

<b>Kaplan v Ladenburg Thalmann &amp; Co., Inc.</b>
2017 NY Slip Op 32281(U)
October 19, 2017
Supreme Court, New York County
Docket Number: 656188/2016
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 48

-----X  
HOWARD J. KAPLAN and MICHELLE A. RICE,

Plaintiffs,

Index No.: 656188/2016

-against-

Mot. Seq. Nos. 002, 003

LADENBURG THALMANN & CO., INC.,  
HOWARD M. LORBER, RICHARD J. LAMPEN,  
and SIGNATURE BANK,

Defendants.  
-----X

ANDREA MASLEY, J.S.C.:

In motion sequence No. 002, defendants Ladenburg Thalmann & Co., Inc. (the Landlord), Howard M. Lorber, and Richard J. Lampen move, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5), (a) (7), and 3016 (b), to dismiss the verified complaint (the Complaint) of plaintiffs Howard J. Kaplan and Michelle A. Rice, based on documentary evidence, lack of standing, the applicable statutes of limitation, and failure to state a cause of action. Defendants further move, pursuant to 22 NYCRR 130-1.1, for the imposition of sanctions on plaintiffs for frivolous conduct.

In motion sequence number 003, proposed intervenors Arkin Kaplan Rice LLP (the Arkin Kaplan Firm) and Stanley S. Arkin move, pursuant to CPLR 1012 and 1013, to intervene in this action as defendants. The Arkin Kaplan Firm and Arkin also move, pursuant to CPLR 3211, to dismiss the Complaint with prejudice, and, pursuant to 22 NYCRR 130-1.1, for the imposition of sanctions on plaintiffs for frivolous conduct.

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

**Background**

Arkin, Kaplan, and Rice are former named partners of the Arkin Kaplan Firm, now in dissolution (Complaint, ¶ 1). Landlord was the Arkin Kaplan Firm's sub-landlord (*id.*, ¶ 14), and defendants Lorber and Lampen are executives and officers of nonparty Ladenburg Thalmann

Financial Services, Inc. (LTF Parent), Landlord's parent company (*id.*, ¶¶ 15-16). Defendant Signature Bank maintained a bank account for the Arkin Kaplan Firm (*id.*, ¶ 17).

In 1996, Arkin and one of the Arkin Kaplan Firm's predecessor firms entered into a sublease for office space on the 35th Floor of 590 Madison Avenue (the Sublease) (*id.*, ¶ 20). Pursuant to an amendment dated November 1, 2004, the Arkin Kaplan Firm had the option to renew the Sublease through June 29, 2015 (second amendment to Sublease, § 3). The Arkin Kaplan Firm exercised that option on November 16, 2009 (Complaint, ¶ 26).

Pursuant to the Sublease, all partners of the Arkin Kaplan Firm were "jointly and severally liable" for rent (Sublease, § 24 [a]). When a partner withdrew from the firm, he or she was released from all rights and obligations under the Sublease as of the date he or she left the partnership (*id.*, § 24 [b]). Further, the Sublease required the Arkin Kaplan Firm to put up \$833,000 in security, either in cash or by letter of credit (*id.*, § 21 [a]). Landlord was allowed to draw on the letter of credit or the cash account if the Arkin Kaplan Firm failed to timely pay rent (*id.*). If the Arkin Kaplan Firm chose to deliver a letter of credit as security, the Sublease required that the letter of credit automatically renew each year on the anniversary of its issue, unless the bank elected not to renew it (*id.*, § 23 [c] [ii]).

The Arkin Kaplan Firm's predecessor firm elected to provide Landlord with a letter of credit, issued by Signature Bank (letter of credit and amendments). The letter of credit, originally issued on August 1, 2005, provided that it would automatically renew each year until August 31, 2009 (*id.* at 2). Prior to the dissolution of the Arkin Kaplan Firm, the letter of credit was amended four times; the final amendment, dated September 14, 2011, extended the final expiration date of the letter of credit to June 29, 2015 (*id.* at 11).

