SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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ALFREDO VILLETA

Index No.: 711705/2021

Plaintiff,

-against-

THE KOKOLAKIS LAW FIRM, PLLC AND JOHN A. KOKOLAKIS

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' PRE-ANSWER MOTION TO DISMISS

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Exhibit A – Summons with Notice and Verified Complaint.

Exhibit B – May 17, 2019 Order by Honorable Richard Latin.

Exhibit C – January 20, 2021 order by Honorable Carmen Velasquez.

Exhibit D – March 5, 2021 order by Honorable Margaret Parisi McGowan.

Exhibit E – Copies of tax transcripts and schedule E of Georgia Villeta's filed taxes (2018-2020) and taxes filed jointly by Plaintiff and Georgia Villeta (2015-2017) showing income and expenses of properties.

Exhibit F – Letters and Affidavit from Plaintiff and Georgia Villeta's accountants.

Exhibit G – 3821 Property Bank Account Statements (2016-2020).

Exhibit H – 3819 Property Bank Account Statements (2016-2020).

Exhibit I – 2909 Property Bank Account Statements (2016-2020).

Exhibit J – Quontic Bank Account Statements.

Exhibit K – Copies of checks and withdrawals by Plaintiff of property account funds.

Exhibit L – Copies of the Recorded Deeds for the Subject Properties.

Exhibit M – Audio Recording and Transcript.

Exhibit N – Copies of checks for Rent Payment of 2nd Floor apartment for 2909 Property.

Exhibit O – Survey and ACRIS print outs showing mixed- use of 2909 Property.

Exhibit P – Copy of Plaintiff's Answer to the Trust Action.

Exhibit Q – Correspondence between Kate Christoforatos Esq. and Plaintiff's Attorney.

PRELIMINARY STATEMENT

This Memorandum of Law is submitted along with the affirmation of Deborah E. Velez Cardec, the affidavits of John A. Kokolakis, Georgia Villeta, George Zournatzoglou and Kate Christoforatos, Esq., and the exhibits annexed thereto in support of the pre-answer motion by Defendants John Kokolakis (" Kokolakis") and The Kokolakis Law Firm, PLLC ("KLF") for an Order: (1) dismissing Plaintiff's Verified Complaint, and all claims against Defendants a) pursuant to CPLR §3211(a)(1) as documentary evidence resolves all factual issues and completely disposes of plaintiff's claim, b) pursuant to CPLR §3211(a)(5) as all claims are barred by *res judicata* and collateral estoppel, c) pursuant to CPLR §3211(a)(5) on the basis of untimeliness, d) pursuant to CPLR §3211(a)(7) on the basis that plaintiff fails to state a cause of action as to Defendants, e) pursuant to CPLR §3211(a)(10) as the court should not proceed with this action in the absence of Georgia Villeta, a necessary party, and f) pursuant to CPLR §3016(b) for failure to plead the breach of duty claims with sufficient particularity; (2) Pursuant to 22 NYCRR § 130-1.1 awarding the Movants sanctions, fees and costs, and that Plaintiff Alfredo Villeta ("Plaintiff") be declared a vexatious litigant and enjoined from making future filings, making all of his future filings, including motions and pleadings, null and void without court approval; and (3) for such further and other relief as the Court deems just and proper.

The underlying action is Plaintiff's **fourth time** in front of this Court, addressing matters involving the subject premises. Plaintiff brings this action despite the fact that he has had multiple opportunities to litigate his alleged claims against Defendant,continuing a pattern of changing attorneys in order to bring frivolous actions with the intent to harass and maliciously injure Defendant Kokolakis.

In his most recent complaint Plaintiff has not only failed to state valid causes of action and join a necessary party, but Plaintiff is also barred from bringing the within action by the doctrines of *res judicata* and collateral estoppel and by the corresponding statute of limitations. Accordingly, the Court should dismiss Plaintiff's complaint in its entirety and sanction and enjoin Plaintiff for continually filing frivolous and vexatious actions.

STATEMENT OF FACTS

Defendant Kokolakis is the brother of Georgia Villeta, Plaintiff's wife, and brother-in-law of Plaintiff. Since on or about 1995, Defendant Kokolakis located and negotiated prices for investment on certain properties located at 3821 27th Street, Long Island City, New York (3821 Property); 3819 27th Street, Long Island City, New York (3819 Property); and 29-09 21st Avenue, Astoria, New York (2909 Property) (known together as "subject properties" or "the properties").

In or about the Spring of 1995, Defendant Kokolakis, at the age of 22 or 23, located and negotiated a price on the 3821 Property and prior to purchasing approached his sister Georgia and Plaintiff and inquired if they wanted to purchase the property together, with Defendant Kokolakis investing 50% of the required funds and Georgia and Plaintiff investing the other 50%. All agreed and moved forward with the purchase together.

Moving forward with obtaining financing and closing on the 3821 Property, Georgia, Defendant Kokolakis and Plaintiff (hereinafter together referred to as "the parties" for convenience, although Georgia Villeta, a necessary party, was not joined in this action) were advised that it was easier to move forward with Defendant Kokolakis not being named in title. The parties then agreed to purchase the property with Georgia and Plaintiff nominally holding

title as to Defendant Kokolakis' 50% undivided interest in trust for his benefit and with the promise that Georgia and Plaintiff would later, at Defendant Kokolakis' request, convey to Defendant by a suitable, proper and sufficient deed his 50% undivided interest. The 3821 Property was purchased on August 31, 1995.

The 3821 required renovations before tenants could occupy the property and the parties agreed that Defendant Kokolakis would manage the renovations project. The renovations were completed with the knowledge and acquiescence of all parties and rented. An account was opened in the name of Georgia and Plaintiff where the property's income was deposited and all expenses, including mortgage payments, were paid from the income generated by the property.

On or about the Summer of 2003 Defendant Kokolakis discovered the adjoining property was being sold and advised Georgia and Plaintiff that he was interested in purchasing it and suggested they purchase it together. As the investment in the 3821 property had been successful and equity on the house had been gained, the parties as co-owners discussed and agreed to refinance the mortgage of the 3821 property to use the equity funds and any profits from the 3821 property to invest and purchase the 3819 property for rental purposes, minimizing their out of pocket expenses. Just as in the purchase of the 3821 Property, the parties agreed for Georgia and Plaintiff to nominally hold title as to Defendant Kokolakis' 50% undivided interest in trust for his benefit and Georgia and Plaintiff hold the remaining 50% interest. The refinance of the 3821 Property mortgage was completed on June 27, 2003 and with the refinance funds and the closing expenses divided 50% by Defendant Kokolakis and 50% by Georgia and Plaintiff, the parties purchased the 3819 Property on August 28, 2003.

The 3819 Property also required renovations and just as before the parties agreed that Defendant Kokolakis would manage the renovations. As with the 3821 Property, the 3819

property's income was deposited in the property account in Plaintiff and Georgia Villeta's name and all expenses, including mortgage payments, were paid from the income generated by the properties. The parties agreed that Defendant Kokolakis would manage both properties, including, but not limited to, assisting in collecting the rent from the tenants which would then be deposited in corresponding accounts or provided to Georgia or Plaintiff to be deposited in the corresponding bank account.

On or about December 2011, after years of looking for a certain type of property, Defendant Kokolakis found a two-story mixed-use property and had the opportunity to purchase it before news spread that it was on the market. Defendant Kokolakis approached Georgia and Plaintiff to share that he had found a mixed-use property at good value and communicated that he wanted to purchase this property to use it as his office. Georgia and Plaintiff were interested in the property, but they did not have enough funds to cover their share of funds to effectuate the purchase. Defendant Kokolakis told Georgia and Plaintiff to not worry, and if they were short on funds, he would loan the difference in funds to cover their share of the required funds. The parties agreed and proceeded to purchase the 2909 Property.

The parties used the equity generated with the purchase of the 3819 Property to invest those funds in the purchase of the 2909 Property, and did a Consolidation, Extension and Modification Agreement (CEMA) of the mortgage of the 3819 Property with Quontic Bank, which closed on April 13, 2012, and the purchase of the 2909 Property closed on April 19, 2012.

The 2909 Property also required renovations and just as with the other two properties, the parties agreed that Defendant Kokolakis would manage the renovations. In order to facilitate the record keeping of the income and expenses for each property, separate accounts in the name of Georgia and Plaintiff were opened with CitiBank for each property, and each property's income

was deposited in the corresponding account and all expenses, including mortgage payments, were paid from the income generated by the corresponding property. An account with Quontic bank was also opened in the name of Georgia and Plaintiff with the remaining funds from the CEMA for other general property-related expenses (the Quontic Account) . The parties agreed that Defendant Kokolakis would manage the properties, including, but not limited to, assisting in collecting the rent from the tenants which would then be deposited in corresponding accounts or provided to Georgia or Plaintiff to be deposited in the corresponding bank account.

Defendant Kokolakis managed the renovations of the 2909 Property, consulting with Georgia and Plaintiff about all costs and expenses needed and keeping them appraised of the renovation work. The funds invested into the 2909 Property for repairs were joint funds generated from the investment properties.

Once the renovations were complete at the 2909 Property, the parties agreed for the residential apartments of the building to be rented and for Defendant Kokolakis to move, as co-owner of the property, into the commercial space to use as his office for his practice and continued to manage the properties. Defendant Kokolakis 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.

Georgia and Plaintiff separated, and were discussing the possibility of selling the properties. On or about January 15, 2019, Defendant Kokolakis requested for Georgia and Plaintiff to convey to Defendant Kokolakis, as the parties had agreed, his undivided fifty (50%) percent interest in and to the 3821, 3819 and 2909 Properties. The meeting ended with Plaintiff acknowledging Plaintiff's ownership as to the undivided fifty (50%) interest and requesting for

the deed and transfer documents to be forwarded to his attorney for his execution. The deed and transfer documents were sent to Plaintiff's attorney on January 18, 2019, but Plaintiff refused to sign the deed and transfer documents, forcing Defendant Kokolakis to file an action.

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.

