

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re

251 West 121 Street, Inc. : Chapter 11  
Debtor. : Case No. 03-14377

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APPEARANCES:

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BEATTY, PRUDENCE CARTER, U.S.B.J.

MEMORANDUM DECISION RE DAVID N. ADDISON AND IDA FULLER

Based on the findings of fact<sup>1</sup> and for the reasons hereafter set forth, the court denies the objections of 251 West 121 Street Inc. (the “Debtor” or the “Corporation”)<sup>2</sup> and Elayne Richards (“Richards”) to the various claims of David N. Addison (“Addison”) and Ida Addison Fuller (“Fuller”), Addison’s former wife. The court has entered a separate order based on this decision.

**Findings of Fact**

The Debtor filed this Chapter 11 case on July 8, 2003. Almost two years later and by order dated June 8, 2005, the Court authorized an auction for the sale of the sole asset of the Corporation, a four-story brownstone located at 251 West 121<sup>st</sup> Street in Manhattan, New York (the “Property”). ECF Doc. No. 41. The high bid was \$800,000. The sale price represents a major upward change in the New York City real estate market since early 2000, when the Corporation was formed, as well as a significant improvement in the immediate neighborhood. Upwards of 20 “crack” houses had been on the block in 2000 but all, or substantially all of them, had been closed down by the time of the sale. The sale was confirmed by order dated December 1, 2005 and the Property was sold free and clear. ECF Doc. No. 51.

Subsequently, the Debtor filed a Chapter 11 plan on May 15, 2006. ECF Doc. No. 64. The plan was confirmed by order dated September 13, 2007. ECF Doc. No. 105.

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<sup>1</sup> This decision is based on the testimony taken and exhibits introduced at a four and a half day trial held in August.

<sup>2</sup> During the Chapter 11 case the attorney presently representing both the Debtor and Richards was the court-authorized attorney for the Debtor. After confirmation, it was agreed that he could represent Richards individually as well since it would have been unnecessarily expensive for Richards to be required to retain a separate attorney. Addison retained his own attorney to represent his interests as a shareholder and claimant.

The terms of the confirmed Chapter 11 plan provide for the payment of all allowed administration and unsecured claims in full. In addition, because of the very substantial net proceeds received from the sale of the Property, the plan provides for distributions to the Corporation's shareholders.

It is undisputed that Richards is the record holder of 75% of the shares of the Corporation. It is likewise undisputed that Addison is the record holder of the remaining 25% of the shares (hereafter the "Addison/Fuller Shares").<sup>3</sup> Richards claims that Addison obtained his shares by fraud or fraud in the inducement.

Richards has already received a distribution of \$301,436.13 from the proceeds of the sale based on her ownership of at least 75% of the shares of the Corporation. ECF Doc. No. 105 Neither Addison or Fuller have received any distributions to date due to Richards' various objections.

Addison filed an administration claim (Claim No. 10) for \$7,375.22 and a general unsecured claim (Claim No. 14) for \$38,000 (collectively the "Claims"). The Claims seek reimbursement for the expenses for the Property that Addison paid. Richards objected to these Claims on the bases that Addison had no authority to undertake the various work he claims to

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<sup>3</sup> Addison transferred half of his shares to Fuller in 2005. In a divorce settlement agreement entered into on March 8, 2005 Fuller agreed to provide him with \$5,000 and he agreed she would receive 50% of his shares in the Corporation *inter alia*. While Richards was not a party to this agreement, no convincing legal argument has been made that she was required to be a party to what was a matrimonial settlement or that her non-party status defeats Fuller's derivative distribution rights. Parenthetically, the evidence at trial was that Addison needed the \$5,000 to pay for repairs on the Property and that was the money so used by Addison.

have performed on the Property and that any work undertaken was done for the benefit of Addison as a tenant at the Property.

