual fifty percent membership interest in the Property to Mayfair, on the authority of *Kraker v Roll*, 100 AD2d 424 (2d Dept 1984) (tenant in common estopped to deny transfer of his title, but could not convey title of his cotenants). The Appellate Division did not disturb that ruling.

[34] RPL §291 provides, in pertinent part:

> Every conveyance [of real property] not ... recorded is void as against any person who subsequently purchases ... the same real property or any portion thereof, ... in good faith and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyance, ... is first duly recorded ....

interest is upset by an interest that is recorded on the public record, particularly in New York City where the block and lot method of recording is used. *Id.*

A purchaser is not a BFP as to a prior, recorded interest because a recorded interest is constructive notice as a matter of law. *Id*, at 17 & 22-25. Where the prior interest is recorded, a legal presumption arises that the purchaser had constructive notice, and the presumption cannot be rebutted. As the Court of Appeals explained in *Williamson*:

> Constructive notice ... is a legal inference from established facts; and like other legal presumptions does not admit of dispute. "Constructive notice," says Judge Story, "is in its nature no more than evidence of notice the presumption of which is so violent that the court will not even allow of its being controverted."

Williamson v Brown, 15 NY 354, 358 (1857), citing *Story's Equity Jurisdiction*, §399. Where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with what he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a BFP. *Williamson,* at 362; *accord Morrocoy Marina, Inc. v Altengarten*, 120 AD2d 500 (2d Dept 1986) (recorded lis pendens is constructive notice as matter of law); *Fairmont Funding, Ltd. v Sefansky*, 301 AD2d 562 (2d Dept 2003); *HSBC Mtge. Services, Inc. v Alphonso*, 58 AD3d 598 (2d Dept 2009) (purchaser must be presumed to have investigated title, examined every deed or instrument properly recorded, and known every fact disclosed or which inquiry suggested by record would have led and is chargeable as matter of law with constructive notice of such facts).

Cosmopolitan was not a BFP when it purchased Mayfair in the 2002 Transaction. The 1990 Deed, the Indenture, the Designation, and the Mayfair Deed were recorded conveyances that affected title to the Property. RPL §290. Together these recorded conveyances gave

Cosmopolitan constructive notice, before it purchased Mayfair, that Maurice and Rosemarie had title to the Property as co-trustees. *See*, RPL §291; *Andy Associates, Inc. v Bankers Trust Co.*, *supra*; *Williamson v Brown*, *supra*; *Morrocoy Marina, Inc. v Altengarten*, *supra*; *Fairmont Funding, Ltd. v Sefansky*, *supra*; *HSBC Mtge. Services, Inc. v Alphonso*, *supra*. However, the Mayfair Deed was signed only by Maurice. Where a defect in title is apparent from recorded instruments, a purchaser is charged with notice of the facts which an examination would have disclosed, even if the purchaser obtains title insurance. *Washington Temple Church of God in Christ, Inc. v Global Props. & Assoc., Inc.*, 55 AD3d 727, 729 (2d Dept 2008). Hence, Cosmopolitan had notice and by law was not a BFP. *Id.*[35]

Furthermore, as noted above, a purchaser has a duty to inquire as to the authority of a trustee, and the failure to do so may result in liability to a trust. *Fritz v City Trust*, *supra*; *Cooper v Illinois C.R. Co.*, *supra*. Here, the Contract, particularly the Release, establishes as a matter of law that Cosmopolitan, and its successor Gramercy Realty, knew that the Trust previously had an interest in the Property and they can be held liable for any loss to the Trust. On this motion, the loss that Rosemarie as Trustee seeks to recover is title to half of the Unsold Condominiums.[36]

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[35] Although the Appellate Division ruled that there was a question of fact as to whether defendants were BFPs, their opinion addressed a motion to dismiss, which has a different standard of review than a motion for summary judgment. *Friedman v Connecticut Gen. Life Ins. Co.*, *supra*; *RXR WWP Owner LLC v WWP Sponsor, LLC*, *supra*.