PROCEDURAL HISTORY

The Trust and Breach of Fiduciary Duty Action

Plaintiff, despite his promises, refused to execute the required documents to reflect Defendant Kokolakis' ownership in the subject properties, resulting in Defendant Kokolakis bringing an action in Queens County Supreme Court against Plaintiff and Georgia Villeta under Index Number 701510/2019. The action was filed on January 25, 2019, with a Supplemental Summons and Amended Complaint being filed and served on February 8, 2019 for causes of action including to quiet title on the subject premises pursuant to Article 15, for a judgement declaring that Georgia Villeta and Plaintiff held an undivided fifty (50%) percent interest to the properties in trust for the benefit of Defendant Kokolakis, for the imposition of a constructive trust for the properties, breach of constructive trust, unjust enrichment, breach of fiduciary duty, breach of contract, and for causes of action solely against Plaintiff for fraud, prima facia tort, intentional infliction of emotional distress, negligent infliction of emotional distress, and attorney's fees (hereinafter referred to as the "Trust Action").

Plaintiff failed to timely answer. On March 26, 2019, Defendant Kokolakis filed a Motion for Default Judgment. Initial arguments for the fully briefed motion were held on May 9,

2019, including an in-chambers conference with Hon. Richard Latin where Plaintiff's allegations, including the alleged failure by Defendant to cover his share of mortgage expenses and the renting of the properties under market value, were argued. The matter was adjourned to May 17, 2019, whereby oral arguments continued with the Court regarding the causes of action and were ultimately resolved by So Order stipulation, with the order, *inter alia*, settling the claims, directing the parties to execute the deeds to the subject properties including Defendant Kokolakis as 50% owner of the subject properties, and discontinuing the action. Thereafter, the executed So Ordered Stipulation was read on the record, and the parties executed the deeds to the properties in Hon. Latin's courtroom in the presence of the Principal Law clerk.

Deeds were signed and recorded and the subject properties are now being held as follows: *Alfredo Villeta and Georgia Villeta, husband and wife, as tenants by the entirety to an undivided 50% interest, and John Kokolakis and Gerasimoula Konidaris, husband and wife, as to an undivided 50% interest as tenants by the entirety.*

The Matrimonial Action

Plaintiff and Georgia Villeta are parties of a pending divorce action in the Matrimonial Part of Queens County Supreme Court under Index No. 702641/2021 formerly Index 453/2019 filed January 24, 2019. There have been multiple conferences and discovery exchange between the parties addressing the accounting and division of the matrimonial assets, including filing of a Statement of Financial Affairs by each party and exchange of bank statements and other financial information, including those of the subject properties.

On March 5, 2021, the Matrimonial Judge issued an order recusing herself from the matrimonial case, as it had come to her attention that Plaintiff's newly retained counsel "has

made formal complaints to the Commission of Judicial Conduct against 3 of the Supreme Court Justices presiding over consented matrimonial actions in Queens County". The order further states that said judge was "the only Justice presiding over contested matrimonials in Queens County who has not had a charge brought against her", prompting the Judge to recuse herself from the case and refer the matter to the Administrative Judge for re-assignment. At this time, the Matrimonial Action is pending re-assignment by the Administrative Judge.

The Partition Action

On November 11, 2019, Plaintiff retained a second attorney to file a Summons and Verified Complaint against Georgia Villeta, Defendant Kokolakis and Gerasimoula Konidaris, (Defendant Kokolakis' wife) in Queens County Supreme Court under Index Number 719121/2019 alleging that he was seized of a one-quarter (¼) interest as tenant in common the subject properties and requesting from the court that the subject premises be sold, and an accounting for costs and profits be provided in accordance with the partition.

As Plaintiff and Georgia Villeta, as tenants by the entirety, own an undivided 50% interest in the subject premises, Defendant Kokolakis and his wife filed a motion to dismiss pursuant to CPLR§ 3211(a)(1) as the documentary evidence resolved all factual issues and disposed of Plaintiff's claim, and pursuant to CPLR§ 3211(a)(3) as plaintiff lacked the legal capacity to bring the lawsuit as Tenants by the Entirety are not entitled by law to bring a Partition Action. The matter was fully briefed and submitted to the Hon. Carmen Velasquez who issued an order dated January 20, 2021, agreeing with Defendants that Plaintiff is a Tenant by the Entirety with Georgia Villeta owning an undivided 50% interest in the subject premises, that as a tenant by the entirety Plaintiff is not entitled to bring the partition action, and that the issues relating to

the distribution of the properties would certainly be resolved by the Matrimonial Action. The judge granted Defendants' motion to dismiss to the extent that the Partition Action was stayed pending resolution of the Matrimonial Action. Motion Practice is currently pending in the action as Defendant Kokolakis and his wife filed a motion to reargue and renew requesting the stay be lifted and the case dismissed in its entirety.

The Underlying Action

After the Partition Action order was issued, Plaintiff retained a third attorney to represent him. Thereafter, following Defendant's filing of a motion to reargue and renew the Partition Action, Plaintiff, in lieu of opposing the motion, commenced the underlying action by filing a Summons with Notice on May 25, 2021. Subsequently, Defendant The Kokolakis Law Firm PLLC ("KLF") served a Demand for Complaint on Plaintiff on May 27, 2021 upon Plaintiff's new counsel. Defendant Kokolakis was personally served on June 7, 2021 and an affidavit of service was filed on June 7, 2021. Defendant KLF was served on May 25, 2021 and an affidavit of service was filed on June 14, 2021.[1] A copy of the Summons with Notice and Verified Complaint are enclosed herein as Exhibit A.

The causes of action within Plaintiff's complaint for breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, unjust enrichment and accounting, arise out of the purchase and co-ownership of the subject premises.

[1]Service in this action is defective. The Affidavit of Service as to KLF is inaccurate. The process server was advised that the person who he attempted to serve was not authorized to accept service and did not ask anyone about being active in the military. Furthermore, the business address where the mailing was supposedly sent has the incorrect zipcode, and the required mailing was never received. . The Affidavit of Service for John Kokolakis is also defective as it does not state if Shorena Wolter is a licensed process server, and whether she has served less than 5 times in the year, as required by law.

Defendants file this pre-answer motion within the timeframe authorized by the CPLR to answer, appear or otherwise move.

STANDARD OF REVIEW

The CPLR requires dismissal when causes of action are barred due to res judicata, collateral estoppel, statute of limitations, failure to join a necessary party, when the documentary evidence resolved all issues as a matter of law and/or when the pleading fails to state a cause of action. CPLR §§ 3211(a)(1)(5), (7), and (10).

New York Courts are well settled that in a motion to dismiss pursuant to CPLR§ 3211, the pleading is to be afforded a liberal construction in the light most favorable to the Plaintiff. *Leon v. Martinez* 84 N.Y. 2d 83, 88 (1994). Initially, the Court must accept the facts alleged in the complaint as true, and then determine whether those facts fit within any cognizable legal theory. *Kempf v Magida*, 37 AD3d 763, 832 N.Y.S.2d 47 (2d Dept 2007). However, when "the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, (Plaintiff) is not entitled to any such consideration, nor to that *arguendo* advantage." *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (1999), *Minovici v. Belkin BV*, 109 A.D.3d 520, 521 (2d Dep't 2013).

The test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned for its averments." *JP Morgan Chase v. J.H. Elec. Of N.Y., Inc.* 69 A.D.3d 802, 803 (2d Dep't 2010) quoting *Moore v. Johnson*, 147 A.D. 2d 621, 621 (2d Dep't 1989).

As argued in the within motion, Plaintiff's complaint should be dismissed on multiple grounds including 1) pursuant to CPLR §3211(a)(1) as documentary evidence resolves all factual issues and completely disposes of plaintiff's claim, 2) pursuant to CPLR §3211(a)(5) as all claims are barred by *res judicata* and collateral estoppel, 3) pursuant to CPLR §3211(a)(5) on the basis of untimeliness, 4) pursuant to CPLR §3211(a)(7) on the basis that plaintiff fails to state a cause of action as to Defendants, 5) pursuant to CPLR §3211(a)(10) as the court should not proceed with this action in the absence of Georgia Villeta, a necessary party, and 6) pursuant to CPLR §3016(b) for failure to plead the breach of duty claims with sufficient particularity. With these standards in mind, none of Plaintiff's causes of action can survive as a matter of law, and accordingly the complaint should be dismissed in its entirety.

ARGUMENT

I. PLAINTIFF'S COMPLAINT MUST BE DISMISSED PURSUANT TO CPLR §3211(a)(1) AS DOCUMENTARY EVIDENCE RESOLVES ALL FACTUAL ISSUES AND DISPOSSES OF PLAINTIFF'S CLAIMS

A motion to dismiss pursuant to CPLR §3211(a)(1) will be granted when the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim" *Fontanetta v John Doe*, 73 AD3d 78, 83-84 (2d Dept 2010), *Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383, *Leon v Martinez*, 84 NY2d 83, 88; *Martin v New York Hosp. Med. Ctr. of Queens*, 34 AD3d 650; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347. If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR §3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action. *Stinner v Epstein*, 79 NYS3d 212, 214 (2d Dept 2018) *Guggenheimer v. Ginzburg* , 43 N.Y.2d 268, 275, 401 N.Y.S.2d

182, 372 N.E.2d 17 *; Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.* , 46 A.D.3d 530, 846 N.Y.S.2d 368).

Documentary evidence are documents that "must be "unambiguous, authentic, and undeniable". *Fontanetta v John Doe 1,* 73 AD3d 78, 84-86 (2nd Dept 2010). If the documentary proof submitted in support of the motion disproves a material allegation of the complaint, a determination in the defendant's favor is warranted. *W. Flooring & Design, Inc. v K. Romeo, Inc.*, 2016 NY Slip Op 31967, 3 (Sup Ct, Suffolk County 2016), *Weiss v . TD Waterhouse* , 45 AD3d 763, 847 NYS2d 94; *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661-662, 799 NYS2d 65); *Snyder v. Voris , Martini & Moore , LLC* , 52 AD3d 811, 812, 860 NYS2d 622, 623-24 (2d Dept. 2008)).

Plaintiff's verified complaint is comprised of false, untrue and conclusory statements. In essence, the material facts in which Plaintiff bases his causes of action are: 1) that Plaintiff is a tenant in common with Defendant Kokolakis, 2) that Defendant Kokolakis has exclusive management control of the properties and his actions have devalued the 2909 Property, 3) that Plaintiff has exclusively made mortgage payments for the subject properties and exclusively paid for taxes associated with the income of the properties , and 4) that Defendant is renting the properties under market value and Plaintiff has not been provided any portion of the rental income of the subject properties.

