SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

ALFREDO VILLETA,	**Index No.:**	711705/20121
Plaintiff,		
-against-		
THE KOKOLAKIS LAW FIRM, PLLC, and JOHN A. KOKOLAKIS,		
Defendants.		

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION

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Preliminary Statement

This Memorandum of Law is being presented by YONATAN S. LEVORITZ, the Attorney for Plaintiff herein, in Opposition to the Defendants', THE KOKOLAKIS LAW FIRM, PLLC's (hereinafter, "Defendant Kokolakis Firm), and, JOHN A. KOKOLAKIS', (hereinafter, "Defendant Kokolakis"), Pre-Answer Motion for Dismissal of the Action, and for Sanctions, and in Support of Plaintiff's, ALEFREDO VILLETTA's, Cross-Motion seeking an Order: (i) denying Defendants' frivolous motion for dismissal and sanctions in its entirety; (ii) pursuant to CPLR §3025, granting Plaintiff leave to amend the Complaint to add Plaintiff's Wife, GEORGIA VILLETA, and, Defendant Kokolakis' Wife, GERASIOULA KONIDARIS, as Defendants to the action, and amending the caption to reflect addition of the Defendants; (iii) pursuant to CPLR §3025, granting Plaintiff leave to amend the Complaint to conform the facts to the evidence; and, (iv) for such other and further relief as the Court deems just and proper.

The relevant facts and procedural history in this matter have been set forth in detail in the accompanying Proposed Amended Verified Complaint in Support of the instant application (Exhibit 1), and Your Deponent has discussed the legal issues pertaining to Defendant's motion pursuant to CPLR §3211(a)(5), seeking dismissal for alleged preclusion by the Doctrines of Res Judicata and Collateral Estoppel, and, pursuant to CPLR §3211(a)(10), for alleged failure to join a necessary party, in the accompanying Attorney's Affirmation.

Therefore, this Memorandum of Law will focus on the factual and legal issues pertaining to Defendants' motion pursuant to CPLR §3211(a)(7), for dismissal based on alleged failure to state a cause of action; pursuant to CPLR §3211(a)(1), seeking dismissal on the basis of alleged documentary evidence disposing of the Plaintiff's claims; and, pursuant to CPLR §3211(a)(5), for

dismissal based on the alleged expiration of the Statute of Limitations, as well as, the legal issues pertaining to Plaintiff's Cross-Motion for Leave to Amend the Complaint.

ARGUMENT I

DEFENDANT'S MOTION FOR DISMISSAL PURSUANT TO CPLR §3211(a)(7) MUST BE DENIED AS PLAINTIFF'S VERIFIED COMPLAINT PROPERLY STATES CAUSES OF ACTION AGAINST THE DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED

1. The law is clear that "when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (Leon v. Martinez, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

2. The law is also clear that a motion for dismissal must be denied if, from the pleading's four comers, factual allegations are discerned which taken together manifest any cause of action cognizable at law (McGill v. Parker, 179 A.D.2d 98, 582 N.Y.S.2d 91 [1992]).

3. "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss" (Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38; see EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19). "Indeed, the question of whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26 [2005]). See, Roni LLC v. Arfa, 18 N.Y.3d 846, 848, 963 N.E.2d 123, 124 (2011).

4. As set forth by the Court in L. Magarian & Co., Inc. v Timberland Co., 246 AD2d 69 (1997): Strong presumptions exist favoring the complaint on a CPLR 3211(a)(7)

motion, such as that the court must accept each factual allegation as true and make no effort to evaluate the ultimate merits of the case; that the complaint should be liberally construed in favor of the non-moving party; that a claim should not be dismissed when a cause of action may be discerned no matter how poorly stated, that any fact that can be fairly implied from the pleadings will be deemed alleged; and that facts from affidavits may be considered as supplementary to the complaint to show the cause of action to be valid."

PLAINTIFF'S VERIFIED COMPLAINT PROPERLY STATES AN ACTIONABLE CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY WITH REQUISITE PARTICULARITY PURSUANT TO CPLR § 3016(b)

5. A claim for breach of fiduciary exists when plaintiff alleges (1) the existence of a fiduciary duty owed, (2) a breach of that duty, and (3) resulting damages. See, Jones v. Voskresenskaya, 125 A.D.3d 532, 533, 5 N.Y.S.3d 16 (2015).

6. Pursuant to CPLR § 3016(b), where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

7. As detailed below, Plaintiff's Verified Complaint properly establishes the foregoing elements with the requisite particularity necessary to maintain a cause of action for breach of fiduciary duty, and Defendants' false allegations to the contrary and frivolous application for dismissal must be summarily denied.

A. THE EXISTENCE OF A FIDUCIARY DUTY OWED IS PROPERLY PLEAD, AND FULLY SUPPORTED BY THE EVIDENCE

8. Plaintiff's Complaint properly sets forth sufficient factual allegations to indicate the existence of a fiduciary duty owed by Defendant as Plaintiff's Brother-In-Law, Attorney, Co-Tenant, Business Partner, and Sole Manager of the investment properties which are the subject of this Action.

9. Specifically, as Plaintiff alleges, and Defendant Kokolakis expressly admits, the Defendant represented the Plaintiff and his Wife, in his capacity as an Attorney, in the purchase of the very same properties which are the subject of this Action (hereinafter, the "Subject Properties").

10. Moreover, the Deeds to the Subject Properties, along with other legal documents sworn to "under penalty of perjury" expressly name Defendant, Kokolakis, as the attorney for the Plaintiff and his Wife (Defendant's Exhibit L).

11. While Defendant self-servingly alleges that his representation of Plaintiff ended on the closing of title for the 2909 Property in August 2012, Defendant expressly admits that he continued to manage the Subject Investment Properties on behalf of the parties, as expressly set forth in Defendant's Affidavit: "To date, I continue to manage all three properties, as I have done since the purchase of the first property."

12. Significantly, the bank statements corresponding to each of the Subject Properties provided as (Defendants' "Exhibits G, H, and I"), clearly name the Defendant Kokalakis, as having Power Of Attorney ("POA"), as recently as 2020.

13. While Defendant frivolously denies the existence of an attorney-client relationship with Plaintiff, the law is clear that whether an attorney-client relationship exists is an issue of fact, necessitating denial of a motion to dismiss at the pleading stage ("[A]n attorney-client relationship may exist in the absence of a retainer or fee" (Gardner v. Jacon, 148 A.D.2d 794, 795, 538 N.Y.S.2d 377]; "In determining the existence of an attorney-client relationship, a court must look to the actions of the parties to ascertain the existence of such a relationship" Wei Cheng Chang v. Pi, 288 A.D.2d 378, 380, 733 N.Y.S.2d 471; see McLenithan v. McLenithan, 273 A.D.2d 757, 758–759, 710 N.Y.S.2d 674]).

14. Even beyond the pleading stage, Courts have consistently held that where a factual dispute exists regarding the existence of an attorney-client relationship giving rise to a fiduciary duty, it is the obligation of the jury to weigh the competing evidence and assess the credibility if the testimony (see, Kehoe v. Abate ["Even if plaintiff was representing defendants on other matters involving a different property at the time of the closing, the record evinces a factual dispute as to whether there was an attorney-client relationship giving rise to a fiduciary relationship between plaintiff and defendants with respect to the purchase and sale of the commercial property. The jury had the obligation to weigh the competing evidence and to determine which testimony was more credible" (see, Maksuta v Heitzman, 165 AD3d 1550, 1552, 86 NYS3d 772 [2018]; Matter of Giaquinto, 164 AD3d 1527, 1531, 83 NYS3d 728 [2018], affd 32 NY3d 1180, 94 NYS3d 244, 118 NE3d 906 [2019])."

15. Notably, Defendant admits to taking necessary legal steps in the performance of his managerial duties, including eviction of tenants from the Subject Properties for failure to pay rent, which raises further issues of fact pertaining to actions undertaken by Defendant in his express capacity as an Attorney acting on behalf of Plaintiff and on behalf of the parties' joint enterprise, necessitating the denial of Defendants' frivolous and premature Pre-Answer Motion to Dismiss this Action without the benefit of discovery.

16. Moreover, Defendant expressly admits that the Subject Properties were purchased for investment purposes, to be developed and rented to tenants to generate profits that would accrue equally to the benefit of the parties.

17. Furthermore, in her Affidavit in support of Defendants' Motion to Dismiss this Action sworn to on June 21, 2021, Alfredo and I are lucky that since a young age, my brother has been able to "read" the real estate market and our investments have been successful,

allowing us to increase our wealth and become owners of not one but three investment properties.[1]

18. Accordingly, notwithstanding Defendant's unavailing excuses, the law is clear that the Defendant had a continuing fiduciary duty to Plaintiff as an Attorney entering into a business relationship with a client.

19. Specifically, Plaintiff's Verified Complaint sets forth that, "Because Defendant Kokolakis was the Attorney representing and advising the Plaintiff and his wife in connection with the management of the parties' jointly owned real properties, a fiduciary relationship existed between the Plaintiff and Defendant Kokolakis".[2]

20. As set forth by the Court in Greene v. Greene, 56 N.Y.2d 86, 94–95, 436 N.E.2d 496, 501 (1982) "although it is not advisable, an attorney may also contract with a client with respect to matters not involving legal services, or in addition to legal services (Howard v. Murray, 38 N.Y.2d 695, 382 N.Y.S.2d 470, 346 N.E.2d 238, 43 N.Y.2d 417, 401 N.Y.S.2d 781, 372 N.E.2d 568). However, the relationship between an attorney and his client is a fiduciary one and the attorney cannot take advantage of his superior knowledge and position."

21. As further set forth by the Court in Kehoe v. Abate, 172 A.D.3d 1800, 100 N.Y.S.3d 786 (2019): "Where an attorney enters into a business relationship with a client while also acting as the client's attorney with respect to the relationship, the attorney must fully and fairly inform the client of the consequences of any action taken in furtherance of the relationship and certainly may not exploit the client's trust for his or her own benefit" (Beltrone v General Schuyler & Co., 252 AD2d at 641; see Greene v Greene, 56 NY2d at 92-93)."

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1 Attached hereto as "Exhibit 3," is a copy of the Affidavit of Defendant Georgia Villeta sworn to on June 1, 2021.

2 Attached hereto as "Exhibit 4" is a copy of the Verified Complaint dated June 2, 2021.

22. Moreover, the law is clear that whether a fiduciary duty exists is a fact-dependent analysis, as such a relationship might be found to exist in appropriate circumstances between close friends, relatives, or even where confidence is based upon prior business dealings and also in more informal relationships where it can be readily seen that one party reasonably trusted another.

23. As set forth by the Court in Roni LLC v. Arfa, 18 N.Y.3d 846, 848, 963 N.E.2d 123, 124–25 (2011): "A fiduciary relationship arises "between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (id. [internal quotation marks and citation omitted]). Put differently, "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (AG Capital Funding Partners, L.P v. State St. Bank & Trust Co., 11 N.Y.3d 146, 158, 866 N.Y.S.2d 578, 896 N.E.2d 61 [2008] [internal quotation marks and citation omitted]). Ascertaining the existence of a fiduciary relationship "inevitably requires a fact-specific inquiry" (Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 561, 883 N.Y.S.2d 147, 910 N.E.2d 976 [2009]).

24. As expressly set forth in Plaintiff's Verified Complaint, "Defendant Kokolakis led the Plaintiff to believe that as his Brother-In-Law and his In-House Attorney, who was supposedly providing advice for the benefit of the Plaintiff, he could trust Defendant Kokolakis to make sound financial decisions that were in the Plaintiff's best interest and that he would not manipulate and seek to defraud him" (Exhibit 4).

25. As further set forth in Plaintiff's Verified Complaint: "The Plaintiff reposed his trust and confidence in the integrity and fidelity of Defendant Kokolakis in connection with his management of the parties' jointly owned real properties, as the Plaintiff

believed that Defendant Kokolakis would not do anything to betray his trust as his Brother-In-Law and as an attorney licensed to practice law in New York State, whom Plaintiff knew was bound by professional rules requiring him to act in an ethical and lawful manner. The Plaintiff relied on his personal and professional relationship with Defendant Kokolakis, who was a co-partner in an enterprise that Plaintiff believed was being operated for the parties' mutual benefit, to his detriment." (Exhibit 4).