[36] Defendants' reliance on cases involving fraud is misplaced. There was no fraud here because Defendants had the means of discovering the facts from the recorded instruments. *Vermeer Owners, Inc. v Guterman*, 169 AD2d 442, 445 (1st Dept 1991) (where party has means to discover true nature of transaction he is about to enter into exercise of ordinary diligence, he must use them and cannot claim fraud); *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 207 (1st Dept 2012) (fraud does not lie where true facts could have been learned by plaintiff through due diligence). Here, as previously noted, Defendants had notice from recorded documents that Rosemarie was a co-trustee but only Maurice conveyed the Property, and knew they were dealing with a Trustee, whose authority they had a duty to investigate or suffer the Trust's loss. Consequently, Defendants cannot claim to have been defrauded. The cases Defendants cited held that there was no recorded document or facts that put the buyer on inquiry notice of fraud. *Miner*

E. Plaintiffs Did Not Ratify or Consent to the Mayfair Deed

Ratification is the act of knowingly giving sanction or affirmance to an act that would otherwise be unauthorized and not binding. 57 *NY Jurisprudence 2nd*, Estoppel, Ratification, and Waiver §94 (2014), citing *Stauss v Title Guarantee & Trust Co.*, 284 NY 41 (1940) (failure to object to, and acceptance of payments under contract voidable for fraud barred rescission); *Skytrack Condominium Bd. of Managers v Windberk Partners*, 167 AD2d 381 (2d Dept 1990) (voidable decision to commence lawsuit ratified by vote of condominium board). Consent and ratification mean the same thing and are used interchangeably. *Mooney v Madden*, 193 AD2d 933, 933-934 (3d Dept 1993) (trustee may bind trust to invalid agreement when beneficiaries consent or ratify).

The statute of frauds provides that a conveyance or contract relating to real property must be in writing, signed by the party to be charged or his agent authorized in writing. General Obligations Law §5-703. In addition, real property contracts and conveyances must be ratified in writing. *Newton v Bronson*, 13 NY 587, 593 (1856) (contract to sell land executed by agent without written authority could be ratified in writing); *Haydock v Stow*, 40 NY 363, 371 (1869) (ratification of contract to sell real estate must be in writing); *Hermes v Title Guarantee & Trust Co.*, 282 NY 88 (1939) (forged mortgage ratified by formal instrument executed by true mortgagor); *Roskam-Scott Co. v Thomas*, 175 AD 84, 87 (1st Dept 1916) (explaining and

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v Edwards, 221 AD2d 934 (4th Dept 1995)(conveyance from mother to daughter when buyer could not know she was receiving SSI subject to lien); *Fleming-Jackson v Fleming*, 41 AD3d 175, 176 (1st Dept 2007) (no recorded contracts affecting BFP's title); *LaSalle Bank Nat. Ass'n v Ally*, 39 AD3d 597, 600 (2d Dept 2007) (no means of knowing that seller's signature was forged); *Anderson v Blood*, 152 NY 285 (1897) (question not whether purchaser could have discovered fraud by trustee but whether she was on notice of facts that would prompt ordinary person to make inquiry). *See* Defendants' Memorandum of Law, Dkt 269, p 18.

approving reasoning of *Haydock v Stow*); *Lancaster at Fresh Meadow, Inc. v Suderov*, 6 Misc2d 12, 15 (Sup Ct Queens Co 1957), *affirmed sub nom Lancaster at Fresh Meadow v Suderov*, 5 AD2d 1015 (2d Dept 1958) (seller's attorney could not ratify cancellation of deed restriction in writing without written authority); *Mashomack Fish & Game Preserve Club, Inc. v Estate of Jackson*, 130 AD2d 464 (2d Dept 1987) (contract for sale of real property can only be ratified in writing); *Kwang Hee Lee v ADJMI 936 Realty Assoc.*, 46 AD3d 629, 631 (2d Dept 2007) (contract to sell real property not binding because signature of one owner forged and could not be ratified by non-signatory without writing); *Williams v Cohn*, 51 AD2d 1031 (2d Dept 1976) (factual question as to defendant's possible written ratification of agreement to sell real property); *O'Neill v Vebeliunas*, 136 AD3d 876 (2d Dept 2016)(ratification of lease and easement in correspondence, citing *Newton v Bronson, supra*);[37] *Weston Assoc., Inc. v Niagara Properties, Inc.*, 130 AD2d 964 (4th Dept 1987) (agent's acts not valid unless performed pursuant to writing and can only be ratified in writing); *Simmons v Westwood Apartments Co.*, 46 Misc2d 1093, 1096–98 (Sup Ct 1965), *affirmed*, 26 AD2d 764 (4th Dept 1966) (attorney's writing could not modify property description in deed unless attorney's authority was written and plaintiffs could not ratify without writing).[38]

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[37] Defendants cited only an earlier decision in *O'Neill v Vebeliunas*, sub nom *Lipman v Vebeliunas*, 39 AD3d 488 (2d Dept 2007), which denied summary judgment as to ratification without mentioning the writing requirement. The later appeal after trial makes clear that there was written correspondence to support ratification. *Lipman v Vebeliunas, id.*