In the Complaint, Kaplan and Rice allege that, on March 29, 2012, Arkin stated that he wanted a "divorce" from Kaplan and Rice (Complaint, ¶ 27). On May 17, 2012, Kaplan and Rice officially withdrew from the firm and established their own firm, Kaplan Rice LLP (the

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Kaplan Rice Firm) (*id.*, ¶ 32). It is alleged that, despite the partners agreeing that the Arkin Kaplan Firm would be dissolved, Arkin “began his covert attempts to transfer [the Arkin Kaplan Firm’s] assets, including its insurance policies and bank accounts, to his new firm Arkin Solbakken LLP (the AS Firm)” (*id.*, ¶ 34). Arkin allegedly began using funds from the Arkin Kaplan Firm’s account with Signature Bank to cover expenses and salaries for the AS Firm, as well as to continue paying rent to Landlord (*id.*, ¶¶ 34-36). It is alleged that a substantial portion of the funds in the Signature Bank account belong to Kaplan and Rice, as those funds are partnership assets (¶¶ 35-36). To that end, Kaplan and Rice convinced Signature Bank to require their signatures on any withdrawals from the partnership account, and informed Landlord that they had withdrawn from the firm and were, therefore, released from obligations under the Sublease (*id.*, ¶¶ 36-37). Landlord, allegedly as part of a conspiracy with Arkin to deny Kaplan and Rice access to the partnership account and make them liable for the Arkin Kaplan Firm’s rent obligation, responded that it intended to hold Kaplan and Rice liable under the Sublease (*id.*, ¶ 38). Lorber and Lampen allegedly authorized this decision (*id.*).

On July 2, 2012, Arkin commenced an action, individually, and on behalf of the Arkin Kaplan Firm and Lisa Solbakken, against Kaplan, Rice, and the Kaplan Rice Firm (*Arkin Kaplan Rice LLP, et al. v Howard Kaplan, et al.*, Sup Ct, NY County, Index No. 652316/2012 [the Arkin Kaplan Action]). In the Arkin Kaplan Action, Arkin alleged various causes of action against Kaplan, Rice, and the Kaplan Rice Firm regarding, inter alia, the obligation to pay rent under the sublease; sought an injunction preventing Kaplan and Rice from interfering with rent payments; and requested a declaratory judgment that the Arkin Kaplan Firm was obligated to pay rent, and could do so using the partnership account prior to the distribution of Kaplan and Rice’s partnership interests (the Arkin Kaplan Action, NYSCEF Doc. No. 1, complaint dated 7/2/12).

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Arkin also sought an accounting of the Arkin Kaplan Firm's assets under the Partnership Law (*id.*, ¶¶ 95-97). Kaplan and Rice allege that Arkin kept Lorber and Lampen fully apprised of the Arkin Kaplan Action, and offered legal advice related to the Sublease and litigation strategy (Complaint, ¶ 41). On July 20, 2012, the court (Sherwood, J.) ordered the Kaplan Rice Firm and the AS Firm to pay, respectively, 9/17ths and 8/17ths of the monthly rent as use and occupancy while the Kaplan Rice Firm remained in the space, and fixed the date of dissolution as May 17, 2012 for purposes of determining use and occupancy (Arkin Kaplan Action, NYSCEF Doc. No. 36, tr dated 7/20/12 at 53:15-19, 57:7-10). At the end of August 2012, plaintiffs and Kaplan Rice moved out of the space and paid use and occupancy for August, as ordered (Complaint, ¶ 46).

On September 25, 2012, Arkin sought an emergency order allowing the use of the Arkin Kaplan Firm's funds in the partnership account to pay rent for September, alleging that Landlord had threatened to find the Arkin Kaplan Firm in default (Arkin Kaplan Action, NYSCEF Doc. No. 57, order to show cause dated 9/25/12). Judge Sherwood declined to sign the order due to Arkin's failure to show irreparable harm (*id.* at 4).