26. As further set forth in Plaintiff's Verified Complaint, "The Plaintiff relied on his personal and professional relationship with Defendant Kokolakis, who was a co-partner in an enterprise that Plaintiff believed was being operated for the parties' mutual benefit, to his detriment" (Exhibit 4).

27. Notably, Defendant Kokolakis' own Affidavit dated May 7, 2019, expressly sets forth that "The defendants and I had a special, close, confidential and trusting relationship. We were a family that went on weekend camping trips together, spent countless hours at the arcade playing video games, and did several activities together like going to the park, engaging in lengthy discussions, enjoying family gatherings together and walking the dog. I was always spending time with Georgia and Alfredo to the point that they even gave me a key to their apartment. Alfredo was a part of many of my most important life events, such as teaching me how to drive and being the best man at my wedding. Our relationship was close even until our most recent Thanksgiving, where Alfredo was not able to come to my home for Thanksgiving dinner and I made sure to reach out to him and even brought him a plate of food" [3]

28. Accordingly, notwithstanding Defendant's unavailing excuses, the existence of a fiduciary relationship between the parties is beyond reproach herein, as the law is

[3] Attached hereto as "Exhibit 5" is a copy of the Affidavit of Defendant, John A. Kokolakis, sworn to on May 7, 2019.

clear that a fiduciary relationship, whether formal or informal, "is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another, and might be found to exist, in appropriate circumstances between close friends.

29. As set forth by the Court in Velez v. Mitchell, 2021 NY Slip Op 30898(U), ¶¶ 9-10 (Sup. Ct.), in sustaining a plaintiff's breach of fiduciary duty claims based on the nature of the close personal and professional relationship between plaintiff and defendants, at the pleading stage, the Court in reasoned that: "In Apple Records, Inc. v. Capitol Records, Inc., 137 A.D.2d 50, 58, 529 N.Y.S.2d 279 (1988) ("Apple I"), the court affirmed the denial of the defendant's motion to dismiss a breach of fiduciary duty claim, recognizing that a fiduciary relationship, whether formal or informal, "is one founded upon trust or confidence reposed by one person in . . . the integrity and fidelity of another . . . [and] might be found to exist, in appropriate circumstances between close friends." "Such a relationship might be found to exist . . . even where confidence is based upon prior business dealings." Penato v. George, 52 A.D.2d 939, 942, 383 N.Y.S.2d 900 (1976); see also Comer v. Krolick, 2015 N.Y. Misc. LEXIS 4395 at *26 (2015) (the court found a breach of fiduciary duty when the plaintiff relied on the personal and professional relationship of the defendant to make business decisions to his detriment). Id.

30. On the basis of the foregoing, the Court in Velez v. Mitchell, 2021 NY Slip Op 30898(U), ¶¶ 9-10 (Sup. Ct.) similarly held that: "Plaintiff clearly had a close relationship with the individual defendants and worked with them on what appears to be a near-daily basis for a decade. The Complaint details collaborative efforts between Plaintiff and Defendants and frequent communications that went into planning, promoting and executing a decade's worth of live events. See St. John's Univ. v. Bolton 757 F.Supp.2d 144, 166 (2010) ("a fiduciary relationship embraces not only those the law has long adopted . . . but also more

informal relationships where it can be readily seen that one party reasonably trusted another"). Id.

31. The Court in Velez v. Mitchell sustained the plaintiff's breach of fiduciary duty claims, "based on the nature of the close personal and professional relationship between plaintiff and defendants, at the pleading stage," and it is respectfully submitted that the same result is appropriate here.

B. PLAINTIFF'S VERIFIED COMPLAINT PROPERLY SETS FORTH CIRCUMSTANCES CONSTITUTING DEFENDANT'S BREACH OF HIS FIDUCIARY DUTIES WITH REQUISITE PARTICULARITY, AND DAMAGES RESULTING THEREFROM

32. Pursuant to New York law, "it is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." Birnbaum v. Birnbaum, 73 N.Y.2d 461, 539 N.E.2d 574, 576, 541 N.Y.S.2d 746 (N.Y. 1989).

33. The duty "not only bars blatant self-dealing, but also requires avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." Id. Included in the scope of the duty "is every situation in which a trustee chooses to deal with another in such close relation with the trustee that possible advantage to such other person might influence, consciously or unconsciously, the judgment of the trustee who is in duty bound to consider only the interest of his [or her] cestui que trust." Albright v. Jefferson Cty. Nat'l Bank, 292 N.Y. 31, 53 N.E.2d 753, 756 (N.Y. 1944). The trustee's actions must be entirely for the benefit of the beneficiaries." Id.

34. As set forth above, Plaintiff's Verified Complaint sets forth sufficient factual allegations to indicate (and the documentary evidence, including Defendant's own admissions, fully support) the existence of a fiduciary duty owed by Defendant arising out of his

position as Plaintiff's Attorney, Brother-In-Law, Business Partner, Sole Manager of jointly owned investment properties, Co-Tenant, and Close Friend.

35. As further set forth in Plaintiff's Verified Complaint, Defendant breached his fiduciary duty owed to Plaintiff by engaging in self-dealing and causing damages to Plaintiff by, *inter alia*: taking at least Seventy Thousand Dollars ($70,000.00) in funds from bank accounts that were only supposed to be used for the management of the Properties, and using the funds for his own personal benefit to build himself an office on the first floor of the parties' jointly owned 2909 Investment Property; operating his law firm, known as "THE KOKOLAKIS LAW FIRM, PLLC," on the first floor of the 2909 Property for nine (9) years, without paying the Plaintiff or the parties' enterprise any rent; and renting the upstairs apartment to his Law Office employee at below market rates in lieu of a salary and subletting the rest of the apartment via Airbnb.

36. As further set forth in Plaintiff's Verified Complaint "Defendant Kokolakis also violated his fiduciary and managerial obligations by not fully renting out the parties' jointly owned properties, which have an appraised, combined fair market rental value of Eighteen Thousand, Six Hundred Dollars ($18,600.00) per month, thereby preventing the Plaintiff and the parties' enterprise from maximizing their profits" (Exhibit 4).

37. "Defendant Kokolakis has received rental income in excess of his own just proportion as a 50% joint owner with the Plaintiff, yet Defendant Kokolakis has to date failed to fully account for all of the rental income which has been generated by the 2909 Property." (Exhibit 4).

38. "Defendant Kokolakis has effectively denied the Plaintiff any use of the 2909 Property by using the first floor of the premises as his law office, and by renting out the

second floor of the property to his employee at below-market rates, and failing to keep the property in good repair, causing the 2909 Property to be worth substantially less than the property would have been worth had been used for its intended and agreed upon purposes." (Exhibit 4).

39. Significantly, there are tiles presently hanging off the roof of the premises which have gotten visibly worse and at this point, cause a safety issue, further evidencing Defendant's mismanagement of the property and failure to keep the property in good repair.[4]

40. Plaintiff's Verified Complaint further sets forth that "Defendant Kokolakis breached his fiduciary duty to the Plaintiff by advising the Plaintiff to file false tax returns to benefit Defendant Kokolakis (an Attorney) and to engage in a scheme to defraud Plaintiff and to cause him to pay additional funds in taxes in the amount and sum of no less than Fifty Thousand Dollars ($50,000.00), which Defendant Kokolakis did not declare on his tax returns, thereby exposing the Plaintiff to increased legal and tax liability" (Exhibit 4).

41. "Defendant Kokolakis has also taken advantage of the Plaintiff by manipulating him in coordination with the Plaintiff's wife, and causing him to pay Defendant Kokolakis' Wife, Gerasimoula Konidaris, a check for Forty-Six Thousand Dollars ($46,000.00)." (Exhibit 4).

42. Significantly, Defendant persists to commit blatant deception upon this Court in stating that "As a note to the Court, Plaintiff statement in his verified complaint that he was manipulated and caused to pay Defendant's Wife Gerasimoula Konidaris a check for $46,000.00 is false. Plaintiff has never provided Gerasimoula Konidaris with a $46,000.00 check" (see, Defendants' Memorandum of Law, at Page 19).

[4] Attached hereto as "Exhibit 6" is a copy of a current Photograph of the roof of the 2909 Property.

43. Notwithstanding Defendant's false assertions, annexed hereto as is a copy of the check issued to Defendant Kokolakis,[5] serving as further proof that Defendant's representations to this Court are not credible, or in the very least, serving to prove that there is an issue of fact requiring denial of Defendant's premature and frivolous request for dismissal.

44. For one, the Plaintiff's Wife admits in her Affidavit sworn to on June 1, 2021, stating that "On or about June 6, 2017, years after the purchase of the 2909 Property, once my and Alfredo's financial situation had stabilized, I discussed with my brother repayment of the 2012 loans. John and I calculated the amount due and agreed that me and Alfredo owed John $45,733.50 to cover the total due for the two loans."[6]

45. "Defendant Kokolakis has failed to repay his share of mortgage payments from the inception of the mortgages for the Properties and he did not claim such payments on his tax returns, and he therefore owes the Plaintiff and Plaintiff's Wife no less than Eight Hundred, Forty-Six Thousand, Nine Hundred, Thirty-Five Dollars and Fifty-Two Cents ($846,935.52) in Mortgage Arrears for the time the properties were being held in constructive trust by the Plaintiff." (Exhibit 4).

46. "Defendant Kokolakis has breached his fiduciary duty to the Plaintiff by advising Plaintiff regarding the purchase of the properties located at 38-19 27th Street, Long Island City, New York 11101, and 38-21 27th Street, Long Island City, New York 11101, which are adjoining properties in Long Island City, under the pretense of developing a Multi-Unit Structure, and then failing to follow through on the parties' agreement, even though the Plaintiff could have increased either the revenue from rentals of the Properties or allowed for a much

[5] Attached hereto as "Exhibit 7" is a copy of the check issued to Defendant, Kokolakis.

[6] Attached hereto as "Exhibit 8," is a copy of the Affidavit of Defendant Georgia Villeta sworn to on June 1, 2021.

greater return on the investment by selling the subject properties, which could have been accomplished and has caused losses of no less than Five Million Dollars ($5,000,000.00) by virtue of not moving forward under the project proposed" (Exhibit 4).

47. "Defendant Kokolakis has violated his managerial obligations to the partnership by failing to convert two (2) of the parties' joint properties into an eight-property unit, which he could have done at no cost to him if he simply provided Real Estate Developer, Michael Difonza with a share of the profits." (Exhibit 4).

48. Instead the Defendant modified the 3821 Property from a 2-family unit, into a 3-family unit property for which Defendant Kokolakis did not apply for the proper permits or obtain a Certificate of Occupancy, causing the Property to be worth substantially less than the property would have been worth had the permits and certificate been obtained, and whether his failure to do so resulted in the property being worth less to the parties' as an investment property is an issue of fact and not disposed by Defendant's self-serving assertions and irrelevant documents, as it is clearly set forth in the Plaintiff's Verified Complaint that "Defendant Kokolakis has obtained an opportunity to make personal profits and advantageous arrangements as a result of his exclusive management and control over the Properties, and he did not pass on these advantages to the partnership." (Exhibit 4).

49. The court in Birnbaum v Birnbaum, 117 AD2d 409, 416, 503 N.Y.S.2d 451 (1986) noted that: "One of the most stringent precepts in the law is that a fiduciary shall not engage in self-dealing and when he is so charged, his actions will be scrutinized most carefully. When a fiduciary engages in self-dealing, there is inevitably a conflict of interest; as fiduciary he is bound to secure the greatest advantage for the beneficiaries; yet to do so might work to his

personal disadvantage. Because of the conflict inherent in such transaction, it is voidable by the beneficiaries unless they have consented."

50. Accordingly, there can be no dispute that the Verified Complaint properly details the circumstances constituting Defendant's wrongs with the requisite particularity necessary to maintain a cause of action for breach of fiduciary duty.

51. Contrary to Defendant's misrepresentations of law, Plaintiff is not required to plead its damages with particularity as rule of procedure requires only that, for claims or defenses based on fraud, the circumstances constituting the wrong shall be stated in detail. See, Solomon Capital, LLC v Lion Biotechnologies, Inc., 171 A.D.3d 467, 98 N.Y.S.3d 26, 2019 N.Y. App. Div. LEXIS 2633 (2019).

