2013 WL 1787222 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

Richard J. KORN, Plaintiff,

v.

Sylvia KORN, Defendant.

No. 8266-VCG.
April 22, 2013.

Defendant's Answering Brief in Response to Plaintiff's Motion to Dismiss

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Dated: April 22, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

On January 31, 2013, Plaintiff Richard J. Korn ("Plaintiff" or "Richard") filed his Verified Complaint ("the Complaint"). The Complaint consisted of two counts - one for partition and sale of real property, and one for declaratory judgment of a joint account dispute.

Defendant Sylvia Korn ("Defendant" or "Mrs. Korn") filed an Answer and Counterclaim on March 11, 2013. The Counterclaim consisted of four counts: rescission of deed to real estate, rescission of deed to cemetery plots, demand for accounting, and constructive trust and request for judgment.

Plaintiff thereafter filed a Motion to Dismiss Defendant's Counterclaim on April 5, 2013. The parties, by way of a Stipulation and Order dated April 11, 2013, agreed to enter into a scheduling order for answering and reply briefs on the Motion to Dismiss. The Court approved the Stipulation and Order on April 11, 2013.

This is Defendant's Answering Brief in Response to the Plaintiff's Motion to Dismiss.

STATEMENT OF FACTS

The following facts are alleged in the Counterclaim:

Mrs. Korn is the mother of Richard. *Counterclaim* ¶2. A deed was executed on March 25, 2010, purporting to convey a portion of Mrs. Korn's ownership of Unit 4-E, Building B, Coffee Run Condominium, 614 Loveville Road, Hockessin, DE ("the Property") to Richard. *Counterclaim* ¶4. Mrs. Korn denies that this conveyance was legally valid. *Counterclaim* ¶*4.* Richard did not pay any consideration to Mrs. Korn when his name was added to the deed to her property on March 25, 2010. *Counterclaim* ¶43. Mrs. Korn was also persuaded on April 19, 2012 to add Richard's name to her Morgan Stanley Investment Account ("the Morgan Stanley account"). *Counterclaim* ¶5. Richard requested having his name added to Mrs. Korn's Morgan Stanley account and explained that he could more easily handle Mrs. Korn's affairs and protect her assets that way. *Counterclaim* ¶33. Mrs. Korn has also been pressured by Richard to deliver to him significant sums of money over the past eight years, but Mrs. Korn did not intend for these deliveries to constitute gifts. *Counterclaim* ¶7. Richard further insisted that Mrs. Korn add his name to multiple other **financial** accounts, including a checking account at Wilmington Trust and a savings account at Bank of America. *Counterclaim* ¶8. Richard is a law school graduate and the son of Mrs. Korn and, accordingly, Mrs. Korn believed that Richard's multiple requests to be added to her **financial** accounts were legitimate attempts to assist and benefit her. *Counterclaim* ¶34. Richard entered into a fiduciary relationship with Mrs. Korn when he had his name added to her **financial** accounts and told Mrs. Korn that he would handle her affairs and protect her assets. *Counterclaim* ¶33. At all times relevant, Richard purported to act on behalf of Mrs. Korn and for her benefit. *Counterclaim* ¶44.

Mrs. Korn's Morgan Stanley account had a balance of approximately $1,044,000.00 in April 2010. *Counterclaim* ¶35. Richard withdrew approximately $140,000 during 2010 by signing checks payable to himself from the Morgan Stanley account. *Counterclaim* ¶36. Richard withdrew approximately $336,500 during 2011 by signing checks payable to himself from the Morgan Stanley account. *Counterclaim* ¶37. Richard also incurred interest charges of approximately $16,000 and loan liabilities of approximately $433,000 against the Morgan Stanley account. *Counterclaim* ¶37. By December 31, 2011, the value of the account had been reduced to approximately $250,000.00. *Counterclaim* ¶37. During 2012, Richard signed checks payable to himself for approximately $69,000 and incurred interest charges of approximately $28,000 against the Morgan Stanley account. *Counterclaim* ¶38.

