NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MAURICE HALLIVIS,

Index No. **814476/2021E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

BRYAN W. KISHNER, individually, and as an Attorney, KISHNER & ASSOCIATES, P.C., KISHNER MILLER HIMES, P.C., Successor in interest to KISHNER & ASSOCIATES, P.C., KISHALL, LLC, KISHBAY, LLC, and PEAPACK-GLADSTONE BANK,

Defendants.

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The following papers numbered 1 to 3, read on this motion, noticed on 3/15/2022, and duly submitted as no. 1 on the Motion Calendar of 4/29/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Defendants' motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 8/4/22

Hon. **FIDEL E. GOMEZ, A.J.S.C.**

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: September 26, 2022 at 2:00 p.m.

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

Case Disposed □
Settle Order □
Schedule Appearance □

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
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MAURICE HALLIVIS,

Index No. **814476/2021E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

BRYAN W. KISHNER, individually, and as an Attorney, KISHNER & ASSOCIATES, P.C., KISHNER MILLER HIMES, P.C., Successor in interest to KISHNER & ASSOCIATES, P.C., KISHALL, LLC, KISHBAY, LLC, and PEAPACK-GLADSTONE BANK,

Defendants.
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Defendants Bryan W. Kishner ("Mr. Kishner"), Kishner & Associates, P.C. ("Kishner & Associates"), Kishner Miller Himes, P.C. ("Kishner Miller Himes"), Kishall, LLC ("Kishall"), and Kishbay, LLC ("Kishbay") (collectively, "Defendants") move for an order dismissing the complaint pursuant to CPLR 3211(a)(5), 3211(a)(7), § 3013, and 3016(b) and canceling the notice of pendency pursuant to CPLR § 6514. Plaintiff Maurice Hallivis ("Plaintiff") opposes. Defendant Peapack-Gladstone Bank ("Peapack") submits a response, arguing that if Plaintiff's claim for partition and sale is dismissed, Peapack should also be dismissed from this matter, as that is the only claim alleged against it in the complaint.[1]

For the reasons which follow, Defendants' motion to dismiss the complaint is granted, in part.

BACKGROUND:

On October 22, 2021, Plaintiff commenced this action against Defendants, alleging nineteen causes of action. Plaintiff seeks, *inter alia*, declarations that a partnership or joint venture

[1] The only allegation made against Peapack is that it holds a mortgage lien on the Properties (Compl., ¶ 154).

existed, a dissolution of the partnership, an accounting, $10 million in damages, the imposition of a constructive trust, a partition and sale, a declaration that Defendants are alter egos of one another, and a permanent injunction.

The complaint alleges that Plaintiff is a real estate broker (Compl., ¶ 6). Plaintiff alleges that Mr. Kishner, a lawyer, is the principal of the law firms, Kishner & Associates and Kishner Miller Himes (Compl., ¶ 8-12). Plaintiff alleges that Kishner Miller Himes is the successor in interest to Kishner & Associates (Compl., ¶ 13). Plaintiff also alleges that Mr. Kishner is the managing member of the limited liability companies, Kishall and Kishbay (Compl., ¶ 14-17).

The complaint alleges that in or around 2013, Plaintiff and Mr. Kishner decided to engage in three business together (Compl., ¶ 25). Plaintiff alleges that the first business began in or around November 2013, when he and Mr. Kishner began exploring the idea of taking over a pre-existing stuffed animal business known as Ormont (Compl., ¶ 26). Plaintiff alleges that he and Mr. Kishner agreed to equally share the profits and losses of Ormont (Compl., ¶ 28). Plaintiff alleges that the second business venture was to open a Weichert Realty Franchise on City Island to sell real estate (Compl., ¶ 31). He alleges that the third business venture was to find and buy real property on City Island as an investment, as space to operate the Weichert Franchise and operate a real estate investment company (Compl., ¶ 32).

Plaintiff alleges that on September 3, 2014, Mr. Kishner formed Kishall in furtherance of the partnership/joint venture (Compl., ¶ 55).

Plaintiff alleges that in or around October 2014, he and Mr. Kishner agreed to begin the partnership/joint venture and purchase property on City Island (Compl., ¶ 33). He alleges that as part of their partnership and/or joint venture agreements, they agreed to each contribute sweat equity capital, with Mr. Kishner donating legal work and negotiating the purchase offering price, and Plaintiff using his real estate broker's license to locate a building for their business (Compl., ¶ 34). Plaintiff alleges that he contributed much time and effort to find a suitable building (Compl., ¶ 38-42). Plaintiff alleges that he and Mr. Kishner agreed to enter into the partnership/joint venture agreement as co-owners, each contributing an equal amount of capital, including sweat equity and any down payments, and share equally in any profits and/or losses (Compl., ¶ 43-44).

The complaint alleges that Mr. Kishner, Kishner & Associates, and Kishner Miller Himes acted as the attorney for the three business ventures, as Plaintiff's counsel and as Plaintiff's partners and joint ventures. Plaintiff alleges that these defendants never put anything in writing regarding their representation of Plaintiff, and as such, violated DR-1.8 (Compl., ¶ 45).

Plaintiff alleges that he and Mr. Kishner agreed that the investment property on City Island to open a Weichert Realty office would be acquired by purchase on the account of the partnership and therefore, would be partnership property, to be co-owned by them as equal partners (Compl., ¶ 46-47). Plaintiff alleges that they agreed that they would also use that space for their real estate investment business (Compl., ¶ 48). Plaintiff alleges that he and Mr. Kishner filled out a franchise agreement to operate a Weichert Realty Office franchise (Compl., ¶ 49) and that they went for training at Weichert (Compl., ¶ 50).

