SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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PRIME PROPERTIES (USA) LLC,

Plaintiff,

- v -

VASSILIOS KEFALAS,

Defendant.

INDEX NO. 651839/2020

MOTION DATE 06/14/2022, 09/02/2022

MOTION SEQ. NO. MS 003 004

DECISION + ORDER ON MOTION

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 175

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 167, 168, 169, 170, 171, 172, 173, 174, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188

were read on this motion to/for DISQUALIFY COUNSEL.

Vassilios Kefalas and Petros Pappas, a key affiliate of Prime Properties (USA) LLC, entered various decades-long shipping and real estate business ventures. Their business relationship has prompted a number of civil suits against each other.[1]

In the instant action (the Prime Action), plaintiff Prime Properties (USA) LLC (Prime) moves pursuant to CPLR 3025 for an order granting it leave to file a second amended complaint (MS 003) and to disqualify defendant Vassilios Kefalas's attorneys (MS 004). One of the related actions, *Petros Pappas and Arindale Enterprises Ltd. v Kefalas, Kay Development LLC, Parkview Estates I LLC , and K-Sher Corp.* -- Index No. 651837/2020 (the Pappas Action), also seeks to disqualify Kafalas' attorneys[2] (Pappas Action – Index No. 651837/2020 · MS 005).

[1] Defendant Kefalas is also involved in two related actions which are being jointly administered: *Petros Pappas and Arindale Enterprises Ltd. v Kefalas, Kay Development LLC, Parkview Estates I LLC , and K-Sher Corp.* -- Index No. 651837/2020 (the Pappas Action); and *Kefalas v Pappas et al*, Index No. 610245/2020 (the Kefalas Action) now electronically filed with Index No. 453042/2022).

[2] At oral argument for the disqualification motion, counsel for Pappas and Prime indicated movants also seek disqualification of Kefalas' counsel in the Kefalas Action (NYSCEF # 189 at 6:10 – 7:16).

Pappas is an affiliate of Prime and they have the same attorney. In both the Prime Action and the Pappas Action, both Prime and Pappas are represented by the same attorneys, and Kefalas and his affiliated companies, the co-defendants in this and related cases, are represented by Kordas & Marinis, LLP (the Kordas Firm), with Rosenberg Calica & Birney LLP (RCB) appearing as co-counsel. As both the Prime and the Pappas motions to disqualify Kefalas' attorneys are largely identical, the decision on this disqualification issue applies to both MS 004 in the Prime Action and MS 005 in the Pappas Action. Unless otherwise indicated, citations to the New York State Courts Electronic Filing (NYSCEF) system are to the instant Prime Action.

Background

By way of background,[3] Pappas and Kefalas' real estate portion of their business ventures included the development of two properties in Valley Stream, NY (the K-Sher Property and the Parkview Property) and another one in Manhattan (the Maiden Lane Property).

Related to the K-Sher Property, Prime seeks to recover upwards of a quarter of a million dollars in unpaid promissory note interest under various legal theories: Prime sues Kefalas for a pair of guaranty contracts (First and Second Causes of Action), breach of fiduciary duty (Third Cause of Action), and fraud (Fourth Cause of Action) (NYSCEF # 120 – Proposed Second Amended Complaint, ¶'s 70-105). Prime would also add the Kordas Firm and its attorney, Nicholas Kordas (Kordas), to the action for aiding and abetting breach of fiduciary duty, aiding and abetting fraud, and breach of fiduciary duty (respectively, the Fifth, Sixth, and Seventh Causes of Action).

K-Sher agreed to repay the amounts owed under the relevant 2003 promissory note, which note the lender later assigned to Prime (NYSCEF # 120 – Proposed Second Amended Complaint, ¶ 1; NYSCEF # 104 – the Note). In 2008, Prime arranged payment on behalf of K-Sher to end foreclosure proceedings brought by K-Sher's prior lender (*id.*, ¶ 25). As a result of Prime's payment, Prime ended up holding the Note, the original guaranty on the loan by Kefalas (the 2003 Guaranty), and the mortgage on the K-Sher Property securing the Note (NYSCEF # 120, ¶ 26). Prime asserts that Kefalas also executed a new guaranty at this time (the 2008 Guaranty; *id.*, ¶ 29).

Prime states that in early 2012, Kefalas arranged a sale of the K-Sher Property, at which time K-Sher paid the outstanding balance on the principal of the promissory note to Prime, but failed to pay all interest amounting to more than $235,988.88 that had accrued on the Note (*id.*, ¶ 33; ¶ 2). Prime alleges that at the

[3] Certain background for the parties' disputes has previously been set forth in this court's consolidation decision (Pappas Action, Index No. 651837/2020, NYSCEF # 112), an evidentiary hearing regarding arbitration in Nassau County (Pappas Action, NYSCEF # 27), and Judge Driscoll's decision considering Pappas's motion to dismiss the Kefalas action (Index No. 453042/2022, NYSCEF # 84).

time of this partial payment, Kefalas promised to repay the balance of accrued interest, but has yet to do so (*id.*, ¶'s 35-36). Prime claims that Kefalas engaged in a fraudulent self-dealing scheme that purportedly released his and K-Sher's obligations to Prime on the accrued interest (*id.*, ¶ 4).