52. The Plaintiff has properly pled damages resulting from Defendant's misconduct and Defendant's request to dismiss for failure to prove damages is premature, as "Plaintiffs are not required to plead and prove the amount of damages at the pleading stage of litigation. Plaintiffs are entitled to conduct discovery as any evidence of "resultant damages" is in the hands of the defendants." See, VLIW Tech., LLC., supra; Furia v Furia, 116 AD2d 694, 695, 498 N.Y.S.2d 12 (1986).

53. This is particularly so where the conduct of wrongdoers has rendered it difficult to ascertain the damages suffered with the precision otherwise possible (Story Parchment Co. v Paterson Co., supra, at p 563; Eastman Co. v Southern Photo Co., supra, at p 379). In re Estate of Rothko, 43 N.Y.2d 305, 323, 401 N.Y.S.2d 449, 457, 372 N.E.2d 291, 298-99 (1977)

54. Accordingly, Plaintiff's Verified Complaint properly alleges each of the elements necessary to maintain a cause of action for breach of fiduciary duty with requisite

particularity, and Defendants' false allegations to the contrary and frivolous application for dismissal must be summarily denied.

ARGUMENT II

THE DOCUMENTARY EVIDENCE DOES NOT RESOLVE ALL FACTUAL ISSUES OR DISPOSE OF ANY OF THE PLAINTIFF'S CLAIMS AS REQUIRED PURSUANT TO CPLR §3211(a)(1)

55. The law is clear that "A motion to dismiss on the basis of CPLR 3211(a)(1) should be granted only where the documentary evidence that forms the basis of the defense is such that it refutes the plaintiff's factual allegations or conclusively disposes of the plaintiff's claims as a matter of law" (Schiller v. Bender, Burrows & Rosenthal, LLP, 116 A.D.3d 756, 757, 983 N.Y.S.2d 594; see Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; Held v. Kaufman, 91 N.Y.2d 425, 430–431, 671 N.Y.S.2d 429, 694 N.E.2d 430).

56. If the evidence submitted in support of the motion is not "documentary," the motion must be denied (CPLR 3211 [a][1]; see Prott v Lewin & Baglio, LLP, 150 AD3d 908, 55 NYS3d 98 [2017]). To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable" (Granada Condominium III Assn. v Palomino, 78 AD3d 996, 997, 913 NYS2d 668 [2010]), such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (see Prott v Lewin & Baglio, LLP, 150 AD3d 908, 55 NYS3d 98 [2017]). Conversely, letters, emails, and, as most relevant to this appeal, affidavits, do not meet the requirements for documentary evidence (see id.; Attias v Costiera, 120 AD3d 1281, 1283, 993 NYS2d 59 [2014]; Matter of Walker, 117 AD3d 838, 839, 985 NYS2d 690 [2014]). An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as

another affidavit (see J.A. Lee Elec., Inc. v City of New York, 119 AD3d 652, 990 NYS2d 223 [2014]).

57. In support of Defendant's frivolous allegation that documentary evidence disposes of Plaintiff's claims herein Defendant presents bank statements (labeled as Defendant's "Exhibits G, H, I, and J") and purports that same serve as documentary evidence that "All income and expenses for each property has been held in separate bank accounts corresponding to each property and held in Plaintiff and Georgia Villeta's name," and that "despite his claims, Plaintiff has always received income and had control of the finances for the subject premises".

58. Preliminarily, as is clear upon review of the bank statements provided as "Defendant's Exhibits G, H, I, and J," and as expressly admitted by Defendant herein, the Plaintiff's name was intentionally removed from all the foregoing accounts in January 2019, and the statements have since been mailed to the 2909 Property, which as alleged herein is occupied exclusively by the Defendants.

59. Moreover, Subpoenaed records from Maspeth Federal Savings Bank, reveals that just as Plaintiff previously alleged, there was more than enough funds from the equity and profits generated from the 3819 Property which were used to invest in the purchase of the 2909 Property, through Consolidation, Extension and Modification Agreement (CEMA) of the mortgage of the 3819 Property with Maspeth Federal Savings Bank, and that there were, in fact, extensive funds left over from the loan above the purchase price of the 2909 Property, and thus that there was no money owed by Plaintiff and or his Wife to Defendant Kokolakis.[7]

60. The newly received documents further evidence multiple inconsistencies regarding Defendant Kokolakis' purported investment of funds for the purchase of the 2909

[7] Attached hereto as "Exhibit 9," is a copy of the relevant Mortgage Loan Statement.

Property, evidencing his collusion with the Plaintiff's Wife to defraud the Plaintiff dating back as far as 2012, including but not limited to a letter from Defendant purporting to "Gift" $150,000.00 to the Plaintiff's Wife,[8] and numerous checks issued to the Plaintiff's Wife by Defendant Kokolakis of which the Plaintiff had no knowledge.

61. Moreover, the bank statements provided by Defendant Kokolakis in support of his motion, along with banks record received pursuant to Subpoena, reveal that even before the Defendants acting in concert without the Plaintiff's knowledge or consent, unilaterally transferred the funds from the Investment Properties' accounts with CitiBank and opened new Flushing Bank accounts for each property first in the sole name of Plaintiff's Wife and then together in the names of Plaintiff's and Defendant Kokolakis' Wife, Defendants acting in concert began to deplete the Citibank accounts in or about the Summer of 2018.[9]

62. As clearly set forth in Plaintiff's Verified Complaint: "Defendant Kokolakis has exclusively been using two (2) entire floors, including the first floor, which he uses for his law office, the parking spot in the rear of the [2909] property, and the upstairs apartment, which is very spacious and has been used to generate rental income via the online marketplace known as Airbnb" (Exhibit 4).

63. Moreover, as expressly admitted by Defendant, "Defendant continues to this day to occupy the commercial space and manage the three properties, having the 2909 Property as a centralized location for matters relating to the properties, including being the main address for tenants of all properties to contact the co-owners" (Exhibit 4).

[8] Attached hereto as "Exhibit 10," is a copy of the Letter from Defendant Kokolakis dated March 2012.

[9] Attached hereto as "Exhibit 11," are copies of the relevant CitiBank Statements.

64. Significantly, Defendant expressly admits that the parties used the equity generated with the purchase of the first two investment properties to invest those funds in the purchase of the 2909 Property."

65. Thus, as is clear from a review of Defendants' own admissions and the Plaintiff's allegations, the majority of the damages alleged in the Plaintiff's Verified Complaint stem, both directly and indirectly, from the Defendants' misconduct in connection with his mismanagement of the 2909 Property.

66. As for the Quontic bank statements provided as "Defendant's Exhibit J" upon review of the statements provided, there is no indication of any rental income being deposited into the foregoing account, as there is no change to the balance or apparent deposits until Defendant in collusions with Plaintiff's Wife began depleting the account on or around the summer of 2018.

67. Moreover, Defendant expressly admits that the Plaintiff's name was likewise removed from the foregoing account on or about 2019.

68. While Defendant preposterously alleges that Plaintiff's removal from the account was done in response to his unauthorized withdrawals for personal use, the only evidence of any withdrawal made by the Plaintiff in more than 25 years, is the one withdrawal for $7,500.00 made on January 15, 2019, the same day that Defendant admits to having a meeting with Plaintiff and presenting him with documents for signature, and admitting that the aforementioned meeting ended with their agreement that Plaintiff would retain an Attorney to review the papers (Defendants' Exhibit K).

69. Accordingly, the foregoing bank statements provided as (Defendant's Exhibits G, H, I, J, and K), cannot serve as proof that the Plaintiff received any income from, or had any access or control of, the finances related to the Subject Properties.

70. Among the other documents presented by Defendant are Plaintiff's and his Wife's jointly filed Income Tax Returns for the years 2015, 2016, and 2017, and Plaintiff's Wife's, Georgia Villeta's, individually filed Income Tax Returns for the years 2020, 2019 and 2018 (Defendant's Exhibit E), as well as purported Letters and one Affidavit from Accountants (Defendant's Exhibit F).

71. Defendant purports that "Plaintiff's tax returns (Defendant's Exhibit E) together with the supporting accountant letters and affidavit (Defendant's Exhibit F), undeniably show that "despite his claims, Plaintiff has always received income and had control of the finances for the subject premises."

72. Preliminarily, it is untenable that Defendant presents the Plaintiff's Wife's individually filed Income Tax Returns as "Plaintiff's tax returns," or how Plaintiff's Wife's individually filed Income Tax Returns could serve as proof of Plaintiff's receipt of income from, or access to and control of, the finances for the Subject Properties.

73. Nor do the three (3) years' worth of Income Tax Returns jointly filed by Plaintiff and his Wife for the four (4) years prior to the commencement of this action serve as proof that Plaintiff ever had control of finances for the subject properties, or that the Plaintiff ever received the entirety of the income due to him, or that the Plaintiff received any income from the subject properties during the four (4) years preceding this action,

74. As set forth by the Court in Scadura v Robillard, 256 A.D.2d 567, 683 N.Y.S.2d 108, 1998 N.Y. App. Div. LEXIS 14016 (N.Y. App. Div. 2d Dep't 1998): "The Court

erred in dismissing mortgage foreclosure action under CLS CPLR § 3211(a)(1) and (5), even though defendants' documentary evidence showed that, based on their unilateral amortization calculations, defendants tendered amount that they believed was sufficient to satisfy their indebtedness to plaintiff, since plaintiff asserted facially-valid claim for additional amount of money."

75. Significantly, it should be noted that the Plaintiff's Wife's individually filed Income Tax Returns raise more issues than they purport to dispose (ie.: the annual rental income from each of the three (3) Subject Properties as reflected in the Tax Returns is identical [Defendant's "Exhibit E"]).

76. As for the purported letters from accountants for the years 1997 through 2003, as well as one Affidavit from an Accountant dated 2017, the foregoing cannot serve as documentary evidence as a matter of law, as the law is clear that "letters, emails, and, as most relevant to this appeal, affidavits, do not meet the requirements for documentary evidence (see id.; Attias v Costiera, 120 AD3d 1281, 1283, 993 NYS2d 59 [2014]; Matter of Walker, 117 AD3d 838, 839, 985 NYS2d 690 [2014]).

77. Moreover, the purported letters from accountants for the years 1997 through 2003, are merely cover letters for the filing of the jointly filed Income Tax Returns and do not state that Plaintiff has received income from the subject properties, nor does the Affidavit from the accountant (who is Defendant Kokolakis' life-long friend) dated 2017, and it should be noted that a review of the Plaintiff's Wife's Individually filed Income Tax Returns list the Accountant as a third party beneficiary as to the Subject Properties (Defendant's Exhibit E), and thus, even if same were admissible, which it is not, same cannot be deemed credible ("An affidavit is not documentary evidence because its contents can be controverted by other

evidence, such as another affidavit" [J.A. Lee Elec., Inc. v City of New York, 119 AD3d 652, 990 NYS2d 223 [2014]).

78. As for Defendant's frivolous contention that "The property bank statements and checks (Defendant's "Exhibit K") show that IRS payments were made from the property account, or once the corresponding payments to the IRS were made by Plaintiff and Georgia Villeta from their individual account, they would be reimbursed from the property account funds." The foregoing only shows payments made from Plaintiff's account to the IRS and there is not a single check made out to Plaintiff.

79. Moreover, Defendant's frivolous allegation that the letters and Affidavit prove that Plaintiff has been advised of his 50% tax liability, does not negate or dispose of the Plaintiff's claims that he has paid 100% of the tax liabilities, and that he is entitled to contribution from Defendant for all reasonable payments necessarily made by Plaintiff to preserve the interests of the parties in the Subject Properties, and other redress against Defendant's continued misconduct and ongoing damages.

80. As set forth by the Court in H & Y Realty Co. v. Baron, 160 A.D.2d 412, 414, 554 N.Y.S.2d 111, 113 (1990): "It is well established that a tenant-in-common is liable for rent to his co-tenant if he occupies the property to the exclusion of that co-tenant or commits acts amounting to a denial of the rights of cotenants (Zapp v. Miller, 109 N.Y. 51, 15 N.E. 889; see also Jemzura v. Jemzura, 36 N.Y.2d 496, 369 N.Y.S.2d 400, 330 N.E.2d 414)."

81. Similarly, "a tenant-in-common who occupies the premises to the exclusion of his co-tenant is responsible for all charges on the property, including real estate taxes (Van Duzer v. Anderson, 282 A.D. 779, 123 N.Y.S.2d 46, affd. 306 N.Y. 707, 117 N.E.2d

805; see also Worthing v. Cossar, 93 A.D.2d 515, 462 N.Y.S.2d 920; Topilow v. Peltz, 25 A.D.2d 874, 270 N.Y.S.2d 116).