Plaintiff alleges that on October 14, 2014, he sent Mr. Kishner an email with information for the purchase of five contiguous buildings known as 321 City Island Avenue, Bronx, NY 10464, 323 City Island Avenue, Bronx, NY 10464, 325 City Island Avenue, Bronx, NY 10464, 327 City Island Avenue, Bronx, NY 10464, and 329 City Island Avenue, Bronx, NY 10464 (the "Properties"), so that they could be purchased for the parties' partnership/joint venture (Compl., ¶ 60). He alleges that on October 19, 2014, he sent Mr. Kishner an email with information for the Properties and advised Mr. Kishner on how to negotiate the price for the Properties (Compl., ¶ 62). He alleges that on October 20, 2014, they discussed making an offer to purchase the Properties for $2,000,000.00 (Compl., ¶ 64).

Plaintiff alleges that in or around October 2014, Mr. Kishner met with the seller of the Properties to make a deal to purchase the Properties for the partnership/joint venture (Compl., ¶ 65). Plaintiff alleges that after October 13, 2014, Mr. Kishner stopped communicating with him regarding the business and joint venture/partnership (Compl., ¶ 69). Plaintiff alleges that after Mr. Kishner met with the seller, Mr. Kishner decided to cut Plaintiff out of the business and decided to purchase the Properties for himself (Compl., ¶ 70-71).

Plaintiff alleges that on July 28, 2015, Mr. Kishner formed Kishbay (Compl., ¶ 72).

Plaintiff alleges that on November 12, 2015, Mr. Kishner, through Kishbay, purchased the Properties (Compl., ¶ 77). Plaintiff alleges that he never received the benefits and his share of the Properties and lost the opportunity to own a Weichert Realty franchise. He also alleges that the stuffed animal business "Ormont" never got off the ground (Compl., ¶ 80-81).

On October 27, 2021, Plaintiff filed a notice of pendency against the Properties.

On February 15, 2022, Defendants filed the instant motion. The motion was marked fully submitted on April 29, 2022.

DISCUSSION:

Failure to Attach a Copy of the Summons and Complaint to the Motion:

As a preliminary matter, the Court declines to deny Defendants' motion on the basis that they have not attached the summons and complaint as an exhibit to the motion. Although Defendants failed to attach a copy of the summons and complaint to their motion, the pleading was filed electronically on NYSCEF and is available to the parties and to the Court (*Galpern v Air Chefs, LLC*, 180 AD3d 501, 502 [1st Dept 2020] ["The motion court providently exercised its discretion under CPLR 2001 to disregard plaintiff's failure to submit the pleadings because the record was 'sufficiently complete' and otherwise available to the court and parties on the New York State Courts Electronic Filing docket"]; *Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 632 [1st Dept 2012] ["Although Addison failed to include the pleadings with its motion, the error was properly overlooked, as the pleadings were filed electronically and thus were available to the parties and the court"]; CPLR 2214[c] ["Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system."]).

Accordingly, the Court will consider Defendants' motion.

CPLR 3211(a)(5) - Statute of Limitations:

CPLR 3211(a) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (5) the cause of action may not be maintained because of . . . statute of limitations . . ."

"In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired" (*MTGLQ Investors, LP v Wozencraft*, 172 AD3d 644, 644 [1st Dept 2019]; *Education Resources Institute, Inc. v Hawkins*, 88 AD3d 484, 485 [1st Dept 2011]; *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2d Dept 2016]; *Ferdico v Pabone*, 125 AD3d 718, 718 [2d Dept 2015]). "To meet its burden, 'the defendant must establish, inter alia, when the plaintiff's cause of action accrued'" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]).

"The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period,

and the plaintiff must 'aver evidentiary facts establishing that the action was timely or [ ] raise an issue of fact as to whether the action was timely'" (*MTGLQ Investors, LP* at 645).

Defendants argue that the causes of action predicated on the alleged partnership/joint venture are time-barred. Defendants argue that the statute of limitations began to run on October 13, 2014, or at the latest, on November 3, 2014, when Plaintiff and Mr. Kishner ceased communicating. Defendants argue that Plaintiff had six years from November 3, 2014, to bring the causes of action for breach of contract, fraud, unjust enrichment, and quantum meruit, and three years to bring the causes of action for tortious interference and breach of fiduciary duty. Defendants argue that even after applying the 228-day toll created by Executive Order 202.8, the latest that Plaintiff could have brought his causes of action was June 19, 2021. Defendants argue that since the complaint was filed on October 25, 2021, these causes of action are untimely and should be dismissed.

Breach of Implied Contract – Twelfth Cause of Action:

"The statute of limitations on a breach of contract or joint venture cause of action is six years" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]). "[A] breach of contract cause of action accrues at the time of the breach" even though "no damage occurs until later" (*Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 402 [1993]; *Lebedev* at 28).

Plaintiff alleges that Defendants breached the Joint Venture Agreement on November 12, 2015, by purchasing the Properties without Plaintiff's knowledge (Compl., ¶ 179).

Defendants have not demonstrated their entitlement to dismissal of this cause of action. Although Defendants argue that the statute of limitations began to run at the latest on November 3, 2014, when Plaintiff and Mr. Kishner ceased communicating, a cause of action for breach of contract accrues at the time of the breach. The complaint alleges that the breach occurred on November 12, 2015 (Compl., ¶ 179). Since this action was brought within six years of November 12, 2015, this cause of action is timely.

Accordingly, Defendants' motion to dismiss the twelfth cause of action for breach of implied contract as time-barred is denied.

Fraud – Fourth & Fifteenth Causes of Action:

In light of the Court's dismissal of these causes of action pursuant to CPLR 3211(a)(7), as explained below, Defendants' motion to dismiss these causes of action as time-barred is denied as

moot.