Specifically, Prime raises the fact that Kefalas assigned the associated mortgage to the buyer, Valiotis, along with an allonge endorsement to the Note making it payable to Valiotis's affiliate, Alma Realty Corp., instead of to Prime (*id.*, ¶'s 47-48). Prime continues that Kefalas simultaneously obtained from Valiotis a release relieving Kefalas and K-Sher from any obligation under the Note, as well as relieving Kefalas from any obligation the 2003 guaranty (*id.*, ¶ 5). Prime notes that Kefalas has not obtained a release on the 2008 Guaranty, however (*id.*, ¶ 51).

Prime acknowledges that Kefalas disclosed to Prime of the pending sale of the K-Sher Property. Prime nominated Kefalas as the authorized signatory for Prime in the Prime Officer's Certificate to execute and deliver the mortgage documents such as the satisfaction (NYSCEF # 112). Thus, Kefalas was authorized specifically to obtain a mortgage satisfaction on behalf of Prime. Prime alleges that what Kefalas did not disclose to Prime in this sale of the K-Sher Property transaction and in getting the Prime Officer's Certificate was the self-dealing portion of the transaction, which are the releases of K-Sher's and Kefalas' obligations (*id.*, ¶ 6). Prime posits that Kefalas did not detail the future assignments and releases that he intended to execute, and that he misrepresented his supposedly scant knowledge of the details regarding the upcoming sale transaction when Prime authorized Kefalas as the signatory for Prime (NYSCEF # 112 – the Prime Officer's Certificate; NYSCEF # 120, ¶ 8).

Prime points to Kefalas' omission of the third page of a transaction closing statement that Kefalas gave to Prime while, conversely, Kefalas sent the full statement to his accountant (NSYCEF # 120, ¶ 9). The third page is significant because it listed the alleged self-dealing documents, including: (i) an assignment of Prime's mortgage, (ii) an allonge to Prime's promissory note making it payable to the buyer of the K-Sher Property, and (iii) a release of Kefalas from any obligation under the note and the associated 2003 guaranty (NYSCEF #'s 120, ¶ 5; 114 – Assignment of Mortgage; 115 – Allonge; 116 – Kefalas Release).

Meanwhile, Prime's claims against the attorney defendants stems from Prime's allegation that Prime was the Kordas Firm's former client. The allegations that follow include: Nicholas Kordas, as Prime's former attorney, prepared the Prime Officer's Certificate; discussed its true purpose with Kefalas; and knew that Kefalas would then use it as cover to effect the self-dealing release (NYSCEF # 120, ¶ 64-66). Prime argues that the Kordas Firm has continued to perpetuate the scheme in this litigation, defending, and strategizing with Kefalas against its alleged Prime, the Kordas Firm's former client (*id.*, ¶ 69; NYSCEF # 124 at 20).

Discussion

Counsel Disqualification

Prior to this motion, Prime indicates that on February 9, 2021, the Pappas parties wrote to Kefalas's counsel asking them to withdraw, which was declined (NYSCEF # 174 – MS004 MOL at 8). Litigation proceedings were suspended on separate occasions as the parties discussed settlement, which talks terminated on July 13, 2022 (NYSCEF # 174 at 9-10). Prime filed its motion to disqualify on September 2, 2022 (NYSCEF # 167 – Notice of MS004).

In support of its present motion, Prime cites Rule 1.9 (a) of the NY Rules of Professional Conduct, which covers duties to former clients, and more specifically, Rule 1.7 (a) (1), which covers conflict of interest with current clients, and Rule 3.7, which covers when a lawyer is likely to be a witness on a significant issue of fact (NYSCEF # 174 at 11; 16-17; 18). Prime asserts that the Kordas Firm was counsel to Prime because Kefalas, acting as Prime's agent, engaged the Kordas Firm for that task (NYSCEF # 174 at 12). Prime notes that the firm was paid legal fees for such work from the proceeds of the sale of the K-Sher Property (NYSCEF # 174 at 12, citing NYSCEF # 118 – Sale Closing Statement). Prime claims that the Kordas Firm's current representation of Kefalas is substantially related and materially adverse to its prior representation of Prime (NYSCEF # 174 at 14).

Citing Rule 1.10 (a), Prime posits that the RCB law firm should also be disqualified by imputation of the Kordas Firm's conflict (NYSCEF # 174 at 20-21). Prime asserts that RCB's relationship with the Kordas Firm has been close, regular, and personal, noting that George Kordas of the Kordas Firm was previously associated with RCB before he joined his father at the Kordas Firm (NYSCEF # 174 at 22).

Prime claims that there would be little prejudice to Kefalas if his attorneys were disqualified because this action is still in its "very early stages" and that substantial discovery remains outstanding (NYSCEF # 174 at 22-23).

Pappas's motion to disqualify echoes Prime's arguments, and adds that Kordas's concurrent representation of Parkview, K-Sher, KAY Development, and Kefalas is impermissible because Pappas has alleged that Kefalas diverted funds from those three corporate entities, making Kefalas adverse to such other defendants (Pappas Action, NYSCEF # 139 at 13). Further, Pappas asserts that he is a 50% shareholder in each of Parkview and K-Sher, which he posits mandates disqualification, even under a theory that he is only entitled to a profit interest (*id.* at 15-16). Pappas also embellishes Prime's advocate-witness rule argument, indicating that Kordas will likely be called to explain documents Kefalas signed on behalf of Parkview and may be uniquely positioned to testify about the Maiden Lane Property (*id.* at 19).