Richards has a long association with the Property. She lived in the ground and second floor duplex (the “Duplex”) for many years between 1949 and 1999. Richards, Tr. at 28. From 1949 to 1966 Richards resided in the Duplex with her mother and/or her parents. Shortly after her graduation in 1966 from New York University with a bachelors degree in education, Richards moved to Germany to work as a recreational specialist with the NATO Special Forces. Richards, Tr. at 11-12. After she returned from Germany in 1969, she lived at the Property for the next four years while working for various hospitals in New York City. Richards, Tr. at 13-14, 26. From 1973 until 1976 she studied healthcare administration at Stony Brook University on Long Island. Richards, Tr. at 13. At some point Richards moved to the Bronx and in 1993 moved back to the Property.

Although she had lived at the Property for many years, Richards did not have an ownership interest in the Property until 1970. At that time her mother, who had been the sole owner since 1949, made her co-owner. Richards, Post-Trial Brief at 1, ECF Doc. No. 117; Richards, Tr. at 17-19. Thereafter and in 1992, Richards became the sole owner of the Property as the result of the transfer to her from her mother of her mother’s remaining interest. Richards, Tr. at 19.

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In 1993 Richards' mother moved to a nursing home. Richards, Tr. at 26-27, 31.<sup>4</sup> Richards continued to live in the Duplex alone until some time in the fall of 1999.<sup>5</sup> Richards, Tr. at 27, 51.

On the first floor of the Duplex were the kitchen, a bedroom and the bathroom. Richards, Tr. at 29. The second floor had another bedroom and the parlor/living room. Richards, Tr. at 29. The two floors were connected by an internal staircase.

The third and fourth floors of the Property each had three rental units and a single bathroom. Richards, Tr. at 29-30. There was a staircase connecting these floors to the first floor entry level.

The rental proceeds from the six units were used for paying the bills such as real estate taxes, electricity and heat, and making any needed repairs by Richards' mother and then by her when she took over the management of the Property from her mother. Richards, Tr. at 29-33.

When Richards first took over management of the Property from her mother in 1993, she was receiving sufficient rent from the tenants to timely pay the bills for the Property. Richards, Tr. at 32-33. By the spring of 1999, there were five tenants remaining in the building, three of whom were not paying rent. Richards, Tr. at 32. By then Richards was struggling to pay the bills for the Property. Richards, Tr. at 32. She was attempting to evict one the tenants, Shillingsford ("Shillingsford"), who had a long history of not paying rent. Richards, Tr. at 34, 52.

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<sup>4</sup> Her mother passed away in 2002. Richards, Tr. at 38.

<sup>5</sup> According to her testimony, she moved out in December 1999. Richards, Tr. at 51. Addison did not know when Richards stopped living at the Property.

In September 1999 while she was still living at the Property Richards determined she would not pay the \$300 due on the electric bill for the Property.<sup>6</sup> Richards, Tr. at 50. Although she had the money to pay that bill at the time, Richards did not want to do so because she was concerned she would not be able to pay for heat and fuel oil or necessary expenses during the winter months as well as her own living expenses. Richards, Tr. at 51. The failure to pay the electric bill meant that there was no heat or hot water in the Property (as well as electricity) since the furnace had an electric starter motor. Richards, Tr. at 128.

Richards testified that the first time she met Addison was in August or September 1999 when Addison biked past the Property while she was standing and talking to her now-deceased neighbor, Earl Lockett (“Lockett”), who lived across the street.<sup>7</sup> Richards, Tr. At 38. Both Richards and Addison had known Lockett for a number of years before that introduction. However prior to their introduction by Lockett they had not known each other nor are they related.

How Lockett introduced Addison to Richards at that initial meeting is a matter of contention and forms much of the basis of Richards’ claim of fraud and fraud in the inducement. Richards’ initial testimony was that Lockett introduced Addison as his friend, my attorney. Richards Tr. at 44. She immediately corrected herself to say it was “my friend, my lawyer.”

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<sup>6</sup> When Richards moved out of the Property she to a room in a brownstone located about a block away from the Property. Richards, Tr. at 51

<sup>7</sup> While Richards testified that this initial introduction took place in August or September 1999, Addison testified it took place some time between Christmas and New Years. The Court does not view this difference in date as material.

Richards, Tr. at 44. While Richards placed considerable emphasis on the fact that the word lawyer was used and not the word attorney, the terms are synonymous.