On the same date that Richard made an alleged deposit of $125,000 into the Morgan Stanley account, he also made a withdrawal of $135,000. *Counterclaim* ¶13. Richard also made an additional deposit of $70,000 into the Morgan Stanley account, but the funds for this deposit were derived from a sale of real estate from which Mrs. Korn lent Richard $200,000. *Counterclaim* ¶13.

Richard has made repeated requests to be reimbursed for the $195,000 he had deposited into the account using Mrs. Korn's funds. *Counterclaim* ¶14. In addition to the $195,000, Richard has also improperly obtained funds in excess of $486,000 from the Morgan Stanley account. *Counterclaim* ¶58.

Mrs. Korn contacted Morgan Stanley Smith Barney to "freeze" her Morgan Stanley account in order to avoid further misuse of funds by Richard. *Counterclaim* ¶9. Richard has demanded access to the account since the "freeze" in an attempt to take more money from the account without Mrs. Korn's approval. *Counterclaim* ¶11. Mrs. Korn requested the freeze on the Morgan Stanley account after she realized that Richard had been taking advantage of her and depleting her funds. *Counterclaim* ¶24. After Mrs. Korn had requested that the account be frozen, Richard began to make harassing and **abusive** phone calls to Mrs. Korn demanding access to the Morgan Stanley funds. *Counterclaim* ¶39. Richard also changed the locks to the condominium and Mrs. Korn was denied access. *Id.* Shortly thereafter, Mrs. Korn filed a Protection from **Abuse** Petition in Family Court due to Richard's harassing and threatening behavior. *Counterclaim* ¶40.

In March 2010, Mrs. Korn wished to purchase cemetery plots at Beth Emeth Memorial Park to plan for her family. *Counterclaim* ¶49. On March 9, 2010, Mrs. Korn delivered to Richard a check for $4,000 payable to Richard individually and directed Richard to purchase eight cemetery lots on her behalf. *Id.* Mrs. Korn wished to re-intern three members of her family at these new plots, and also to plan for future family burials at the location, including her own burial. *Id.* Richard purchased these lots on or about March 19, 2010 using the $4,000 funds provided by Mrs. Korn. *Counterclaim* ¶50. Richard now refuses to permit Mrs. Korn to use these cemetery plots and will not deed over the title to Mrs. Korn. *Counterclaim* ¶51.

ARGUMENT

In his Opening Brief, Plaintiff advances three main arguments in support of his position that the Counterclaim should be dismissed. First, Plaintiff argues that Richard never acted in any fiduciary capacity and never had any obligation to act for the benefit of Mrs. Korn. *Mtn.* ¶4-5. Second, Richard argues that there have not been any facts pled which would rebut an alleged presumption that all transfers of property from Mrs. Korn to Richard were gifts. *Mtn.* ¶6. Third, Richard argues that Mrs. Korn's Counterclaims are barred by the doctrine of *laches* because it has been approximately three years since Richard's name was added to the accounts, added to the deed, and purchased the cemetery plots. *Mtn.* ¶12. As will be discussed more fully herein, each of Plaintiff's arguments are without merit.

I. *Standard for Motion to Dismiss*

Court of Chancery Rule 12(b)(6) provides that a party's complaint or counterclaim may be dismissed via motion if the pleading reflects a "failure to state a claim upon which relief can be granted." *Ct. Ch. R. 12(b)(6).* The pleading standards governing the 'motion to dismiss stage' of a case in Delaware are minimal. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC,* 27 A.3d 531, 536 (Del. 2011). When considering a motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint or Counterclaim as true. *Id.* The Court should accept even vague allegations in the Complaint or Counterclaim as "well-pleaded" if such pleadings provide the opposing party with notice of the claim. *Id.* Delaware Courts must draw all reasonable inferences in favor of the non-moving party, and will deny a motion to dismiss unless the non-moving party could not recover under any reasonably conceivable set of circumstances susceptible of proof. *Id.* Even if it proves ultimately impossible for the non-moving party to prove his or her claims at a later stage of the proceeding, such a determination is not relevant in deciding whether or not the claim shall survive a motion to dismiss. *Id.* The governing pleading standard in Delaware to survive a motion to dismiss is "reasonable conceivability." *Id.* at 537. "All facts alleged in the pleadings and inferences that can reasonably be drawn from them are accepted as true." *Globis Partners v. Plumtree Software,* 2007 WL 4292024 at *7 (Del. Ch. Nov. 30, 2007). [1]