In opposition, Kefalas emphasizes that movants have engaged in "extreme laches" and that disqualification would cause him "enormous and undue prejudice"

(NSYCEF # 182 – MS004 Opp at 3, 10). Kefalas disputes Prime's contention that this case is at an early stage, noting the several years of highly contested litigation between Pappas and Kefalas, including the evidentiary hearing before Justice Driscoll in Nassau County and the depositions of Prime's corporate representative and Kefalas himself (NYSCEF # 182 at 10-11). Kefalas ventures that it would cause major duplicative efforts even for new counsel to come up to speed on the various cases, including the fully briefed cross-appeals pending before the Second Department in the Kefalas Action (NYSCEF # 182 at 11-12). Kefalas underscores that his chosen counsel's fluency in Greek has mitigated costs given the relevant documents and emails written in that language (NYSCEF # 182 at 10).

Kefalas disputes that disqualification would be proper under the rules concerning prior or concurrent representation (NYSCEF # 182 at 12). To the extent any purported conflict of interest exists on account of Kefalas's affiliated entities, K-Sher and Parkview, which Kefalas indicates are nominal parties, Kefalas denies that Pappas owns any equity in them (NYSCEF # 189 – Jan 31, 2023 Oral Arg Tr at 62:2-10). As for Prime's newly asserted claims, Kefalas argues that Prime does not have standing to assert the purported conflict because Prime was never a client of the Kordas Firm (NYSCEF # 182 at 17, citing deposition testimony of plaintiff's corporate representative). Acknowledging that the Kordas Firm was paid legal fees for work in connection with the sale of the K-Sher Property, Kefalas nonetheless indicates that that is consistent with the firm's representation of Kefalas and K-Sher (*id.* at 25).

Kefalas argues that the advocate-witness concerns are unavailing because Kordas's testimony would not be central to the partnership dispute or prejudicial to the Kefalas Parties, and the facts to be ascertained by such testimony are available from other sources, including Valiotis, the buyer of the K-Sher Property (*id.* at 19-20). Referring to Kordas's affirmation, Kefalas states that the Assignment of Mortgage and other closing documents were not prepared Kordas but by counsel to Valiotis (*id.* at 26, citing NYSCEF # 180 at 346:17-22 and NYSCEF # 179, ¶ 26). Kefalas posits that even if there were any bona fide advocate-witness concern, that would not reach George Kordas or RCB and should not even reach Nicholas Kordas at this stage in the action when such issue would better be determined at trial (NYSCEF # 182 at 24).

In reply, Prime emphasizes that based on Kefalas's testimony, the responsibility was placed on Kordas to ascertain the advisability of signing the allegedly self-dealing documents (NYSCEF # 186 – MS004 Reply at 5). As for Kefalas's argument that Prime did not engage the Kordas Firm directly, Prime asserts that Prime did not itself need to hire the Kordas Firm but Kefalas as Prime's appointed agent and fiduciary at the closing, hired the Kordas Firm to advise on documents signed on behalf of Prime (*id.* at 7-8).

As for the advocate-witness rule, Prime argues that Kefalas delegated to Kordas the responsibility to decide whether signing the alleged self-dealing documents was proper and advisable, which makes Kordas's testimony central to

this dispute (*id.* at 9). Prime also asserts that Kordas's affirmation that he advised only Kefalas, not Prime, demonstrates that his testimony would be prejudicial to Kefalas by establishing Kefalas's breach of fiduciary duty to Prime (*id.* at 9). Prime further ventures that Kordas's affirmation proffers new facts about the Assignment of Mortgage, and that Prime should be able to conduct cross-examination (*id.* at 10).

Contesting that Valiotis's testimony is relevant, Prime posits that key issue is whether anyone determined if the documents in dispute were proper and advisable to Prime, and that Kordas put his understanding of those documents directly at issue by referring to them as routine in commercial transactions (*id.* at 10).

Prime denies that laches is available as a defense to disqualification under the advocate-witness rule or given Kefalas's unclean hands (*id.* at 11). Prime also argues that it only recently learned of the basis for the present motion (*id.* at 12). And Prime disputes that there is undue prejudice to Kefalas by disqualification, denying that financial hardship so qualifies and indicating that knowledge of Greek is not necessary (*id.* at 13).

In addition to reiterating his and Prime's arguments, Pappas in reply further explains why he believes Kordas's involvement with the Maiden Lane Property and the litigation with Valiotis support disqualification (Pappas Action, NYSCEF # 151 at 2-3). Pappas notes that Kefalas admits that Kordas represented Maiden Lane Development LLC in a prior dispute with a parking lot tenant (*id.* at 6). Pappas argues that this alone disqualifies Kordas because part of the claim against Kefalas is an accounting for money put in escrow by the movants to pay for that parking garage litigation (*id.*). Pappas continues that Kefalas's characterization of the limited scope of Kordas's work for the Maiden Lane Property is inaccurate, referring to an invoice for services Kordas rendered in connection with the sale of the property.

Analysis of Disqualification

On a motion to disqualify counsel, "the moving party must prove, among other things, the existence of a prior attorney-client relationship between itself and opposing counsel" (*Campbell v McKeon*, 75 AD3d 479, 480 [1st Dept 2010]). "To determine whether an attorney-client relationship exists, a court must consider the parties' actions . . . . [A]n attorney-client relationship is established where there is an explicit undertaking to perform a specific task. . . . While the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions" (*Pellegrino v Oppenheimer & Co.*, 49 AD3d 94, 99 [1st Dept 2008]).