82. As set forth by the Court in Cagan v. Cagan, 56 Misc. 2d 1045, 1048-50, 291 N.Y.S.2d 211, 214-16 (1968): "Clearly, the plaintiff is entitled to contribution for all reasonable payments necessarily made by her to preserve the interests of the parties in the property, such as those for mortgage principal and interest, for taxes, and for fire insurance premiums, failure to pay any of which would (or could) result in a loss of the property by mortgage foreclosure. She is not so entitled for utilities whose sole purpose was obviously the sole convenience of the plaintiff, nor to general maintenance charges, not applicable to the preservation of the property. Equally clearly, the denial of the defendant's rights to occupancy have been so complete that the only redress under the circumstances of the case and the prior determinations of the court relative to occupancy is to subject the tenant in possession to a charge for the reasonable rental value of the house as a matter of offset." Id.

83. Beyond the foregoing documents, Defendant offers nothing more than self-serving blanket assertions in support of his frivolous request for dismissal based on documentary evidence.

84. Defendant falsely asserts that "As Defendant Kokolakis has not received any rents, it is an impossibility that Defendant could have received rents in excess of his just proportion," which statement contradicts not only what was stated in the sworn Affidavit of the Plaintiff's Wife, Georgia Villeta, sworn to on March 26, 2019, stating that "He collected the rent from the tenants and provided the rent to either myself or Alfredo to deposit in the bank account opened for the 3821 property," but also contradicts Defendant's own allegations that "To date, I continue to manage all three properties. As I have done since the purchase of the first property,

upon collecting or receiving the rents from the tenants, I promptly provided the rents to Georgia Villeta or plaintiff, or arranged for the rents to be deposited into the corresponding property accounts" (Defendant's Affidavit at Page. 9).

85. Thus, notwithstanding Defendant's self-serving and conclusory assertions, the law is clear that where evidentiary materials submitted merely disputed certain factual allegations contained in the complaint and do not conclusively establish that plaintiff has no cause of action, accordingly, dismissal cannot be granted.

86. As set forth by the Court in DeStaso v Condon Resnick, LLP, 90 A.D.3d 809, 936 N.Y.S.2d 51, 2011 N.Y. App. Div. LEXIS 9086 (N.Y. App. Div. 2d Dep't 2011): "Trial court erred in dismissing, pursuant to N.Y. C.P.L.R. 3211(a)(1), plaintiff's malpractice claims against a law firm, because the evidentiary materials submitted by the firm did not conclusively establish that plaintiff had no cause of action; rather, they merely disputed certain factual allegations contained in the complaint."

87. To the extent that Defendant purports that the So-Ordered Stipulation of Settlement and Discontinuance serves as documentary evidence that "that "Defendant has already agreed to indemnify and hold Plaintiff harmless for monetary payments on the subject properties retroactively to the date of Purchase, which to date there have been none," rather than submitting purported documentary proof that payments on the subject properties retroactively to the date of Purchase have been made or that there are none as Defendant self-servingly alleges, Defendant submits a copy of the So-Ordered Stipulation setting forth his responsibility to make the foregoing payments (Defendant's Exhibit B).

88. As set forth in the accompanying Attorney's Affirmation, the foregoing Stipulation only serves to prove that Defendant has an undeniable Court Ordered obligation to

add his name to the mortgages for the Properties (Defendant's Exhibit B) and make all monetary payments on the subject properties retroactively to the date of Purchase.

89. Plaintiff's Verified Complaint properly alleges that Defendant Kokolakis has failed to comply with any of his aforementioned obligations, and Defendant fails to prove otherwise.

90. As to Defendant's allegation of agreed upon repairs, Defendant misleadingly asserts that "Defendant, Plaintiff and Georgia Villeta were all aware that the 2909 Property required repairs," however, the law is clear that: "that a co-tenant is not entitled to an allowance for improvements which are not in the nature of repairs or restoration and are made for the co-tenants' own purposes without the agreement or consent of the other co-tenants (Wawrzusin v Wawrzusin, 212 AD2d 779, 780, 623 NYS2d 255 [1995]; citing Cosgriff v Foss, 152 NY 104, 46 NE 307 [1897]; Scott v Guernsey, 48 NY 106 [1871]; Peerless Candy v Kessler, 123 Misc 735, 205 NYS 883 [1989]." (Cytron v Malinowitz, 831 N.Y.S.2d 347, 2006 NY Slip Op 51899[U] [Sup Ct, Kings County 2006]).

91. Plaintiff being aware that the property needed repair does not in any way establish that Plaintiff consented to Defendant building himself an office for his own personal use for his personal business to occupy rent free, to the exclusion and detriment of the Plaintiff and his rights as co-tenant.

92. Defendant further frivolously purports that documentary evidence proves that the 2909 Property value has increased, and the property is rented at market value, and presents "a copy of an ACRIS Print out and Recording and Endorsement Cover Page showing the property type as a 1-3 Family with Store/Office, and showing the Purchase price to be $730,000.00", in comparison to the more recent valuation presented by Plaintiff.

93. Preliminarily, the issue of whether or not the property value may have increased has no dispositional effect on Plaintiff's causes of action herein – Plaintiff has properly alleged that the property is being mismanaged, to his exclusion therefrom, and not being used in accordance with its agreed upon purpose.

94. As properly set forth in Plaintiff's Verified Complaint, "Defendant Kokolakis has violated his managerial obligations to the partnership by failing to convert two (2) of the parties' joint properties into an eight-property unit, which he could have done at no cost to him if he simply provided Real Estate Developer, Michael Difonza with a share of the profits" (Exhibit 4).

95. Moreover, Defendant Kokolakis has exclusively been using two (2) entire floors, including the first floor, which he uses for his law office, the parking spot in the rear of the property, and the upstairs apartment, which is very spacious and has been used to generate rental income via the online marketplace known as Airbnb.

96. Defendant acknowledges that the properties at issue are investment properties for the benefit of both parties, however, by using the downstairs floor of the 2909 property as his law office without paying any rent, Defendant is indisputably devaluing the property and causing it to generate less profit than it would if the property was fully used for investment purposes as agreed.

97. As for Defendant's "Exhibit O" the Automated City Register Information System (ACRIS) documents, showing that the usage of the 2909 Property has not changed from before or after the purchase, Plaintiff's Verified Complaint clearly sets forth that the properties referred to in the Plaintiff's Complaint are the two adjoining properties in Long Island City.

98. As set forth in Plaintiff's Verified Complaint "Defendant Kokolakis has breached his fiduciary duty to the Plaintiff by advising Plaintiff regarding the purchase of the properties located at 38-19 27th Street, Long Island City, New York 11101, and 38-21 27th Street, Long Island City, New York 11101, which are adjoining properties in Long Island City, under the pretense of developing a Multi-Unit Structure, and then failing to follow through on the parties' agreement, even though the Plaintiff could have increased either the revenue from rentals of the Properties or allowed for a much greater return on the investment by selling the subject properties, which could have been accomplished and has caused losses of no less than Five Million Dollars ($5,000,000.00) by virtue of not moving forward under the project proposed." (Exhibit 4).

99. Instead the Defendant modified the 3821 Property from a 2-family unit, into a 3-family unit property for which Defendant Kokolakis did not apply for the proper permits or obtain a Certificate of Occupancy, causing the Property to be worth substantially less than the property would have been worth had the permits and certificate been obtained, and whether his failure to do so resulted in the property being worth less to the parties' as an investment property is an issue of fact and not disposed by Defendant's self-serving assertions herein.

100. As set forth by the Court in Pokoik v. Norsel Realties, 138 A.D.3d 493, 494–95, 30 N.Y.S.3d 38, 39–40 (2016): "Plaintiffs sufficiently alleged that Steinberg and Lieberman were conflicted and stood to benefit personally***in particular, in addition to alleging that the devalued rent paid by 575 Realties advanced the individual defendants' personal estate planning, plaintiffs also alleged that the devalued rent allowed 575 Realties, and its affiliated entity SPMC, to retain more money to pay higher salaries to the individual defendants."

101. The law is clear that, to succeed upon a motion to dismiss under CPLR 3211(a)(1) where a defense is founded upon documentary evidence, the moving party must show that the essential facts have been "negated beyond substantial question" by the evidentiary matter submitted. Blackgold Realty Corp v Milne, 119 AD2d 512, 513, 501 N.Y.S.2d 44 (1st Dep't 1986), aff'd 69 NY2d 719, 504 N.E.2d 392, 512 N.Y.S.2d 25 (1987).

102. Thus, as Defendant fails to demonstrate that that the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the Plaintiff's claims, Defendant's frivolous application for dismissal must be summarily denied. See, Scadura v Robillard, 256 AD2d 567, 683 N.Y.S.2d 108 (1998).

ARGUMENT III

DEFENDANT'S MOTION FOR DISMISSAL PURSUANT TO CPLR §3211(a)(7) MUST BE DENIED AS PLAINTIFF'S CAUSES OF ACTION ARE NOT TIME-BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

103. A defendant seeking dismissal under CPLR §3211(a)(5) on statute of limitations grounds bears "the initial burden of establishing, *prima facie*, that the time in which to sue has expired." Benn v. Benn, 82 A.D.3d 548, 548 (1st Dept. 2011) (internal quotation marks and citation omitted). "To meet its burden, the defendant must establish, *inter alia*, when the plaintiff's cause of action accrued." Lebedev v. Blavatnik, 144 A.D.3d 24, 28 (1st Dept. 2016) (internal quotation marks and citation omitted). If the defendant meets that burden, "then the burden shifts to the plaintiff to aver evidentiary facts establishing that the cause of action was timely or to raise a question of fact as to whether the cause of action was timely." Lake v. New York Hosp. Med. Ctr. of Queens, 119 A.D.3d 843, 844 (2d Dept. 2014) (internal quotation marks and citation omitted).

104. As set forth above, in light of the existence of a fiduciary duty owed by Defendant arising out of his position as the Attorney representing and advising the Plaintiff and his Wife, Brother-In-Law, Business Partner, Sole Manager of jointly owned investment properties, Co-Tenant, and Close Friend, the Plaintiff reposed his trust and confidence in the integrity and fidelity of Defendant Kokolakis in connection with his management of the parties' jointly owned real properties, as the Plaintiff believed that Defendant Kokolakis would not do anything to betray his trust and would make sound financial decisions that were in the Plaintiff's best interest and had no reason to believe that Defendant Kokolakis would seek to defraud him.

105. Accordingly, as set forth below, Plaintiff's Causes Of Action are both proper and timely as same are tolled by the application of the Doctrines of Continuing Representation and Continuing Wrongs which anew Plaintiff's causes of action each day for each continuation of the wrong.

106. As set forth in greater detail below, in the event that the Court determines that any of the Plaintiff's Causes of Action are not tolled by the foregoing doctrines, it must be noted that the crux of Defendants' fraudulent misconduct and breaches of his fiduciary duties to the Plaintiff took place in or around 2019, after the Defendant Kokolakis reneged on the parties' agreement to use the jointly owned investment properties for its agreed upon and intended purpose, after which Defendant Kokolakis engaged in abhorrent and unlawful misconduct in breach of his fiduciary duties to the Plaintiff through, *inter alia,* refusing to comply with Plaintiff's request for accounting, transferring each and every bank account related to the parties' jointly owned Investment Properties to a different bank without the knowledge or consent of Plaintiff, and denying him any access to or control of any and all finances related to the parties.

A. PLAINTIFF'S CAUSES OF ACTION ARE TOLLED BY THE DOCTRINE OF CONTINUING REPRESENTATION AND DEFENDANT DID NOT OPENLY REPUDIATE HIS ROLE AS A FIDUCIARY

107. Preliminarily, as set forth above, Plaintiff's Verified Complaint properly alleges, and Defendant Kokolakis expressly admits, that the Defendant represented the Plaintiff and his Wife, in his capacity as an Attorney, in the purchase and of the very same properties which are the subject of this Action. Moreover, the Deeds to the Subject Properties, along with other legal documents sworn to "under the penalty of perjury" expressly list Defendant, Kokalakis, as the attorney for the Plaintiff and his Wife (Defendant's Exhibit L).