Unjust Enrichment – Seventh Cause of Action:

The statute of limitations for a cause of action for unjust enrichment is six years (*Simon v FrancInvest, S.A.*, 192 AD3d 565, 567 [1st Dept 2021]; *Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]). "[A] claim for unjust enrichment accrues upon the occurrence of the alleged wrongful act giving rise to restitution" (*Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003]).

Plaintiff alleges that Mr. Kishner, Kishner & Associates, Kishner Miller Himes, Kishall and Kishbay have been unjustly enriched by receiving Plaintiff's work, labor, advice, services and research without paying or compensating him. Plaintiff alleges that Defendants must return the monies, profits and equity owed to Plaintiff (Compl., ¶ 126-127).

Defendants have not demonstrated their entitlement to dismissal of this cause of action. Although Defendants argue that the statute of limitations began to run at the latest on November 3, 2014, when Plaintiff and Mr. Kishner ceased communicating, that is not the "alleged wrongful act" that the complaint alleges gives rise to the cause of action for unjust enrichment. The "alleged wrongful act giving rise to restitution", as alleged in the complaint, is Defendants' failure to compensate Plaintiff for his work in the form of "monies, profits and equity owed to Plaintiff". Plaintiff argues that this duty to compensate him arose on November 12, 2015, when Defendants purchased the Properties. Since this action was brought within six years of November 12, 2015, this cause of action is timely.

Accordingly, Defendants' motion to dismiss the seventh cause of action for unjust enrichment as time-barred is denied.

Quantum Meruit – Seventeenth Cause of Action:

The statute of limitations for a cause of action for quantum meruit is six years (*Simon* at 567; *Eisen v Feder*, 307 AD2d 817, 818 [1st Dept 2003]). "In an action to recover for work performed on a quantum meruit basis, the cause of action accrues when the work is completed and accepted" (*Elliott v Gian*, 19 AD2d 196, 198 [4th Dept 1963]; *Demian v Calmenson*, 156 AD3d 422, 423 [1st Dept 2017] [holding that a cause of action for quantum meruit accrues when "any alleged benefit could have been conferred by plaintiff]; *Zere Real Estate Services, Inc. v Parr General Contracting Co., Inc.*, 102 AD3d 770, 771-772 [2d Dept 2013] [finding that the cause of action to recover damages in quantum meruit accrued on the date plaintiff had a legal right to

demand payment]; *Howard B. Spivak Architect, P.C. v Zilberman*, 2008 WL 4264549 [Sup Ct, New York County 2008]; *Davis, P.C. v Summers*, 2010 WL 11680356, *2 [Sup Ct, New York County 2010] ["Finally, as to quantum meruit, this cause of action accrues when the final legal service is performed"]).

The complaint alleges that in October 2014, Plaintiff performed labor and services by, *inter alia*, obtaining information regarding the Properties and advising Mr. Kishner on how to negotiate the purchase price of the Properties (Compl., ¶ 40, 60-65). The complaint also alleges that unbeknownst to Plaintiff, on November 12, 2015, Mr. Kishner purchased the Properties (Compl., ¶ 77-78), for the purchase price suggested by Plaintiff (Compl., ¶ 140). The complaint alleges that despite due demand by Plaintiff, Defendants have failed to pay Plaintiff for the cost of his work, labor, and services in connection with the Properties (Compl., ¶ 224).

Defendants have demonstrated their entitlement to dismissal of this cause of action. Defendants argue that the statute of limitations began to run at the latest on November 3, 2014, when Plaintiff and Mr. Kishner ceased communicating. The complaint does not allege that Plaintiff rendered any services after November 3, 2014. Since this cause of action was brought on October 22, 2021, more than six years from November 3, 2014, this cause of action is untimely.

Accordingly, Defendants' motion to dismiss the seventeenth cause of action for quantum meruit as time-barred is granted.

Tortious Interference – Thirteenth Cause of Action:

The statute of limitations for a cause of action for tortious interference is three years (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 48 [1st Dept 2009]; *Turecamo v Turecamo*, 55 AD3d 455, 455 [1st Dept 2008]). "A cause of action for tortious interference with contract generally accrues when an injury is sustained" (*American Federal Group, Ltd. v Edelman*, 282 AD2d 279, 279 [1st Dept 2001]).

The thirteenth cause of action for tortious interference is dismissed as time-barred. Whether the statute of limitations runs from November 3, 2014, as Defendants allege, or November 12, 2015, as Plaintiff alleges, the three-year statute of limitations expired long before October 22, 2021, when Plaintiff commenced this action.

Accordingly, Defendants' motion to dismiss the thirteenth cause of action for tortious interference as time-barred is granted.

Breach of Fiduciary Duty – Fifth & Fourteenth Causes of Action:

"New York law does not provide any single limitations period for breach of fiduciary duty claims. Generally, the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought. Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies. On the other hand, where the suits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging 'injury to property,' to which a three-year statute of limitations applies" (*Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]; *Lebedev* at 28-20 ["The statute of limitations on a breach of fiduciary duty claim is three years where . . . money damages are sought"]). "Nevertheless . . . a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period" (*Kaufman* at 119). "A breach of fiduciary duty claim accrues where the fiduciary openly repudiates his or her obligation – i.e., once damages are sustained" (*Lebedev* at 28).

The complaint alleges that Defendants violated their fiduciary duties to the partnership and to Plaintiff by violating DR-1.8 et seq. (Compl., ¶ 119) and by purchasing the Properties through Kishbay and refusing to inform Plaintiff of the purchase (Compl., ¶ 192-193).