Addison testified that Lockett introduced him as his friend and said “he used to be my lawyer ” but that he would always consider him his lawyer.<sup>8</sup> Addison Tr. at 532. Richards’ and Addison’s testimony differs as to whether Lockett introduced Addison as Lockett’s former or current attorney. This court accepts the testimony of Addison that whatever the exact words used by Lockett they did not convey the meaning that Addison was currently a practicing attorney. Addison, Tr. at 530-532.

Richards agrees that Addison affirmatively stated at the initial meeting that he was a full-time teacher working for the New York City Board of Education. Richards, Tr. at 132-133. Richards also agrees that Addison never told her affirmatively that he was a lawyer. She testified that after their introduction Lockett and Addison carried on a conversation that did not include her. Richards, Tr. at 45. Her case is premised on Lockett’s statement and Addison’s failure to make any “corrective” statement. It is indisputable from the record that Richards did not ask Addison any follow up questions on the subject at that initial meeting or thereafter. She failed to ask any questions about, why if he was a lawyer, he was teaching school full-time. Nor did she inquire where his office was, what type law he practiced, where he went to law school or when

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<sup>8</sup> Addison graduated from a mid-western law school in 1970 and at one time practiced as an attorney. Addison, Tr. at 501. He was admitted to the New York bar in 1976. Addison, Tr. at 504. He submitted his resignation from the New York bar in 1981. Addison, Tr. at 499. The circumstances of his resignation were not put on the record. Subsequent to his resignation, he, as he testified at trial, held a number of different positions both in New York and elsewhere. Among those positions were several teaching positions including the one he was working at full-time in 1999 when he met Richards.

was he admitted to practice. Nor did she ask these questions in the following few months before the Corporation was formally created. She never told Addison that it was her belief he was an attorney or that it was important to her that he was. In fact their transaction with respect to the Property was solely a business deal that did not require Addison to do any legal work.

Richards and Addison met for a second time during late December of 1999 or early January 2000 in Lockett's apartment where they had discussions regarding the Property. Addison, Tr. at 543. Richards told Addison that she owned the Property and was having trouble managing it and paying the bills. Richards, Tr. at 50; Addison, Tr. at 543-544. Addison informed Richards he had some real estate experience and could potentially help her manage and rehabilitate the Property so she could collect rent from tenants as well as live there. Addison, Tr. at 544, 552.

Sometime in January 2000 Richards and Addison reached at least a preliminary agreement about his participation in the Property. While both parties testified that it was in writing, neither party had a copy of the agreement. Richards, Tr. at 53.

As events would have it and before any further steps could be taken, on the night of February 14, 2000 a multiple-alarm fire occurred at the vacant building immediately adjacent to west of the Property. Richards Tr. at 60-61. That building was owned by the City of New York. Richards Tr. at 60-61. Although the fire did not spread to the Property, the Property was damaged by the firefighting efforts. As part of their efforts, the firefighters dug holes in the roof of the Property and broke the skylight to prevent the spread of the fire to the Property. Richards, Tr. at 62. A substantial amount of water was directed to the roof of the Property during the

firefighting. Richards, Tr. at 62. Over the next few days and weeks that water found its way down into the interior space at the Property. Richards, Tr. at 126. There was also some smoke damage but that was remedied by airing out the Property. Richards, Tr. at 60-61, 126.

Immediately following the fire, Richards and Lockett called Addison to come to the Property to view the damage. Richards, Tr. at 63, 136; Addison, Tr. at 550. Richards was very upset. Addison walked through the entire Property and surveyed the water damage as well as the overall condition of the Property. Addison, Tr. at 550. In addition to the water damage caused by the firefighting efforts, Addison saw that additional water damage had resulted because pipes had frozen and burst throughout the Property as a result of there having been no heat since winter began. Addison, Tr. at 552. Addison told Richards that he thought that while the Property looked bad because of the water damage it could be restored to rentable condition. Addison, Tr. at 553-554.