108. While Defendant self-servingly alleges that his representation of Plaintiff and Georgia Villeta ended on the closing of title for the 2909 Property in August 2012, Properties Plaintiff's causes of action are not time-barred as the continuous representation alleged herein relates to the matter upon which the causes of action for breach of fiduciary duty are predicated.

109. As set forth by the Court in Sendar Dev. Co., LLC v. CMA Design Studio P.C., 68 A.D.3d 500, 503, 890 N.Y.S.2d 534, 537 (2009): "If the action is commenced after the statute of limitations expires, a plaintiff may avoid dismissal by asserting that the statute of limitations is tolled by the continuous representation doctrine, or at least showing that there is an issue of fact as to its application (860 Fifth Ave. Corp. v. Superstructures—Engrs. & Architects, 15 A.D.3d 213, 790 N.Y.S.2d 12 [2005])."

110. As further set forth by the Court in Serino v. Lipper, 47 A.D.3d 70, 76, 846 N.Y.S.2d 138 [2007]: The buyer's malpractice claims against his former attorney were not time-barred, despite the statute of limitations having run in September 2010, CPLR 214(6), because in opposition to defendant's motion to dismiss, plaintiff submitted an affidavit saying

that he was continually represented by Stetch up to and including February 2012. The only matter for which plaintiff retained the attorney defendants was the purchase of his home. Thus, as required for the application of the doctrine, Stetch's continuous representation related "to the matter upon which the allegations of malpractice are predicated" (Serino v. Lipper, 47 A.D.3d 70, 76, 846 N.Y.S.2d 138 [2007] [internal quotation marks omitted], lv. dismissed 10 N.Y.3d 930, 862 N.Y.S.2d 333, 892 N.E.2d 399 [2008])."

111. Defendant expressly admits that he continued to manage the properties on behalf of the parties, and, significantly, the bank statements corresponding to each of the Subject Properties provided as (Defendants' "Exhibits G, H, and I"), clearly list the Defendant, John Kokalakis, as having Power Of Attorney ("POA"), as recently as 2020.

112. Thus, Defendant admits, and documentary evidence supports the existence of an Attorney-Client relationship, and whether and when that relationship may have terminated and when the claims for breach accrued, are all issues of fact requiring the denial of Defendants' request to dismiss the Complaint based on Defendants' false proposition that the Plaintiff's claims are barred by the statute of limitations.

113. While Defendant self-servingly asserts that his representation ended, he continued to represent himself as the Attorney for the Plaintiff, and continued to use Plaintiff's trust, managing the properties, thus, Plaintiff herein raises triable issues of fact as to whether the statute of limitations was tolled by the doctrine of continuous representation, requiring denial of Defendants' motion to dismiss at this stage of a litigation (see Shumsky v. Eisenstein, 96 N.Y.2d 164, 726 N.Y.S.2d 365, 750 N.E.2d 67; cf. Rachlin v. LaRossa, Mitchell & Ross, 8 A.D.3d 461, 462, 778 N.Y.S.2d 303).

114. Plaintiff's Verified Complaint clearly sets forth that "Because Defendant Kokolakis was the Attorney representing and advising the Plaintiff and his wife in connection with the management of the parties' jointly owned real properties, a fiduciary relationship existed between the Plaintiff and Defendant Kokolakis" and that "Defendant Kokolakis led the Plaintiff to believe that as his Brother-In-Law and his In-House Attorney, who was supposedly providing advice for the benefit of the Plaintiff, he could trust Defendant Kokolakis to make sound financial decisions that were in the Plaintiff's best interest and that he would not manipulate and seek to defraud him." Thus, the continuous representation doctrine is properly applicable herein.

115. As further set forth by the court in Regency Club at Wallkill, LLC v. Appel Design Grp., P.A., 112 A.D.3d 603, 606, 976 N.Y.S.2d 164, 167–68 (2013): "The continuous representation" doctrine, as applied to professionals including architects and engineers, "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed of the manner in which the services are rendered" (Greene v. Greene, 56 N.Y.2d 86, 94, 451 N.Y.S.2d 46, 436 N.E.2d 496; see Shumsky v. Eisenstein, 96 N.Y.2d 164, 167, 726 N.Y.S.2d 365, 750 N.E.2d 67; City of Binghamton v. Hawk Eng'g P.C., 85 A.D.3d 1417, 1419–1420, 925 N.Y.S.2d 705; Matter of Clark Patterson Engrs., Surveyor, and Architects, P.C. [City of Gloversville Bd. of Water Commr.], 25 A.D.3d at 987, 809 N.Y.S.2d 247). The doctrine applies when a plaintiff shows that he or she relied upon a continuous course of services related to the particular professional duty allegedly breached (see Shumsky v. Eisenstein, 96 N.Y.2d at 168, 726 N.Y.S.2d 365, 750 N.E.2d 67; Sendar,168 Dev.

Co., LLC v. CMA Design Studio P.C., 68 A.D.3d at 504, 890 N.Y.S.2d 534). See, Greene v. Greene, 56 N.Y.2d 86, 92, 436 N.E.2d 496, 499 (1982).

116. Moreover, the law is well-settled that "The statute of limitations on claims against a fiduciary for breach of its duty, is tolled until such time as the fiduciary openly repudiates the role." Access Point Med. LLC v. Mandell, 106 A.D.3d 40, 45 (1st Dept. 2013). This rule exists "to protect beneficiaries in the event of breaches of duty by fiduciaries such as ... corporate officers ... in circumstances in which the beneficiaries would otherwise have no reason to know that the fiduciary was no longer acting in that capacity." See, Knobel v. Shaw, 90 A.D.3d 493, 496 (1st Dept. 2011); See, e.g., Golden Pac. Bancorp v. FDIC, 273 F.3d 509, 518-19 (2d Cir. 2001); Westchester Religious Inst. v. Kamerman, 262 A.D.2d 131, 132 (1999); Steele v. Anderson, No. 03-CV-1251, 2004 WL 45527 (2004) (tolling limitations period on claims against corporate directors and officers for breach of fiduciary duty, corporate waste, and accounting until termination of fiduciary relationship).

117. Thus, as the existence of an ongoing fiduciary duty owed by Defendant is beyond reproach herein, and whether and when that duty may have terminated and when the claims for breach thereof accrued, are all issues of fact requiring the denial of Defendants' request to dismiss the Complaint based on Defendants' false proposition that the Plaintiff's claims are barred by the statute of limitations.

B. PLAINTIFF'S CAUSES OF ACTION ARE TIMELY AND TOLLED BY THE CONTINUING WRONG DOCTRINE

118. The continuing wrong doctrine "is employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" (Selkirk v. State of New York, 249 A.D.2d 818, 819, 671 N.Y.S.2d 824).

119. "In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party" (Henry v. Bank of Am., 147 A.D.3d 599, 601, 48 N.Y.S.3d 67; see Bulova Watch Co. v. Celotex Corp., 46 N.Y.2d 606, 611, 415 N.Y.S.2d 817, 389 N.E.2d 130).

120. Moreover, Plaintiff's Verified Complaint properly sets forth both recent and ongoing injury to Plaintiff, and continued breach of fiduciary duty by Defendant constituting continuing wrongs, including that Defendant Kokolakis continues to deny the Plaintiff any use of the 2909 Property and continues to cause ongoing damages to the Plaintiff by, *inter alia,* using the first floor of the premises as his law office, renting out the second floor of the property to his employee at below-market rates for his own self-interests, failing to maintain the property in good repair, ongoing failure to pay his share of the expenses related to the Subject Properties, ongoing failure to provide Plaintiff with his share of the rental income, and ongoing exclusion of the Plaintiff from the 2909 Property by virtue of the foregoing and by refusing to use the property for its agreed upon use and intended purpose.

121. Accordingly, as Defendant admits that his obligation to manage the properties for the benefit of both parties continues to date, the claims for breach of that obligation are not referable exclusively to the day the original wrong was committed.

122. Instead, Plaintiff's causes of action anew every day for each continuation of the wrong.

123. As set forth by the Court in Stalis v. Sugar Creek Stores, Inc., 295 A.D.2d 939, 940–41, 744 N.Y.S.2d 586, 587–88 (2002): "The general rule applicable to contract actions is that a six-year Statute of Limitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation" (Airco Alloys Div. v. Niagara Mohawk

Power Corp., 76 A.D.2d 68, 80, 430 N.Y.S.2d 179). "However, where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously" (Id.).

124. "Because defendant's obligation to assure "code compliance" with respect to the septic system was a continuing one (see, Orville v. Newski Inc., 155 A.D.2d 799, 801, 547 N.Y.S.2d 913, lv. dismissed 75 N.Y.2d 946, 555 N.Y.S.2d 693, 554 N.E.2d 1281), the claims for breach of that obligation are "not referable exclusively to the day the original wrong was committed" (1050 Tenants Corp. v. Lapidus, 289 A.D.2d 145, 146, 735 N.Y.S.2d 47; cf. State of New York v. CSRI Ltd. Partnership, 289 A.D.2d 394, 395, 734 N.Y.S.2d 626; Kearney v. Atlantic Cement Co., 33 A.D.2d 848, 849, 306 N.Y.S.2d 45).

125. Instead, "a cause of action accrue[d] anew every day" for each continuation of the wrong (1050 Tenants Corp., 289 A.D.2d at 146–147, 735 N.Y.S.2d 47), and thus the statute of limitations has not run on attempts to enforce defendant's obligation prospectively (see Orville, 155 A.D.2d at 801, 547 N.Y.S.2d 913; cf. 509 Sixth Ave. Corp. v. New York City Tr. Auth., 15 N.Y.2d 48, 52, 255 N.Y.S.2d 89, 203 N.E.2d 486; Meruk v. City of New York, 223 N.Y. 271, 275–276, 119 N.E. 571; Galway v. Metropolitan El. Ry. Co., 128 N.Y. 132, 143, 28 N.E. 479).

C. PLAINTIFF'S CAUSES OF ACTION ARE TIMELY AND THE STATUTE OF LIMIATIONS PERIOD APPLICABLE TO PLAINTIFF'S CAUSES OF ACTION IS SIX YEARS FROM THE TIME OF ACCRUEL

126. As set forth above, Defendant owes a continuing fiduciary duty to Plaintiff, and Plaintiff's causes of action "anew" every day for each continuing wrong or breach thereof.

127. However, it must be noted that Plaintiff's causes of action relating to Defendant's breach of fiduciary duty and managerial obligations resulting from the failure to convert two (2) of the parties' joint properties into an eight-property unit even though the Plaintiff could have increased either the revenue from rentals of the Properties or allowed for a much greater return on the investment by selling the subject properties, did not accrue until 2019 when the Plaintiff presented the opportunity to Defendant Kokolakis to complete the project at no cost by simply providing Real Estate Developer, Michael Difonza with a share of the profits.

128. Instead, Defendant Kokolakis engaged in delay tactics, refusing to provide the necessary financial disclosure to move forward with the project, and has caused losses of no less than Five Million Dollars ($5,000,000.00) by virtue of not moving forward with the project.

129. Moreover, as Defendant admits that the Plaintiff's name was unilaterally and intentionally removed from all the bank accounts corresponding to each of the Subject Properties on or about 2019, and the statements have since been mailed to the 2909 Property exclusively occupied by the Defendant, raising yet another issue of fact as to when Plaintiff's causes of action may be properly deemed to have accrued.

130. It should further be noted that the law is clear that "the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought. (Kaufman v. Cohen, 307 A.D.2d 113, 118, 760 N.Y.S.2d 157 [2003]; Yatter v. William Morris Agency, 256 A.D.2d 260, 261, 682 N.Y.S.2d 198 [1998]). Where the relief sought is equitable in nature, the six-year limitations period of CPLR § 213(1) applies. (Loengard v. Santa Fe Indus., 70 N.Y.2d 262, 267, 514 N.E.2d 113, 519 N.Y.S.2d 801 [1987]). On the other hand, "where suits alleging a breach of fiduciary duty seek only money damages, courts have viewed such

actions as alleging 'injury to property,' to which a three-year statute of limitations applies." (Kaufman, 307 A.D.2d at 118; CPLR § 214[4]).

131. "Moreover, a party seeking the equitable remedy of an accounting is governed by the six-year statute of limitations as set forth in CPLR §213. See, Evangelista v. Mattone, 844 NYS 2d 14 (2007)". Id.

132. The Verified Complaint clearly seeks both monetary and equitable relief, including causes of action of unjust enrichment and the equitable remedy of accounting, accordingly Plaintiff's causes of action are subject to a six-year limitations period from the time of accrual, which is clearly in dispute herein.

