SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

LITTLE REST TWELVE, INC.,

Plaintiff,

- against -

NINA ZAJIC, JOSEPH KAY, DAVID KAY, JOSEPH GIL, and THOMAS GIGLIO,

Defendants.

NINA ZAJIC, JOSEPH KAY, and DAVID KAY,

Third-Party Plaintiffs,

- against -

MARTIN RUSSO, MARLEN KRUZKHOV, and SARAH KHURANA,

Third-Party Defendants.

Index No.: 650209/2010

Motion Seqs.: 003, 004, 006

DECISION/ORDER

This case is but one of a number of actions in which different factions are contesting the ownership of various assets and corporate entities, including Little Rest Twelve, Inc. (LR12). As discussed further below, one of these factions is represented by Gusrae Kaplan Nusbaum PLLC (Gusrae Kaplan), which currently represents LR12, plaintiff in the instant action. Another of the factions is represented by Sternik & Zeltser, which represents Nina Zajic, Joseph Kay and David

Kay, defendants/third-party plaintiffs (Zajic/Kay) in the instant action.[1]

In the instant action, LR12, the owner of the now defunct Buddha Bar restaurant, sues defendants Nina Zajic, Joseph Kay, and David Kay, its alleged former officers and/or managers or employees, for corporate waste (first cause of action), breach of fiduciary duty (second cause of action), an accounting (third cause of action), negligence (fourth cause of action), violation of Business Corporation Law § 715 (h) (fifth cause of action), violation of Business Corporation Law § 720 (a) (1) (A) (sixth cause of action), violation of Business Corporation Law § 720 (a) (1) (B) (seventh cause of action), conversion (eighth cause of action), unjust enrichment (ninth cause of action), prima facie tort (tenth cause of action), and a permanent injunction (eleventh cause of action).

The Zajic/Kay defendants served an answer and Zajic and David Kay served amended counterclaims, alleging causes of action for wrongful termination – i.e., termination in violation of the by-laws (first counterclaim), breach of contract based on termination of alleged employment agreements (second counterclaim), and a declaratory judgment that the termination of Zajic and David Kay from their positions at LR12 violated the by-laws and their employment agreements (third counterclaim). The Zajic/Kay defendants also served a third-party complaint against Martin Russo, Marlen Kruzkhov, and Sarah Khurana, attorneys with Gusrae Kaplan (Gusrae Kaplan attorneys). The third-party complaint arises out of the participation of Russo and Khurana in a "raid" at the LR12 premises on March 31, 2010, in which Zajic and David Kay were allegedly wrongfully ousted from their positions with LR12. The third-party complaint

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[1] This court alone currently has three actions pending before it. The instant action, Little Rest Twelve, Inc. v Visan (Sup Ct, New York County, index No. 600676/2007), and Mutual Benefits Offshore Fund v Zeltser (Sup Ct, New York County, index No. 650438/2009) (the MBOF action).

alleges causes of action for indemnification/contribution (first cause of action), violations of Judiciary Law § 487 (second cause of action), fraud and aiding and abetting fraud (third cause of action), a permanent injunction (fourth cause of action), tortious interference with contract (fifth cause of action), and assault and battery (sixth cause of action).

On its own motion, this court raised the issue of whether Gusrae Kaplan is disqualified, based on a conflict of interest, from representing LR12 as plaintiff in the main action, while also representing Russo, Kruzkhov, and Khurana as defendants in the third-party action. The court directed supplemental briefing on this issue, which has now been received. The court also has before it a motion by the Gusrae Kaplan attorneys to dismiss the third-party complaint, pursuant to CPLR (a) (1), (5), (7), and (8). By separate motion, LR12 moves to dismiss the amended counterclaims asserted against it by Zajic and David Kay, pursuant to CPLR 3211 (a) (1), (5), and (7). In a third motion, Zajic and the Kays move for a protective order, pursuant to CPLR 3103, quashing subpoenas served on third-party financial institutions.

Disqualification

The Rules of Professional Conduct prohibit an attorney from representing clients with differing interests, absent a waiver by each affected client. (Rule 1.7 [a] [1] [22 NYCRR 1200.0].) The Rules do not, however, permit waiver where the conflict involves "the assertion of a claim by one client against another." (Rule 1.7 [b] [3] [22 NYCRR 1200.0].)