II. *Richard acted in a fiduciary capacity for Mrs. Korn.*

The bulk of Plaintiff's Motion to Dismiss is premised on an assertion that Richard owed no fiduciary duties to Mrs. Korn at any time. This is simply incorrect. Richard was engaged in a confidential relationship with his mother, whereby he promised that he would handle her **finances** and keep her assets secure. Mrs. Korn, an **elderly** woman, believed her son's promises and trusted his **financial** acumen. As a result, she obliged Richard's requests to be added to her numerous **financial** accounts, including her Morgan Stanley investment account. Mrs. Korn allowed Richard's name to be added to her accounts because she honestly believed that he would assist with her **finances**, monitor her investments, and ensure **financial** stability. Richard acted in a fiduciary capacity for Mrs. Korn with regards to having his name added to the Morgan Stanley Account, having his name added to the Wilmington Trust account, having his name added to the Bank of America account, having his name added to the deed to her property at 614 Loveville Road, and purchasing the cemetery lots on her behalf.

Richard alleges that since *noformal* fiduciary agreement was entered into between the parties, this automatically removes any possibility that Richard owed any fiduciary duties to his mother. This is incorrect, or, at the very least, a genuine issue of material fact which cannot be disposed of in a Motion to Dismiss. This Court has previously held that a determination of whether or not a fiduciary relationship exists is a factual inquiry that requires further examination: "[T]he finding of a fiduciary relationship is a factual inquiry that requires an examination into whether the 'relationship is of such a confidential or dependent nature as to rise to fiduciary status.' Upon the finding of a fiduciary relationship, the party seeking to sustain the transfer can overcome the presumption of fraud by showing the fairness of the transaction." *Coleman v. Newborn*, 948 A.2d 422, 429 (Del. Ch. 2007). This Court also held that a fiduciary relationship can still exist even in the absence of formal documentation: "Even where there is no formal appointment of a power of attorney, it is still possible for a fiduciary relationship to exist that will impose the legal presumption of fraud." *Id.* "The relationship connotes a dependence." *Hendry v. Hendry*, 2006 WL 1565254 at *10 (Del. Ch. May 26, 2006). While it is true that there may be no written and executed documentation to establish a formal fiduciary relationship in the present case, this does nothing to change the reality that a fiduciary relationship nonetheless existed. There does not need to be any signed documentation for a fiduciary relationship to exist: "Nevertheless, a formal, documented fiduciary relationship is not the only means by which a 'confidential relationship' for purposes of undue influence analysis can be established." *Stone v. Stant*, 2010 WL 2734144 at *8 (Del. Ch. July 2, 2010).