"A party has a right to be represented by counsel of its choice, and any restrictions on that right must be carefully scrutinized . . . . The decision of whether to grant a motion to disqualify rests in the discretion of the motion court" (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015] [quotation marks omitted]).

Prime's motion to disqualify is denied as is Pappas's motion in the Pappas Action.[4] Prime and Pappas have failed to prove the existence of an attorney-client relationship. Pappas claims ownership of 50% of the shares of K-Sher, and while it is undisputed that Kefalas signed a stock purchase agreement which would have effected such K-Sher share transfer to Pappas, it is also clear that Pappas did not countersign such proposed agreement (Pappas Action, NYSCEF # 11). Justice Driscoll rejected the applicability of the arbitration clause in that proposed agreement and credited the testimony of Kefalas in its entirety (Pappas Action, NYSCEF # 27 – Hearing Transcript at 116:10-24).

Pappas claims to own approximately half of the Parkview venture, but he acknowledges that he never received share certificates and only received a membership certificate as "security" (NYSCEF # 18, ¶ 19-21). Pappas's reliance on *Dembitzer v Chera* is unavailing. There, the court required disqualification where it was demonstrated that the plaintiff's attorney had an ongoing attorney-client relationship with a partnership in which the defendant owned a 50% interest (285 AD2d 525, 525 [2d Dept 2001]). Here, neither Prime nor Pappas have demonstrated any such ongoing relationship with any partnership among the parties analogous to that in *Dembitzer*. Further, *Dembitzer* is also distinguishable in that, here, Kordas's actions are consistent with representation of Kefalas and corporate entities, and the movants have failed to bear their burden of establishing an attorney-client relationship with the type of joint venture partnership that would avail them of the relief they seek.

Prime's reliance on a letter of March 3, 2007 from Kefalas to Pappas is of no moment (NYSCEF # 189 at 74:15-75:14, citing Pappas Action, NYSCEF # 138 – Progress Report). Although Kefalas has a heading: "Your equity: 51% - Parkview Estates I, LLC and 50% - K-Sher Corp.," the text thereunder indicates "the transfer of stock is not concluded" respecting K-Sher on account of the stock transfer only being signed by Kefalas; Pappas never did sign that agreement, as established at the hearing before Justice Driscoll. Respecting Parkview, the letter indicates the parties should discuss and decide the timing of the official transfer, including respecting the tax consequences. This letter therefore only indicates a future intention to transfer ownership, which the record demonstrates never took place.

Prime has accordingly failed to establish an attorney-client relationship on the basis of Pappas's alleged ownership of K-Sher or Parkview (*see Campbell*, 75 AD3d at 480–81 ["A lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual"]; *see also Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014] [noting that "attorneys for a corporation represent the corporate entity, not the shareholders" including where the "parties did not expressly agree otherwise"]).

[4] This conclusion is reached even without the court reaching the issues of laches and undo prejudice to Kefalas.

Pappas does not claim ownership in any of the direct or indirect holders of title to the Maiden Lane Property, including Maiden Lane Development LLC (NYSCEF # 18, Pappas Action – First Amended Complaint, ¶ 59). Pappas has failed to demonstrate that the work Kordas did for Maiden Lane Development LLC is cognizable as a manner of transforming Kordas into counsel to Pappas (*see also Campbell*, 75 AD3d at 480–81). And Pappas fails to cite to any authority that his alleged funding in escrow to pay for the parking garage litigation, without any indication that Pappas had a retainer agreement with the Kordas Firm or otherwise engaged Kordas in an attorney-client fashion, can be sufficient here (*compare Pellegrino*, 49 AD3d at 99).

Nor is Pappas's reference to Kefalas's email referencing "our lawyers" sufficient to establish movants in fact had an attorney-client relationship with the Kordas Firm (Pappas Action, NYSCEF # 139 at 20, citing NYSCEF # 132). While this may indicate Kefalas's state of mind about the Kordas Firm representing Pappas, it is at best ambiguous whom the third-person plural pronoun is meant to refer ((i) Kefalas and Pappas or (ii) Kefalas and other(s)). More fundamentally, it does not demonstrate Pappas or Kordas's intention to form an attorney-client relationship.

Pappas's claim that Kordas acted as counsel to Prime in connection with the sale of the K-Sher Property in 2012 is also unavailing. Prime's corporate representative testified that Prime did not have legal counsel in the United States advising it in connection with the K-Sher Property sale (NYSCEF # 169 – Ktistakis EBT tr at 244:22-245:15). Pappas characterizes this testimony as not precluding that Kefalas, as Prime's agent, engaged Kordas for Prime. But Prime fails to cite to any authority to support the assertion that an attorney-client relationship was formed in such manner (NYSCEF # 174 at 13; *compare Pellegrino*, 49 AD3d at 99 [noting a relationship is established where there is an explicit undertaking to perform a specific task]).

Nor does the Prime Officer's Certificate authorize Kefalas to retain counsel for Prime. The record is devoid of any evidence that Kordas affirmatively assumed the duty of representing either Prime or Pappas (*see e.g. Kushner v Herman*, 215 AD2d 633, 633 [2d Dept 1995] [placing obligation on the party seeking disqualification to establish the existence of an attorney-client relationship]).[5] That the Kordas Firm was paid legal fees for its work from the proceeds of the sale of the K-Sher Property is also unavailing as that can be explained by its work on behalf of its clients Kefalas and K-Sher.