In this action, Kaplan and Rice allege that, in November 2012, Arkin convinced Signature Bank to remove the restrictions on the Arkin Kaplan Firm's account with Signature Bank, and then transferred more than \$500,000 out of the account (Complaint, ¶¶ 49-50). Specifically, Kaplan and Rice allege that Arkin transferred a total of \$513,147.16, from which he paid \$489,299.20 to Landlord to cover rent for November and December 2012 (*id.*, ¶ 50).

In the Arkin Kaplan Action, Kaplan and Rice moved by order to show cause for an order requiring Arkin and Solbakken to return the funds to the account, enjoining any further withdrawals without written consent of all four former partners, and appointing a temporary

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receiver for the Arkin Kaplan Firm (Arkin Kaplan Action, NYSCEF Doc. No. 81, proposed order to show cause dated 11/29/17). Judge Sherwood granted the motion to the extent of directing Arkin and his co-plaintiffs to return the money to the account, stating that the money was withdrawn in violation of his order that the Arkin Kaplan Firm's funds could not be used for post-dissolution expenses (Arkin Kaplan Action, NYSCEF Doc. No. 93, Order dated 12/3/12). Further, Judge Sherwood ordered that any further withdrawals from the account would require a signature from each side of the partnership dispute (*id.*). This order was affirmed by the Appellate Division, First Department (*see Arkin Kaplan Rice LLP v Kaplan*, 120 AD3d 427, 428 [1st Dept 2014] ["Plaintiffs' use of funds in the AKR account to pay post-dissolution rent expenses was in violation of a preliminary injunction and subsequent orders limiting plaintiffs' use of those funds to the payment of pre-dissolution expenses"]).

Meanwhile, on November 6, 2012, Kaplan and Rice commenced an action against Arkin, Solbakken, the Arkin Kaplan Firm, and the AS Firm (*Howard J. Kaplan and Michelle A. Rice v Stanley Arkin, et al.*, Sup Ct, New York County, Index No. 653835/2012 [the Kaplan Rice Action]). Kaplan and Rice alleged a single cause of action for an accounting of the Arkin Kaplan Firm (the Kaplan Rice Action, NYSCEF Doc. No. 1, complaint dated 11/6/2012). Defendants in the Kaplan Rice Action moved for partial summary judgment dismissing the portion of the complaint that sought an order declaring that the AS Firm was the Arkin Kaplan Firm's legal successor for purposes of rent payments (the Kaplan Rice Action, NYSCEF Doc. No. 126, Order dated 6/3/13). Defendants also asserted nine counterclaims, identical to their claims in the Arkin Kaplan Action, which, save for the accounting counterclaim, Kaplan and Rice sought to dismiss (the Kaplan Rice Action, NYSCEF Doc. No. 125, Order dated 6/3/13). The court (Sherwood, J.) denied defendants' motion for partial summary judgment (the Kaplan

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Rice Action, NYSCEF Doc. No. 126, Order dated 6/3/13), and granted plaintiffs' motion to the extent of dismissing all counterclaims except that for an accounting, with leave to replead following completion of the accounting in the Arkin Kaplan Action (the Kaplan Rice Action, NYSCEF Doc. No. 125, Order dated 6/3/13). Ultimately, the Kaplan Rice Action was consolidated with the Arkin Kaplan Action (the Arkin Kaplan action, NYSCEF Doc. No. 553, Order dated 7/12/13).

Having been ordered, in the Arkin Kaplan Action, to reimburse the amount withdrawn from Signature Bank account, Arkin allegedly conspired with Signature Bank and Landlord to withdraw funds from the account via the letter of credit. Kaplan and Rice allege that, in August 2012, Signature Bank and Arkin arranged for the letter of credit to be renewed in the name of the Arkin Kaplan Firm, instead of the AS Firm (Complaint, ¶ 55), so that Arkin could utilize the Signature Bank account indirectly by having Landlord draw down on the letter of credit (*id.*, ¶ 56). Kaplan and Rice further allege that, upon learning of the renewal, they notified Signature Bank that any such renewal was improper, that the dissolution of the Arkin Kaplan Firm was an event of default under the letter of credit, and that any use of the partnership funds to pay Landlord's draws on the letter of credit would violate prior court orders (*id.*, ¶¶ 57-58).