133. Additionally, "[t]he case law in New York clearly holds that a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period." (Kaufman, 307 A.D.2d 113 at 119, 760 N.Y.S.2d 157 [If a breach of fiduciary duty claim is based upon fraud, like an employee stealing from their employer, then the Court will apply a six-year statute of limitations. See, Kaufman v. Cohen, 760 NYS2d. 157 (2003). The discovery rule may also toll the statute of limitations if it is a fraud-based breach of fiduciary duty claim. Id.

134. "Courts look for the reality, and the essence of the action and not its mere name'". (Id., See AQ Asset Mgt., LLC v. Levine, 119 A.D.3d 457, 462, 990 N.Y.S.2d 465 [1st Dep't 2014] [reinstating breach of fiduciary duty claim; contention that defendant misrepresented full benefits accruing to defendant under agreement, including personal interest in inventory sale proceeds, sufficiently alleged fraudulent conduct on defendant's part so as to warrant a six-year statute of limitations]." See, NRT N.Y., LLC v. Morin, 2015 NY Slip Op 31932(U), ¶¶ 5-6 (Sup. Ct.).

135. As detailed above, Plaintiff's Verified Complaint clearly sets forth allegations of fraudulent conduct and expressly alleges that the "Defendant Kokolakis (an Attorney) engaged in a scheme to defraud the Plaintiff" (Exhibit 4).

136. Moreover, as set forth in Plaintiff's Proposed Amended Verified Complaint (Exhibit 1), on January 21, 2019, as the Plaintiff and his Wife agreed and discussed, Plaintiff commenced an action for divorce, and Plaintiff's Wife was served that same morning at her home, as per her request that she not be served at work.

137. Later that same day, in a concerted effort to obtain admissions from the Plaintiff to use as ammunition against the Plaintiff in what was apparently a pre-planned legal strategy to commence an Action for Constructive Trust, Plaintiff's Wife, and Defendant's Wife acting in concert with Defendant Kokolakis, telephoned the Plaintiff and recorded the conversation which ensued (Exhibit 1).

138. As is clear upon review of the entirety of the Transcript of the Telephone Conversation, the Plaintiff made it clear that he is not trying to be difficult, but that with all of the issues surrounding the mismanagement of the properties, and his lack of access to any of the finances or records pertaining to the parties' jointly owned Investment Properties, the Plaintiff needed assurances that the parties intended to move forward with their agreement to use the properties for the agreed upon purpose of selling the properties to generate profits, rather than continuing to use the properties for the sole benefit of Defendant Kokolakis to the exclusion and detriment of Plaintiff.[10]

139. Defendant Kokolakis' Wife assured the Plaintiff that if his only issue with signing over the 50% ownership interest to Defendant Kokolakis, is his fear that the parties' will

[10] Attached hereto as "Exhibit 12," is a copy of the Transcript of the Recorded Conversation of January 21, 2019.

renege on their agreement to move forward with a sale of the properties, then he need not worry, as they fully intended to move forward with their agreement to sell (Exhibit 11).

140. The conversation ended with Defendant Kokolakis' Wife stating she will speak with Defendant Kokolakis about putting together a separate contract agreeing to sell the properties at a certain range of price to give the Plaintiff the assurances that he needs to ensure that the Defendants do not renege on their promise to sell the properties, and that this way if Defendant Kokolakis tried to impede the sale of the properties in any way, Plaintiff would have recourse against him in a court of law (Exhibit 11).

141. The Plaintiff agreed that this would be the precise reassurance and he would need and that he would gladly sign the papers conveying Defendant Kokolakis' 50% interest in the parties jointly owned Investment Properties upon receiving the aforementioned reassurances (Exhibit 11).

142. Instead of providing the agreed upon documents, just a few short days thereafter, on January 25, 2019, Defendant, John Kokolakis, commenced an action in Queens County Supreme Court (hereinafter referred to as the "Constructive Trust Action") against the Plaintiff, Alfredo Villeta, and Plaintiff's Wife (Defendant's Kokolakis' Sister), Georgia Villeta, and on February 8, 2019, and filed an Amended Summons and Complaint setting forth Twenty Five ("25") causes of action seeking, *inter alia*, the imposition of a Constructive Trust for the 3819 Property, the 3821 Property, and the 2909 Property (hereinafter referred to collectively as the "Subject Properties"), and for causes of action solely against the Plaintiff herein for fraud, prima facia tort, intentional infliction of emotional distress, negligent infliction of emotional distress, and attorney's fees, as part of a coordinated legal strategy meant to financially harm the Plaintiff.

143. Moreover, as Plaintiff's Verified Complaint seeks equitable relief in addition to money damages so as to warrant application of a six-year limitations from the time of accrual, which is in dispute herein.

D. THE SO-ORDERED STIPULATION OF SETTLEMENT AND DISCONTINUANCE EXECUTED BY THE PARTIES IN THE TRUST ACTION OPERATES AS AN INDEPENDENT CONTRACT, AND ALL CAUSES OF ACTION STEMMING THEREFROM ARE INDISPUTABLY PROPER AND TIMELY

144. Moreover, as adequately implied in Plaintiff's Verified Complaint and detailed in the accompanying Proposed Amended Complaint, the So-Ordered Stipulation of Settlement and Discontinuance executed by the parties in the Trust Action operates as an independent contract, and all causes of action stemming therefrom are indisputably proper and timely.

145. Pursuant to the So-Ordered Stipulation, Defendant Kokolakis is required to add his name to the outstanding mortgages, lines of credit on the subject properties; Defendant is liable for 50% of the outstanding mortgage, HELOC loans and lines of credit encumbering the 3 subject properties; Defendant is liable for 50% of the property taxes and carrying charges, of said properties. The Plaintiff shall indemnify and hold harmless the Defendant Alfredo Villeta for any mortgage payments, real estate taxes, carrying charges, and additional expenses on the property retroactively to the date of purchase of the properties, if any (Defendants' Exhibit B).

146. As set forth in Plaintiff's Verified Complaint, Defendant Kokolakis has failed to comply with any of his aforementioned obligations, and his failure constitutes a new and continuous breach, and thus a timely cause of action for breach of fiduciary duty, breach of contract, and accounting is interposed by Plaintiff herein.

147. The elements necessary for an accounting are a fiduciary relationship between plaintiff and defendant and alleged wrongdoing by defendant. Brigham v McCabe, 27

AD2d 100, 105, 276 N.Y.S.2d 328 (1966), affirmed, 20 NY2d 525, 232 N.E.2d 327, 285 N.Y.S.2d 294 (1967). This is precisely what plaintiff alleges here.

148. Accordingly, Defendant Kokolakis should be directed to provide a detailed, sworn, written account of all profits, including rental income, and all expenses paid in connection with the maintenance and management of the Properties, from August 28, 2003, to the present, and the causes of action are timely.

149. As set forth by the Court in Pawling Lake Prop. Owners Ass'n, Inc. v. Greiner, 72 A.D.3d 665, 668, 897 N.Y.S.2d 729, 732 (2010): "Though the issue of improper assessment of membership dues was raised in the 2000 action, any losses occasioned by assessments made after the discontinuance of that action constitute separate injuries for which recovery could not have been obtained in the 2000 action (see Matter of People v Applied Card Sys., Inc., 11 NY3d 105, 122-123, 894 NE2d 1, 863 NYS2d 615 [2008]; O'Brien v City of Syracuse, 54 NY2d 353, 357, 429 NE2d 1158, 445 NYS2d 687 [1981]; Breslin Realty Dev. Corp. v Shaw, 72 AD3d 258, 265, 893 NYS2d 95 [2010]; Matter of State of New York v Seaport Manor A.C.F., 19 AD3d 609, 610, 797 NYS2d 538 [2005]; People v Court Reporting Inst., 245 AD2d 564, 565, 666 NYS2d 730 [1997]). The promise made by the plaintiffs in the 2000 action to "no longer pursue any of the causes of action ... that are spelled out in the amend[ed] complaint" does not operate to prevent the plaintiff here from asserting causes of action that accrued after the stipulation came into effect (see Dolitsky's Dry Cleaners v YL Jericho Dry Cleaners, 203 AD2d 322, 323, 610 NYS2d 302 [1994]). "Moreover, the doctrine of collateral estoppel is not applicable since the issues resolved by the stipulation of settlement were never actually litigated" (1829 Caton Realty v Caton BMT Assoc., 225 AD2d 599, 599, 639 NYS2d 110 [1996])."

E. THE ACTION IS NOT BARRED BY THE DOCTRINE OF LACHES

150. Laches is "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." Matter of Barabash, 31 N.Y.2d 76, 81, 286 N.E.2d 268, 334 N.Y.S.2d 890 (1972). The essential element of this defense is delay causing prejudice to the opposing party. Id. See also, Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (2003). Prejudice is established by demonstrating an injury, change in position, loss of evidence or some disadvantage resulting from the delay. In re Linker, 23 A.D.3d 186, 803 N.Y.S.2d 534 (2005); Resk v. City of New York, 293 A.D.2d 661, 741 N.Y.S.2d 265 (2002); and Skrodelis v. Norbergs, 272 A.D.2d 316, 707 N.Y.S.2d 197 (2000).

151. As set forth by the Court in Sirico v. F.G.G. Prods., Inc., 71 A.D.3d 429, 434, 896 N.Y.S.2d 61, 66 (2010): As a threshold matter, we find that plaintiffs' claims are not automatically barred by laches. While defendant contended it was prejudiced by plaintiffs' delay, it has not yet shown that the delay hampered its ability to defend against their claims, (see Commissioners of the State Ins. Fund v. Ramos, *63 A.D.3d 453, 880 N.Y.S.2d 281 [2009];* see also Continental Cas. Co. v. Employers Ins. Co. of Wausau, *60 A.D.3d 128, 137–138, 871 N.Y.S.2d 48 [2008]).*

152. Defendant frivolously contends that "The documentary evidence in this action shows that Plaintiff has always had knowledge and control of the matters relating to the subject premises, and would have had plenty of opportunity to raise any grievances in connection with Defendant occupying the 2909 property or Defendant actions as manager of the properties, as set forth in greater detail above, the purported documentary evidence presented by Defendant

shows nothing of the sort, and as is clear upon review of the bank statements provided as "Defendant's Exhibits G, H, I, and J," and as expressly admitted by Defendant herein, the Plaintiff's name was intentionally removed from all of the foregoing accounts in 2019, and the statements have since been mailed to the 2909 Property, which as alleged herein is occupied exclusively by the Defendants.

153. As further set forth above, the majority of the injuries alleged in Plaintiff's Verified Complaint are recent and ongoing, and thus, cannot be barred by the doctrine of laches.

154. Moreover, any purported delay that may have occurred in Plaintiff's bringing of the instant Action could not be unreasonable as same was premised on the Plaintiff's reasonable reliance on Defendant's advice and representations as Plaintiff's Attorney and fiduciary, which Defendant never repudiated.

155. Plaintiff's Verified Complaint properly sets forth that "The Plaintiff reposed his trust and confidence in the integrity and fidelity of Defendant Kokolakis in connection with his management of the parties' jointly owned real properties, as the Plaintiff believed that Defendant Kokolakis would not do anything to betray his trust as his Brother-In-Law and as an attorney licensed to practice law in New York State, whom Plaintiff knew was bound by professional rules requiring him to act in an ethical and lawful manner" (Exhibit 4)

156. "The Plaintiff relied on his personal and professional relationship with Defendant Kokolakis, who was a co-partner in an enterprise that Plaintiff believed was being operated for the parties' mutual benefit, to his detriment" (Exhibit 4).

157. As set forth by the Court in Ganzi v. Ganzi, 183 A.D.3d 433, 435, 123 N.Y.S.3d 574, 577 (2020): The trial evidence does not support defendants' affirmative defense of laches based on an unreasonable delay in bringing the breach of fiduciary duty claims. In any

event, as the court observed, the defense of laches is not available to a fiduciary unless the fiduciary openly repudiates the relationship (see Matter of Barabash, 31 N.Y.2d 76, 82, 334 N.Y.S.2d 890, 286 N.E.2d 268 [1972]; and the trial evidence does not establish that defendants' self-dealing use of the intellectual property was done in a manner that openly repudiated their fiduciary duties (see, Knobel v. Shaw, 90 A.D.3d 493, 496, 936 N.Y.S.2d 2 [2011]).