Even in the context of Pappas's allegations that Kefalas diverted funds from Parkview, K-Sher, and KAY Development, nonetheless that theory does not establish a basis for disqualification, especially given Pappas's unavailing assertion

[5] Kefalas denies that K&M acted as Prime's counsel (NYSCEF # 182 at 17). K&M also denies same, affirming that he never even communicated with them regarding any of their business or legal matters (NYSCEF # 179 – Nicholas Kordas Affirmation, ¶ 4).

of ownership in such entities and the attendant lack of standing (*see e.g. A.F.C. Enterprises, Inc. v New York City Sch. Const. Auth.*, 33 AD3d 736 [1st Dept 2006] [holding that since the movant seeking disqualification was "neither a present nor a former client of the subject attorneys, it has no standing to seek disqualification based on conflict of interest"]).[6]

Pappas misplaces its reliance on *34-06 73, LLC v Seneca Ins. Co., Inc*, in which the disqualified firm was representing one company while simultaneously accusing the company's principal of fraud, which circumstances are entirely different from those present here (2014 WL 4483326 [Sup Ct, NY County, 2014]). Nor does Pappas's citation to *Hempstead Video, Inc. v Inc. Vill. of Valley Stream* make its point. There, the *Hempstead* court rejected disqualification even considering the firm's representation of the defendant concurrent with the firm's "of counsel" attorney having an attorney-client relationship with the plaintiff (409 F3d 127, 132 [2d Cir 2005]). The *Hempstead* court also warned about standards which would unduly "interfere with a party's entitlement to choose counsel and create opportunities for abusive disqualification motions" (*id.* at 135–36).

Prime's alternative advocate-witness rule basis to support disqualification is also unavailing at this stage. The movant under the advocate-witness rule (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7) bears a "heavy burden" of establishing that an attorney's testimony is necessary, and not merely cumulative, based on the significance and weight on which she or he would testify and the unavailability of other sources of such evidence (*Campbell*, 75 AD3d at 481; *Segal v Five Star Elec. Corp.*, 165 AD3d 613, 613 [1st Dept 2018]). Courts properly exercise discretion in finding advocate-witness rule disqualification to be premature prior to the completion of discovery when the substance and necessity of the attorney's testimony is as yet unknown (*Salomone v Abramson*, 48 Misc 3d 318, 328–29 [Sup Ct, NY County 2015], quoting *Harris v Sculco*, 86 AD3d 481 [1st Dept 2011]; *see also S & S Hotel Ventures Ltd. P'ship v 777 S.H. Corp.*, 69 NY2d 437, 444 [1987] ["the roles of an advocate and of a witness are inconsistent" and "from a public image point of view" it is " 'unseemly' for a lawyer *in a trial* also to argue [as to the lawyer's] own credibility as a witness"] [emphasis added]). Prime does not met its heavy burden in establishing Kordas's potential function as a witness mandates disqualification, particularly as the issue can better be evaluated ahead of trial.

Prime makes much about Kefalas's deposition testimony that he did not read the documents he signed and rather looked to Kordas to determine whether to sign (NYSCEF # 170 – Kefalas EBT Transcript at 359-365). Prime does not mention that Kefalas also testified as to the tax-based justifications involved in the assignment documents (NYSCEF # 180 – at 349:4-11). Prime has failed to show that Kordas's testimony is of such weight as to mandate disqualification or is otherwise necessary and not merely cumulative, particularly when the buyer, Valiotis, may be able to

[6] This also demonstrates that Prime's claim that Kordas's testimony would be prejudicial to Kefalas lacks merit to compel disqualification.

expand on the rationales for the particular set of documents it allegedly asked Kefalas to sign to complete the sale of the K-Sher Property. Prime's claim that Valiotis's testimony is irrelevant overly narrows the question to Kefalas and his attorneys' actions and thinking (NYSCEF # 186 at 10).

That Pappas may seek Kordas's testimony respecting Parkview refinancing transactions and the sale of the Maiden Lane Property is also insufficient (*see e.g. Omansky v 64 N. Moore Assocs.*, 269 AD2d 336, 336 [1st Dept 2000] [finding that law firm's representation of a partnership in a prior action did not render the law firm counsel for the plaintiff partner in that action and further rejecting the relevancy of "the law firm's alleged advice to the partnership to withhold from the plaintiff partner his share of the settlement payment to the partnership in that action unless he withdrew the instant action . . . so as to create a need for testimony by any attorney with the law firm"]).

In the exercise of its discretion against finding disqualification, the court also finds notable the relatively small monetary amount of Prime's $235,988.88 claim against Kefalas in contrast with the amounts claimed in the other actions, being $7.7 million claimed in the Pappas Action and $50 million claimed in the Kefalas Action (Pappas Action, NYSCEF # 18 at 49; NYSCEF # 5 in Index No. 453042/2022 at 16-17). Should movants later demonstrate entitlement to Kordas's testimony ahead of trial, appropriate remedies short of disqualification can be addressed then (*see e.g. Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 638 [1998] [noting concern of disqualification motions for derailing litigation]).

As the court rejects disqualification of the Kordas Firm, the court also denies disqualification of RCB by imputation. The court also notes that any basis for disqualification in that Prime seeks to make Kordas and his firm defendants is also without merit because, as discussed below, the court denies Prime's motion to add such claims against the attorneys.