Here, service of the third-party complaint created adverse interests on the part of Gusrae Kaplan's clients – plaintiff LR12 and the attorneys from its firm. The indemnification claim sets up an unwaivable conflict because, if the individual Gusrae Kaplan attorneys (as third-party defendants) were obligated to indemnify Zajic and the Kays (as third-party plaintiffs), the Gusrae

Kaplan firm (as counsel for its own attorneys) would have the incentive to achieve as limited as possible a recovery on behalf of LR12, its other client in the action.[2]

The court notes that Zajic and the Kays have previously asserted that they alone are authorized to act on behalf of LR12 in this and other proceedings, and have sought to be represented by Sternik & Zeltser (and counsel other than Gusrae Kaplan). In the context of deciding a motion to determine which counsel, Gusrae Kaplan or Sternik & Zeltser and others, was the rightful counsel to LR12, this Court, on a provisional basis, determined who had authority to act for LR12. In so doing, the Court considered the veracity of proffered by-laws, corporate resolutions regarding transfer of ownership, and purported employment relationships with officers and directors. After an 11-day evidentiary hearing, this Court held that Gusrae Kaplan "carried its burden of showing, by a preponderance of the credible evidence, that the shareholders of LR12 [parties other than Zajic and the Kays] appointed [Gusrae Kaplan] as LR12's sole attorney on March 30, 2010." (Id. at 44.)

Considered in this context, the Zajic/Kays third-party complaint appears to be yet another attempt to prevent LR12 from being represented by counsel of its choice, Gusrae Kaplan. Moreover, as discussed below in connection with the Gusrae Kaplan attorneys' motion to dismiss, the third-party complaint is patently defective and will be dismissed in its entirety. Gusrae Kaplan may therefore continue its representation of LR12.

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[2]With respect to any other potential conflict, Gusrae Kaplan has submitted a written conflict waiver signed by Boagdan Mykhalus, Chief Executive Officer of LR12, as well as the affidavit of Mykhalus attesting to his position and his authority to consent to the waiver. (Conflict Waiver, dated Feb. 11, 2014 [Ex. 1 to Mykhalus Aff.].) At this juncture, the court finds that Mykhalus has prima facie authority to sign a waiver on behalf of LR12.

Motion to Dismiss Third-Party Complaint

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

A. Indemnification/Contribution

Zajic and the Kays plead merely that if they are found to be liable to LR12, then the attorneys should also be held to be liable because it was their "conduct in ejecting [Zajic and the Kays] from their ownership and control of [LR12] [that] destroyed the business of [LR12], ultimately leading to its permanent closure." (Third-Party Complaint, ¶ 65.) "[T]he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor.'"

(Raquet v Braun, 90 NY2d 177, 183 [1997] [quoting Mas v Two Bridges Assocs., 75 NY2d 680, 690 [1990]].) Similarly, "[t]he 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought.'" (Raquet, 90 NY2d at 183 [quoting Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., 71 NY2d 599, 603 [1988].) Zajic and the Kays wholly fail to state a claim for indemnification and/or contribution against the Gusrae Kaplan attorneys, because Zajic and the Kays do not plead that the attorneys owe a contractual duty to Zajic and the Kays. Nor do they plead facts supporting a claim that the attorneys are joint tortfeasors with Zajic and the Kays. Accordingly, the first cause of action for indemnification/contribution must be dismissed.

B. Violations of Judiciary Law § 487

This cause of action is entirely based on Gusrae Kaplan's alleged conduct in the MBOF action, a separate action currently pending before this court. Zajic and the Kays allege that the Gusrae Kaplan attorneys violated Judiciary Law § 487 by deceitful conduct in that action, including unlawfully obtaining confidential bank records and distributing those records to parties with an interest in this or other litigations, failing to disclose that Mutual Benefits Offshore Fund was a nominal entity and failing to identify Gusrae Kaplan's "true clients," making false filings, falsifying business records, and bribing a witness.[3] (Third-Party Complaint, ¶¶ 42-62.)

The allegations regarding Gusrae Kaplan's alleged deceit are not appropriately raised in

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[3] Section 487 provides, in relevant part as follows: "An attorney or counselor who: 1. [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

the instant action but, rather, should be raised, if at all, in the still pending MBOF action in which the misconduct allegedly occurred. (See Melnitzky v Owen, 19 AD3d 201, 201 [1st Dept 2005]; Yalkowsky v Century Apts. Assocs., 215 AD2d 214, 215 [1st Dept 1995].) Indeed, the court notes that some of the same or similar allegations were previously before the Court in that action. (See e.g. Mutual Benefits Offshore Fund v Zeltser, Sup Ct, New York County, Nov. 1, 2010 [Motion Seq. 004], Fried, J., index No. 650438/2009 at 3 and Nov. 1, 2010 [Motion Seq. 007], Fried, J., index No. 650438/2009 at 2.)