Both before and after the fire, Richards and Addison engaged in discussions about rehabilitating the Property. Richards asked Addison for his help and Addison informed her that except for his time to simply guide her, he had limited resources to offer. Addison, Tr. at 551. Addison informed Richards that if he was to be significantly involved beyond mere guidance, he would require some equity interest in the Property. Addison, Tr. at 551-552. Addison also suggested forming a corporation in order to get the electricity turned back on and to speed up the rehabilitation process. Richards, Tr. at 139-140; Addison, Tr. at 551. A few more discussions followed in which the parties contemplated Addison receiving a percentage ownership in the corporation. Richards, Tr. at 142-146. They discussed both the percentage distribution of the

stock between them and the possibility that Richards would take on the role of president and Addison vice president or treasurer. Richards, Tr. at 142-146.

They agreed that title to the Property would be transferred to a corporation with Richards receiving 75 percent of its shares and Addison 25 percent of its shares. Richards, Tr. at 197-198. In exchange for his shares, Addison agreed to pay Richards \$7,500. Addison, Tr. at 561. He agreed to assume management responsibilities and initiate all repairs in order to bring the Property to a condition where it could be rented. Addison, Tr. at 561. The expenses were to be split based on their percentage ownership interest.<sup>9</sup> Addison, Tr. at 591-593. All changes and updates would be subject to Richards' approval. Richards, Tr. at 196-197. Once the Property was in the proper condition, Addison would procure new tenants. Richards, Tr. 55; Addison, Tr. at 562.

On March 10, 2000 Richards and Addison met with Kip Lenoir, a licensed attorney. Lenoir, Tr. at 332. The meeting occurred in an office in Lenoir's home. Lenoir, Tr. at 332. Lenoir was selected after Addison spoke to Richards and she advised him that she did not know an attorney they could use to form a corporation. Addison knew Lenoir, although they were not close personal friends, and asked Richards if he would be okay with her. She said he was.

Prior to the meeting, Addison spoke to Lenoir to ask him to set up a corporation and use the address of the Property as the corporate name. Lenoir, Tr. at 329-330. At the meeting on

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<sup>9</sup> As it turned out Richards did not contribute anything towards the expenses and they were all paid by Addison. Addison testified that he did not initially know that Richards either could or would not make contributions for the expenses because he assumed that with her college education and work experience she would be able to make some financial contribution even if she was then without much in financial resources. Addison, Tr. at 591.

March 10, 2000, which lasted two hours according to Lenoir and Addison and four hours according to Richards, Lenoir explained in detail how the deed to the Property would be transferred from Richards to the Corporation and how the shares would be apportioned between Richards and Addison. Richards, Tr. at 147-150; Lenoir Tr. at 332-335.

Richards claims that she did not understand that by transferring the Property to the Corporation and issuing 25% of the shares of the Corporation to Addison that he would have any financial interest in the Property by virtue of owning the shares. Richards, Tr. at 95. Yet she testified that the March 10 meeting lasted twice as long as the other participants and that she asked numerous questions of Lenoir. Richards, Tr. at 145-148. Given her level of education and personal experience in the management and ownership the Property, this court does not accept her claim of ignorance.<sup>10</sup> Since the Corporation had only one asset, the Property, ownership of shares in the Corporation necessarily translated into a financial interest in the Property itself. Certainly she had the means to understand because Lenoir did not represent either her or Addison and would have answered any questions she had on the subject.

At the March 10 meeting, Lenoir delivered their respective shares in the Corporation to each of them. He also delivered the original deed transferring the Property to the Corporation to Richards. Lenoir, Tr. at 336-338.

Over two years later and in August 2002 Addison split up with Fuller and moved into a third floor room at the Property. Fuller, Tr. at 459-460. Fuller had visited the Property a number

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<sup>10</sup> For example, she previously stated that the Property had been transferred into her sole name for estate planning purposes. Richards, Affidavit in Support of Sale at 1, ECF Doc. No. 48.

of times before then beginning in early 2000 on of one Addison's days off from school. Fuller, Tr. at 438-439. On some of those occasions she ran into Richards and talked to her. Fuller, Tr. at 450-451.

Richards submitted a number of letters Addison wrote her regarding the Property which she claims are evidence of Addison's misrepresentations. Richards, Tr. at 98-99. Debtor, Ex. 12-16. Richards argues that the letters reveal Addison's fraudulent scheme to intimidate her and take over the Property rather than manage it. However the letters, which did not begin until June 2001, well over a year after the Corporation was formed and long after Addison had substantial repairs made to the Property, in no way indicate a fraudulent intent at the time the parties entered into their agreement in early 2000.