Plaintiffs allege that, in order to implement their scheme, Arkin and Landlord agreed that Arkin would partially default on the Sublease so that Landlord could draw on the letter of credit (*id.*, ¶ 61), and that Signature Bank then would transfer funds from the partnership account to Landlord (*id.*). The three participants allegedly agreed to this plan with full knowledge of the prior court orders regarding the use of partnership funds (*id.*, ¶ 62). Kaplan and Rice claim that Lampen discussed this plan with Arkin and approved it (*id.*, ¶ 63).

In March 2013, Kaplan and Rice claim that Signature Bank informed them that Landlord

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had been inquiring about drawing down on the letter of credit (*id.*, ¶ 64). They further claim that Landlord, Lorber, Lampen, and Arkin were already planning to trigger the letter of credit the next month (*id.*, ¶ 65). Indeed, beginning in April 2013, Arkin allegedly underpaid the rent to Landlord by \$40,000, and continued to do so for more than two years until the AS Firm left the space (*id.*, ¶¶ 67-68). In response, Landlord drew down on the letter of credit, allegedly knowing that Signature Bank would use the funds from the partnership account to satisfy the draw, leaving insufficient funds in the account to pay Kaplan and Rice their partnership interests (*id.*, ¶ 69)

In response to Signature Bank's communication, Kaplan and Rice moved in the Arkin Kaplan Action, to transfer the partnership funds from Signature Bank to a different bank, so they could not be used to satisfy a draw on the letter of credit (the Arkin Kaplan Action, NYSCEF Doc. No. 238, tr dated 4/1/13 at 3:14-17). Judge Sherwood denied that motion (*id.* at 7:1), holding that "the bank might well have rights against the letter of credit," and that the court would not "take preemptive action to prevent the bank from acting pursuant to its rights" (*id.* at 6:1-4). When Landlord attempted to draw on the letter of credit later in April 2013, Signature Bank rejected the attempt because it did not conform to the requirements of the letter of credit (verified complaint, ¶ 70). In June 2013, Landlord commenced an action against Signature Bank to force the bank to honor the request (*Ladenburg Thalmann & Co. Inc. v Signature Bank*, Sup Ct, NY County, Index No. 651982/2013 [Signature Bank Action]). The Signature Bank Action culminated in a judgment, entered on March 10, 2014, ordering Signature Bank to pay Landlord \$405,058.80 to cover additional drawdowns made in the interim, and to honor any future drawdown requests (Signature Bank Action, NYSCEF Doc No. 62, Judgment entered 3/10/14). This judgment was affirmed by the Appellate Division, First Department (*Ladenburg Thalmann*

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& Co. Inc. v Signature Bank, 128 AD3d 36, 45-46 [1st Dept 2015]).

Meanwhile, Kaplan and Rice moved for partial summary judgment in the Arkin Kaplan Action, dismissing Arkin's claims that rent for the space could be paid out of the Arkin Kaplan Firm's assets (the Arkin Kaplan Action, NYSCEF Doc. No. 252, notice of motion dated 5/1/13). Judge Sherwood granted the motion, holding that "[u]nder Section 24 (B), Arkin remains liable for rent despite the withdrawal of partners from the firm or re-configuration of the firm in possession after such withdrawal" (*Arkin Kaplan Rice LLP v Kaplan*, 2013 NY Slip Op 31210[U], \*10 [Sup Ct, NY County 2013]). Further, Judge Sherwood found that "[the AS Firm] is the entity responsible for the obligations that run with the land by virtue of a presumptive assignment of the Sublease. Accordingly, it is liable for rent due post-dissolution" (*id.* at \*11). This decision was later modified by the Appellate Division, First Department, to the extent of holding that the Arkin Kaplan Firm, rather than the AS Firm, remained liable for rent until the expiration of the Sublease on June 29, 2015 (*Arkin Kaplan Rice LLP v Kaplan*, 120 AD3d 422, 426-27 [1st Dept 2014]). Further, the First Department held that Partnership Law § 71, which provides that the statutory rules for "settling accounts between the partners after dissolution" are "subject to any agreement to the contrary" (Partnership Law § 71), did not require the Arkin Kaplan Firm to pay rent to Landlord first, instead of preserving Kaplan and Rice's partnership assets, because the Sublease modified the procedures set forth in the Partnership Law (*Arkin Kaplan Rice LLP*, 120 AD3d at 426). At a later hearing, the court (Oing, J.) reiterated the Appellate Division, First Department's decision (the Arkin Kaplan Action, NYSCEF Doc. No. 1065, tr dated 1/23/15 at 28:25-29:5 ["At the end of the day, [the Arkin Kaplan Firm] . . . [and] Stanley Arkin, the sole remaining partner[, are] on the hook for the sublease, but Howard Kaplan and Michelle Rice, as of May 17, 2012 . . . they're out. And that includes the personal assets, as