Although a § 487 claim may be brought in a separate action where the alleged misconduct "was merely a means to the accomplishment of a larger fraudulent scheme," Zajic and the Kays' allegations are wholly conclusory and fall far short of pleading such a "scheme." (See Specialized Indus. Servs. Corp. v Carter, 68 AD3d 750, 752 [2d Dept 2009] [internal quotation marks and citation omitted].) Accordingly, the second cause of action for violations of Judiciary Law § 487 must be dismissed. This opinion shall not be construed as suggesting that a claim for violation of § 487, even if brought in the MBOF action, would be timely or otherwise proper.

C. Fraud

To plead a claim of fraud, "the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996].) The allegations made by Zajic and the Kays to support their cause of action for common law fraud are duplicative of those made in support of the Judiciary Law § 487 claims. (Third-Party Complaint, ¶¶ 71-73.) Although common law fraud requires a different

showing on damages than a § 487 claim, Zajic and the Kays cannot transform what is an alleged deceit upon the Court into a common law fraud perpetrated upon them. (See Amalfitano v Rosenberg, 12 NY3d 8, 12-13 [2009].) Moreover, Zajic and the Kays fail to plead the alleged fraud with the requisite particularity. (CPLR 3016 [b].) Zajic and the Kays do not plead facts that the Gusrae Kaplan attorneys made any of the alleged misstatements with the intent to induce Zajic and the Kays to rely on them or that Zajic and the Kays did justifiably rely on them. Accordingly, the third cause of action for fraud and aiding and abetting fraud must be dismissed.

D. Permanent Injunction

Zajic and the Kays also seek a permanent injunction enjoining the Gusrae Kaplan attorneys from "distributing or using in any manner the improperly obtained confidential banking records." (Third-Party Complaint, ¶ 80.) As acknowledged in the complaint, these allegations derive from actions taken by the Gusrae Kaplan attorneys in the MBOF action and in their capacity as counsel for plaintiff MBOF. (Id., ¶¶ 42-46.) As held above, the more appropriate forum in which to seek any such relief regarding the use of the documents is in the MBOF action, which remains pending. Accordingly, the fourth cause of action for a permanent injunction must be dismissed. This opinion, however, shall not be construed as suggesting that an application for a permanent injunction, even if brought in the MBOF action, would be timely or otherwise proper.

E. Tortious Interference with Contract

Zajic and the Kays allege that, based on their participation in the March 2010 raid – i.e., their "forcible ejection and purported termination" of Zajic and the Kays, the Gusrae Kaplan attorneys violated the written agreements between LR12 and Zajic and David Kay, and the LR12

by-laws. (Third-Party Complaint, ¶ 82.) "In a contract interference case—as here—the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." (White Plains Coat & Apron Co., Inc. v Cintas Corp., 8 NY3d 422, 426 [NY 2007]. See also Lama Holding Co., 88 NY2d at 424.)

Zajic and the Kays fail to adequately plead the tortious interference claim with respect to their alleged employment contracts, as they do not identify the provisions of the contracts governing their termination or specify the respects in which such provisions were allegedly violated. As to the by-laws, although their terms are identified, Zajic and the Kays do not cite legal authority supporting maintenance of a tortious interference claim against a third party for a violation of by-laws. Accordingly, the fifth cause of action for tortious interference with contract must be dismissed.

F. Assault and Battery

Zajic and the Kays plead that the Gusrae Kaplan attorneys "intentionally threatened to inflict injury upon the [LR12's] employees and management," "created a reasonable apprehension of bodily harm or offensive contact in [LR12's] employees and management," and directed others, who "intentionally caused harmful or offensive contact to [LR12's] employees and management." (Third-Party Complaint, ¶¶ 86-88.)

To plead assault, "a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact." Gould v Rempel, 99 AD3d 759, 759-760 [2d Dept 2012] [internal quotation marks and citation omitted].) Mere "words, without some menacing gesture or act accompanying them, ordinarily will not be sufficient to state a cause of

action" for assault. (Id. [internal citation omitted].) To plead battery, a plaintiff "must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact." (Laurie Marie M. v Jeffrey T.M., 159 AD2d 52, 55 [2d Dept 1990], affd 77 NY2d 981 [1991].)