158. Moreover, as set forth above and in Plaintiff's Proposed Verified Complaint (Exhibit 1), and as is evidence by the Transcript of the parties' recorded telephone conversation of January 21, 2019 (Defendants' Exhibit M), Defendants intentionally and deliberately concealed their intent to not develop or sell the Investment Properties but rather keep same as rental premises so as to retain the Investment Properties and to divert funds therefrom for their own personal benefit at the expense and to the detriment of Plaintiff.

159. Plaintiff relied upon the Defendants' omissions and concealment to his detriment by lulling Plaintiff into inaction when he would have acted to stop the unlawful misconduct detailed herein had Plaintiff been properly informed of facts to which he was entitled.

160. Defendants prevented Plaintiff from obtaining discovery on the precise issues of Defendants' knowledge and intent with respect to the foregoing omissions and concealments, including but not limited to, the failure to carry out the agreed upon and intended purposes of the Investment Properties to maximize their profits.

161. In light of the foregoing, Plaintiff should be entitled to the benefit of the Doctrine of Equitable Estoppel or the Fraud Discovery Accrual Rule.

162. Moreover, no prejudice has been alleged by Defendant for any purported delay aside from Plaintiff's concern that he will have to pay costs and expenses in order to

defend his fraudulent misconduct, including the possibility of having to spend funds to procure a new office space for his Law Firm, instead of continuing to fraudulently occupy the parties' jointly owned property to the exclusion of Plaintiff.

163. However, Defendant's self-interest does not constitute prejudice warranting the preclusion of the Plaintiff's proper and timely Causes of Action, as same could not be alleged to have hampered Defendant's ability to defend against the Plaintiff's claims.

164. Moreover, it must be noted that Defendant Kokolakis is an Attorney licensed to practice law in the State of New York, and has been using his employees and resources of his law firm "The Kokolakis Law Firm PLLC" to represent himself in the defense of this Action at no cost to Defendant, while continuing to cause damages to Plaintiff by refusing to pay a single dollar in rent for his Law Firm's exclusive occupancy of the parties' jointly owned property.

165. As further set forth by the Court in Knobel v. Shaw, 90 A.D.3d 493, 496, 936 N.Y.S.2d 2, 7 (2011) laches does not bar the timely portions of plaintiff's claims. Indeed, defendants have not shown that plaintiff's delay in bringing the claims "hampered [their] ability to defend against [them]" (*Sirico,* 71 A.D.3d at 434, 896 N.Y.S.2d 61). Moreover, as noted earlier, Mr. Shaw had a fiduciary relationship with plaintiff and there is no indication that he openly repudiated that relationship; thus, he is not entitled to rely upon the defense of laches (Barabash, 31 N.Y.2d at 82, 334 N.Y.S.2d 890, 286 N.E.2d 268).

166. Thus, as the evidence establishes that Defendant did not sustain any injury, change in position or disadvantage as a result of any purported failure to promptly press the Plaintiff's claims, and did not establish that any evidence relevant to this claim was lost or

destroyed as a result of any purported delay, and thus laches does not bar any of the Plaintiff's claims.

167. Moreover, as noted earlier, Defendant had a fiduciary relationship with Plaintiff and there is no indication that he openly repudiated that relationship, he is thus, not entitled to rely upon the defense of laches.

PLAINTIFF PROPERLY ALLEGES NECESSARY ELEMENTS OF AN AGREEMENT AND CLAIM OF BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING.

168. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 N.Y. Jur. 2d, Contracts § 9)" See, Kowalchuk v. Stroup, 61 A.D.3d 118, 121, 873 N.Y.S.2d 43 (2009).

169. Defendant outlandishly purports that "Plaintiff fails in the underlying action to establish the existence of an agreement between Plaintiff and Defendant Kokolakis", yet within the very same paragraph and breath, Defendant sets forth that "As co-owners of the properties, Defendant Kokolakis, Plaintiff and Georgia Villeta have always been in agreement that they would share the income and expenses of the properties equally.

170. Thus, it is clear from Defendant's own admissions that Defendant disputes the terms of the parties' agreement and not existence thereof nor the Plaintiff's failure to properly allege the existence thereof.

171. Plaintiff's Verified Complaint clearly sets forth that by failing to make any payments in furtherance of the parties' partnership as agreed upon, failing to provide the Plaintiff with his equitable share of the proceeds resulting from the rental of the Properties, failing to cooperate with Plaintiff regarding the parties agreed-upon plan to develop the Properties for

investment purposes, and failing to apply for the proper permits or obtain a Certificate of Occupancy, Defendant Kokolakis' actions have had the effect of destroying and injuring the right of the Plaintiff to receive the fruits of the parties' oral partnership agreement.

172. While Defendant self-servingly professes that "There would be no incentive or consideration for Defendant Kokolakis to agree to pay additional funds when he is already a co-owner of the properties," and that "all expenses of the properties are shared equally between the co-owners," preliminarily, whether the Plaintiff is justified in a certain belief is a factual dispute, and Defendant's questioning of the consideration therefor does not render Plaintiff's belief unjustifiable.

173. The law is clear that "Under the traditional principles of contract law, the parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value" (Apfel v. Prudential–Bache Sec., 81 N.Y.2d 470, 475, 600 N.Y.S.2d 433, 616 N.E.2d 1095; see Spaulding v. Benenati, 57 N.Y.2d 418, 456 N.Y.S.2d 733, 442 N.E.2d 1244). Consideration to support an agreement exists where there is "either a benefit to the promisor or a detriment to the promisee" (Weiner v. McGraw–Hill, Inc., 57 N.Y.2d 458, 464, 457 N.Y.S.2d 193, 443 N.E.2d 441; see Matter of Urdang, 304 A.D.2d 586, 758 N.Y.S.2d 125). "It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him" (Hamer v. Sidway, 124 N.Y. 538, 545, 27 N.E. 256). See, Hollander v. Lipman, 65 A.D.3d 1086, 1087, 885 N.Y.S.2d 354, 355–56 (2009).

174. Moreover, contrary to Defendant's blanket assertions, Plaintiff's Complaint sets forth multiple reasons for why Defendant would have incentive to enter into an agreement to make the foregoing payments, including but not limited to, Defendant's insistence

that his name not be listed on the deeds or mortgages, and Plaintiff's payment of taxes and increased tax liability resulting therefrom, and Defendant's occupying jointly owned investment property for personal use, and excluding the Plaintiff from his rights to the properties.

175. As set forth by the Court in Jemzura v. Jemzura, 36 N.Y.2d 496, 503–04, 330 N.E.2d 414, 419–20 (1975): "Here, plaintiff, at all times herein, exclusively retained possession of the premises, and that there was an implied agreement among the parties that plaintiff was to pay the taxes, maintain the premises and waive interest on the net mortgage debt, in return for his possession, use and occupancy of the premises."

176. "A contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words (Miller v. Schloss, 218 N.Y. 400, 406, 113 N.E. 337, 338—339; Wells v. Mann, 45 N.Y. 327, 331), and is derived from the 'presumed' intention of the parties as indicated by their conduct (Martin v. Campanaro, 2 Cir., 156 F.2d 127, 129, cert. den. 329 U.S. 759, 67 S.Ct. 112, 91 L.Ed. 654). It is just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct (Matter of Ahern v. South Buffalo Ry. Co., 303 N.Y. 545, 560, 561, 104 N.E.2d 898, 906—907, affd. Sub nom. South Buffalo Ry. Co. v. Ahern, 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395)." Id.

177. "A waiver on the part of the promisee of a legal right is sufficient consideration (Ryerson & Son v. O'Donnell, 279 N.Y. 109, 115, 17 N.E.2d 788, 790—791; Hamer v. Sidway, 124 N.Y. 538, 545, 27 N.E. 256, 257), and the agreement heretofore found (see City of New York v. Third Ave. Ry. Co., 294 N.Y. 238, 243, 62 N.E.2d 52, 54) involved waivers of this variety, as well as affirmative acts. Plaintiff had the right of occupancy of the entire premises subject to the same right vested in the cotenants. The waiver of said right

constituted consideration on the part of the cotenants. Likewise, the waiver by plaintiff of his claim for contribution for the payment of taxes and for interest payments constituted his consideration for the agreement."

F. PLAINTIFF HAS PROPERLY PLEAD THAT DEFENDANT HAS BEEN ENRICHED AT PLAINTIFF'S EXPENSE TO MAINTAIN A CAUSE OF ACTION FOR UNJUST ENRICHMENT

178. To state a cause of action for unjust enrichment, the plaintiff must allege that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (see Alan B. Greenfield M.D., P.C. v Long Beach Imaging Holdings, LLC, 114 AD3d 888, 889, 981 N.Y.S.2d 135). Here, the sixth and seventh causes of action, which allege unjust enrichment, were sufficiently pleaded since they allege that Wiesel was enriched at the expense of the plaintiff and A & Z, and that it was against equity and good conscience to permit Wiesel to retain what was sought to be recovered (see Canzona v Atanasio, 118 AD3d at 843).

179. Similarly, herein, Plaintiff's Verified Complaint clearly sets forth that Defendant was enriched as the Plaintiff's expense and that it would be against equity and good conscience to permit Defendant to retain what is sought to be recovered.

180. Defendant further self-servingly proclaims that "Except for limited exceptions that are not claimed by Plaintiff and do not apply to our case, rental payments should not be charged to a tenant in common who simply occupies the premises himself."

181. Notwithstanding Defendant's conclusory assertions, the foregoing exceptions which Defendant self-servingly disclaims, are not only directly applicable to Plaintiff's Causes of Action herein but are specifically designed to provide a party in Plaintiff's position with redress for the precise misconduct alleged to be committed by the Defendant, as to

deprive the Plaintiff of the opportunity to be heard with respect to these matters would be contrary to the fundamental imperatives of due process, real property law, and equity.

182. As set forth by the Court in H & Y Realty Co. v. Baron, 160 A.D.2d 412, 414, 554 N.Y.S.2d 111, 113 (1990): "It is well established that a tenant-in-common is liable for rent to his co-tenant if he occupies the property to the exclusion of that co-tenant or commits acts amounting to a denial of the rights of cotenants (Zapp v. Miller, 109 N.Y. 51, 15 N.E. 889; see also Jemzura v. Jemzura, 36 N.Y.2d 496, 369 N.Y.S.2d 400, 330 N.E.2d 414)."

183. Similarly, "a tenant-in-common who occupies the premises to the exclusion of his co-tenant is responsible for all charges on the property, including real estate taxes (Van Duzer v. Anderson, 282 A.D. 779, 123 N.Y.S.2d 46, affd. 306 N.Y. 707, 117 N.E.2d 805; see also Worthing v. Cossar, 93 A.D.2d 515, 462 N.Y.S.2d 920; Topilow v. Peltz, 25 A.D.2d 874, 270 N.Y.S.2d 116).

184. As further set forth by the Court in H & Y Realty Co. v. Baron, 160 A.D.2d 412, 414, 554 N.Y.S.2d 111, 113 (1990): In the present situation, defendant was accused by plaintiffs of failing to pay her share of taxes on the property and was prohibited from raising her claim for the rental value of the upper stories notwithstanding that plaintiff have occupied these premises rent-free since November of 1981. Defendant proposes to demonstrate that even if plaintiffs paid the property taxes, they excluded her from the premises, creating a complete defense at law to their demand for reimbursement, and she also seeks her share of the market rental value for the upper three floors of the commercial building. The foregoing are valid issues for the reference. To deprive defendant of the opportunity to be heard with respect to these matters would be contrary to the fundamental imperatives of due process (see Goldberg v. Kelly,

397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; Sierra Club v. SCM Corp., 572 F.Supp. 828, aff'd 2nd Cir., 747 F.2d 99)." Id.

185. Similarly, Plaintiff's Verified Complaint properly sets forth that Defendant Kokolakis has effectively denied the Plaintiff any use of the 2909 Property by, *inter alia,* using the first floor of the premises as his law office, renting out the second floor of the property to his employee at below-market rates for his own self-interests, failing to maintain the property in good repair, ongoing failure to pay his share of the expenses related to the Subject Properties, ongoing failure to provide Plaintiff with his share of the rental income, and ongoing exclusion of the Plaintiff from the 2909 Property by virtue of the foregoing and by refusing to use the property for its agreed upon use and intended purpose.