The following documents, which not only are unambiguous, authentic and undeniable by Plaintiff but also have always been in Plaintiff's possession, completely dispose of Plaintiff's essential allegations and claimed material facts:

1) Copy of the May 17, 2019 Order by Honorable Richard Latin, enclosed herein as Exhibit B:
    a. Proof that Plaintiff had the opportunity to litigate the merits of an action related to the subject properties and payments made in connection with the property.
    b. Proof that Plaintiff is indemnified by Defendant Kokolakis for overpayment of mortgage and taxes, *if any*.
2) Copy of the January 20, 2021 Order by Hon. Carmen Velasquez enclosed herein as Exhibit C:
    a. Proof that the Court, after Plaintiff's **second** opportunity to litigate on the merits an action related to and arising from the subject properties and his accounting claim, clearly stated that Plaintiff **is not** a tenant in common with Defendant, and that the accounting concerns will be decided by the Matrimonial Court handling Plaintiff and Georgia Villeta's divorce.
3) Plaintiff and Georgia Villeta's filed taxes. As a sample, enclosed are Georgia Villeta's taxes for 2020, 2019 and 2018, as well as Plaintiff and Georgia Villeta's jointly filed taxes for 2017, 2016 and 2015, the most recent jointly filed taxes reporting, inter alia, the income Plaintiff received from each property. Copies of the taxes are enclosed herein as Exhibit E.
    a. Proof that Plaintiff has been provided with the rental income for the properties and has had access to the properties' information.
4) Letters and Affidavits from Plaintiff and Georgia Villeta's Accountants enclosed herein as Exhibit F.

a. Proof that Plaintiff has been provided the rental income from the premises and has been advise of his and Georgia Villeta's tax liabilities only as to their 50% ownership.

5) Copies of bank statements of the 3821 Account in Plaintiff and Georgia Villeta's name enclosed herein as Exhibit G

a. Proof of the consistent rental income of the property at market rates.

b. Proof that the property expenses, including utility and mortgage payments, have been made from the funds generated by the co-owned properties and not exclusively by Plaintiff.

c. Proof that the bank account with the income generated by the property has been in Plaintiff and Georgia Villeta's name and mailed to their address, and that Plaintiff has had knowledge and control of the income and expenses information.

6) Copies of bank statements of the 3819 Account in Plaintiff and Georgia Villeta's name enclosed herein as Exhibit H

a. Proof of the consistent rental income of the property at market rates.

b. Proof that the property expenses, including utility and mortgage payments, have been made from the funds generated by the co-owned properties and not exclusively by Plaintiff.

c. Proof that the bank account with the income generated by the property has been in Plaintiff and Georgia Villeta's name and mailed to their address, and that Plaintiff has had knowledge and control of the income and expenses information.

7) Copies of bank statements of the 2909 Account in Plaintiff and Georgia Villeta's name enclosed herein as Exhibit I

    a. Proof of the consistent rental income of the property at market rates, specifically that the second floor apartment has not been rented for only $800.00 a month.

    b. Proof that the property expenses, including utility and mortgage payments, have been made from the funds generated by the co-owned properties and not exclusively by Plaintiff.

    c. Proof that the bank account with the income generated by the property has been in Plaintiff and Georgia Villeta's name and mailed to their address, and that Plaintiff has had knowledge and control of the income and expenses information.

8) Copies of bank statements of the Quontic account for the subject properties in Plaintiff and Georgia Villeta's name enclosed herein as Exhibit J.

    a. Proof that the bank account has been in Plaintiff and Georgia Villeta's name and mailed to their address, and that Plaintiff has had knowledge and control of the income generated by the property.

9) Copies of and honored checks written, signed or confirmed with Plaintiff enclosed herein as Exhibit K

    a. Proof that Plaintiff has not made 100% of the tax payments for the subject premises, with copies of the checks to the IRS being written from the property bank account, and Plaintiff and Georgia Villeta being reimbursed from the

funds generated by the subject properties for any tax payments made in connection with the subject properties.

b. Proof that Defendant Kokolakis did not take "funds from Bank account to build himself an office" (Verified Complaint, Exhibit A, ¶ 54) as Plaintiff has had control and access to the properties' income and expenses, and was aware and appraised of the expenses needed to repair the properties, including the 2909 Property, with copies of checks for repairs done from property accounts, written and signed by Plaintiff, and signed and confirmed with Plaintiff.

c. Proof that Plaintiff has access and control to the income of the subject premises, with statements showing a $7,500.00 unilateral withdrawal made by Plaintiff to use the funds for personal matters unrelated to the subject properties (personal legal fee payments).

10) Copies of rent payments for the 2nd floor apartment of the 2909 Property. As a sample, quarterly statements with proof of deposited rents for the past 3 years are enclosed herein as Exhibit N.

a. Proof that the 2nd floor apartment is being rented by Deborah Velez at market rates and not for $800.00 a month.

11) Copies of documents showing commercial use of the premises, enclosed herein as Exhibit O:

a. Survey of the 2909 Property dated August 19, 1996 showing the property as a two story brick building with store and dwellings.

b. Survey of the 2909 property dated March 30, 2012 showing the property as a two story brick commercial building

c. Copy of 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.

12) Recorded deeds for the 3821 Property enclosed herein as Exhibit L

a. Proves that Plaintiff is not a tenant in common with Defendant Kokolakis as ownership of the property is held by: Plaintiff *and Georgia Villeta Tenants by the Entirety as to an undivided 50% interest in the property*, and Defendant Kokolakis and Gerasimoula Konidaris, as tenants by the entirety as to an undivided 50% interst in the property.

13) Recorded deeds for the 3819 Property enclosed herein as Exhibit L

a. Proves that Plaintiff is not a tenant in common with Defendant Kokolakis as ownership of the property is held by: Plaintiff *and Georgia Villeta Tenants by the Entirety as to an undivided 50% interest in the property*, and Defendant Kokolakis and Gerasimoula Konidaris, as tenants by the entirety as to an undivided 50% interst in the property.

14) Recorded deeds for the 2909 Property enclosed herein as Exhibit L

a. Proves that Plaintiff is not a tenant in common with Defendant Kokolakis as ownership of the property is held by: Plaintiff *and Georgia Villeta Tenants by the Entirety as to an undivided 50% interest in the property*, and Defendant Kokolakis and Gerasimoula Konidaris, as tenants by the entirety as to an undivided 50% interst in the property.

A. Documentary evidence shows that Plaintiff had knowledge, control and access to the properties' account and has received his share of income generated by the properties.

The most surprising allegations by Plaintiff are his claims that he has exclusively made payments for the mortgages, that Defendant has exclusive management control, and that Plaintiff has not received his share of income generated by the properties.

Tax Returns and Accountant Statements

Plaintiff's tax returns (Exhibit E) together with the supporting accountant letters and affidavit (Exhibit F), undeniably show that despite his claims, Plaintiff has always received income and had control of the finances for the subject premises. Since 1997, after the purchase of the 3821 Property, Plaintiff and his wife Georgia Villeta advised their Certified Public Accountants about the ownership and division of profit and expenses of the properties. And thereafter, based on the information Plaintiff and Georgia Villeta provided, their accountant would prepare a breakdown of their tax liability as to their fifty (50%) percent ownership and advise them of any credit that was due to Defendant as to his fifty percent. Affidavit of Georgia Villeta ¶36. The property bank statements and checks (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. Therefore, payments in connection with the house have been equally divided between the co-owners, including Defendant.

Bank Statements

Plaintiff also had access, knowledge and control of the accounts holding the properties' income and information. The monthly bank statements enclosed as Exhibits G,H, I and J show that the accounts have been in Plaintiff and Georgia Villeta's name, and prior to 2017 were mailed directly to Plaintiff's Forrest Hill home. In 2017, Georgia Villeta changed the bank

account addresses for the statements to be mailed to the 2909 Property as important correspondence, including debit cards and pin numbers, were mysteriously disappearing. Georgia Villeta Aff. ¶69. While the paper statements are now being delivered to the 2909 Property, Plaintiff and Georgia Villeta have online access to the accounts, and periodically, Plaintiff and Georgia Villeta were provided a copy of the statements either in person or by e-mail. Georgia Villeta Aff.¶ 70.

Plaintiff's access, receipt and use of rental income

Plaintiff has also had access and has used the income of the subject properties for his benefit. For instance, in 2019, Plaintiff made a $7,500.00 withdrawal from the 3821 Account to use for personal matters not related to the subject properties. Georgia Villeta Aff. ¶72. See also Account Statement as Exhibit K. To prevent further depletion of the properties account, Georgia Villeta transfered the house funds from the CitiBank accounts and opened new Flushing Bank accounts for each property. However, while Plaintiff's name is no longer on the account, Plaintiff is periodically provided copies of the statements as part of the Discovery and Accounting in the matrimonial action. Affidavit of Kate Christoforatos, Esq. ¶ 11.

Furthermore, expenses relating to the properties, including payments in connection with the repairs, have been paid from the subject property accounts. Throughout the years, Plaintiff has detailed the property expenses in his tax returns, has had knowledge of the cost of repairs of the property and has been involved in the repairs and with the management of the property. See Exhibit E, tax returns, and Exhibit K for checks and payments of expenses. For instance, the enclosed checks in Exhibit K show that Quontic bank confirmed the legitimacy of and obtained Plaintiff's approval prior to honoring a check made in "cash", as well as Plaintiff writing and

signing checks from the accounts, as proof that he had access to the accounts. Georgia Villeta Aff. ¶ 31-32.

2909 Property value has increased and the property is rented at market value

Plaintiff's claims that Defendant Kokolakis failed to obtain a certificate of occupancy and has therefore caused the 2909 Property to be "worth substantially less" (Exhibit A, Verified Complaint ¶ 55) and that Defendant is renting the 2nd floor of the 2909 Property "for only $800, none of which has been shared with Plaintiff" (Verified Complaint, Exhibit A ¶ 59) are also false. As shown by the surveys and the Automated City Register Information System (ACRIS) documents (Exhibit O), the usage of the property has not changed from before or after the purchase, and continues to be a two story brick building with store/office and dwellings. Furthermore, Plaintiff has had knowledge and access to the information showing that the second floor apartment is not being rented for $800. Plaintiff has always had knowledge, as he has been provided with the current leases of the premises (Kate Christoforatos Aff. ¶ 7), the rent payments by Deborah Velez Cardec's account are deposited into the 2909 account which statements he receives (Exhibit N) and Plaintiff's tax returns reflect the received and declared annual rent (Exhibit E).