The Motion to Dismiss attempts to simplify the complex nature of fiduciary relationships into four limited instances - trusts, corporations, partnerships, and estates. *Mtn* ¶13. This simplification is unnecessary and evinces a clear intent to avoid the reality that Richard and Mrs. Korn were in a confidential relationship. There are numerous other types of fiduciary relationships outside of the four that Plaintiff cites. A fiduciary relationship is a much broader category than this. "A fiduciary relationship is defined as a situation 'where one person reposes special confidence in another, or where a special duty exists on the part of one person to protect the interests of another, or when there is a reposing of faith, confidence, and trust, and the placing of reliance by one person on the judgment and advice of another.' " *Lank v. Steiner*, 213 A.2d 848, 852 (Del. Ch. 1965) (internal citations omitted). In addition, "it may fairly be stated as a rule of thumb, that where one party has a relationship of superiority to another, and the other party's protections are based on investing trust and confidence in the person holding the superior position, those circumstances will give rise to a fiduciary relationship." *Faraone v. Kenyon*, 2004 WL 550745 at *8 (Del. Ch. Mar. 15, 2004). In the present case, Mrs. Korn reposed her faith, confidence, and trust in her son Richard when she allowed his name to be added to her **financial** accounts. Mrs. Korn trusted that Richard would properly handle her **finances** and would not mismanage or misappropriate her assets. Since Mrs. Korn reposed a special confidence in Richard, whereby Mrs. Korn relied on the judgment and advice of Richard, it is clear that a relationship existed. *Lank* at 852. In a similar vein, Richard held a position of superiority to his mother. He was more experienced in **financial** management, he was more highly educated, and Mrs. Korn invested her trust and confidence in Richard when he told her that he would manage her **finances** and protect her assets. Thus, a fiduciary relationship was born.

In addition to Richard acting in a fiduciary capacity for Mrs. Korn, it is likewise the case that Richard and Mrs. Korn were operating in a confidential relationship. "A confidential relationship exists where 'circumstances make it certain the parties do not deal on equal terms but on one side there is an overmastering influence or on the other weakness, dependence or trust, justifiably reposed.' " *In re Wiltbank*, 2005 WL 2810725 at *6 (Del. Ch. Oct. 18, 2005) (citations omitted). In the present case, it is clear that Mrs. Korn exercised justifiable dependence and trust when she permitted her son Richard to have access to

her significant **finances**. Richard is a law school graduate and a professional. Mrs. Korn is an **elderly** 93-year-old individual. Richard indicated to Mrs. Korn that he would be better suited to monitor her **finances** and to protect her assets. Mrs. Korn justifiably relied on Richard's representations and allowed him to access her **financial** accounts because she depended on him and trusted him to do well. The Court has recently expounded further regarding the existence of a confidential relationship, holding: "This Court has frequently looked to the transferor's extensive or exclusive reliance on another for physical, emotional, or decisional support, a query informed by the transferor's disposition and mental and physical capabilities, as well the existence and extent of any additional support network. Kinship by blood or marriage is also a factor, but is not itself determinative." *Mitchell v. Reynolds,* 2009 WL 132881 at *9 (Del. Ch. Jan. 6, 2009). In the present case, Mrs. Korn relied extensively on her son Richard for decisional support, due in large part to the fact that her support network was small. Mrs. Korn is a widow and does not have a **financial** advisor. Her son, Richard, was, in her eyes, a trustworthy advisor who could assist with her **financial** situation and protect her assets. Accordingly, when Richard began to request to have his name added to her bank accounts and investment accounts, Mrs. Korn agreed out of an abundance of dependence and trust. Thus, Richard was engaged in a confidential relationship with Mrs. Korn at all relevant times.

Richard's final argument regarding a lack of any fiduciary duty is that the parent-child relationship does not automatically create a fiduciary relationship. Contrary to Richard's assertions that there is no case precedent regarding a parent-child fiduciary relationship, Delaware courts have made it clear that "Kinship by blood or marriage is also a factor .." to consider in weighing the existence of a fiduciary relationship. *Id.* Delaware courts have found fiduciary and/or confidential relationships to exist in countless situations involving a parent depending on a child (or close relative) for support. *See, e.g., Heston v. Miller,* 1979 WL 174446 (Del. Ch. Oct. 11, 1979); *Swain v. Moore,* 71 A.2d 264 (Del. Ch. 1950), *Faraone v. Kenyon,* 2004 WL 550745 (Del. Ch. 2004); *Moffett v. Sutor-Banks,* 2012 WL 5877458 (Del. Ch. Nov. 8, 2012); *In re Szewzcyk,* 2001 WL 456448 (Del. Ch. Apr. 26, 2001); *Tucker v. Lawrie,* 2007 WL 2372616 (Del. Ch. Aug. 17, 2007). The prevalence of a fiduciary relationship is even more common when the parent is **elderly** and the child is in a superior position to the parent. *Faraone* at *8; *Szewzcyk* at *5; *Tucker* at *7. In the present case, Mrs. Korn is a widow with a small support network, and Richard is her son. While it may or may not be true that the parent-child relationship automatically creates a confidential or fiduciary relationship, it is abundantly clear that the Court of Chancery has no qualms with finding such a relationship to exist between parent and child, especially when the parent is **elderly** and is relying on the child for support and advice.