Motion to Amend, Arguments of the Parties (MS003)

Supporting its motion to amend, Prime argues that neither Kefalas nor Kordas can show prejudice or surprise from the Proposed Second Amended Complaint (NYSCEF # 124 – MOL in MS003 – at 14). Prime asserts that it first learned the factual basis for its new claims at Kefalas's April 27, 2022 deposition and that Prime prepared its new complaint less than a month later (*id.* at 14). Specific to the unpaid interest claim, Prime asserts that Kefalas himself admitted at his deposition that the balance is an open issue (*id.* at 5). Prime further indicates that Kefalas already had a chance to depose Prime's corporate representative and inquired about the alleged self-dealing documents (*id.* at 14). Prime also details the showing required for its new causes of action and posits that the amendment would not be futile (*id.* at 15-20).

As to its claims against Kordas and his firm, Prime indicates that Kordas drafted the Prime Officer's Certificate and the closing statement, that he has been "devising defenses and strategies in response to Prime Properties' demands for

payment and this litigation," and that it is "virtually certain that Defendant Kefalas discussed the true purpose of the officer's certificate with the Kordas Defendants, and the Kordas Defendants knew that Kefalas would misuse the certificate as cover to execute the undisclosed self-dealing documents" (*id.* at 2, 10).

In opposition, Kefalas begins by asserting that the proposed amended complaint is unverified and Prime failed to provide an affidavit of merit, such that leave to amend should be denied on that basis alone (NYSCEF # 133 – Opp to MS003 at 7).

Kefalas continues by disputing that Prime has standing to assert breach of the 2003 Guaranty by virtue of the recorded Assignment of Mortgage and Allonge, neither of which does Prime seek to set aside (*id.* at 7-8). Kefalas posits that it is a settled matter of law that such assignments carry the assignment of any guaranty of payment, including the 2003 and 2008 Guarantees.

Kefalas also asserts that the proposed cause of action for breach of the 2003 Guaranty is time-barred as a matter of law (*id.* at 9). Kefalas posits that interest could not have continued to accrue after payment of the principal under the Note (*id.* at 9-10). Prime admits it accepted payment of the principal amount owed under the Note in 2012, and Kefalas argues that the latest time a default under the 2003 Guaranty could have accrued therefore was in 2012 (*id.* at 10). Citing General Obligations Law 17-101, Kefalas asserts that in order to revive a time-barred claim, only a signed writing validly acknowledging a debt and containing nothing inconsistent with an intention on the part of the debtor to pay, is sufficient (*id.* at 10). Accordingly, Kefalas contests the sufficiency of Prime's allegation that Kefalas promised to pay unpaid interest, including its characterization about Kefalas's statement at his deposition about interest being open (*id.* at 10-11).

Kefalas argues that plaintiff's causes of action for breach of fiduciary duty and fraud are untimely, asserting that Prime was on inquiry notice over the eight years that the allegedly owed interest remained unpaid (*id.* at 13-14). Kefalas adds that Prime had constructive notice by virtue of the Assignment of Mortgage publicly recorded with the Nassau County Clerk's office in 2012 (*id.* at 15).

Kefalas denies the merit of the fifth and sixth causes of action against Kordas and his firm.[7] Kefalas asserts that such claims are not pleaded with the requisite particularity under CPLR 3016 (b) (*id.* at 16). Kefalas takes issue with Prime's allegation, on information and belief, that, with little doubt, Attorney Kordas discussed with Kefalas the true purpose of the Prime Officer's Certificate and knew Kefalas would misuse it (*id.* at 17, quoting NYSCEF # 120, ¶'s 66, 110). Kefalas asserts that such "pure speculation" is legally insufficient to support the claims (NYSCEF # 133 at 17). Kefalas continues that there are no allegations whatsoever of any knowingly made misrepresentation by Kordas to Prime or even any communication whatsoever between them (*id.* at 17-18).

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[7] The attorney defendants also submit opposition to Prime's motion to amend, which the court did not consider.

Kefalas adds that Kordas's involvement was within the scope of attorney-duties such that aiding and abetting liability may not be imposed (*id.* at 18). Kefalas posits that the lack of any attorney-client relationship between Prime and Kordas is dispositive of Prime's claims to the extent liability would be imposed by reason of failure to disclose or under the Seventh Cause of Action (*id.* at 18, 20-21). Kefalas also asserts that the claim for breach of fiduciary duty is time-barred as the alleged conduct took place in 2012 (*id.* at 21).

In reply, Prime denies that its fraud-based claims are time-barred, noting that it discovered the elements of its tort claims at the 2022 deposition of Kefalas. Alternatively, Prime indicates that the earliest Kefalas raised his release was in his answer of August 2020, such that Prime's June 6, 2022 motion to amend is timely (NYSCEF # 151 – Reply in MS003 at 4). Prime contests that Kefalas's non-payment of interest amounts to inquiry notice, asserting that, at best, it raises an issue of fact (*id.* at 4-6). Prime also denies that the public recording of the Assignment of Mortgage could have given it constructive notice as Prime asserts that it had no knowledge requiring it to search the clerk's records (*id.* at 6).

Respecting the timeliness of its claim based on the 2003 Guaranty, Prime asserts that given the maturity date of June 10, 2018 for "all sums" including "accrued interest," the expiration of the statute of limitations would not be until June 10, 2024 (*id.* at 9, quoting NYSCEF # 104). Furthermore, Prime disputes that it lacks standing to pursue a breach of contract claim under the 2003 Guaranty given its assertion that the transfer to Alma Realty was a fraudulent assignment (NYSCEF # 151 at 13).