[38] While there is some case law discussing ratification of a real property conveyance by the acceptance of benefits, there is no New York appellate authority that upheld an unwritten deed ratification, except for a conveyance approved by court order. *See, Burkard v Crouch*, 169 NY 399 (1902) (ratification by minor beneficiary where land sale and distribution of proceeds to beneficiary approved judicial accounting proceeding in which beneficiary was represented by guardian ad litem); *Lequerique v Lequerique*, 60 AD3d 504 (1st 2009) (ratification of deed rejected because no evidence that spouse knowingly acquiesced); *Alexandru v Berritt*, 168 AD2d 472 (2d Dept 1990) (limited partners ratified sale of buildings by written affidavits and acceptance of benefits); *Holm v C.M.P. Sheet Metal, Inc.*, 89 AD2d 229, 232-233 (4th Dept

Plaintiffs did not ratify or consent to the Mayfair Deed. Document discovery is complete, and there is no writing by Rosemarie or her Sons that ratified it. It is unnecessary to consider whether Rosemarie ratified the Mayfair Deed by other conduct, including acceptance of benefits, because a writing is required.

E. Statute of Limitations

The applicable statute of limitations in an action to quiet title is CPLR 212 (a), which provides that:

> an action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest was seized or possessed of the premises within ten (10) years prior to the commencement of the action.

Koo v Robert Koo Wine & Liquor, 170 AD2d 360 (1st Dept 1991). CPLR 212(a) must be read in conjunction with RPAPL 311, which provides:

> In an action to recover real property or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title unless the premises have been held and possessed adversely to the legal title for ten years before the commencement of the action.

Elam v Altered Ego Realty Holding Corp., 114 AD3d 901 (2d Dept 2014).

1982) (no ratification from acceptance of rent because agent had no written authority to lease and no proof that principal knew terms). Although *Lequerique* implied that acceptance of benefits would suffice, it did not find ratification or discuss the writing requirement. *Holm* said that the acceptance of rent from a tenant could have resulted in ratification, if the landlord knew the terms of the lease, but found there was no evidence of the latter. The *Holm* court also held that acceptance of rent under a lease is a special class of case. Under principles of stare decisis, an opinion's binding authority is confined to the facts before the court and the point actually decided. *Dougherty v. Equitable Life Assurance Soc.*, 266 NY 71, 88 (1934); *Danann Realty Corp. v Harris*, 5 NY2d 317, 322 (1959) (opinion limited to facts and circumstances before court). Thus, none of these authorities are precedent holding that a deed conveying real property can be ratified without a writing, except for a judicial determination that binds a party to the proceeding.

A record title owner's possession is presumed, and the statute of limitations is not a bar unless the premises have been held adversely to the record owner for ten years. *Id*; *Kraker v Roll*, *supra*. The requirement to bring an action within ten years is imposed upon persons who would *challenge* record title to property rather than those who seek to quiet title to their own land. *Orange & Rockland Utils. v Philwold Estates*, 52 NY2d 253, 261 (1981), citing *Ford v Clendenin*, 215 NY 10, 17 (1915) (owner of real property in possession has continuing right to invoke court of equity to remove cloud on title unless there is adverse possession for prescriptive period).[39] A party who never received title, does not obtain title by the passage of time. *Faison v Lewis*, *supra.*

Defendants' statute of limitations defense is dismissed because the Trustees at all times prior to commencement of Action 1 are presumed to have been in possession of the Unsold Condominiums. RPAPL 311. The court has ruled that the Mayfair Deed did not convey the Trustees' title to the Property. The statute did not run against the Trustees, the record title holders. *See Orange & Rockland Utils. v Philwold Estates*, *supra*; *Faison v Lewis*, *supra; Elam v Altered Ego Realty Holding Corp.*, *supra*; *Kraker v Roll*, *supra*. The 2002 Transaction closed in 2003, less than ten years before this action was filed. Defendants do not claim that there was adverse possession by them for ten years prior to the commencement of this action in 2012. They argue only that Rosemarie lost title in 1997, a claim that the court has rejected, and failed to commence Action 1 for more than ten years after she lost it. Defendants' Memorandum of Law, Dkt 269. p 3. The statute of limitations does not bar the Plaintiffs' claim to quiet the Trustees' title to half of the Unsold Condominiums.

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[39] Laches is not a bar to a claim brought against the record title holder or where the defendant has constructive notice of the recorded title. *Koo v Robert Koo Wine & Liquor*, *supra*; *Washington Temple Church of God in Christ, Inc. v Global Props. & Assoc., Inc.*, *supra*; *Kraker v Roll*, *supra.*

Furthermore, it is law of the case that the statute of limitations is no bar to Plaintiffs' claim to quiet title. The Appellate Division did not reverse this court's ruling in the Dismissal Decision denying Defendants' motion to dismiss based on that ground.