In sum, whether it is a fiduciary relationship or a confidential relationship, there is a genuine issue of material fact regarding the type of relationship that existed between Mrs. Korn and Richard. Richard and Mrs. Korn were either in a fiduciary relationship or a confidential relationship with regards to having Richard's name added to the Morgan Stanley Account, having his name added to the Wilmington Trust account, having his name added to the Bank of America account, having his name added to the deed to her property at 614 Loveville Road, and purchasing the cemetery lots on her behalf. Accordingly, the Motion to Dismiss should not be granted at this stage of the proceedings because "[T]he finding of a fiduciary relationship is a factual inquiry that requires an examination into whether the 'relationship is of such a confidential or dependent nature as to rise to fiduciary status.' " *Coleman* at 429.

III. ***The Counterclaims sufficiently rebut the alleged presumption of gifts.***

Richard has argued that Mrs. Korn has failed to plead any facts which could possibly rebut the "conclusive presumption" that all transfers from Mrs. Korn to Richard shall be considered gifts. *Mtn* ¶6. Richard further argues that as Mrs. Korn's child, Richard is the "natural object of the beneficent, donative intent of a parent." *Mtn* ¶11. Both of these claims are simply misplaced and lack merit, as discussed in more detail below. There are multiple facts in the pleadings which rebut the so-called "conclusive presumption" that Mrs. Korn has irrevocably gifted the Morgan Stanley account, the property at 614 Loveville Road, and the $4,000 check for burial plots to Richard. These factual pleadings are set forth below:

1) Mrs. Korn denied that the conveyance of 50% interest in the real estate was legally valid. *Counterclaim ¶4.*

2) Mrs. Korn denied that the conveyance of 50% interest in the Morgan Stanley account was legally valid, indicating that it was the result of Richard's persuasion. *Counterclaim* ¶5.

3) Mrs. Korn specifically denied possessing *any donative intent* when Richard's name was added to the Morgan Stanley account and the real estate. *Counterclaim* ¶6.

4) Mrs. Korn alleged that the transfers were based on misrepresentation, deceit, and undue influence. *Id.*

5) Mrs. Korn specifically denied that any of the transactions between herself and Richard in the past eight years were gifts - "It is denied that these transactions were gifts." *Counterclaim* ¶7.

6) Mrs. Korn denied that there was any donative intent when Richard's name was added to her Wilmington Trust and Bank of America accounts - "There was no donative intent by Mrs. Korn at any time." *Counterclaim* ¶8.

7) Mrs. Korn denied that she had gifted 50% of the Morgan Stanley account to Richard when she indicated that he had been demanding to be allowed to take more funds from the account after it was frozen. *Counterclaim* ¶11.

8) Mrs. Korn denied that Richard has deposited any of his own personal money into the Morgan Stanley account, refuting any claim of joint funding or joint ownership. *Counterclaim* ¶13.

9) Mrs. Korn admitted that she requested a "freeze" on the Morgan Stanley account once she realized Richard had been taking advantage of her and stealing her money. *Counterclaim* ¶24.

10) Mrs. Korn allowed Richard's name to be added to her Morgan Stanley account because she believed he would help manage her **finances** and she believed Richard was making a legitimate attempt to assist her. *Counterclaim* ¶33, 34.