Respecting its tort claims, Prime argues that its Proposed Second Amended Complaint meets the heightened pleadings required of CPLR 3016 (b) (*id.* at 9). Prime posits that it more than adequately alleged that Kordas engaged in "numerous misrepresentations, including by drafting the" Prime Officer's Certificate (*id.* at 11). Prime further alleges that Kordas knew that his advice to Kefalas constituted legal advice to Prime in connection with the 2012 sale of the K-Sher Property, such that he had a duty to speak up rather than direct Kefalas to take action detrimental to Prime's financial interests (*id.* at 11).

As for its breach of fiduciary duty claim against Kordas and his firm, Prime ventures that Kefalas ignores that Kefalas himself was Prime's fiduciary, such that his alleged self-dealing including his engagement of the Kordas Firm is particularly egregious, which Prime suggests distinguishes the cases upon which Kefalas relies (*id.* at 11).

Analysis of Motion to Amend

CPLR 3025 (b) provides that leave to amend "shall be freely given upon such terms as may be just." The First Department has explained that amendments can be denied "only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" (*CIFG Assur. North Am. Inc. v J.P. Morgan Securities LLC*, 146 AD3d 60, 64-65

[1st Dept 2016]). As there is no claim of prejudice or surprise from the proposed claims, at issue is whether the proposed claims are of sufficient merit.

As a preliminary matter, the court rejects Kefalas's assertion that leave to amend should be dismissed on the basis of the lack of an affidavit of merit. Kefalas's reliance on *Kemeny v Liberty Mut. Ins. Co.* (194 AD3d 483, 484 [1st Dept 2021]) is misplaced. The First Department did not require an affidavit of merit but rather found that the party seeking to amend had failed to submit "evidentiary proof" to support its claims.[8] Kefalas does not explain why the various transaction documents Prime files along with its motion do not constitute evidentiary proof or why the court should otherwise disregard such documents.

Nonetheless, the court agrees with Kefalas that Prime lacks standing under either guaranty (*see e.g. Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 461 [1st Dept 2010] ["Once plaintiff assigned the mortgage, it lacked standing to sue to recover the overpayment under the mortgage documents" and "plaintiff cannot assert any claim under the guaranty"]). Prime does not dispute the effectiveness of the Allonge of the Note or the release by the assignee, Alma, of Kefalas's liability under the Note. As Prime does not seek to set any of such transactions aside, the court has no present opportunity to evaluate the breach of contract claims in such context. Prime seeks to distinguish the authorities Kefalas relies on solely on the basis of such cases not involving a fraudulent assignment (NYSCEF # 151 at 13). Prime fails to cite to any authority at all on the standing issue, let alone one supporting that an undisturbed alleged fraudulent assignment mandates against denying standing.

Next, the court considers Prime's causes of action against Kefalas for breach of fiduciary duty and fraud. "To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699–700 [1st Dept 2011]). Prime has pled a prima facie case of breach of fiduciary duty in alleging that the Prime Officer's Certificate created a fiduciary relationship via Kefalas's agency to effect the K-Sher transaction; that Kefalas expressly promised to pay Prime the outstanding interest on the Note while executing transaction documents on Prime's behalf that vitiated Prime's standing to collect such interest; and that as a result, Prime has been damaged to the extent of the uncollected interest.

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[8] Kefalas's reliance on *Matthews v City of New York* (138 AD3d 507, 508 [1st Dept 2016]) is also unavailing as that court noted that the movant had "submitted no evidence." Nor does the finding in *Est. of Brown v Pullman Grp.* (60 AD3d 481, 482 [1st Dept 2009]) mandate otherwise as the court stated: "We further note that the proposed amendment was unsupported by an affidavit of merit (see Schulte Roth & Zabel, LLP v Kassover, 28 AD3d 404 [2006])." The *Schulte Roth* case requires on a motion to amend "an affidavit of merit or an offer of evidence similar to that supporting a summary judgment motion" (*Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404, 404–05 1st Dept 2006]). Accordingly, the *Brown* and *Schulte Roth* case read together mandate some evidentiary showing, which may but need not be in the form of an affidavit of merit.

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Prime has also pled a prima facie case of fraud in claiming that Kefalas misrepresented that the purpose and scope of the Prime Officer's Certificate was to effect a mortgage satisfaction when instead Kefalas allegedly intended to execute an assignment and release, which Kefalas allegedly intentionally hid by sending Pappas an abbreviated closing statement omitting mention of the documents actually effected.

Prime's motion to amend to add claims for breach of fiduciary duty and fraud is granted. Rather than focusing on Prime's prima facie case, Kefalas argues that the statute of limitations bars each claim. Kefalas is mistaken. "Pursuant to CPLR 213 (8), an action alleging fraud must be commenced by the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it" (*Shalik v Hewlett Assocs., L.P.*, 93 AD3d 777, 778 [1st Dept 2012] [quotation marks omitted]). A "defendant must make a prima facie case that a plaintiff was on inquiry notice of its fraud claims more than two years before it commenced the action" (*Epiphany Cmty. Nursery Sch. v Levey*, 171 AD3d 1, 7 [1st Dept 2019]).