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well as their partnership assets . . . .”]).

Kaplan and Rice allege that Signature Bank was aware of the trial court and First Department decisions, and, upon information and belief, that Signature Bank did not renew the letter of credit, which allegedly expired on August 31, 2013 (Complaint, ¶¶ 74, 77). Nevertheless, Kaplan and Rice claim that, in August 2014, Arkin convinced Signature Bank to retroactively renew the letter of credit as of August 2013, and then to renew it again through the end of the lease term (*id.*, ¶ 79). Allegedly, neither Signature Bank nor Arkin informed the court or the parties that the letter of credit had been renewed (*id.*). It is further alleged that Signature Bank was aware that the only purpose of the renewal was to allow Landlord to drawdown on the letter of credit, and, indeed, Landlord made an additional drawdown of \$500,000 after the purported expiration of the letter of credit (*id.*, ¶¶ 79, 81). Additionally, Kaplan and Rice state that Signature Bank’s act of taking its fees related to the letter of credit from the partnership account was a violation of the prior court orders regarding the account (*id.*, ¶ 80).

In the interim, the parties in the Arkin Kaplan Action filed competing motions for partial summary judgment on the complaint. Judge Oing denied Arkin, Solbakken, and the Arkin Kaplan Firm’s motion, granted Kaplan, Rice, and the Kaplan Rice Firm’s motion, and dismissed all of the causes of action alleged against Kaplan and Rice, except for the accounting claim (the Arkin Kaplan Action, NYSCEF Doc. No. 1065, tr dated 1/23/15 at 49:10-26). Judge Oing also dismissed all counterclaims asserted by Kaplan, Rice, and the Kaplan Rice Firm, as they were part and parcel of the “global accounting” (*id.* at 54-55). This decision was affirmed by the Appellate Division, First Department (*Arkin Kaplan Rice LLP v Kaplan*, 138 AD3d 415 [1st Dept 2016]).

In March 2015, Landlord commenced an action against the Arkin Kaplan Firm for unpaid

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rent dating back to 2013 (*Ladenburg Thalmann & Co. Inc. v Arkin Kaplan Rice LLP in dissolution*, Sup Ct, NY County, Index No. 151984/2015 [the Landlord Action]).<sup>1</sup> On March 26, 2015, allegedly at Arkin's behest, Signature Bank transferred \$884,351.47 to Landlord out of the partnership account to satisfy unpaid rent, an amount that exceeded Landlord's judgment against Signature Bank (Complaint, ¶ 90). Kaplan and Rice claim that roughly half of this amount was to satisfy the Signature Bank judgment, and the remainder was based on a post judgment drawdown demand from Landlord (*id.*). At least one of the transfers was allegedly made directly from the partnership account to Landlord, in violation of the letter of credit, which required Signature Bank to pay Landlord and then "look to available collateral to reimburse itself" (*id.*, ¶ 91).

Kaplan, Rice and the Kaplan Rice Firm moved, in the Arkin Kaplan Action, to compel Arkin to repay the money transferred out of the account (*Arkin Kaplan Rice LLP v Kaplan*, 2016 NY Slip Op 30845[U], \*2 [Sup Ct, NY County 2016]). On April 26, 2016, Judge Oing denied the motion, holding that the Appellate Division, First Department's prior rulings regarding the Arkin Kaplan Firm's liability under the Sublease mandated denial of the motion (*id.* at \*19). Further, Judge Oing held that Arkin's conduct related to the payment of rent was not, for purposes of the motion, a breach of any fiduciary duty against Kaplan and Rice (*id.* at \*20).