The tax returns, checks and bank statements clearly show that Plaintiff has received his share of income and expenses, and has had knowledge and approved the management decisions impacting the properties. Therefore, as the independent, unambiguous and undeniable documents provided by Defendant clearly disprove Plaintiff's material and essential allegations, the verified complaint and its claims should be dismissed in its entirety.

B. Documentary Evidence shows that Plaintiff has litigated or had the opportunity to litigate on the merits the causes of action raised in the underlying action.

Not counting the pending matrimonial action, Plaintiff has been in front of the Court on three different occasions alleging causes of action against Defendant Kokolakis which all stem from the same subject premises and the unfounded allegations that Defendant has not carried his share of the expenses related to the subject premises and that Plaintiff has not been provided his share of the income.

As will be explained in more detail in Part III below, Plaintiff's causes of action are barred by the doctrines of res judicata and collateral estoppel. In addition, although no damages have been suffered by Plaintiff due to increasead tax liability nor has Plaintiff exclusively made mortgage payments to the subject properties, Defendant has already agreed to indemnify and hold Plaintiff harmeless for monetary payments on the subject properties retroactively to the date of Purchase, which to date there have been none. (Exhibit B). John Kokolakis Affidavit ¶ 61.

Although the Trust Action was brought in front of the Court as a Default Motion, the merits of the case, including the allegations raised by Plaintiff in his verified answer of breach of fiduciary duty, were fully argued in front of the Court and settled by the Court. A copy of Alfredo Villeta's Verified Answer to the Trust Action is enclosed as Exhibit P. [2] As stated in the So Ordered Stipulation, Defendant's Default Motion against Plaintiff was withdrawn, the order settled the claims of the Trust Action on the merits and the action was discontinued. (Exhibit B).

In addition, the January 20, 2021 Order of Hon. Carmen Velasquez is clear evidence that Plaintiff's cause of action for accounting has been raised, and as specifically stated by the Court is to be decided in the Matrimonial Action.

[2] Defendant respectfully requests that the Court takes Judicial Notice of the documents included in this motion, as well as the court records of the four related matters and materials derived from official government websites. *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.* (61 AD3d 13, 19 - 20 2d Dept 2009).

C. Documentary Evidence shows that Plaintiff is not a tenant in common with Defendant

It is incomprehensible how Plaintiff continues to claim that he is a tenant in common with Defendant Kokolakis, when the recorded deeds of the subject premises clearly state ownership as follows:

> Alfredo Villeta and Georgia Villeta, husband and wife, as tenants by the entirety to an undivided 50% interest, and John Kokolakis and Gerasimoula Konidaris, husband and wife, as to an undivided 50% interest as tenants by the entirety.

See Exhibit L.

What's more, Plaintiff's unsuccessful Partition Action was also based on the inaccurate statement that Plaintiff alone was a tenant in common with Defendant Kokolakis. The January 20, 2021 order clearly states that Plaintiff alone is not a tenant in common with Defendant, but that, as a married couple legally regarded as one person, Plaintiff AND Georgia Villeta, Tenants by the Entirety as to 50% undivided interest in the properties are tenants in common with Defendant and his wife.

The documentary evidence, specifically the recorded deeds and court orders, unambigously and undeniably prove that Plaintiff's statement in the verified complaint stating that Plaintiff is a tenant in common with Defendant is based on knowingly false and untrue statements.

II. PLAINTIFF'S COMPLAINT MUST BE DISMISSED PURSUANT TO CPLR §3211(a)(5) AS THE ALLEGED CAUSES OF ACTION ARE TIME-BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

Not only are Plaintiff's sworn to causes of action based on untrue and conclusory statements, but they are untimely. In New York, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. *See Singh v Edelstein*, 103 AD3d 873, 874-875 (2nd Dept 2013); *DeStaso v Condon Resnick, LLP*, 90 AD3d 809, 812 (2nd Dept 2011). "To meet its burden, the defendant must establish, inter alia, when the plaintiff's cause of action accrued." *Loiodice v BMW of North America, LLC,* 125 AD3d 723, 725 (2d Dept 2015), *Swift v. New York Med. Coll.,* 25 A.D.3d 686, 687, 808 N.Y.S.2d 731 *).* Once a defendant meets its initial burden in this regard, the burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether he or she actually commenced the action within the applicable limitations period. See *Jalayer v Stigliano*, 94 AD3d 702, 703 (2 nd Dept 2012); *Williams v New York City Health & Hosps. Corp*., 84 AD3d 1358, 1359 (2 nd Dept 2011).

Affording Plaintiff the most liberal and favorable interpretation of the complaint, the statute of limitations on his breach of duty and unjust enrichment claims is three-years and the cause of action for the breach of implied covenant of good faith and fair dealing is six years. The causes of action in this matter accrued on or before 2012 and are therefore untimely.

A. The causes of action for breach of duty and breach of implied covenant accrued on or before 2012, and Plaintiff's action was commenced more than 6 years after accrual

Plaintiff alleges in his complaint that Defendant has mismanaged the properties, has failed to provide Plaintiff with any rental income from the properties and has occupied the 2909 Property without paying rent.

Accepting Plaintiff's allegations as true for purpose of this motion to dismiss, and providing Plaintiff the most favorable interpretation, the causes of action accrued shortly after the closing of title of the 2909 Property in 2012. Defendant's alleged misconduct of using property funds to "build himself an office" occurred in 2012. Furthermore, Plaintiff's alleged damages of being deprived of income from the rental properties, and Defendants' supposed failure to pay rent would have began right after the 2909 property was purchased in 2012. Therefore, even providing Plaintiff with the longest available statute of limitations of 6 years would bar Plaintiff from starting any action after 2018. The instant action was commenced in 2021, well after the applicable statute of limitations had expired.

Plaintiff also cannot state that the statute of limitations was tolled, as Plaintiff was not a minor or incapacitated. Furthermore, Plaintiff and Defendant do not have an attorney-client relationship and therefore the continuos representation doctrine does apply. Defendant's representation of Plaintiff and Georgia Villeta ended on the closing of title for the 2909 Property in August 2012, and the relationship since then has been as co-owners of the property. Kokolakis Aff. ¶ 40, Georgia Villeta Aff. ¶ 80-83. But even if a relationship existed, New York Courts have found that the continuous representation doctrine is applicable when there is "a mutual understanding that further services were needed on the matter in question" and when "the record indisputably established that plaintiffs were left with the *reasonable* impression that defendant was, in fact, actively addressing *their legal* needs." (emphasis added). *Shumsky v Eisenstein*, 96 NY2d 164, 169 (2001), *Town of Wallkill v. Rosenstein*, 40 A.D.3d 972 (2d Dep't 2007).

Defendant's alleged actions were not in connection with representation of Plaintiff, there was not a mutual understanding that further services were needed and there are no legal needs that Defendant was addressing on behalf of Plaintiff. There is no reasonable explanation as to

why Plaintiff would delay bringing an action to recover his alleged damages or to stop Defendant's alleged misconduct and Plaintiff has proffered none.

Therefore, as Plaintiff is barred from starting an action after 2018, Plaintiff's complaint is irretrievably out of time and should be dismissed in its entirety

B. As Plaintiff seeks only money damages for the alleged breach of duty, a three-year statute of limitations applies and affording Plaintiff the longest available statute of limitation does not cure the untimeliness of Plaintiff's action.

New York law does not provide any single limitations period for breach of fiduciary duty claims. *Whitney Holdings, Ltd. v. Givotovsky*, 988 F. Supp. 732, 741 (SDNY 1997). Generally, the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought. It has been repeatedly held that (w)here the relief sought is equitable in nature, the six-year limitations period of CPLR §213(1) applies, but when a breach of fiduciary duty seeks only money damages, courts have viewed such actions as alleging "injury to property," to which the CPLR §214 three-year statute of limitations applies. *see Loengard v. Santa Fe Indust., Inc., 70 N.Y.2d 262, 267; Whitney Holdings, Ltd. v. Givotovsky, 988 F. Supp. at 741. Yatter v. William Morris Agency, 256 A.D.2d at 261; Kaufman v Cohen, 307 AD2d 113, 118 (1st Dept 2003).*

Also, a claim for breach of fiduciary duty accrues "as soon as the claim becomes enforceable". *Murphy v. Morlitz*, 751 F. App'x 28, 30 (2d Cir. 2018). It has been decided by the court that breach of fiduciary duty accrues "when a plaintiff first suffers a loss" *IDT Corp. v. Morgan Stanley Dean Witter & Co.,* 12 NY3d 132, 139 (2009).

In the underlying action, Plaintiff seeks only money damages for the alleged claims, and therefore the three-year statute of limitations applies. As Plaintiff's loss due to Defendant's alleged breach of duty would have accrued right after the purchase of each subject property, the

statute of limitations for actions based on the 3821 Property (purchased in 1995) would have accrued on 1998, those based on the 3819 Property (purchased in 2003) would have accrued on 2006, and those based on the 2909 Property (purchased in 2012) would have accrued on 2015.

Providing Plaintiff with the most favorable timeframe of an accrued date in 2012, his claims for breach of fiduciary duty would have to be filed before 2016. Plaintiff filed his complaint in 2021, way past the permitted timeframe, and once again cannot demonstrate that the statute of limitations was tolled. Accordingly, Plaintiff's causes of action for breach of fiduciary duty are time barred and should be dismissed.

C. Plaintiff's causes of action for breach of implied covenant of good faith and fair dealing is untimely

A claim from breach of the implied covenant of good faith and fair dealing "is a contract claim" intrinsically tied to the damages allegedly resulting from a breach of the contract. See *Smile Train, Inc. v Ferris Consulting Corp*., 986 NYS2d 473, 475 (1st Dept 2014), *Canstar v. Jones Constr. Co.*,212 A.D.2d 452, 453, 622 N.Y.S.2d 730 (1st Dept.1995). The *CPLR §213(2)* provides that a breach of contract claim is subject to a six-year statute of limitations, and accordingly Plaintiff's statute of limitations for breach of implied covenant of good faith and fair dealing is six years.