186. Moreover, it should be noted that Defendant expressly admits that Defendant Kokolakis is a private attorney with a firm (Defendant KLF) representing a multitude of clients, and is not and has never acted as in-house counsel for Plaintiff, accordingly, while it may be true that Defendant has certain rights to occupy the premises as a co-tenant in common Plaintiff, Defendant has no entitlement to operate his own personal business for his sole personal interest to the detriment and exclusion of Plaintiff from the jointly owned property.

187. Most significantly, it is imperative that it be noted that while Defendant has repeatedly and continuously admitted that he has not paid a single dollar in rent for occupying the entire first floor of the 2909 Subject Premises, and frivolously purports that he has no obligation to do so because he is co-owner of the premises and has the right to use the 2909 premises, and that his permitted use of the premises would not be self-dealing or enrich him at Plaintiffs expense, as set forth above, evidence recently obtained pursuant to a third-party subpoena has revealed Defendant has been fraudulently concealing documentary evidence which

indisputably disposes of Defendant's frivolous defenses, destroys his credibility with this Court, and necessitates the grant of Plaintiff's request for leave to amend the Complaint to include additional causes of action in connection with Defendant's fraudulent misconduct.

188. As detailed in Plaintiff's Proposed Amended Complaint (Exhibit 1) documents received from Maspeth Federal Savings Bank, reveal a Lease Agreement executed by the parties in February 2012, expressly obligating the Defendant Kokolakis to pay rent for his occupancy of the 2909 Property at a rate of $3,250.00, per month on the first year of occupancy, and an additional 3% increase in rental obligations for every year thereafter. [11]

189. It should be noted that as the foregoing lease if for a Ten ("10") year term, the causes of action stemming therefrom are undoubtedly proper and timely.

190. Accordingly, there can be no dispute that the Plaintiff's Complaint properly sets forth actionable causes of action against the Defendant, and Defendant's frivolous allegations do not dispose of any of the Plaintiff's claims. Accordingly, Defendant's frivolous motion should be summarily denied.

191. Moreover, as set forth in greater detail in below, Plaintiff's request for leave to amend the Complaint to include additional Defendants and causes of action stemming from the collusions to of the foregoing Defendants with Defendant Kouklakis to defraud the plaintiff should be freely given and summarily granted herein.

PLAINTIFF'S REQUEST FOR LEAVE TO AMEND THE COMPLAINT MUST BE GRANTED IN LIGHT OF NEWLY DISCOVERED EVIDENCE AND TO PROMOTE FINALITY

192. CPLR 3025 (b) provides that a party may amend his pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.

[11] Attached hereto as "Exhibit 13," is a copy of the subject Lease Agreement dated January 1, 2012.

193. It is well settled that leave to amend a pleading rest within the court's discretion and should be freely granted provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (see CPLR 3025 [b]; Tabak v Shaw Indus., Inc., 149 AD3d 1132, 1133 [2nd Dept 2017], citing Morris v Queens Long Is. Med. Group, P.C., 49 AD3d 827, 828 [2nd Dept 2008]).

194. "The burden of establishing prejudice or surprise precluding the amendment of the pleading is on the party opposing the amendment (Krakovski, 173 AD3d 1146)." Id.

195. To establish prejudice that will bar amendment, party must show that it has been hindered from preparation of its case or has been prevented from taking some measure in support of its position. State v Super Value, Inc., 257 A.D.2d 708, 682 N.Y.S.2d 492, 1999 N.Y. App. Div. LEXIS 97 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 815, 697 N.Y.S.2d 562, 719 N.E.2d 923, 1999 N.Y. LEXIS 2141 (N.Y. 1999).

196. It is respectfully submitted that Defendant cannot allege prejudice or surprise from the grant of the Plaintiff's request for Leave to Amend the Complaint to add the Plaintiff's Wife as a Defendant himself insists that Plaintiff's Wife, Georgia Villeta, is a necessary party herein.

197. Nor can Defendant allege to be prejudiced or surprised by the grant of the Plaintiff's request for leave to amend the Complaint to add Defendant's Wife, Gerasimoula Konidaris, as Defendant in this Action, who along with Plaintiff, Plaintiff's Wife, and Defendant Kokolakis, are all joint owners of the Investment Properties which are the subject of this Action, and who have all been previously named as parties in prior actions related to the Subject Properties.

198. Nor can Defendant allege to be prejudiced or surprised by the grant of the Plaintiff's request for leave to amend the Complaint to include allegations related to his collusion with his Wife, Gerasimoula Konidaris, and his Sister, Plaintiff's Wife, Georgia Villeta, in light of all of the foregoing parties' having been named as parties to every prior action commenced related to the Subject Properties, and in light of his use of their sworn Affidavits in support of his application as means of corroborating his frivolous allegations against the Plaintiff herein.

199. Further, leave to amend may be made "at any time by leave of court" (CPLR R. 3025 [b]), and has been permitted on the eve of trial, during, or even after trial. (Murray v City of New York, 43 NY2d 400, [1977] ["Where no prejudice is shown, the amendment may be allowed during or even after trial.'"], quoting Dittmar Explosives, 20 NY2d at 502). Application to amend pleadings are within the sound discretion of the court, which is given "considerable latitude in exercising their discretion" (Matter of Von Bulow, 63 NY2d 221, 224 [1984]; see Murray, 43 NY2d at 405 [noting courts considering motions to conform pleadings pursuant to CPLR R. 3025 are afforded "the widest possible latitude" in permitting or denying such amendment]).

200. In reviewing Defendants' argument alleging prejudice from Plaintiff's purported delay to bring the instant Action further serves as proof that no prejudice can be alleged by Defendant that would warrant a denial of Plaintiff's request for leave to amend the Complaint, as the only prejudice alleged by Defendant therein stems from Defendant's concern that he will have to pay costs and expenses in order to defend his fraudulent misconduct, including the possibility of having to spend funds to procure a new office space for his Law Firm, instead of continuing to fraudulently occupy the parties' jointly owned property to the detriment and exclusion of the Plaintiff.

201. However, Defendant's self-interest does not constitute prejudice warranting denial of Plaintiff's request for leave to amend the Complaint, as the possibility of having to spend funds to procure a new office space for his Law Firm, instead of continuing to fraudulently occupy the parties' jointly owned property to the detriment and exclusion of the Plaintiff, could not be alleged to have hampered Defendant's ability to defend against the Plaintiff's claims.

202. Nor could Defendant's concern that he will have to pay costs and expenses in order to defend his fraudulent misconduct, particularly in light of the fact that both the Matrimonial and Partition Actions are presently stayed, and the only expenses that Defendant is incurring therein is from the making of his frivolous motion to renew and reargue the Court's use of its discretion issue a Stay of the Partition Action, *sua sponte,* pending the severance of the tenancy by the entirety between the Plaintiff and his Wife through the issuance of a judgement of divorce, in lieu of granting Defendant's request for dismissal of the Action.

203. Moreover, it must be noted that Defendant Kokolakis is an Attorney licensed to practice law in the State of New York, and has been using his employees and resources of his law firm "The Kokolakis Law Firm PLLC" to represent himself in the defense of this Action at no cost to Defendant, while continuing to cause damages to Plaintiff by refusing to pay a single dollar in rent for his Law Firm's exclusive occupancy of the parties' jointly owned property.

204. The law is clear that "Defendant opposing amendment of complaint must show actual prejudice, which requires some indication that defendant has been hindered in preparation of case or prevented from taking some measure in support of position and is not

found in mere exposure of defendant to greater liability." See, Brewster v Baltimore & O. R. Co., 185 A.D.2d 653, 585 N.Y.S.2d 647 (1992).

205. Thus, it is respectfully submitted that, as a practical matter, the grant of Plaintiff's request for leave to amend the complaint serves the salutary purpose of providing the means for resolving the immediate concerns regarding the ongoing conflict of interest and fraudulent misconduct of all Three ("3") of the Plaintiff's co-owners of the parties' Investment Properties, and the only prejudice that can be alleged by either party herein, is the prejudice that would be caused to the Plaintiff in the event this court Plaintiff's request for leave to amend the Complaint, as there would appear to be no remedy available to Plaintiff to redress the ongoing wrongs of Defendants since partition is not available under the applicable law without the consent of the Plaintiff's Wife, who is Defendant Kokolakis' Sister and Co-Conspirator, until the termination of the tenancy by the entirety through the issuance of a judgement of divorce in a Matrimonial Action that has been indefinitely stayed.

206. Moreover, the law is clear that a court shall not examine the legal sufficiency or merits of a pleading unless the insufficiency or lack of merit is clear and free from doubt (Krakovski v Stavros Assocs., LLC, 173 AD3d 1146 [2nd Dept 2019], citing United Fairness, Inc. v Town of Woodbury, 113 AD3d 754, 755 [2nd Dept 2014]). "No evidentiary showing of merit is required under CPLR 3025(b)" (Krakovski v Stavros Assocs., LLC, 173 AD3d 1146 [2nd Dept 2019], citing Favia v Harley—Davidson Motor Co., Inc., 119 AD3d 836, 836 [2nd Dept 2014]). Rather, the appropriate standard to be applied on a motion for leave to amend a pleading is that, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (Gallagher v 109-02 Development, LLC, 137

AD3d 1073 [2nd Dept 2016] citing Maspeth Fed. Sav. & Loan Assn. v Simon—Erdan, 67 AD3d 750, 751 [2nd Dept 2009]).

207. Notwithstanding the foregoing, it should be noted that there is ample evidence existing even in this pre-answer stage of merit to the Plaintiff's Causes of Action which he seeks to interpose in the Proposed Amended Complaint.

208. Most significantly, as set forth above, it is imperative that it be noted that while Defendant has repeatedly and continuously admitted that he has not paid a single dollar in rent for occupying the entire first floor of the 2909 Subject Premises, and frivolously purports that he has no obligation to do so because he is co-owner of the premises and has the right to use the 2909 premises, and that his permitted use of the premises would not be self-dealing or enrich him at Plaintiffs expense, evidence recently obtained pursuant to a third-party subpoena has revealed Defendant has been fraudulently concealing documentary evidence which indisputably disposes of Defendant's frivolous defenses, destroys his credibility with this Court, and necessitates the grant of Plaintiff's request for leave to amend the Complaint to include additional causes of action in connection with Defendant's fraudulent misconduct.

209. By way of example, documents received from Maspeth Federal Savings Bank, reveal a Lease Agreement executed by the parties in February 2012, expressly obligating the Defendant Kokolakis to pay, *inter alia,* rent for his occupancy of the 2909 Property at a rate of $3,250.00, per month on the first year of occupancy, and an additional 3% increase in rental obligations for every year thereafter (Exhibit 13).

210. It should be noted that as the foregoing lease if for a Ten ("10") year term, the causes of action stemming therefrom are undoubtedly proper and timely.

211. The newly received documents further support that there is ample merit to the Plaintiff's claims based on the inconsistencies regarding Defendant Kokolakis' purported investment of funds for the purchase of the 2909 Property, evidencing his collusion with the Plaintiff's Wife to defraud the Plaintiff dating back as far as 2012, including but not limited to a letter from Defendant purporting to "Gift" $150,000.00 to the Plaintiff's Wife (Exhibit 8), and numerous checks issued to the Plaintiff's Wife by Defendant Kokolakis of which the Plaintiff had no knowledge.

212. Accordingly, it is respectfully requested that Plaintiff's request for leave to amend the Complaint to include additional Defendants and causes of action in connection with the additional Defendants' collusion with Defendant Kokolakis and the aiding and abetting of his fraudulent misconduct, should be freely given and summarily granted herein, as the purpose of an amendment of pleadings pursuant to CPLR 3025 is to permit the plaintiff to amend his or her theory of recovery to comply with the facts as they unfold.

WHEREFORE, the Plaintiff, ALFREDO VILLETA, respectfully seeks an Order of the Court denying Defendants' motion in its entirety and granting an Order;

A. Pursuant to CPLR §3025, granting Plaintiff leave to amend the Complaint to add Plaintiff's Wife, GEORGIA VILLETA, and Defendant Kokolakis' Wife, GERASIOULA KONIDARIS, as Defendants to the action, and amending the caption to reflect addition of the Defendants;

B. Pursuant to CPLR §3025, granting Plaintiff leave to amend the Complaint to conform the facts to the evidence; and,

C. Granting Plaintiff such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 19, 2021

YONATAN S. LEVORITZ