Kefalas's assertion that the claims related to the interest began to accrue in 2012 when the allegedly improper actions took place is insufficient as there is no indication that Prime discovered the alleged self-dealing scheme until discovery commenced in the various actions. That the interest is allegedly outstanding is also insufficient to conclusively determine that the statute of limitations bars Prime's claims because the Note's maturity date was June 10, 2018, and because Kefalas testified that the unpaid interest is "an open issue" since "Pappas didn't want the interest paid at that time" (NYSCEF # 104 at 1; NYSCEF # 170 at 103:17-21). Nor is it determinative that the Note calls for monthly payments of principal and interest when Kefalas does not indicate the parties strictly followed such provision, negotiated by the previous lender (NYSCEF # 151 at 4). The pages of the closing statement that Kefalas delivered to Prime do not mandate dismissal; while there is an indication that Prime would be collecting $7,957.39 in interest, nowhere does the statement indicate that such interest payment constituted a full settlement (NYSCEF # 117 – Kefalas Email with Closing Statement at 3).

Kefalas has failed to make its prima facie showing that Prime was on inquiry notice of the alleged fraud. Thus, the court need not reach the issue of whether Prime's reasonable diligence could have discovered the alleged fraud because the assignment of mortgage was publicly recorded (*see e.g. Epiphany*, 171 AD3d at 7 ["The issue of when a plaintiff, acting with reasonable diligence, could have discovered an alleged fraud . . . involves a mixed question of law and fact, and, where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred, the cause of action should not

be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact"]).[9]

Next, the court considers the claims against the attorney defendants. Given the court's determination that Prime and Pappas did not have an attorney-client relationship with Kordas or his firm, the Seventh Cause of Action for breach of fiduciary duty, which core premise is this relationship, is insufficient as a matter of law (NYSCEF # 120, ¶'s 121-122).

The Fifth and Sixth Causes of Action for aiding and abetting (i) breach of fiduciary duty and (ii) fraud fare no better. The First Department has explained:

> In general, all who aid and abet the commission of a trespass are liable . . . But where one acts only in the execution of the duties of his calling or profession, and does not go beyond it, and does not actually participate in the trespass, he is not liable, though what he does may aid another in its commission. . . . Moreover, it is recognized that public policy demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients."

(*Art Cap. Grp., LLC v Neuhaus*, 70 AD3d 605, 606 [1st Dept 2010]).

Prime's allegations that Kordas prepared the officer's certificate and closing statement are insufficient to support Prime's claims. Such actions, as alleged, are within the duties of Kordas's calling as counsel. Nor can Prime reasonably lay liability on Kordas for his "devising defenses and strategies in . . . this litigation," which again is clearly within the scope of Kordas's professional responsibilities.

Cassaforte Ltd. v Pourtavoosi is distinguishable in that the allegations against the attorney defendant included that allegations that the attorney prepared the certificate that misrepresented the operational provisions of agreements of certain entities involved in the transaction (2022 WL 2387852 at *6 [Sup Ct, NY County 2022]). Here, the closest Prime comes to analogous actions is that Kordas allegedly drafted the mortgage satisfaction document that Prime posits is false but Prime ignores Prime's assignment of the mortgage to Alma (NYSCEF # 124 at 19-20; NYSCEF # 113 [stating that following the assignment to Prime, the "mortgage has not been further assigned of record"]). Prime alleges that Kefalas executed the mortgage satisfaction simultaneously with the mortgage assignment (NYSCEF # 120, ¶ 47). For the satisfaction necessarily to be false, it would have needed to be executed after the assignment was effective.[10]

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[9] Given this analysis, the court need not reach Kefalas's argument concerning equitable estoppel or tolling (NYSCEF # 133 at 12, n2), which plaintiff does not raise in any event.

[10] Kefalas explains that, in line with routine commercial practice, the purchaser requested a mortgage assignment instead of a satisfaction to save on tax recording costs need not be determined (NYSCEF # 133 at 3, n 2). Prime, however, claims that the satisfaction was a "fraudulent ruse" to

As to Prime's allegation that it is "virtually certain" that Kordas and Kefalas discussed the officer's certificate and Kordas knew Kefalas would misuse it, such claim is unavailing under the special pleading standards required by CPLR 3016 (b) ("Where a cause of action or defense is based upon . . . fraud . . . [or] breach of trust . . ., the circumstances constituting the wrong shall be stated in detail"; *see also Nat'l Westminster Bank USA v Weksel*, 124 AD2d 144, 149 [1st Dept 1987] ["Where liability for fraud is to be extended beyond the principal actors, to those who, although not participants in the fraudulent scheme, are said to have aided in and encouraged its commission, it is especially important that the command of CPLR 3016 (b) be strictly adhered to"]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC,* 83 AD3d 804, 808 [2d Dept 2011] ["A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b)"]).

Conclusion

In light of the foregoing, it is

ORDERED that the branch of Prime Properties (USA) LLC's motion (motion sequence 003) to amend its complaint as set forth in the Proposed Second Amended Complaint with respect to the Third and Fourth Causes of Action is granted; and it is further

ORDERED that the branch of Prime Properties' motion sequence 003 to amend its complaint with respect to the First, Second, Fifth, Sixth, and Seventh Causes of Action is denied; and it is further

ORDERED that Prime Properties' motion (motion sequence 004) for an order disqualifying defendant Kefalas's attorneys Kordas & Marinis, LLP and Rosenberg Calica & Birney LLP is denied; and it is further

ORDERED that Prime Properties shall serve a copy of this decision, along with notice of entry, on all parties within ten days of entry.

04/10/2023
DATE

MARGARET CHAN, J.S.C.

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

intentionally hedge against the risk that Prime would ask to see the mortgage satisfaction document, which the Prime Officer's Certificate expressly mentions (NYSCEF # 124 at 9). While such claims go to the direct claims against Kefalas, they need not be resolved at this stage.