Richards objected to the Claims for reimbursement for property expenses he paid on the grounds that the amounts were unreasonable and that she had not given prior authorization for the work to be done. At the trial Richards testified that under their agreement Addison could not undertake any work on the Property without her prior approval, including such minimal work as repainting or plastering damaged walls, and that she never approved any of the work he had done on the Property. Richards, Tr. at 196-197, 102-103. Given the obvious necessity of the work done, her frequent presence at the Property when work was being done and her failure to object to Addison about anything she saw, this Court finds that the agreement between them did not require her prior approval for work of the nature that was done and that in any event she gave her implicit consent to the work that was done by failing to object. None of the work was in the nature of a renovation. For example, the broken skylight had to be repaired to prevent water entering the

Property whenever it rained or snowed. Likewise re-roofing was essential to weatherproof the Property because of the holes that had been made in the roof at the time of the fire.

Once electricity was restored to the Property, Addison had someone attempt to restart the furnace. Unfortunately the motor required several days of work before it would work and the furnace could be restarted. The furnace also had to be reinspected. Addison, Tr. at 566-567. In addition plumbing work on the heating risers and replacement of radiators were also necessary to protect the Property from further water damage and to conduct the heat once the furnace was working. Addison, Tr. at 567. The staircase to the third floor had to be partially rebuilt as damaged wood made it a safety hazard. With the repairs that Addison initiated, the Property became marginally inhabitable.

In April of 2003, a piece of mail that was addressed to Richards arrived at the Property. Addison believed was related to real estate taxes. Addison, Tr. at 825. Addison brought it to Richards and stressed to her the consequences of a tax lien on the Property and the urgency of the situation. Addison, Tr. at 826-827.

In addition to speaking to Richards, Addison also sent a letter to her and enclosed information regarding the tax lien. Richards, Tr. at 156; Addison, Tr. at 826; see also Addison Ex. J. Addison and Richards then took steps to stop the foreclosure in state court by filing an affidavit and agreeing to pay an initial amount of \$3,000.<sup>11</sup> Richards, Tr. at 163; Addison, Tr. at 835-836. Richards' affidavit filed in the state court stated she owned 75% of the stock and

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<sup>11</sup> Addison asked family members to help him pay the \$3,000. It turned out that there was still a small amount left in his father's estate that he was entitled to and that was the money he used to pay the \$3,000. Addison, Tr. at 843.

Addison owned 25%. Richards, Tr. at 163-164. Addison paid the \$3,000. Addison, Tr. at 836. Addison and Richards were given an adjournment to try to raise the funds necessary to pay the remainder of the taxes. Addison, Tr. at 837. Addison attempted to raise money by obtaining a mortgage but Richards refused to agree to mortgage the Property. Richards, Tr. at 165-166.

Addison testified at trial that Richards told him in 2003 when the foreclosure notice was received to simply let the Property go. Addison, Tr. at 838. Although at trial Richards denied having said that, this Court credits Addison's version of the conversation rather than Richards because she did not offer any explanation for her own lack of action or how she thought the foreclosure could be stopped. Nor did she go along with Addison's efforts to raise the money by obtaining a mortgage.

Addison and Fuller were finally able to come up with the \$10,500 to pay off the tax lien and attempted a wire transfer of the money shortly before the bank closed on July 7, 2003, a day before the tax sale was scheduled to take place. Fuller, Tr. at 472-473; Addison, Tr. at 672-675. Unfortunately, the transfer failed due to an error in wire instructions. Addison, Tr. at 672-673.

On July 8, 2003 with no prior discussion with Addison, Richards caused the Chapter 11 petition to be filed. Addison, Tr. at 677. Addison did not learn of the Chapter 11 filing until later that month. Addison, Tr. at 845. See also Debtor Ex. 5.