F. There is No Basis to Estop Rosemarie as Co-Trustee or Beneficiary

Defendants claim that Rosemarie can be estopped as co-trustee and beneficiary from contesting the Mayfair Deed. A party asserting estoppel must show with respect to himself: 1) lack of knowledge of the true facts; 2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position. *BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 853 (1st Dept 1985). Equitable estoppel should be applied with great caution when realty is involved. *Kraker v Roll, supra.*

Under the facts of this case, equitable estoppel does not apply. Defendants had constructive notice that the Mayfair Deed was defective, so it cannot claim lack of knowledge of the true facts, the first element necessary to establish estoppel. *BWA Corp. v Alltrans Express U.S.A., Inc., supra.*[40] Furthermore, they admit that they had no contact with Rosemarie or Offit before the 2002 Transaction closed. Mann Aff, Dkt 270. Ergo, they could not have relied on Rosemarie or Offit when Cosmopolitan purchased Mayfair, the second element of estoppel.

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[40] Although Defendants argue that Rosemarie as co-trustee is estopped from contesting the Mayfair Deed by failing to protest it, the cases Defendants cite did not involve estoppel to contest recorded conveyances of real property. *See, McCormick v Bankers Trust Co.*, 304 AD2d 759, 760 (2d Dept 2003) (possession of same information about transaction not involving real property); *Zimmerman v Pokart*, 242 AD2d 202, 203 (1st Dept 1997) (failure to use tax exemption); *Matter of Sheridan*, 32 Misc2d 38, 41 (Sur Ct NY Co 1961) (failure to sell securities); *In re Niles*, 113 NY 547, 559 (1889) (investments of cash proceeds); *Matter of Collins*, 178 Misc 521 (Surr Ct NY Co 1942) (payment of carrying charges on real property). Here, a finding of estoppel by silence would run afoul of the rules that trustees must act jointly to convey real property and ratification of a deed must be in writing.

BWA Corp. v Alltrans Express U.S.A., Inc., supra. Hence, Plaintiffs are not estopped from quieting title to the Unsold Condominiums.

G. Unclean Hands

Defendants urge that Rosemarie as co-trustee of the Trust has unclean hands because she did not obtain title to the Property. Defendants' Memorandum of Law, Dkt 269, p 24. As discussed earlier, the Designation vested joint title to the Property in Rosemarie and Maurice, as co-trustees. Thus, the court dismisses the unclean hands defense with respect to the claim to quiet title to the Unsold Condominiums. Accordingly, it is

ORDERED that Motion Sequence 008 in Action 1 by Rosemarie A. Herman, individually, and as co-trustee of the trust created by, Harold Herman, as Grantor, and J. Maurice Herman, as Trustee, under a trust indenture, dated March 1, 1990 ("Trust"), and as mother and natural guardian of Gavin and Jesse Esmail, for partial summary judgment on liability on the portion of the first cause of action to quiet title to the condominiums at 36 Gramercy Park East, New York, NY ("Property"), that remained unsold as of November 19, 2012 ("Unsold Condominiums"), and to dismiss the affirmative defenses relating to the Property of Defendants 36 Gramercy Park Realty Associates, LLC, Cosmopolitan Property Acquisition Company, LLC, MMann, LLC, Mann Management, Inc., d/b/a, Mann Realty Associates, and Maurice A. Mann, is granted; and the court dismisses the following affirmative defenses insofar as they relate to said Property: 1) failure to state a claim; 3) Defendants acted in good faith; 4) waiver, laches, equitable estoppel, res judicata, collateral estoppel and/or entire controversy doctrine; 5) statute of limitations; 6) ratification; 8) unclean hands; and 9) consent; and the court dismisses the following affirmative defenses entirely: 10) ratification by acceptance of distributions from

Mayfair York, LLC ("Mayfair"); 11) bona fide purchaser of Mayfair for value; and 12) no deed transferring the Property to Rosemarie or the Trust; and it is further

ORDERED that Motion Sequence 002 in Action 2 by Rosemarie A. Herman, individually, and in any representative capacity she asserts, to dismiss the portion of the first cause of action that seeks a judgment declaring that 36 Gramercy Park Realty Associates, LLC, has clear title to the Unsold Condominiums at the Property, is granted, and said portion of the first cause of action is dismissed.

Dated: April 21, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.