Here, Defendants argue that the three-year statute of limitations applies. Although Plaintiff seeks some equitable relief in his complaint, Plaintiff primarily seeks money damages – specifically, his share of the profits of the alleged partnership/joint venture, and the equitable relief he seeks are incidental to the money damages. As such, "looking to the reality, rather than the form, of this action" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139-140 [2009]), the Court finds that the three-year statute of limitations applies (*See also VA Mgt, LP v Estate of Valvani*, 192 AD3d 615, 615 [1st Dept 2021]). Moreover, since the fraud causes of action are dismissed as further explained below, the six-year statute of limitations does not apply (*Nichols v Curtis*, 104 AD3d 526, 528 [1st Dept 2013] ["since, as indicated, the complaint fails to state a cause of action for fraud, the statute of limitations for the breach of fiduciary duty claims, which seek money damages rather than equitable relief, is three years"]; *Knobel v Shaw*, 90 AD3d 493, 495 [1st Dept 2011]). In any case, Plaintiff does not argue that the six-year statute of limitations should apply.

The fifth and fourteenth causes of action are dismissed as time-barred. Whether the statute of limitations runs from November 3, 2014, as Defendants allege, or November 12, 2015, as Plaintiff alleges, the three-year statute of limitations expired long before October 22, 2021, when Plaintiff commenced this action.

Accordingly, Defendants' motion to dismiss the fifth and fourteenth causes of action for breach of fiduciary duty as time-barred is granted.

CPLR 3211(a)(7) – Failure to State a Cause of Action:

CPLR 3211(a)(7) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action."

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'.

(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976] [". . . affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious claims. Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one'"]; *Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533 [1st Dept 2012]). The facts alleged in such affidavits must also be assumed to be true (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017]). However, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Id.; Cruciata v O'Donnell*, 149 AD3d 1034 [2d Dept 2017]).

A complaint must contain all essential facts to provide notice of the claim asserted (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Accordingly, vague and conclusory allegations will not suffice (*id.* at 239; *Fowler v American*, 306 AD2d 113, 113 [1st Dept 2003]) and a complaint suffering such affliction ought to be dismissed for failure to state a cause of action (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1994]; *O'Riordan v Suffolk Chapter*, 95 AD2d 800, 800 [2d Dept 1983]).

Failure to Allege the Existence of a Partnership or Joint Venture:

Defendants move to dismiss the causes of action for a declaration that a partnership or joint venture existed, a dissolution of the partnership, breach of an implied contract, and breach of the

implied covenant of good faith and fair dealing, arguing that Plaintiff must prove the indicia of the existence of an oral partnership.

Partnership Law § 10(1) provides that: "A partnership is an association of two or more persons to carry on as co-owners a business for profit and includes for all purposes of the laws of this state, a registered limited liability partnership".

"It is well settled that '[a] joint venture … is in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership,' and, as a result, it is proper to look to the Partnership Law to resolve disputes involving joint ventures" (*Eskenazi v Schapiro*, 27 AD3d 312, 314-315 [1st Dept 2006]).

"[I]n determining whether parties forged [] an oral partnership agreement, a court will consider the intent of the parties, whether the parties shared joint control in the management of the business, whether the parties shared profits and losses and the existence of capital contribution." (*Moses v Savedoff*, 96 AD3d 466, 470 [1st Dept 2012]). "No one characteristic of a business relationship is determinative in finding the existence of a partnership in fact" (*Brodsky v Stadlen*, 138 AD2d 662, 663 [2d Dept 1988]; *Hammond v Smith*, 151 AD3d 1896, 1897 [4th Dept 2017]).

"The indicia of the existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, finance resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (*Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 298 [1st Dept 2003]). "[T]he intent of the parties, as one of the factors in determining whether a joint venture exists, may be express or implied" (*Richbell Information Services, Inc.* at 298).

"[A]bsent any definite term of duration, an oral agreement to form a partnership or joint venture for an indefinite period creates a partnership or joint venture at will" (*Foster v Kovner*, 44 AD3d 23, 27 [1st Dept 2007]). Moreover, "[e]ven where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding" (*Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436, 438 [1st Dept 2014]; *Richbell Information Services, Inc.* at 298).

Here, the complaint sufficiently alleges the existence of a partnership/joint venture between Plaintiff and Mr. Kishner. Plaintiff alleges, *inter alia*, that he and Mr. Kishner decided to go into three business together (Compl., ¶ 25), that they agreed to begin or continue their partnership/joint venture in October 2014 (Compl., ¶ 33, 46), that they would enter into the partnership/joint venture

agreement by working together, donating an equal amount of capital, including sweat equity and contributing equally to any down payment and sharing equally in any profits and/or losses (Compl., ¶ 34, 43), that Plaintiff made various contributions to the partnership/joint venture to find a suitable building (Compl., ¶ 39-40), that they would carry on as co-owners of their partnership business for profit (Compl., ¶ 44), that they discussed creating a LLC in furtherance of their partnership/joint venture (Compl., ¶ 36-37), that Mr. Kishner formed a LLC named Kishall and an operating agreement (Compl., ¶ 51), and that Kishall was formed for the purpose of buying the properties for the partnership/joint venture (Compl., ¶ 66).

Defendants have not demonstrated that the alleged partnership/joint venture terminated on November 3, 2014. Although the complaint alleges that November 3, 2014 was the date the parties last communicated (Compl., ¶ 36-37), the complaint does not allege that there was a repudiation or termination of the partnership/joint venture.[2] Although Defendants argue that the parties' cessation of communication is a manifestation of Mr. Kishner's unequivocal intent to terminate the partnership/joint venture and the parties' mutual silence demonstrates a joint abandonment of the partnership/joint venture, Defendants did not submit any evidence demonstrating as such,[3] and Plaintiff explains in his affidavit in opposition that although Mr. Kishner stopped communicating with him in November 2014, he knew that Mr. Kishner was "going through a difficult personal period" and as such, "gave Mr. Kishner his distance under the circumstances" (Affidavit of Maurice Hallivis, ¶ 35-36). Under these circumstances, whether the lack of communication was a repudiation of the partnership/joint venture is an issue of fact and does not warrant a dismissal of the complaint at this juncture.