11) Mrs. Korn did not believe that she was making a "gift" to Richard, but instead believed he was trying to benefit her. *Id.*

12) Mrs. Korn filed a Petition for Protection from **Abuse** with the Family Court of the State of Delaware due to Richard's harassing and **abusive** behavior towards her. *Counterclaim* ¶40.

13) Richard pressured Mrs. Korn to have his name added to the deed to her real estate under a guise that he would be more suited to handle her affairs and protect her property. *Counterclaim* ¶42.

14) Richard sought to have his name added to Mrs. Korn's real estate to benefit himself, and not to benefit Mrs. Korn. *Counterclaim* ¶45, 46.

15) Mrs. Korn directed Richard to purchase eight cemetery lots *on her behalf*, giving him a $4,000 check just a few days before Richard purchased cemetery lots for the same exact dollar amount that was on the check. *Counterclaim* ¶49.

16) Mrs. Korn did not intend this check to be a "gift" to Richard - she clearly wrote a check to him for $4,000 under the assumption that he would use the $4,000 to purchase the cemetery lots that she requested. *Id.*

Richard's contention that, as Mrs. Korn's child, he is the natural object of her donative intent, is also incorrect and taken out of context. Richard cites *Hudak v. Procek*, 727 A.2d 841 (Del. 1999) as support. This case represents the Court of Chancery's interpretation of a deceased donor's presumed intent. In *Hudak*, all of the parties involved - the alleged donors (Anna and John) and the donee (Helen) - were deceased. The Court was unable to have these parties attend the trial and give testimony and, thus, the Court had to presume the parties' intentions from extrinsic evidence. *Id.* at 842. In the present case, Mrs. Korn is alive. She is available to testify and has already indicated in the pleadings that she did not gift the Morgan Stanley account to Richard,

did not gift the real estate to Richard, and did not gift the $4,000 check to Richard. There is no need to apply a presumption of donative intent to Mrs. Korn when she is readily available to testify to the contrary. To apply a presumption to Mrs. Korn's testimony would be akin to putting words in her mouth and disallowing her from testifying. Nevertheless, even if a presumption of intent were applied in this case, the presumption of intent can be rebutted. *Hudak v. Procek*, 806 A.2d 140, 150 (Del. 2002).

Upon a cursory review of the Complaint, Answer, and Counterclaim, it is admittedly baffling that Richard makes the assertion that there are no pleadings to dispute the "conclusive presumption" that all transfers from Mrs. Korn to Richard should be considered gifts. As explained in the previous paragraphs, there are numerous pleadings to dispute the validity of any purported gifts between the two parties. Thus, there is no conclusive presumption that the transfers by Mrs. Korn were gifts or, at the very least, there is a genuine issue of material fact regarding whether or not these transfers should be construed as gifts. Furthermore, Richard's assertions that the Court *must presume* that Mrs. Korn intended to gift the aforementioned property to Richard is incorrect. Presumed donative intent is only relevant in cases where the alleged donor is deceased and unavailable to testify. Here, Mrs. Korn is ready and willing to testify that she did not possess any donative intent and that these transactions were not gifts. Even if the Court were to apply a presumption that Mrs. Korn intended to gift these items to Richard, this presumption may be rebutted by Mrs. Korn's testimony and, accordingly, a motion to dismiss based on this presumed intent is inappropriate.

IV. *The Counterclaims are not barred by the doctrine of laches.*

Richard's final assertion is that Mrs. Korn's Counterclaim should be barred by the doctrine of *laches* due to the fact that the transactions in question took place approximately two to three years ago. *Mtn* ¶12. This assertion represents either an uninformed interpretation of the doctrine of *laches* or a misstatement of the doctrine. The well-known doctrine of *laches* is similar to a statute of limitations in that it acts as a time-bar to filing a lawsuit. *Whittington v. Dragon Group LLC*, 991 A.2d 1, 7 (Del. 2009). The Supreme Court of Delaware has succinctly summarize the doctrine as follows:

> Unlike a statute of limitations, the equitable doctrine of laches does not prescribe a specific time period as unreasonable. Laches is an unreasonable delay by a party, without any specific reference to duration, in the enforcement of a right, and resulting in prejudice to the adverse party. An unreasonable delay can range from as long as several years to as little as one month. The temporal aspect of the delay is less critical than the reasons for it. In some circumstances even a long delay might be excused.