On March 3, 2017, Kaplan and Rice commenced this action. Kaplan and Rice allege eight causes of action: breach of contract against Landlord (first); tortious interference with contract against Signature Bank, Lorber, and Lampen (second); conversion against Landlord and Signature Bank (third); aiding and abetting breach of fiduciary duty against Landlord, Lorber, Lampen, and Signature Bank (fourth); fraudulent conveyance pursuant to Debtor and Creditor

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<sup>1</sup> On September 3, 2015, this case was referred to this part and stayed until further order of the court (the Landlord Action, NYSCEF Doc. No. 48, Order dated 9/3/15; NYSCEF Doc. No. 51, tr dated 9/3/15).

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Law (DCL) §§ 276, 276-a, and 278 against Landlord and/or Signature Bank (fifth and sixth); breach of warranty against Landlord (seventh); and a declaratory judgment that Landlord is bound by the prior orders of the court regarding the partnership account, and the Arkin Kaplan Firm’s liability under the Sublease (eighth).

**Discussion**

*A. Arkin and the Arkin Kaplan Firm’s Motion to Intervene (Mot. Seq. No. 003)*

Arkin and the Arkin Kaplan Firm move, pursuant to CPLR 1012 (a) (3) and 1013, to intervene as defendants in this action. CPLR 1012 (a) (3) provides that a nonparty may intervene as of right “when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.” CPLR 1013 allows for permissive intervention where “the person’s claim or defense and the main action have a common question of law or fact.” “In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party” (*id.*). “Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action” (*Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]). “Distinctions between intervention as of right and discretionary intervention are no longer sharply applied” (*Matter of HSBC Bank U.S.A.*, 135 AD3d 534, 534 [1st Dept 2016] [internal quotation marks and citation omitted]).

Arkin and the Arkin Kaplan Firm argue that they should be allowed to intervene because each cause of action in the complaint is predicated on alleged wrongdoing by one or both of them. Further, they argue, there are common questions of law and fact regarding liability under the sublease and permissible uses of the funds in the partnership account. Additionally, Arkin

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contends that Kaplan and Rice's claim for aiding and abetting a breach of fiduciary duty explicitly requires an underlying finding that Arkin breached such a duty. For those reasons, and because the motion is timely, they argue that intervention should be granted.

In response, Kaplan and Rice argue that the Arkin Kaplan Firm has no claims or defenses that will be compromised by this action, and that Arkin and the Arkin Kaplan Firm cannot intervene simply to dismiss claims against someone else. Further, they claim that there are conflicts between the intervening parties and Landlord, as Landlord has separately sued the Arkin Kaplan Firm, and, thus, Arkin cannot have the Arkin Kaplan Firm move to dismiss this action against Landlord. As for Arkin, Kaplan and Rice argue that he cannot assert any claims against them during the pendency of the Arkin Kaplan Action, and that he fails to identify any claim or defense belonging to him that would be compromised by this action. Further, Kaplan and Rice state that Arkin and the AS Firm have previously represented both Signature Bank and Landlord, and that Arkin is the wind-up partner of the Arkin Kaplan Firm, making his intervention in this case inappropriate. Finally, they assert that any allegations of misconduct against Arkin will be resolved in the Arkin Kaplan Action.<sup>2</sup>

At minimum, Arkin and the Arkin Kaplan Firm have "an actual legal stake in the matter being adjudicated," sufficient to permit their intervention (*Hildene Capital Mgt., LLC v Bank of N.Y. Mellon*, 105 AD3d 436, 437 [1st Dept 2013] [internal quotation marks and citation omitted]). As Arkin correctly points out, the Complaint is rife with allegations of his misconduct. The fourth cause of action for aiding and abetting a breach of fiduciary duty

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<sup>2</sup> Arkin and the Arkin Kaplan Firm's initial lack of a proposed pleading is not fatal. While CPLR 1014 requires that a motion to intervene be "accompanied by a proposed pleading," Arkin and the Arkin Kaplan Firm's papers make plain their asserted defenses (*see Ronen v Cohen*, 126 AD3d 487, 487 [1st Dept 2015], citing *Ryder v Travelers Ins. Co.*, 37 AD2d 797, 797 [4th Dept 1971]). In any case, Arkin and the Arkin Kaplan Firm have provided a proposed answer in reply.