However, the complaint does not allege the existence of a partnership/joint venture between Plaintiff and Defendants Kishner & Associates, Kishner Miller Himes, Kishall and Kishbay. The complaint merely alleges that these Defendants were used in furtherance of the partnership/joint venture. As for Kishall, Plaintiff alleges that he and Mr. Kishner agreed to form

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[2] The Court notes that the complaint alleges in paragraph 71 that: "That after meeting with the seller, the Defendant BRYAN KISHNER decided to cut Plaintiff out of the business and decided to purchase the properties for himself, through an LLC of his, without Plaintiff, thereby violating DR-1.8 et seq." However, the complaint does not state a date on which Mr. Kishner allegedly decided to cut or cut Plaintiff out of the business.

[3] "When evidentiary material [in support of dismissal] is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Here, the absence of any evidence limits the Court's inquiry to whether the complaint states a cause of action.

Kishall for the purposes of the partnership (Compl., ¶ 83), that Kishall was formed for the purpose of buying the Properties (Compl., ¶ 66), that they would operate Kishall together, and that they would equally share the profits and losses with regards to Kishall and the Properties (Compl., ¶ 85).

As for Defendants Kishner & Associates and Kishner Miller Himes, Plaintiff alleges that he and Mr. Kishner agreed that Mr. Kishner would act as the attorney through these law firms (Compl., ¶ 45, 84).

As for Kishbay, Plaintiff alleges that unbeknownst to him, Mr. Kishner purchased the Properties through Kishbay (Compl., ¶ 77-78, 89, 140, 143, 179, 185), that Plaintiff is not a member of Kishbay (Compl., ¶ 141), and that Plaintiff does not control Kishbay (Compl., ¶ 142).

Accordingly, Defendants' motion to dismiss the first and eighth causes of action for a declaration that a partnership or joint venture existed, the second cause of action for a dissolution of the partnership, the twelfth cause of action for breach of an implied contract, and the sixteenth cause of action for breach of the implied covenant of good faith and fair dealing on the basis that Plaintiff did not sufficiently allege the existence of a partnership/joint venture is granted only as against Defendants Kishner & Associates, Kishner Miller Himes, Kishall and Kishbay.

Failure to State a Claim for Fraud:

Defendants argue that both causes of action for fraud must be dismissed because Plaintiff failed to allege any fraud collateral or extraneous to the alleged joint venture agreement. Defendants argue that a general allegation that Mr. Kishner entered into the partnership or joint venture lacking the intention to perform is not sufficient to state a cause of action for fraud.

Defendants also argue that the claims should be dismissed, because they only allege as damages the "value of the fruits of [Defendants'] wrongful conduct". Defendants argue that fraud damages are to compensate a plaintiff for what he lost, not what he could have gained. Defendants argue that absent allegations of damages relating to actual losses by Plaintiff, he has failed to state a cause of action for fraud.

"The elements of a cause of action to recover damages for fraud are (1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages" (*Minico Insurance Agency, LLC v AJP Contracting Corp.*, 166 AD3d 605, 607 [2d Dept 2018]; *Nerey v Greenpoint Mortg. Funding, Inc.*, 144 AD3d 646, 647 [2d Dept 2016]).

CPLR 3016(b) states that: "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail". However, "[a]lthough under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 492 [2008]; *Minico Insurance Agency, LLC* at 607-608).

It is axiomatic that "a fraud claim that 'ar[ises] from the same facts [as an accompanying contract claim], s[eeks] identical damages and d[oes] not allege a breach of any duty collateral to or independent of the parties' agreements' is subject to dismissal as 'redundant of the contract claim" (*Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]; *RGH Liquidating Trust v Deloitte & Touche LLP*, 47 AD3d 516, 517 [1st Dept 2008]; McGee v J. Dunn Constr. Corp., 54 AD3d 1010, 1010 [2d Dept 2008] ["A cause of action to recover damages for fraud does not lie where the only fraud claimed relates to an alleged breach of contract. A general allegation that the opposing party entered into the contract while lacking the intent to perform is insufficient to state a cause of action to recover damages for fraud"]).

Here, Defendants have demonstrated that the two fraud causes of action must be dismissed as duplicative of the breach of implied contract cause of action. The fraud causes of action arise out of the same facts as the breach of implied contract cause of action - that the parties agreed to purchase the Properties for the partnership/joint venture, that Mr. Kishner purchased the Properties without informing Plaintiff, thereby breaching the parties' partnership/joint venture agreement, and that Plaintiff was damaged/deprived of profits to be generated by the Properties; they seek identical damages - $10 million dollars; and do not allege any breach collateral to or independent of the partnership and/or joint venture agreement. That Plaintiff alleges that Mr. Kishner knew that the statement that the Properties would be purchased for the partnership/joint venture was false and that he had no intention to give Plaintiff his share of the profits from the joint venture are not sufficient to state a cause of action for fraud (*Cronos Group Ltd.* at 63 ["Thus, where a fraud claim was supported by allegations that the defendants had 'misrepresented … their intentions with respect to the manner' in which they would perform their contractual duties, we dismissed the fraud claim as duplicative of the plaintiffs' contract claim …"]; *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, [1st Dept 2007] ["The fraud alleged against O'Neill is that he entered the

postnuptial agreement while intending not to perform it. However, plaintiff cannot transform a breach of contract claim into a fraud claim in this manner"]; *McGee* at 1010).