Assuming that Plaintiff's completely fabricated claims are true, the alleged oral agreement was entered in or around February of 2012 (Verified Complaint, Exhibit A, ¶ 73). Applying the six-year statute of limitations, Plaintiff's action was to be brought on or before February 2018. Hence, Plaintiff's purported cause of action filed June 2021 is more than 3 years late and should be dismissed as untimely.

III. PLAINTIFF'S ENTIRE COMPLAINT MUST BE DISMISSED PURSUANT TO CPLR §3211(a)(5) AS THE ACTION IS BARRED BY *RES JUDICATA* AND COLLATERAL ESTOPPEL

The doctrine of *res judicata* precludes a party from "litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" *In re Hunter,* 4 N.Y. 3d 260, 269 (2005). *Res judicata* broadly bars the parties or their privies from relitigating issues that were or could have been raised in that action, precluding the relitigating of all claims falling within the scope of the judgment, regardless of whether or not those claims were in fact litigated. As such, claim preclusion serves to bar not only every matter which was offered and received to sustain or defeat the claim or demand, but also any other admissible matter which might have been offered for that purpose. *Feliciano v Seabrook*, 67 Misc 3d 1235 (Sup Ct, Queens County 2020) citing *Paramount Pictures Corporation v. Allianz Risk Transfer AG* , 31 NY3d 64, 72 (2018), *Pedote v STP Associates, LLC*, 124 AD3d 856 (2d Dept 2015), *Pesa v Dayan*, 104 AD3d 662, 663 (2d Dept 2013), *Douglas Elliman, LLC v. Bergere*,98 A.D.3d 642, 642–643, 949 N.Y.S.2d 766, *O'Brien v. City of Syracuse*,54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158). In other words, the doctrine of *res judicata* precludes Plaintiff from bringing forth the causes of action in the underlying action as Plaintiff could have asserted those claims in the prior actions. "The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" *Kotarba v Bobrow*, 67 Misc 3d 142 (2d Dept 2020).

New York has adopted a "transactional analysis approach" in deciding *res judicata* issues, whereby "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" *Id.* See also *O'Brien v. City of Syracuse* , 54 NY2d 353, 357 (1981*)*

Jacob Marion, LLC v. Jones , 168 AD3d 1043 (2019) ; *Greaves v. Ortiz* , 65 AD3d 1085, 1085-1086 (2009).

Similarly, collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." *Ryan v. New York Tel. Co.,* 62 N.Y.2d 494, 500 (1984*); Chow v. Kshel Realty Corp.,* 2011 NY Slip Op 31149 (NY Misc 2011). The controlling factors are simply (1) whether there is an identity of issue that has necessarily been decided in the prior action and is decisive in the present action and (2) whether there was a full and fair opportunity to contest the decision now said to be controlling. *Buechel v. Bain,* 97 N.Y.2d 295, 303-04 (2001).

In the underlying action case, Plaintiff has been in front of this court on multiple occasions litigating matters against Defendant Kokolakis on actions arising out of the purchase and usage of the subject properties. Even if, *arguendo*, Plaintiff did have any of the pleaded causes of action against Defendant Kokolakis, those causes of action have either already been raised and resolved on the merits or Plaintiff had ample opportunity to raise them in the prior proceedings in front of this Court.

A. The Court's Trust Action Order dated May 17, 2019 is a final judgement on the merits in an action between the same parties and based upon the same transactions as the underlying action

As detailed above in the Statement of Facts and Procedural History, Defendant Kokolakis was forced to bring an action in Queens County Supreme Court for: 1) declaratory judgment that Plaintiff and Georgia Villeta held an undivided 50% interest in the subject properties in trust for the benefit of Defendant Kokolakis, 2) Breach of Trust, 3) Unjust Enrichment and 4) Breach of

Fiduciary Duty (hereinafter referred to as the "Trust Action"). Affirmation of Deborah Velez Cardec ¶5. The Trust Action included fully briefed motion practice, with arguments held before the Court.

During the Trust Action, the parties argued the merits of the matter and had ample opportunity to raise any causes of action in front of the Court, including an in-chambers conference between Hon. Richard G. Latin, Georgia Villeta, Mary Grace Condello, Esq. (Plaintiff's first attorney), and Deborah Velez Cardec, during which Plaintiff raised the allegations that he is now once again raising in the underlying action, including Defendant Kokolakis' alleged breach of fiduciary duty, alleged failure to be responsible for his share of the properties expenses causing Plaintiff to owe additional monies, and claiming that properties were being rented below market value. Plaintiff argued the merits of the case and had the opportunity to raise any ostensible action he could have against Defendant Kokolakis arising out of the purchase or co-ownership of the subject properties. These matters were argued and settled before the Court, with the So Ordered Stipulation dated May 17, 2019 signed by Plaintiff, his attorney and signed by the Judge and read on the record. Georgia Villeta Aff ¶56. Velez Cardec Aff. ¶5.

As recently as 2020, this Court has been clear in its decision: *res judicata* will bar "successive litigation based upon the same transaction or series of connected transactions if: (i) there is a final judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was." *Feliciano v Seabrook*, 67 Misc 3d 1235 (Sup Ct, Queens County 2020), *citing The People ex rel. Spitzer v. Applied Card Sys., Inc.*, 11 NY3d 105, 122 (2008).

Hon. Richard G. Latin's May 17, 2019 order is 1) a final order of the Court on the merits by a court of competent jurisdiction, and 2) Plaintiff was a party in the previous action. Plaintiff's causes of action in the underlying action all stem from the same transactions, the purchase and co-ownership of the three subject properties by the parties. Not only do Plaintiff's underlying causes of action mirror those brought in and decided in the Trust Action, but Plaintiff's allegations were actually raised and decided in the prior action.

Accordingly, Plaintiff's complaint is barred by the doctrines of *res judicata* and collateral estoppel and should be dismissed in its entirety.

B. Plaintiff's Partition Action decided by the Court on January 2021 was also based on the purchase of the subject premises and against the same parties

After the resolution of the Trust Action Plaintiff retained a second attorney and initiated the Partition Action. The underlying action is against the same parties and involving the same subject properties as the Partition Action and includes a claim for accounting which is identical to the one claimed in the Partition Action. Velez Cardec Aff. ¶6.

In the Partition Action, Plaintiff claimed to be a tenant in common with Defendant Kokolakis and requested a partition of the subject properties in addition to pleading a cause of action for accounting. The Trust action and the property deeds establish that Plaintiff owns a 50% undivided interest in the subject premises together with his wife Georgia Villeta. It is also well settled in New York that an action for partition does not lie with respect to property held as tenants by the entirety. RPAPL 901, *Marshall v. Bonica*, 86 AD3d 595, 596 (2nd Dept 2011).

Upon fully briefed motion practice, the Hon. Carmen Velasquez issued an order dated January 20, 2021, confirming that the recorded deeds clearly state that Plaintiff is seized of a 50% undivided interest in the subject premises as Tenant by the Entirety with Georgia Villeta,

and that the issues relating to the distribution of the property (i.e. the requested accounting) will be determined in the Matrimonial Action.

In fact, even before bringing the Partition Action, the judge presiding Plaintiff and Georgia Villeta's Matrimonial action specifically advised Plaintiff that a partition action was not necessary as the matters would certainly be resolved by the matrimonial court. See Affirmation of Kate Christoforatos Esq. at ¶13. Georgia Villeta Aff. ¶61. Nevertheless, Plaintiff filed his unsuccessful Partition action, and now we have not one, but two orders from courts with competent jurisdiction deciding on the merits matters involving the same parties and the subject matters arising from ownership and usage of the subject properties.

C. Plaintiff has had full and fair opportunities to litigate all claims in the underlying action.

In what can only be described as vexatious actions and continuous abuse of the Court system, Plaintiff has now retained a third attorney to bring the underlying action. Overlooking the fact that the verified complaint is based on inaccurate or false statements, even if all the allegations were true, Plaintiff has twice been given the full and fair opportunity to litigate and has argued with the Court the alleged claims against Defendant Kokolakis for breach of fiduciary duty, breach of implied covenant of good faith and fair dealing and unjust enrichment in front of competent jurisdictions. Furthermore, and as clearly stated by the Hon. Carmen Velasquez, the Matrimonial Action will address all accounting concerns Plaintiff may have with regards to the subject premises. See Exhibit C.

Based on the principles of the *res judicata* and collateral estoppel doctrines, Plaintiff is not allowed to relitigate these matters, and therefore Plaintiff's complaint should be dismissed in its entirety.

IV. PLAINTIFF'S CAUSES OF ACTION MUST BE DISMISSED PURSUANT TO CPLR §3211(a)(7) AS PLAINTIFF FAILS TO STATE A CAUSE OF ACTION AGAINST DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED

It is well established that dismissal is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery. *Mid-Hudson Valley, 155 A.D.3d at 1219; Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017).

In the instant matter, even if we assume that Plaintiff's actions are timely, not barred by the doctrines of *res judicata* and collateral estoppel, or disposed by the documentary evidence, Plaintiff categorically fails to properly claim the elements of the alleged causes of action, and more importantly fails to allege the breach of fiduciary duty claims, which merits dismissal of the action as a matter of law.

A. Plainitiff's complaint is bared by the doctrine of laches

Laches is an equitable defense that may be "asserted where neglect in promptly asserting a claim for relief results in prejudice to a defendant.…" *Moreschi v. DiPasquale*, 58 A.D.3d 545, 545 (1st Dept. 2009). The doctrine is "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Tels. v. Ry Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

To invoke the doctrine, "a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the

offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant." *Cohen v. Krantz*, 227 A.D.2d 581, 582 (2d Dept. 1996). All four elements are necessary to invoke the doctrine. *Id.*; *Dwyer v. Mazzola*, 171 A.D.2d 726, 727 (2d Dept. 1991) (citation omitted). When that occurs, the doctrine "will operate as a bar to the relief sought." *Stancioff v Estate of Danielson* , 2018 NY Slip Op 33412 (Sup Ct, NY County 2018).