Id. at 7-8 (internal citations omitted). The doctrine of *laches* is based upon principles of equity: "This doctrine 'is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights.' " *Id.* at 8 (internal citations omitted). To establish the defense of *laches*, the moving party (here, Richard) must establish the existence of three elements: (1) knowledge by the claimant of the potential claim, (2) unreasonable delay in bringing the claim and (3) prejudice to the defendant as a result of this delay. *Id.*

None of the three elements of *laches* are met in the present case. Mrs. Korn did not have knowledge of Richard's misappropriation of funds, attempts to have her condominium partitioned, and misappropriation of the cemetery lots until very recently. Mrs. Korn did not realize that Richard had nearly emptied out her entire Morgan Stanley account until approximately August 2012, at which point she immediately took action by requesting a freeze on the account to prevent any further misappropriation. Thus, there was no delay in taking action to prevent the misuse of the Morgan Stanley account funds. As to any potential delay in taking action to prevent the partition of the real estate, no such claim can be made. Mrs. Korn had no knowledge that Richard would be attempting to sell her property until Richard filed the partition suit on January 31, 2013. Thus, she had no reason to believe that she needed to seek rescission of the deed until this suit was filed. Accordingly, there has been no delay in seeking rescission of the deed to the real estate. Finally, there was likewise no delay in seeking rescission of the deed to the cemetery lots. Until Richard filed his lawsuit, Mrs. Korn was unaware that Richard had secretly kept the deed for the cemetery lots in his sole name instead of registering the deed in Mrs. Korn's name, as she had requested. Mrs. Korn only became aware of the fact that Richard was withholding the cemetery lots when he recently began to indicate to her that she would be unable

to obtain the lots from him. Thus, she had no knowledge of a potential claim regarding the cemetery lots until very recently, when Richard indicated to her that the lots were in his sole name. In the same vein, Mrs. Korn did not have any knowledge that she had a potential claim for demanding an accounting and imposing a constructive trust until approximately August 2012, when she discovered that Richard had been misappropriating the funds in her Morgan Stanley account. Finally, there has been no prejudice to Richard by any potential delay in asserting the Counterclaim. This is because all of the items in question were purchased and funded solely by Mrs. Korn. Richard has not actually invested any of his own time or money into the **financial** accounts, cemetery lots, or real estate. All of the money involved belongs to Mrs. Korn. Richard has not been prejudiced in any way because none of these assets belonged to him in the first place. He did not pay any consideration for having his name added to the real estate. He did not deposit his own money to fund the Morgan Stanley account. Accordingly, he cannot be prejudiced by Mrs. Korn's Counterclaims because none of his personal funds are tied up in this lawsuit.

The doctrine of *laches* is wholly inapplicable to the present case for the reasons discussed above. Mrs. Korn did not have any knowledge of her potential claims until very recently, when she discovered that Richard had withdrawn the majority of the Morgan Stanley funds and when she discovered that Richard was attempting to have her condominium sold. Mrs. Korn did not delay in her response to these activities, acting swiftly to freeze the account and to assert her counterclaims. Richard has not been prejudiced at all by any theoretical delay in taking action. Therefore, the doctrine of *laches* does not apply in this case and should not act as a bar to Mrs. Korn's Counterclaims.

CONCLUSION

In light of the foregoing, Defendant respectfully requests that Plaintiff's Motion to Dismiss be denied.

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Dated: April 22, 2013

Footnotes

1 All unreported cases cited by Defendant are attached in the separate Compendium of Unreported Cases.

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