Moreover, to the extent that Plaintiff may be alleging damages for lost profits or opportunities under its causes of action for fraud, Plaintiff fails to state a cause of action, because damages under a fraud cause of action "are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Arena Riparian LLC v CSDS Aircraft Sales & Leasing Co.*, 184 AD3d 509, 510 [1st Dept 2020] ["in their complaint, plaintiffs seek to recover lost profits they would have realized if they successfully completed the purchase of the aircrafts. However, plaintiffs cannot be compensated under a fraud cause of action 'for what they might have gained'"]; *Princes Point, LLC v AKRF Eng'g, P.C.*, 94 AD3d 588, 588 [1st Dept 2012]).

Accordingly, Defendants' motion to dismiss the fourth and fifteenth causes of action for fraud is granted.

Failure to State a Claim for Partition and Sale:

Defendants argue that the ninth cause of action for partition and sale should be dismissed, because Plaintiff has not alleged that he has any ownership interest as a "joint tenant" or "tenant in common" in the Properties or is in possession of and holds an "estate of inheritance, or for life, or for years" in the Properties in order to maintain a partition action under RPAPL § 901.

RPAPL § 901(1) provides that: "A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners".

"Pursuant to both the common law and statute, a party, jointly owning property with another, may as a matter of right, seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property. The right to seek partition however, is not absolute and may be precluded where the equities so demand, or where partition would result in prejudice" (*Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]; *Graffeo v Paciello*, 46 AD3d 613, 614 [2d Dept 2007]).

Here, Defendants have demonstrated that the ninth cause of action for partition and sale should be dismissed. Plaintiff has not alleged that he has any ownership interest in the Properties, as required to maintain an action for partition pursuant to RPAPL § 901(1). In fact, Plaintiff

concedes that he has no ownership interest in the Properties (Compl., ¶ 155 ["Upon information and belief, that there are no other liens on the properties, and that no persons other than Defendants BRYAN KISHNER and KISHBAY LLC have any interest in the properties currently as owners or otherwise"]). Plaintiff does not oppose.

Accordingly, Defendants' motion to dismiss the ninth cause of action for partition and sale is granted. In light of the dismissal of this cause of action, the complaint is also dismissed as against Peapack, which holds a mortgage lien on the Properties.

Failure to State a Claim for Recovery of Rent and Ouster:

Defendants argue that the cause of action for recovery of rent and for ouster should be dismissed, because Plaintiff has not alleged any ownership interest in the Properties or the existence of an agreement entitling him to any rents or use of the Properties.

Generally, a tenant-in-common cannot collect rent from a co-tenant who is in exclusive possession of the premises unless there is an agreement to that effect or the co-tenant seeking rent has been ousted from the premises (*Cohen v Cohen*, 297 AD2d 201, 201 [1st Dept 2002]; *Perretta v Perretta*, 143 AD3d 878, 880 [2d Dept 2016]; *Perkins v Volpe*, 146 AD2d 617, 617 [2d Dept 1989]).

Here, Defendants have demonstrated that the tenth and eleventh causes of action should be dismissed. Causes of action for recovery of rent and for ouster are premised on the movant having an ownership interest in the properties at issue – specifically, that the movant is a tenant in common of the premises. However, as stated above, Plaintiff concedes that he has no ownership interest in the Properties. Under each of these causes of action, Plaintiff merely alleges that: "Plaintiff is entitled to an undivided fifty percent (50%) interest in the Purchased Properties" (Compl., ¶ 161, 169). Plaintiff does not oppose.

Accordingly, Defendants' motion to dismiss the tenth cause of action for recovery of rent and eleventh causes of action for ouster is granted.

Failure to State a Claim for Accounting:

Defendants argue that the cause of action for an accounting should be dismissed, because Plaintiff has not alleged that he has any interest in the Properties or alleged breach of a fiduciary duty.

"An equitable accounting involves a remedy designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession. The elements include a fiduciary or confidential relationship, money entrusted to the defendant imposing the burden of an accounting, the absence of a legal remedy, and in some cases a demand and refusal" (*Metropolitan Bank & Trust Co. v Lopez*, 189 AD3d 443, 446 [1st Dept 2020]; *Unitel Telecard Distribution Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]; *Blaustein v Lazar Borck & Mensch*, 161 AD2d 507, 508 [1st Dept 1990]; *LMEG Wireless, LLC v Farro*, 190 Ad3d 716, 720-721 [2d Dept 2021]).

Here, Defendants have demonstrated their entitlement to dismissal of the third cause of action for an accounting only as against Kishner & Associates, Kishner Miller Himes, Kishall and Kishbay. As detailed above, Plaintiff has sufficiently alleged a partnership/joint venture with Mr. Kishner. Moreover, Plaintiff sufficiently alleges that he demanded an accounting, but was refused. (*See Joyce v JJF Associates, LLC*, 8 AD3d 190, 191 ["Given an existing partnership, plaintiff's allegations that they demanded an accounting during the bankruptcy proceeding, and that defendants refused, suffice to state a cause of action for an accounting"]; *Conroy v Cadillac Fairview Shopping Center Properties, Inc.*, 143 AD2d 726, 726-727 [2d Dept 1988]).

Accordingly, Defendants' motion to dismiss the third cause of action for an accounting is granted only as against Kishner & Associates, Kishner Miller Himes, Kishall and Kishbay.