"In order for laches to apply, there must be an unreasonable and inexcusable delay." *Waldman v. 853 St. Nicholas Realty Corp*., 64 A.D.3d 585, 588 (2d Dept. 2009). Mere inaction or delay in bringing a proceeding, without a showing of prejudice, [will] not constitute laches." *Haberman v. Haberman*, 216 A.D.2d 525, 527 (2d Dept. 1995). To show prejudice, the defendant must demonstrate "an injury, change of position, or other disadvantage resulting from [the] delay. *Id.*

Plaintiff's causes of action, if true, would be barred by the doctrine of laches. Defendants actions of occupying the first floor office of the 2909 Property location, and the alleged actions Plaintiff claims are a breach of fiduciary duty occurred in or before 2012. Plaintiff had almost a decade of knowledge and opportunity to address any grievances or concerns he supposedly had, which he failed to do.

When the property was purchased in 2012, it was agreed that Defendant would occupy the first floor office while continuing to act as manager of the subject premises. Georgia Villeta Aff. ¶33, Kokolakis Aff ¶29. At no point prior to the 2019 actions did Defendant know or expect Plaintiff to have a complaint with regards to Defendant occupying the 2909 Property. 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.

Plaintiff is bringing these complaints over 25 years after the purchase of the 3821 Property, 18 years after the purchase of the 3819 Property, and almost a decade after the purchase of the 2909 Property, with the intent to injur Defendant. If Plaintiff's relief is granted, Defendant will be injured in various aspects, including affecting his work by a sudden change in work expenses, increasing costs and expenses and having his rights as co-owner of the property be unjustly limited.

Accordingly, Plaintiff's causes of action should be dismissed under the doctrine of laches as Plaintiff unreasonably neglected and delayed bringing his claims for relief for almost a decade.

B. Plaintiff has failed to allege that he has actual and ascertainable damages caused by Defendants for his causes of action.

A showing of actual and ascertainable damages is a common element that all causes of action brought by Plaintiff must have. In New York, a Plaintiff will not succeed where he is unable to set forth facts showing actual and ascertainable damages, as speculative or conclusory damage claims are not sufficient. *Lauer v Rapp*, 190 AD2d 778 (2d Dept 1993).

In his complaint, Plaintiff alleges purely false, speculative and conclusory statements that the properties are rented under fair market value, that Defendant owes Plaintiff monies in mortgage arrears as Plaintiff has exclusively paid the properties' mortgages, and that Defendant has failed to provide Plaintiff with his equitable share of the profits from the subject properties.

Plaintiff's allegations that he has not been provided with his equitable share of the profits from the subject premises, and that Plaintiff has exclusively paid the property mortgages are

false. 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. A look at the bank statements (Exhibits G, H, and I) clearly show the rental income being deposited, and the expenses, including utilities and mortgage payments, paid from each corresponding account. Furthermore, Plaintiff's tax returns (Exhibit E) together with Plaintiff's accountant letters and affidavits (Exhibit F), clearly show that from 1997 onwards Plaintiff has received yearly income from the rented premises and had knowledge of same.

Further, since 1997, Plaintiff and his wife Georgia Villeta have advised their accountant that they are 50% owners of the properties, and their accountant has explained to Plaintiff and Georgia Villeta their corresponding income and liabilities as to said 50% ownership. Georgia Villeta Aff. ¶35-36. It is simply incomprehensible that Plaintiff claims to not be receiving income from the properties when not only have the bank accounts for the properties been held in Plaintiff and Georgia Villeta's name (giving Plaintiff complete access to the income), but Plaintiff's has made withdrawals of thousands of dollars from the property accounts, which the co-owners agreed were to be solely used for the management of the properties, for Plaintiff's sole benefit at the expense of the Defendant.[3] See Exhibit K.

Plaintiff's allegations that the properties are being rented below market value is speculative, conclusory and unfounded. Plaintiff has not suffered any damages, the properties have been rented at reasonable rates and Plaintiff has been aware of and agreed to the rentals through the years.

Plaintiff has not suffered any ascertainable damages, and therefore fails to state any of the claims alleged. Accordingly, Plaintiff's causes of action should be dismissed as a matter of law.

[3] It is undisputed, as Plaintiff states in his verified complaint at paragraph 54, that the bank accounts for the subject properties were to be used only for matters related to the subject premises.

C. Defendants are not and never were Plaintiff's "in-house" counsel and no attorney-client relationship exists.

Another common element in all causes of action claimed by Plaintiff is the false statement that Defendant Kokolakis was Plaintiff's "In-House Counsel" and an attorney-client relationship existed between the parties.

New York defines in-house counsel as an "attorney who is employed full time or part time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization." *22 NYCRR Part 522.1(a).* Defendant Kokolakis is a private attorney with a firm representing a multitude of clients, and is not and has never acted as in-house counsel for Plaintiff. Kokolakis Aff. ¶38, Georgia Villeta Aff. ¶ 82.

Furthermore, New York Courts have also found that an "attorney-client relationship arises only when one contacts an **attorney in his capacity as such** for the purpose of obtaining legal advice or services" *Gipe v Monaco Reps, LLC*, 2013 NY Slip Op 31435, 11 (Sup Ct, NY County 2013) (*emphasis added*). While no single factor determines whether an attorney-client relationship exists, there must be an explicit undertaking to perform a specific task, and Plaintiff's unilateral belief does not confer upon him the status of client. See *Tropp v Lumer*, 23 AD3d 550, 551 (2d Dept 2005) Volpe v Canfield, 237 AD2d 282, 283 (2nd Dept 1997), *Volo Logistics LLC V Varig Logistica, S.A.*, 2007 NY Slip Op 34140, 11-12 (Sup Ct, NY County 2007).

In the underlying action, Plaintiff merely states the words "in-house" counsel and claims an attorney-client relationship solely by reason of Defendant Kokolakis, a co-owner of the properties, being a licensed attorney.

Plaintiff attempts to mislead the court and claim the existence of an attorney-client relationship by stating that Defendant Kokolakis has admitted that Plaintiff was "in a legal and ethical relationship of confidence and trust" with Defendant Kokolakis. (Verified Complaint, Exhibit A, ¶ 46). Defendant Kokolakis statement, made in the Trust Action, addresses the legal and ethical relationship Plaintiff had towards Defendant while holding Defendant Kokolakis' percentage of ownership of the subject properties in a Trust. Kokolakis Aff. ¶67-68. Nothing in said statements reads or can be interpreted as creating an attorney-client relationship between Plaintiff and Defendant.

For over twenty years, Plaintiff and Defendant Kokolakis have maintained a relationship as brothers in law and as co-owners of investment properties, and the relationship was not in Defendant's capacity as an attorney for the purpose of obtaining legal services. Apart from representing Georgia Villeta and Plaintiff for the specific tasks of closing title on the 3819 and 2909 Properties (which were done for convenience and to save all co-owners thousands of dollars in legal fees), Defendant has never otherwise acted as or represented Plaintiff as his attorney. Georgia Villeta Aff ¶ 81-83. Kokolakis Aff. ¶ 39-40.

Based on the facts and history of the relationship, a reasonable person in the same situation as Plaintiff would not have believed the relationship with Defendant amounted to that of an attorney-client relationship. Plaintiff's unilateral belief that being a family member of an attorney confers him attorney-client privileges, does not confer upon him the status of client, and therefore no attorney client relationship exists.

D. Plaintiff fails to allege the necessary elements of fiduciary relationship and Defendant's misconduct necessary for a breach of duty claim

The elements of a cause of action to recover damages for breach of fiduciary duty are 1) the existence of a fiduciary relationship, 2) misconduct by the defendant, and 3) damages directly caused by the defendant's misconduct. *Stortini v. Pollis*, 138 A.D.3d 977, 978-979 (2d Dep't 2016), quoting *Deblinger v Sani-Pine Prods. Co., Inc*. 107 A.D.3d 659, 660 (2d Dep't 2013), *Rut v Young Adults Inst.,* Inc., 74 A.D. 3d 776, 777 (2d Dep't 2010). 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" *EBC I, Inc. v. Goldman, Sachs & Co.* 5 N.Y. 3d 11, 19 (2005). Furthermore, given that damages stemming from the misconduct is an essential element of a breach of fiduciary duty claim, the claim is not enforceable, and thus does not accrue until damages are sustained." *IDT Corp. v. Morgan Stanley Dean Witter & Co.,* 12 NY3d 132, 139 (2009), *Grika v. McGraw*, 55 Misc. 3d 1207(a) (Sup. Ct., N.Y. County 2016).

Plaintiff has not sustained damages, nor has Defendant behaved in a way that has damaged Plaintiff. Since 1995, actions taken by Defendant Kokolakis have been for the benefit of all co-owners and have resulted in successful investments. Georgia Villeta Aff. ¶ 80. Plaintiff simply does not (and cannot) show any misconduct by Defendant Kokolakis or that he has suffered damages caused by Defendant Kokolakis.

Plaintiff falsely claims that Defendant engaged in "egregious misconduct" by taking at least $70,000 in funds from bank accounts that were only supposed to be used for the management of the properties, using the funds to build himself an office on the first floor of the 2909 Property, and occupy same, in addition to claiming that Defendant failed to obtain a

Certificate of Occupancy causing the property to be worth less than if a certificate had been obtained. Verified Complaint, Exhibit A, ¶ 54 -55.

New York Courts have found that a tenant in common "has the right to take and occupy the whole of the premises and preserve them from waste or injury, so long as (they) do not interfere with the right of (the other tenants) to also occupy the premises" *Jemzura v Jemzura*, 336 NY2d 496, 503 (1975). "Mere occupancy alone by one of the tenants does not make that tenant liable to the other tenant(s) for use and occupancy absent an agreement to that effect or an ouster" *McIntosh v McIntosh*, 58 AD3d 814, 814; see *Misk v Moss*, 41 AD3d 672, 673, lv dismissed 9 NY3d 946, lv denied 10 NY3d 704.

First, by law, Defendant Kokolakis is within his rights as co-owner of the 2909 Property to occupy and have his office on the premises. There is no misconduct by Defendant for simply exercising his ownership rights.

Second, it is untrue that Defendant used no less than $70,000 in order to “build himself an office”. (Verified Complaint, Exhibit A, ¶ 54). Defendant, Plaintiff and Georgia Villeta were all aware that the 2909 Property required repairs, including repairs to the pre-existing commercial space, and agreed to use the remaining funds available from the 3819 CEMA, which belonged to all co-owners, for said repairs. Kokolakis Aff. ¶23. Georgia Villeta Aff. ¶26. Defendant was responsible to coordinate and manage the repairs needed to the property, and did so while keeping Plaintiff and Georgia Villeta updated and consulting with Plaintiff and Georgia Villeta about all costs and expenses involved in the repairs, with Plaintiff signing several of the checks used to pay for the repairs. Georgia Villeta Aff. ¶31-32 , Kokolakis Aff. ¶28. See also Exhibit K.