The wholly conclusory pleading of the third-party complaint is insufficient to state a cause of action for assault or battery. At best, the third-party complaint alleges that two of the attorneys, Russo and Khurana, threatened to inflict injury, but does not allege any "menacing gesture or act" on the attorneys' part. Instead, the third-party complaint alleges harmful conduct by unnamed "armed men." The allegations that these men acted at the Gusrae Kaplan attorneys' directive are lacking in any factual detail. Moreover, while the third-party complaint alleges that LR12's "employees and management" were caused to apprehend bodily harm or were offensively touched, the third-party complaint does not identify such employees or management and does not allege that Zajic and/or the Kays were even present at the time of the alleged raid. Accordingly, the sixth cause of action for assault and battery must be dismissed.

The third-party complaint will be dismissed with prejudice. Zajic and the Kays have not requested leave to re-plead, and, in any event, have made no showing of merit to support leave to replead any of the above causes of action. (See AJW Partners, LLC v Admiralty Holding Co., 93 AD3d 486, 486 [1st Dept 2012]; Fletcher v Boies, Schiller & Flexner, LLP, 75 AD3d 469, 470 [1st Dept 2010].)

Motion to Dismiss the Counterclaims

In large part, LR12 contends that the counterclaims are barred by collateral estoppel. In particular, LR12 argues that Zajic and David Kays' claims that they were wrongfully terminated

from LR 12 are not maintainable because this Court previously rejected as incredible Zajic and David Kay's proffered evidence of LR12's by-laws and their employment contracts with LR12. (LR12's Memo. Of Law In Supp. at 10-13.)

It is well settled that "[c]ollateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity." (Buechel v Bain, 97 NY2d 295, 303 [2001][citing Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984], cert denied 535 US 1096 [2002].) "The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination." (Buechel, 97 NY2d 295 at 304 [internal citation omitted].)

As discussed above, the motion before the Court in the Visan litigation sought an interim determination as to which counsel could act for LR12. The Court considered the testimony of various witnesses, including Zajic and David Kay, and the documentary evidence proffered by them, in order to determine who owned LR 12 and therefore who could retain counsel on its behalf. In determining the motion, the Court found that Zajic's testimony as to the veracity of corporate documents and her own employment status was "lacking in credibility." The Court "reject[ed] all of Zajic's testimony in this hearing as unreliable." (Little Rest Twelve, Inc. v Visan [Sup Ct, New York County, July 22, 2011, Fried, J., index No. 600676/2007] at 20-21.) Similarly, the Court found David Kay's testimony and his proffered written employment contract "to be unworthy of belief" and disregarded it "in its entirety as unreliable." (Id. at 27, 29.) As

expressly stated in the decision, however, the Court's findings on the motion as to the ownership of LR12 were "provisional." (Id. at 2.) Contrary to LR12's contention on the instant motion, the Court's findings as to the bona fides of employment agreements and by-laws produced by the Zajic/Kay defendants are no more final than the Court's finding as to the ownership of LR 12. Accordingly, the court rejects LR12's claim of collateral estoppel.

Zajic and David Kay's third amended counterclaim for a declaratory judgment seeks a declaration that they were wrongfully terminated as directors or managers of LR12 (see Amended Counterclaims, ¶¶ 32-34) and is therefore based on the same allegations as the first and second counterclaims. A declaratory judgment claim is not maintainable where a breach of contract claim is based on the allegations as to which a declaration is sought. (Artech Info. Sys., L.L.C. v Tee, 280 AD2d 117, 125 [1st Dept 2001]; Apple Records v Capitol Records, 137 AD2d 50 [1st Dept 1988].) The third amended counterclaim for declaratory judgment must therefore be dismissed.

LR12 also moves to dismiss the first and second counterclaims for failure to state a claim. Both counterclaims are based on the allegations that LR12 breached the employment contracts and the by-laws in ejecting the Zajic and David Kay from their positions with LR12. (Amended Counterclaims, ¶¶ 25-26, 28-29.) At this juncture, the court finds that Zajic and David Kay sufficiently plead breach of contract causes of action.

In determining LR12's motion to dismiss Zajic and David Kays' counterclaims, the court notes that Zajic and Kay have purported to file second amended counterclaims as of right. The filing of these counterclaims was not authorized as of right. (See CPLR 3025.) Nor, to the extent that Zajic and David Kay seek leave to amend their counterclaims, do they set forth a basis

for such relief. The second amended counterclaims include a previously unpleaded fourth counterclaim against various non-parties for tortious interference with Zajic and David Kay's alleged employment contract with LR12. Zajic and David Kay fail to provide an affidavit, or otherwise to make any showing, of the merit of the newly added claim that the non-parties are potentially liable for interference with Zajic or David Kay's employment. (See generally MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010].) Moreover, party discovery is complete in this 2010 action, and leave to amend to add new parties would necessitate a re-opening of discovery, including depositions, that would be prejudicial to plaintiff at this juncture. Leave to amend is accordingly denied.