Failure to State a Claim for Unjust Enrichment:

Defendants move to dismiss the cause of action for unjust enrichment, arguing that Plaintiff has not sufficiently alleged that Defendants were enriched at Plaintiff's expense. Defendants also argue that even if Plaintiff states a cause of action for unjust enrichment, recovery is limited to the reasonable value of the services rendered by him. However, Defendants argue that Plaintiff does not credibly claim the value of any services rendered and simply claims the identical ten million dollars in damages sought in his other causes of action.

"The theory of unjust enrichment is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Mannino v Wells Fargo Home Mortg., Inc.*, 155 AD3d 860, 862 [2d Dept 2017] [internal quotation marks omitted]). "The essential inquiry in any action for unjust enrichment … is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

To plead a cause of action for unjust enrichment, "a plaintiff must allege that (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" (*Mannino* at 862; *Mandarin* at 182; *McMurray v Hye Won Jun*, 168 AD3d 435, *1 [1st Dept 2019]). Moreover, "[a]lthough privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" (*Mandarin Trading Ltd.* at 182; *Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011] ["although privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part"]).

Here, Defendants have not demonstrated entitlement to dismissal of the seventh cause of action for unjust enrichment. Contrary to Defendants' arguments, Plaintiff alleges that Defendants have been unjustly enriched by receiving Plaintiff's work, labor, advice, services and research in locating the Properties and assisting in negotiating the purchase of the Properties, without payment or other compensation (Compl., ¶ 126). Moreover, Plaintiff need not allege the reasonable value of the services rendered as an element of unjust enrichment or prove his damages at this juncture.

Accordingly, Defendants' motion to dismiss the seventh cause of action is denied.

Failure to State a Claim for the Imposition of a Constructive Trust:

Defendants move to dismiss the cause of action for the imposition of a constructive trust, arguing, *inter alia*, that Plaintiff does not allege that he had a prior interest in the Properties, and that Plaintiff does not sufficiently allege breach of a promise to convey the Properties.

"Generally, a constructive trust may be imposed '(w)hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest'" (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). "[A] party claiming entitlement to a constructive trust must establish: (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment." (*Wachovia Securities, LLC v Joseph*, 56 AD3d 269, [1st Dept 2008]; *Sanxhaku v Margetis*, 151 AD3d 778, 779 [2d Dept 2017]). "'[T]hese factors, or elements, serve only as a guideline, and a constructive trust may still be imposed even if all four elements are not established' because 'the constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order

to give expression to the conscience of equity and to satisfy the demands of justice" (*Sanxhaku* at 779).

Here, Defendants have demonstrated their entitlement to dismissal of the sixth cause of action for the imposition of a constructive trust. As Defendants argue, Plaintiff has not alleged that he had a prior interest in the Properties and has thus failed to allege a "transfer made in reliance". Although the "transfer in reliance" element is not limited to instances in which a plaintiff has actually transferred title to the property to the defendant, Plaintiff does not allege that he provided substantial funds for the maintenance and improvement of the Properties (*Hernandez v Florian*, 173 AD3d 1144, 1145 [2d Dept 2019] ["[T]he element of a 'transfer in reliance' is not limited to instances in which the plaintiff has actually transferred title to the property to the defendant, but may also include instances where the plaintiff has provided substantial funds for the maintenance and improvement of it"]; *Hairman v Jhawarer*, 122 AD3d 570, 572 [2d Dept 2014]; *Ruiz v Meloney*, 26 AD3d 485, 486 [2d Dept 2006] ["The plaintiff's allegations that she contributed time, money and energy into finding the home, purchasing and then maintaining it are sufficient to satisfy the 'transfer in reliance' element"]). Plaintiff did not oppose this argument.

Accordingly, Defendants' motion to dismiss the sixth cause of action for the imposition of a constructive trust is granted.

Failure to State a Claim for Injunctive Relief:

Defendants move to dismiss the nineteenth cause of action for a permanent injunction, arguing, *inter alia*, that a permanent injunction is a remedy, not a cause of action, and that Plaintiff cannot demonstrate irreparable injury where, as here, his damages are compensable in money and capable of calculation.

"To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a 'violation of a right presently occurring, or threatened and imminent,' that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor" (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014]; *Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]).

Here, Defendants have demonstrated that the cause of action for a permanent injunction should be dismissed, as Plaintiff cannot demonstrate irreparable injury, as his alleged damages are compensable in money and capable of calculation (*Mintz Fraade Law Firm, P.C. v Federal Ins. Co.*, 193 AD3d 654, 656 [1st Dept 2021]). Plaintiff does not oppose.

Accordingly, Defendants' motion to dismiss the nineteenth cause of action for a permanent injunction is granted.

Failure to State a Claim for Alter Ego Liability:

Defendants move to dismiss the eighteenth cause of action for alter ego and piercing the corporate veil, arguing that alter ego is not an independent cause of action and that Plaintiff has not pled particularized facts to support the cause of action for piercing the corporate veil.

"In order to state a claim for alter-ego liability plaintiff is generally required to allege 'complete domination of the corporation [] in respect to the transaction attacked' and 'that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]; *Bonanni v Straight Arrow Publishers, Inc.*, 133 AD2D 585, 587 [1st Dept 1987]). A plaintiff is "not required to plead the elements of alter ego liability with the particularity required by CPLR 3016(b), but only to plead in a non-conclusory manner" (*2406-12 Amsterdam Associates LLC v Alianza LLC*, 136 AD3d 512, 512 [1st Dept 2016]). Moreover, "alter ego is a theory of recovery, not an independent cause of action" (*2406-12 Amsterdam Associates LLC* at 513; *Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480 [1st Dept 2015]).