Lastly, while repairs were needed and done to the 2909 property, the repairs did not change the use of the property prior to and after the time of purchase. Kokolakis Aff. ¶26. Velez Cardec Aff. ¶48, Georgia Villeta Aff. ¶57. See also Survey and ACRIS documents as Exhibit O. Plaintiff is making bare conclusory allegations that the property's worth has been diminished. Plaintiff's unfounded allegation is contradicted by the fact that in less than a decade, the value of the property has almost doubled from a purchase price of $730,000.00 to the appraised value provided by Plaintiff of $1,350.000. Velez Cardec Aff. ¶49. See also Exhibit O.

Accordingly, Plaintiff has failed to show the necessary elements of misconduct by Defendant, and has failed to show that said misconduct damaged him. Therefore, Plaintiff's three causes of action for breach of fiduciary duty should be dismissed in their entirety.

E. Plaintiff fails to allege the necessary elements of an agreement or Defendant's actions to deprive plaintiff of his rights which are necessary for a claim of breach of implied duty of good faith and fair dealing

In New York, within every contract is an implied covenant of good faith and fair dealing. The covenant is breached when a party acts in a manner that deprives the other party of the right to receive benefits under their agreement and encompasses any promises which a reasonable person in the position of the promisee would be justified in understanding were included. See *511 West 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 153, 746 N.Y.S.2d 131, 773 N.E.2d 496 (N.Y. 2002); *Dalton v. Educational Testing Serv*., 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 663 N.E.2d 289 (N.Y. 1995); *Frankini v. Landmark Constr. of Yonkers, Inc.*, 91 A.D.3d 593, 595, 937 N.Y.S.2d 80 (2d Dep't 2012); *Ochal v. Television Tech. Corp.,* 26 A.D.3d 575, 576, 809 N.Y.S.2d 604; *New York Pattern Jury Instructions – Civil* § 4.1 (2d ed. 2006). Therefore, in order for a duty to arise, first an agreement must be established. "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). That meeting of the minds must include agreement on all essential terms. *Trylon Realty Corp. v Di Martini,* 34 NY2d 899, 900 (1974) *Kaelin v Warner,* 27 NY2d 352 (1971).

Plaintiff fails in the underlying action to establish the existence of an agreement between Plaintiff and Defendant Kokolakis. There was no agreement between Plaintiff and Defendant Kokolakis to make cash payments in the amount of $2,000.00 into a shoe box accessible to the Plaintiff, nor did Defendant agree to make a balloon payment in a sum sufficient to pay off the entire mortgage for the 2909 Property. Kokolakis Aff. ¶41-42, Georgia Villeta Aff. ¶37. 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. Kokolakis Aff. ¶43 . Georgia Villeta Aff. ¶55. It is inherently incredible, and no reasonable person could justifiably believe that Defendant Kokolakis, already a co-owner of the properties, managing the three properties and sharing the cost of expenses, would make a promise to make monthly deposits in the amount of $2,000 *cash into a shoebox,* or promise to make a balloon payment on a mortgage of hundreds of thousands of dollars. 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 all expenses of the properties are shared equally between the co-owners. Kokolakis Aff ¶45.

Accordingly, as Plaintiff fails to claim an agreement existed between Plaintiff and Defendant, and Defendant has not deprived Plaintiff of his interest as a co-owner of the subject premises, Plaintiff's action for breach of implied covenant of good faith and dealings should be dismissed.

F. Plaintiff fails to allege that Defendants have been enriched at Plaintiff's expense

To plead a claim for unjust enrichment, Plaintiff must allege three elements: "(1) the other party was enriched, (2) at that party'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"' *Grifel v Madsen,* 2020 NY Slip Op 33118, 5 (Sup Ct 2020), *Georgia Malone & Co. v. Rieder,* 19 NY3d 511, 516 (2012). In his complaint, Plaintiff has failed to claim that Defendant Kokolakis and Defendant KLF have been enriched at Plaintiff's expenses. As a co-owner of the premises Defendant Kokolakis has the right to use the 2909 premises, and his permitted use of the premises would not be "self-dealing" or enrich him at Plaintiff's expense.

A co-owner has the right to take and occupy the premises. 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..." *Degliuomini v Degliuomini,* 12 AD3d 634, 635 (2d Dept 2004), *Le Barron v. Babcock,* 122 N.Y. 153; *Eldridge v. Wolfe*, 129 Misc. 617.

It is important to clarify that the 2909 Property is a mixed use two-story building, with an office and apartment on the first floor, and an apartment on the 2nd floor. Defendant Kokolakis, as co-owner of the property, occupies the office on the first floor, and the two apartments are rented. As done with the rental income received with the 3821 and 3819 Properties, the rental income received for the 2909 Property's two apartments has been delivered to Plaintiff, Georgia Villeta, or arranged for it to be deposited in the appropriate account. Georgia Villeta Aff. ¶34. Kokolakis Aff. ¶30.

Since the purchase of the first property in 1995, at no point has Defendant Kokolakis ever received any rent income that has not been promptly provided to Plaintiff, Georgia Villeta or

deposited in the corresponding property account. Georgia Villeta Aff. ¶66. As Defendant Kokolakis has not received any rents, it is an impossibility that Defendant could have received rents in excess of his just proportion.

As a co-owner, Defendant Kokolakis has the right to occupy the 2909 Property without being charged rental payments. As the rental income that is indeed received from the rental of the residential units is placed in the property's account for the benefit of all co-owners and Defendant is entitled to use the premises, there is nothing that Defendant has unjustly kept at Plaintiff's expense.

Accordingly, Plaintiff completely fails to state a claim for unjust enrichment against Defendant Kokolakis and Defendant KLF, and accordingly the cause of action for unjust enrichment should be dismissed in its entirety.

V. PLAINTIFF'S COMPLAINT MUST BE DISMISSED PURSUANT TO CPLR §3211(a)(10) AS PLAINTIFF FAILED TO JOIN GEORGIA VILLETA, A NECESSARY PARTY

CPLR §3211(a)(10) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that… the court should not proceed in the absence of a person who should be a party". CPLR §1001(a) provides that necessary parties are persons who might be inequitably affected by a judgment, or persons whose absence would preclude complete relief between Plaintiff and Defendant.

A. Georgia Villeta, Plaintiff's wife and owner of the subject premises as a tenant by the entirety with Plaintiff, is a necessary party as defined by CPLR §1001

Georgia Villeta is Plaintiff's wife, and as Tenant by the Entirety with Plaintiff is the owner of 50% undivided interest in the subject Properties. In New York, by reason of their relationship as husband and wife, a married couple is regarded legally as one person, and conveyance to them by name is a conveyance in law to but one person who took the whole between them, and each is seized of the whole and not of any undivided portion. *Stelz v. Shreck*, 128 N.Y. 263, 266 (N.Y. 1891).

New York Courts have held that "necessary parties are those who might be inequitably affected by a judgment in the action or who "ought to be joined" if complete relief is to be accorded to the parties in an action. CPLR §1001(a). "The primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter." *Wang v Tiaa–Cref Life Ins. Co.*, 35 Misc 3d 1220 (Sup Ct, NY County 2012), *Joanne S. v. Carey*,115 A.D.2d 4, 7 (1st Dept 1986).

Since Plaintiff and Georgia Villeta, as tenant by the entirety, are regarded l*egally as one person*, Georgia Villeta ought to be joined for complete relief to be accorded in all matters relating to the subject properties. For example, if not included in the action, Georgia Villeta would be inequitably affected by not being included in a resolution affecting the subject properties and jointly owned funds. As tenant by the entirety and owner of an undivided 50% interest in the subject properties with Plaintiff, Georgia Villeta has a material interest in the subject matter of this action and will undoubtedly be affected by this action.

Furthermore, Georgia Villeta has always had access and control of the accounts, income and expenses of the subject properties. It would be impossible to accurately and completely find

a resolution with regards to an accounting of the premises or for claims of withheld rents without Georgia Villeta as a party to the action, which could result in additional actions against Georgia Villeta.

Therefore, Plaintiff's complaint should be dismissed for failure to join Georgia Villeta, a necessary party to the within action.

VI. PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIMS SHOULD BE DISMISSED AS PLAINTIFF FAILS THE PARTICULARITY REQUIREMENTS OF CPLR §3016(b)

It is well established that a complaint must "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions" that form the basis of the complaint and "the material elements of each cause of action". *Berardi v Phillips Nizer, LLP*, 2016 NY Slip Op 30860, 13 (Sup Ct, NY County 2016) citing *CPLR §3013.*

CPLR §3016(b) specifically requires that certain causes of action, including those based upon misrepresentation, breach of trust or undue influence, plead the circumstances constituting the alleged wrong in detail. While "there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege the basic facts to establish the elements of a cause of action, and therefore CPLR §3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct". *Argyrides v River Terrace Apartments LLC,* 2014 NY Slip Op 30182, 9 (Sup Ct, NY County 2014), *Eurycleia Partners*, 12 NY3d at 559, quoting *Pludeman,* 10 NY3d at 492*). "*Bare allegations are insufficient" and "allegations that are wholly speculative lack the required particularity under CPLR §3016(b). See *Gervasio v Di Napoli*, 126 AD2d 514, 514 (2d Dept 1987); *Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d

1185, 1189 (2d Dept 2012)), *Li-Shan Wang v TIAA-CREF Life Ins. Co*., 2014 NY Slip Op 30329, 11 (Sup Ct, NY County 2014). *Katz 737 Corp. v Cohen*, 104 AD3d 144, 154 (1st Dept 2012), lv denied -NY3d-, 2013 NY Slip Op 84042, 2013 WL 4711225 (2013).