### **Discussion**

#### **The Addison/Fuller Shares**

Richards seeks to invalidate the Addison/Fuller Shares on the grounds that Addison obtained those shares by fraud or fraud in the inducement. It is fundamental that a fraud claim

will not be presumed, assumed or inferred but must be proved by the party alleging it. 60A N.Y. Jur.2d Fraud and Deceit, § 248 at 404-405. Under New York law to prevail on a claim for fraud, a plaintiff must prove five elements. A plaintiff must prove (1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff. *Wynn v. SC Rochester*, 273 F.3d 153 (2d. Circ.2001) citing *Lama Holding Co. v. Smith Barney, Inc.*, 668 N.E.2d 1370 (1996); see also *Barclay Arms Inc. v. Barclay Arms Assoc.*, 74 N.Y.2d 644 (1989). “Under New York law, each element of a fraud claim must be proven by clear and convincing evidence.” *Travelers Indemnity Company of Illinois v. CDL Hotels USA, Inc.*, 322 F. Supp.2d 482 (S.D.N.Y. 2004) quoting *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775 (2d Circ. 2003). “The courts are vigilant to prevent the rescission of a contract deliberately made for fraud unless the fraud is admitted or proved by the most satisfactory of evidence.” 60A N.Y. Jur.2d Fraud and Deceit, § 248 at 405. Where “a plaintiff has the means of knowing, by the means of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.” *Hyosung America, Inc. v. Sumagh Textile Co., Ltd.*, 137 F.3d 75 (2d Circ. 1998) quoting *Schumaker v. Mather*, 133 N.Y. 590, 596 (N.Y. 1892). “Justifiable reliance will not be found in cases in which the plaintiff was placed on guard or practically faced with the facts.” *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 81 (2d Cir. 1980).

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One of the material misrepresentations that Richards says she relied on is that she believed that Addison was an attorney. On the day that Lenoir introduced them, Richards and Addison had had no discussions about the Property whatsoever. When they did turn to having discussions about Addison being involved with the Property, none of the terms of the participation they talked about and finally agreed on required Addison to be an attorney.

Richards has not shown how whether or not Addison was a licensed attorney was material to what was a business transaction between them that did not require Addison to be an attorney. She admits that he never stated that he was an attorney and she makes her case on the basis of a fleeting remark made to her by her now deceased neighbor on the day he introduced them. Richards has not proven by clear and convincing evidence that Addison's failure to reveal that he was no longer a licensed attorney was a material omission that induced Richards to enter into the contract. "When dealing with a claim of fraud based on material omissions, it is settled that a duty to disclose arises only when one party has information that the other party is entitled to know because of a fiduciary duty or other similar relation of trust and confidence between them." *Travelers Indemnity Co. of Illinois v. CCDL Hotels USA Inc.*, 322 F.Supp.2d 482 (S.D.N.Y. 2004) quoting *United States v. Szur*, 289 F.3d 200, 211 (2d Cir.2002). Richards has failed in her attempt to demonstrate that Addison had any fiduciary duty to her. She could not have legitimately assumed they had an attorney-client relationship since she had never asked him to represent her as an attorney nor entered into any retainer agreement with him. Nor was there any other basis for a fiduciary relationship. When they became co-shareholders they both had fiduciary obligations to the Corporation. Furthermore nothing in the record suggests any reason

based on familial ties or prior friendship why Addison would have become involved in the “project” of restoring the Property, which was significantly uninhabitable in late 1999 that Richards moved out, to its former inhabitable rentable state without a financial incentive. She has simply failed to prove by clear and convincing evidence that a material misrepresentation of fact was made by Addison to her.

An action based on a fraudulent misrepresentations requires the plaintiff to prove “that the defendant made a false representation which was either known to be untrue or made with reckless disregard for the truth and which was made with the intent to deceive and induce the plaintiff to part with or refrain from obtaining something of value, thereby causing injury.” *Travelers*, 322 F. Supp.2d at 502 quoting *Melia v. Riina*, 204 A.D.2d 955, 956, 612 N.Y.S.2d 506, 508 (3d Dep’t 1994). “In order for fraud to arise by virtue of non-disclosure, the party sought to be charged must have knowledge of the facts asserted to have been left undisclosed; the silence must, under the existing circumstances, amount to the affirmation of a state of things which does not exist and the uninformed party must be deceived to the same extent as if there had been a positive assertion.” NY Jur.2d Fraud and Deceit, § 96 at 161-162 citing *First Citizens Bank & Trust Co. of Utica v. Sherman’s Estate*, 250 A.D. 339 (4<sup>th</sup> Dep’t 1937); *Noved Realty Corp. V. A.A.P. Co.*, 293 N.Y.S (1<sup>st</sup> Dep’t 1937), *Petrosky v. Brasner*, 695 N.Y.S 2d 281 (Sup 1999), order aff’d, 279 A.D.2d 75 (1<sup>st</sup> Dep’t 2001).