Likewise, a "party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Sound Communications, Inc. v Rack and Roll, Inc.*, 88 AD3d 523, 524 [1st Dept 2011]; *Sky-Track Tech. Co. Ltd. v HSS Dev., Inc.*, 167 AD3d 964, 964 [2d Dept 2018]). "[A] decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities" (*Tap Holdings, LLC v Orix Finance Corp.*, 109 AD3d 167, 174 [1st Dept 2013]). Moreover, "[p]iercing of the corporate veil is not a cause of action independent of that against the corporation; it is established when the facts and circumstances compel a court to impose the corporate obligations on its owners, who are otherwise shielded from liability" (*Tap Holdings, LLC* at 174). "Factors to be considered in determining whether the owner has 'abused the privilege of doing business in the corporate form' include whether there was a 'failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use'" (*Sky-Track Tech. Co. Ltd.* at 965).

Here, Defendants have demonstrated that the eighteenth cause of action should be dismissed. As stated above, there is no independent cause of action for alter ego or to piece the corporate veil (*2406-12 Amsterdam Associates LLC* at 513; *Tap Holdings, LLC* at 174). Moreover, Plaintiff's conclusory allegations are not sufficient to impose alter ego liability or to pierce the corporate veil (*Ferro Fabricators, Inc.* at 480 ["the first cause of action alleging alter-ego liability is too conclusory, since it fails to plead any particularized facts"]; *Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 [1st Dept 2007] ["The court also properly declined to pierce the corporate veil to allow the claims against the Rouse defendants to continue. Other than conclusory statements that the Rouse defendants dominated and controlled their subsidiaries (), plaintiffs failed to allege particularized facts to warrant piercing the corporate veil"]). Plaintiff does not oppose.

Accordingly, Defendants' motion to dismiss the eighteenth cause of action for alter ego liability is granted.

Notice of Pendency:

Defendants move to cancel the notice of pendency, arguing that Plaintiff has not stated any causes of action against them. Defendants also seek costs and expenses under CPLR § 6514(c).

CPLR § 6501 states, in relevant part, that: "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property."

CPLR § 6514(b) provides that: "The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith".

"A notice of pendency, commonly known as a 'lis pendens,' can be a potent shield to protect litigants claiming an interest in real property. The powerful impact that this device has on the alienability of property, when conjoined with the facility with which it may be obtained, calls for its narrow application to only those lawsuits directly affecting title to, or the possession, use or enjoyment of, real property." (*5303 Realty Corp. v O&Y Equity Corp.*, 64 NY2d 313, 315-316 [1984]).

"In entertaining a motion to cancel, the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501. In conjunction with this

concept, the complaint filed with the notice of pendency must be adequate unto itself; a subsequent, amended complaint cannot be used to justify an earlier notice of pendency." (*5303 Realty Corp.* at 320).

"The same considerations that require strict compliance with the procedural prerequisites also mandate a narrow interpretation in reviewing whether an action is one affecting 'the title to, or the possession, use or enjoyment of, real property'. Thus, a court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of CPLR 6501. Instead, in accordance with historical practice, the court's analysis is to be limited to the pleading's face." (*5303 Realty Corp.* at 321).

Here, the remaining causes of action do not directly affect title to, or the possession, use or enjoyment of, real property. As such, Defendants' motion to cancel the notice of pendency dated October 27, 2021, filed on October 27, 2021, is granted.

CPLR § 6514(c) provides that: "The court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action".

The Court has discretion in awarding costs under CPLR § 6514(c), even without evidence that plaintiff acted in bad faith (*Altair Condominium v 42 West 18th Street Realty Corp.*, 190 AD3d 448, 448-449 [1st Dept 2021]; *Knopf v Sanford*, 132 AD3d 416, 418 [1st Dept 2015]; *Dermot Co., Inc. v 200 Haven Co.*, 73 AD3d 653, 654 [1st Dept 2010]; *Lunney & Crocco v Wolfe*, 180 AD2d 472, 472 [1st Dept 1992]).

Here, Defendants' unopposed request for costs and expenses pursuant to CPLR § 6514(c) is granted. This matter is scheduled for a hearing to determine the actual costs and expenses reasonably incurred by Defendants by the filing and cancelling of the notice of pendency, as well as any costs of the action incurred up to the date of the hearing (*Delmaestro v Marlin*, 168 AD3d 813, 817 [2d Dept 2019]).

It is hereby

ORDERED that the Clerk dismiss the complaint in its entirety against Defendant Peapack-Gladstone Bank; and it is further

ORDERED that the Clerk dismiss the fourth, fifth, sixth, ninth, tenth, eleventh, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, and nineteenth causes of action in their entirety; and it is further

ORDERED that the Clerk dismiss the third causes of action only as against Defendants Kishall, LLC and Kishbay, LLC; and it is further

ORDERED that the Clerk dismiss the first, second, eighth, twelfth, and sixteenth causes of action only as against Defendants Kishner & Associates, P.C., Kishner Miller Himes, P.C., Kishall, LLC and Kishbay, LLC; and it is further

ORDERED that the Clerk cancel the notice of pendency dated October 27, 2021, filed on October 27, 2021, against the properties located at 321, 323, 325, 327, and 329 City Island Avenue, a/k/a 321-329 City Island Avenue, Bronx, NY 10464 (Block: 5631, Lots: 135, 136, 137, 138, and 139); and it is further

ORDERED that this matter is scheduled for a **hearing pursuant to CPLR § 6514(c)** on **Monday, September 26, 2022, at 2:00 p.m.**; and it is further

ORDERED that this matter is scheduled for a **Preliminary Conference** on **Monday, October 3, 2022, at 2:00 p.m.**; and it is further

ORDERED that Defendants serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated:
8/4/22

Hon. **FIDEL E. GOMEZ, A.J.S.C.**