The elements of a cause of action to recover damages for breach of fiduciary duty are 1) the existence of a fiduciary relationship, 2) misconduct by the defendant, and 3) damages directly caused by the defendant's misconduct. *Stortini v. Pollis*, 138 A.D.3d 977, 978-979 (2d Dep't 2016), quoting *Deblinger v Sani-Pine Prods. Co., Inc*. 107 A.D.3d 659, 660 (2d Dep't 2013), *Rut v Young Adults Inst.,* Inc., 74 A.D. 3d 776, 777 (2d Dep't 2010). New York courts have repeatedly held that a cause of action for breach of fiduciary duty falls within the CPLR §3016(b) requirements and must be pleaded with the required particularity. See, e.g., *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808, (2d Dep't 2011); *Ozelkan v. Tyree Bros. Envtl. Servs*., 29 A.D.3d 877, 879 (3d Dep't 2006). In fact, cases for breach of fiduciary duty have been dismissed on the grounds that the complaint fails to specifically allege damages attributable to the alleged breach. *Deraffele v Owners*, 33 AD3d 752 (2d Dept 2006).

In the underlying action, Plaintiff fails to meet the detailed particularity required for breach of fiduciary duty allegations, and Plaintiff simply states bare and speculative allegations (which are utterly false) that Defendant Kokolakis was Plaintiff's "in-house counsel" (Verified Complaint, Exhibit A, ¶45), that Defendant Kokolakis breached his duties to Plaintiff by advising Plaintiff to file false tax returns… and to engage in a scheme to defraud Plaintiff" (Verified Complaint, Exhibit A, ¶ 49), by "exercising exclusive financial and legal control over the management of the properties (Verified Complaint, Exhibit A, ¶ 62) and using false

"pretenses of developing a multi-unit structure and then failing to follow through on the parties' agreement" (Verified Complaint, Exhibit A, ¶ 66).

Assuming for arguments sake that the allegations are true (which they are not), Plaintiff fails to state details about Defendant's misconduct and how said misconduct caused Plaintiff to be damaged. Plaintiff's complaint nowhere sets forth any proof of Defendant's supposed misbehavior, making bare allegations and speculations of supposed agreements and duties breached by Defendant.

In a breach of fiduciary duty claim, Plaintiff also needs to prove "damages caused by the defendant's misconduct". *Stortini v. Pollis*, 138 A.D.3d 977 supra at 978. Once again, Plaintiff simply states either none or mere speculations of the damages he claims to have suffered or will potentially suffer as a result of Defendant Kokolakis' purported breaches, utterly failing to meet the particularity required by the CPLR.

Plaintiffs' causes of action for fiduciary duty in no way meet the burden of CPLR §3016(b) to detail Defendant's alleged misconduct and damages to Plaintiff "and Defendants should not be required to answer such jumble" Rapaport v Diamond Dealers Club, Inc., 95 AD2d 743 (1st Dept 1983). Accordingly, Plaintiff's first, second and third causes of action for fiduciary duty should be dismissed.

VII. DEFENDANT SHOULD BE REIMBURSED FOR EXPENSES AND ATTORNEY FEES AND THE COURT SHOULD SANCTION PLAINTIFF FOR BRINGING A FRIVOLOUS AND VEXATIOUS ACTION, AS WELL AS A FILING INJUNCTION

The court, in its discretion, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. In addition to or in lieu of awarding costs, the court in its discretion may impose financial sanctions

upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. See N.Y. Comp. Codes R. & Regs. tit. 22 § 130-1.1 The Court rules goes on to define that a conduct is frivolous if (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. N.Y. Comp. Codes R. & Regs. tit. 22 § 130-1.1

"In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" *Onetti v. Gatsby Condo*., 2012 NY Slip Op 33471 (Sup Ct, NY County 2012). As for the merits of a matter, the Court stated that "(n)othing could more aptly be described as conduct completely without merit in . . . fact' than the giving of sworn testimony or providing an affidavit, knowing the same to be false , on a material issue." *Klin Constr. Group, Inc. v Blue Diamond Group Corp*., 2009 NY Slip Op 52344, 22-23 (Sup Ct, Kings County 2009). In determining whether sanctions are appropriate, the court must look at the broad pattern of conduct by the offending parties or attorneys *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33 (1st Dept 1999).

Frivolous conduct has been found where the primary purpose is to delay or prolong the resolution of the litigation, or to harass or maliciously injure the other party. *Kaygreen Realty Co., LLC v. IG Second Generation Partners, L.P.,* 78 A.D.3d 1008, 1009, 913 N.Y.S.2d 663; see, e.g., *Sassower v. Signorelli,* 99 A.D.2d 358, 359, 472 N.Y.S.2d 702. Further, "enforcement

of the sanctions rule is essential to deter conduct that wastes judicial resources and inhibits the proper administration of the court system." *Gordon v. Marrone,* 202 A.D.2d at 111, 616 N.Y.S.2d 98. *Klein ex rel. Klein v. Seenauth,* 180 Misc.2d at 220–221, 687 N.Y.S.2d 889.

Plaintiff's underlying action, like his Partition action, meets the definition of a frivolous action. As explained in detail above in the different sections of our motion to dismiss, Plaintiff's Verified Complaint states material factual statements that are clearly false and known to be false by Plaintiff, and Plaintiff's action is without merits and cannot be supported by any reasonable argument. Plaintiff has knowingly made false statements by swearing to the truth of statements that directly contradicts himself in the different actions. For instance, in his **verified** answer to the Trust Action, Plaintiff claims that Defendant has no ownership interest in the three properties, while simultaneously filing with the Matrimonial Court a sworn to Statement of Financial Affairs stating that he is owner of 25% of the Subject Premises, and clearly stating during conversations with Gerasimoula Konidaris that he is fine signing the deeds transferring ownership but does not want to relinquish his control. See Exhibit M. [4] Once there is a finding of frivolousness, sanction is mandatory. *Grasso v. Mathew*, 164 A.D.2d 476, 564 N.Y.S.2d 576, lv. Denied).

Looking at Plaintiff's pattern of abuse of the Court, this is Plaintiff's **fourth time** in front of the Queens County Supreme Court attempting to litigate matters involving and arising from the subject premises. Plaintiff has continuously changed attorneys to prolong the resolution of these matters, and Plaintiff's actions show that he is abusing the court system and the judicial

[4] Defendant respectfully requests for the Court to take judicial notice of the pattern of Plaintiff's contradictory affidavits in the various actions, including the affidavits in support of Order to Show Cause and other filings in the Matrimonial Action, not included pursuant to 22 NYCRR §202.5(e).

process soley out of ill will, spite and in order to harass and maliciously cause injury to Defendant.

Section 130-1.1 also permits this Court to enjoin a vexatious litigator from further filings when a plaintiff has shown a tendency to harass. *Dimery v. Ulster Savings Bank*, 82 A.D.3d 1034, 920 N.Y.S.2d 144 (2d Dep't 2011) ("Public policy generally mandates free access to the courts… (h)ere, however, the record reflects that the plaintiff forfeited that right by abusing the judicial process through vexatious litigation. Accordingly, it was not improper for the Supreme Court to enjoin the plaintiff from bringing any further motions regarding the subject matter of the instant action without its permission."); *Vogelgesang v. Vogelgesang*, 71 A.D.3d 1132, 1134, 899 N.Y.S.2d 272, 274 (2d Dep't 2010) ("The Supreme Court providently exercised its discretion in enjoining the appellant from filing any further actions or motions in the matrimonial action without prior written approval. Public policy generally mandates free access to the courts… However, a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will.")

As stated in Defendant's Motion to Dismiss the Partition Action, Plaintiff has demonstrated a hostile attitude towards Defendant Kokolakis, including making threats against his life. During conversations with Georgia Villeta, Plaintiff has made several remarks on how he wishes harm on Defendant Kokolakis, wishes that he burns in hell for eternity, wishes he was dead, and stating that he is bringing the court actions for "revenge and vindication". See Georgia Villeta Aff. ¶60.

These disturbing and constant statements together with Plaintiff's blatant waste of the court's time and resources with meritless actions based on deliberately false statements, show the malicious intent behind Plaintiff's frivolous claims.

The purpose of 22 N.Y.CRR part 130 is not only to prevent the waste of judicial resources but to also prevent future "vexatious litigation and dilatory or malicious litigation tactics". *Matter of Kernisan v. Taylor*, 171 A.D.2d 869 (N.Y. App. Div. 1991). "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics" *Levy v. Carol Management Corp.,* 260 A.D.2d 27, 34 (1st Dept.1999). Perhaps if the Court in the Partition Action would have sanctioned Plaintiff for his blatant frivolous claims, Plaintiff would not have continued his clearly vexatious litigation.

This Court should dismiss Plaintiff's case, exercise its discretion and award Defendants reimbursement for expenses and attorneys' fees to defend this frivolous action, and should also, in its discretion, impose financial and injunctive sanctions upon Plaintiff for his patently frivolous, vexatious, wasteful and potentially dangerous conduct, preventing him from filing any further paper and rendering any future papers he files null and void.

CONCLUSION

This lawsuit is harassment. Plaintiff's complaint is clearly untimely and barred by *res judicata* and collateral estoppel. Furthermore, the documentary evidence disposes of Plaintiff's claims, which consists of bare legal conclusions and false statements. In the end, Plaintiff's complaint is another frivolous action by Plaintiff who continues to abuse the court system to harass Defendant Kokolakis.

For all of the above reasons, Defendants' pre-answer motion by Defendants KOKOLAKIS and KLF for an Order (1) dismissing Plaintiff's Verified Complaint, and all claims against Defendants: a) pursuant to CPLR §3211(a)(1) as documentary evidence resolves all factual issues and completely disposes of plaintiff's claim, b) pursuant to CPLR §3211(a)(5) as all claims are barred by res judicata and collateral estoppel, c) pursuant to CPLR §3211(a)(5) on the basis of untimeliness, d) pursuant to CPLR §3211(a)(7) on the basis that plaintiff fails to state a cause of action as to Defendants, e) pursuant to CPLR §3211(a)(10) as the court should not proceed with this action in the absence of Georgia Villeta, a necessary party, and f) pursuant to CPLR §3016(b) for failure to plead the breach of duty claims with sufficient particularity; (2) Pursuant to 22 NYCRR § 130-1.1 awarding the Movants sanctions, fees and costs, and that Plaintiff Alfredo Villeta ("Plaintiff") be declared a vexatious litigant and enjoined from making future filings, making all of his future filings, including motions and pleadings, null and void without court approval; and (3) for such further and other relief as the Court deems just and proper , should be granted in its entirety.

Dated: Queens, New York
June 23, 2021

Yours, etc.

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