By switching her theory post-trial to fraud in the inducement, Richards appears to believe that she can prevail based on certain things Addison did several years AFTER their agreement was made in an effort to prove that he never intended to perform the agreement at the time it was

entered into. In particular she points to the letters he wrote trying to buy her stock. The letters, which continued through July of 2003 when the Debtor filed its Chapter 11 petition, do not support her claim for fraud in the inducement because they do not reasonably relate back to 2000 when Richards and Addison entered into the transaction. Moreover once the Chapter 11 was filed, the Corporation was represented by an attorney who took his instructions from Richards, not Addison. Richards has been unable to show that when Addison agreed to the terms of the contract, he made any representations that he knew were untrue or were made with reckless disregard for the truth. In fact the actions Addison took in 2000 are completely consistent with an intention to perform the agreement. Addison paid Richards a substantial amount in cash for the stock. He paid \$6,900 of the total agreed amount. See Ex D-11. Richards' papers gloss over that payment completely. Moreover Addison arranged for and paid thousands of dollars for the necessary repairs to the badly deteriorating Property beginning as soon as the Corporation was formed in 2000.

Richards points to Addison's failure to have Shillingford evicted from the Property. Addison never agreed to do the necessary legal work himself. Since Richards admitted at trial she did not know who the lawyer would be, it is obvious that it was not material to her whether Addison was an attorney. Richards, Tr. at 82. There was nothing to prevent the Corporation from hiring an attorney to try to evict Shillingford. However no eviction would have been successful if essential services as required by New York City law were not being provided. Shillingsford's monthly rent was less than \$150 per month. Without an overall plan for the development of the Property agreed upon between Richards and Addison, there was no point to try to evict Shillingford. Once Richards effectively took control of the Property with the Chapter 11 filing,

she was the one who made the significant economic decisions and she determined that the Property should be sold rather than renovated.

There is no question but that the terms of their relationship turned for the worse as Addison put more and more money into the Property and yet Richards refused to meet with him to discuss the Property and its rehabilitation. As a co-shareholder with Richards, he had a right to expect that she would respond to his requests to meet with her and discuss the Property. She had contributed no money at all since the Corporation was created nor did she invest any time in doing work at the Property, such as cleaning or straightening up the Duplex or supervising the work Addison was having done in the Property.

Rather than evidence of a fraudulent scheme, Addison's letters to Richards reflect Addison's valiant attempt to communicate with Richards who was totally unresponsive. It was Richards who failed in her duty as a co-shareholder by declining to respond to any of Addison's efforts to communicate with her. Addison testified that he continued to send the letters even though Richards did not respond in an attempt to elicit a response from Richards in order to move forward with rehabilitating the Property in which he had made a substantial investment of time and money since 2000.

Richards makes much of the fact that Addison moved into the Property after he separated from his wife in August of 2002. She alleges that he only made the repairs necessary so he could live at the Property.<sup>12</sup> However, the evidence simply does not support this conclusion. The most

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<sup>12</sup> Richards' counterclaim against Addison for use and occupancy based on his living at the Property was dismissed at trial because Richards failed to establish that she ever told Addison she objected to his living at the Property nor did she ever request he pay rent for use and

significant repairs, such as the re-roofing and furnace work, were made in 2000. Richards has failed to establish that in 2000 Addison intended to move into the Property.