Motion to Quash

The Zajic/Kay defendants also move to quash eight subpoenas served by LR12 on non-parties. Section 3103 of the CPLR authorizes the court to enter a protective order "designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." LR12 contends that its corporate records are incomplete, and served a subpoena on Signature Bank for such records. (LR12 Memo. Of Law in Opp. at 12-14.) The Zajic/Kay defendants fail to set forth a basis for quashing LR12's subpoena for its own records. LR12 also served non-party subpoenas on UDR 10 Hanover, LLC and NetJet Aviation, Inc., providers of services that Zajic or the Kays allegedly billed to LR 12 for their personal use. These subpoenas are permissible. However, LR12 is directed to re-serve Signature Bank, UDR 10 Hanover, LLC and NetJet Aviation, Inc. with subpoenas containing the notice required by CPLR 3101 (a) (4). Nothing in this decision shall be construed as suggesting that the recipients of the subpoenas may not have their own valid objections to the subpoenas.

LR12 also served subpoenas on Wells Fargo, TD Bank, and Citibank, seeking production of bank account statements and credit card statements of Zajic, David Kay, and Joseph Kay, and their affiliated or allegedly affiliated entities. These subpoenas are overbroad as they seek all bank account and credit card records for the Zajic/Kay defendants and such entities, regardless of any link to LR12. The subpoenas served on JPMorgan Chase Bank and Chase Bank USA, N.A. are similarly overbroad, as they seek all records for the escrow account of an attorney and all bank records of a separate entity owned by Joseph Kay, JWL Entertainment Group, LLC.

The motion to quash will be granted with respect to the subpoenas served on Wells Fargo, TD Bank, Citibank, JPMorgan Chase Bank, and Chase Bank USA, N.A., without prejudice to new subpoenas tailored to seek only those documents reasonably necessary to trace the alleged misuse of LR12's corporate assets.[4] In light of the sensitivity of these records, counsel are again directed to meet and confer in an effort to agree on a confidentiality order. Counsel are also reminded that they must meet and confer in good faith to resolve discovery disputes, pursuant to the Rules of the Commercial Division and Part 60 Practices, and to request a pre-motion conference before serving a discovery motion.

Accordingly, it is hereby ORDERED that the motion of third-party defendants Martin Russo, Marlen Kruzkhov, and Sarah Khurana to dismiss the third-party complaint brought by Nina Zajic, Joseph Kay, and David Kay is granted to the extent of dismissing the third-party complaint with prejudice; and it is further

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[4] The fact that Wells Fargo has already produced documents pursuant to the subpoena is not dispositive. LR12's counsel are directed to return such documents to Wells Fargo, subject to re-production pursuant to a new appropriately tailored subpoena.

ORDERED that the motion of plaintiff Little Rest Twelve, Inc. to dismiss the counterclaims interposed by defendants Nina Zajic and David Kay is granted to the extent of dismissing the third amended counterclaim for a declaratory judgment; and it is further

ORDERED that the motion of defendants Nina Zajic, Joseph Kay, and David Kay for a protective order is granted to the extent of quashing the subpoenas served by plaintiff Little Rest Twelve, Inc. on JPMorgan Chase, CitiBank, TD Bank, Chase Bank USA, N.A., and Wells Fargo without prejudice; and it is further

ORDERED that any subpoenas that the court has authorized plaintiff Little Rest Twelve, Inc. to re-serve shall contain the notice required by CPLR 3101 (a) (4); and it is further

ORDERED that the parties shall appear for the previously scheduled compliance conference on March 5, 2015 at 2:30 p.m. in Part 60, Room 248, 60 Centre Street, New York, New York.

Finally, the court notes that both parties, through their counsel, have engaged in questionable litigation tactics in this and other actions between them.[5] Counsel are admonished that the court may consider sanctions in the event of any future frivolous litigation tactics.

This constitutes the decision and order of the court.

Dated: New York, New York
December 8, 2014

MARCY S. FRIEDMAN, J.S.C.

[5] This opinion discusses Zeltser & Sternik's service of the third-party complaint in an apparent attempt to create a conflict of interest on Gusrae Kaplan's part. In earlier stages of the litigations, the Court (Fried, J.) disapproved various steps taken by both Gusrae Kaplan and Sternik & Zeltser. (See e.g. Little Rest Twelve, Inc. v Visan, Sup Ct, New York County, July 22, 2011, Fried, J., index No. 600676/2007 at 39-40, 43-44.)