It is apparent that Richards benefitted from Addison's being a co-shareholder. She received an immediate benefit when he paid her \$6,900 for his shares and thereafter from his continued financial support to maintain the Property. In addition, Addison was the sole person taking any action to protect the physical integrity of the Property.<sup>13</sup>

Richards also complains about a number of actions Addison took after she caused the Chapter 11 petition to be filed. Again Richards has failed to prove how any of these actions are indicative of Addison's intentions at the time he received the stock. His actions are perfectly consistent to preserve his rights as a minority shareholder and to recover on his substantial investment of time and money in the Property.

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occupancy at the time she knew he was living at the Property. Although Richards again asserted a right to set-off in her post-trial papers, the Court has already ruled on this issue and denied the claim.

<sup>13</sup> Even after the Chapter 11 petition was filed and Richards removed him from the Board of Directors, Addison continued to act responsibly to preserve the physical integrity of the Property. In early January 2005 when an inspector from the New York City Department of Housing Preservation and Development went to the basement of the Property and saw that the ceiling was collapsing which could have resulted in serious building collapse, he warned Addison that the condition was serious and needed to be addressed immediately or the Property might be shut down. Based on the inspector's recommendation, Addison engaged Maurice Thomas ("Thomas") of J.A.L.T. Concrete and Site Development LLC ("J.A.L.T.") who immediately came over to the Property. The next day a structural engineer visited the Property. Within two days, J.A.L.T. began its work which consisted of installing 75 four inch by four inch wood braces every two feet and installing 2 twelve foot sister beams to stabilize the building and prevent its total collapse. Four days later the work was completed. Addison Tr. at 852-855; Thomas, Tr. at 234-239; Addison, Ex. CC.

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She argues that the mechanic's lien he filed was well over the expenses he paid. However, he explained that he calculated that number as his expenses plus the value of his stock. She complains he was disruptive at the auction by handing out copies of his mechanic's lien. However, since the sale was advertised as being free and clear of all liens and the purchase price was approximately \$800,000, the lien had no effect on the buyers. Its only effect was to preserve, in Addison's mind, his right to the share of the proceeds.

Whatever failures occurred in their relationship after the Corporation was established and Addison had paid her the agreed consideration for his shares are simply irrelevant and cannot establish a material misrepresentation of fact, the key element of a claim for fraud. All of the other elements of a cause of action for fraud depend on first establishing a material representation of fact.

Richards' "facts" are replete with references to Richards presumption that Addison was a licensed attorney. It is undisputed he was not. She has failed to successfully demonstrate that this was the reason why she entered into the agreement with Addison. Addison was in fact knowledgeable about the management of real estate and real estate ownership. To the extent he could without the cooperation of Richards and within the constraints of his own budget, Addison performed well.

The Court believes that Richards, who after a number of conversations with Addison, knowingly deeded the Property to the Corporation, was present when the shareholder certificates were issued to her and Addison in a 75/25 split, and was appointed president of the Corporation with Addison acting as vice president and manager of the property, acted knowingly and willingly

and cannot avoid the transaction on the grounds of fraud or fraud in the inducement. This Court finds no fraudulent misrepresentations induced Richards.

**Claims**

The Court heard testimony from various people with respect to the expenses making up the Claims. The people who worked on the Property who testified were Maurice Thomas, Willie Underwood and Wallace Jones. Thomas testified about work that he and a team conducted to stabilize the floor. Underwood helped Addison with cleaning the place up while Jones conducted most of the other work done in the building. Natasha Dantzler from South Carolina Fuel also testified about fuel orders that Addison had placed for the building. Through this testimony, including that of Addison, the claims were thoroughly examined. The Court disagrees with Richards' position that her prior approval was required to incur these expenses since they were all essential repairs or expenses. Moreover as noted earlier she never objected to the work she saw being done.

It was agreed that the amount of the Claims totaled \$30,629. Of that amount Richards should have paid 75%, which she did not. It was agreed that the allowable amount of the Claims should be reduced by 25%, which was Addison's share. Therefore the allowable amount of the Claims is \$22,972.

**Conclusion**

For the foregoing reasons, this Court denies the Debtor's and Richards objections. A separate order has been signed.

Dated: New York, New York  
December 10, 2009

/s/ Prudence Carter Beatty  
United States Bankruptcy Judge

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