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explicitly requires a predicate finding that Arkin owed a fiduciary duty to Kaplan and Rice, and that he breached it. The questions of law and fact related to Arkin's misconduct are common to any claims that Kaplan and Rice might be able to assert against him directly following the conclusion of the accounting in the Arkin Kaplan Action. As for the Arkin Kaplan Firm, this action explicitly relates to monies withdrawn from the Arkin Kaplan Firm's account; whether such withdrawals were proper; and, if improper, who should be liable. Any findings in this action would necessarily impact determinations in the Arkin Kaplan Action, either as part of the accounting or in terms of Arkin's potential post-accounting liability to Kaplan and Rice. Further, the intervention motion is timely, and Kaplan and Rice fail to raise a meritorious argument in terms of prejudice or delay. Thus, Arkin and the Arkin Kaplan Firm's intervention under CPLR 1013 is proper.

Kaplan and Rice's remaining arguments in opposition are almost entirely without merit. Any potential conflict of interest caused by Arkin and the Arkin Kaplan Firm's prior representation of Landlord and Signature Bank has been eliminated now that the Arkin Kaplan Firm is being represented by separate counsel from Arkin or the AS Firm. While the complaint contains several assertions of wrongdoing by Arkin, plaintiffs provide no authority for the proposition that a potential conflict should bar his intervention herein under those circumstances. Further, while claims against Arkin may be resolved in the Arkin Kaplan action, any findings related to Arkin in this action could have an effect on further proceedings in the Arkin Kaplan Action. The fact that the claims may be resolved in a separate action does not prevent potential prejudice to Arkin if he is barred from intervening. Finally, courts have frequently allowed nonparties to intervene in an action and move to dismiss the complaint (*e.g. Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 87 AD3d 119, 124 [1st Dept 2011], *aff'd* 19 NY3d 543 -

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[2012] [complaint dismissed on motion of intervening party]; *Matter of Rent Stabilization Assn. of N.Y. City v New York State Div. of Hous. & Community Renewal*, 252 AD2d 111, 116 [3d Dept 1998] [“the City could have moved to intervene and *simultaneously* make a preanswer motion to dismiss”]).

Accordingly, Arkin and the Arkin Kaplan Firm’s motion to intervene in the action is granted.

*B. The Motions to Dismiss (Mot. Seq. Nos. 002 and 003)*

The Landlord defendants (Mot. Seq. No. 002) and Arkin and the Arkin Kaplan Firm (Mot. Seq. No. 003) move to dismiss the complaint.<sup>3</sup> “On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). “[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

“Under CPLR 3211 (a) (1), 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). “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

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<sup>3</sup> Arkin and the Arkin Kaplan Firm join in the arguments made in the Landlord defendants’ moving brief. As set forth further below, those arguments are sufficient to determine the motion. Accordingly, the court need not and does not address the additional arguments raised by Arkin and the Arkin Kaplan Firm.

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stated one" (*id.* [internal quotation marks and citations omitted]).

CPLR 3211 (a) (3) provides that a court may dismiss one or more causes of action where "the party asserting the cause of action has not legal capacity to sue." CPLR 3211 (a) (5) provides the same where "the cause of action may not be maintained because of . . . [the] statute of limitations."

#### I. Breach of Contract against Landlord (First Cause of Action)

For their first cause of action, plaintiffs assert that Ladenburg breached the Sublease by accepting rent that was paid for, in part, by Kaplan and Rice's partnership assets, in violation of § 24(b) of the Sublease which relieved them of liability, and in violation of the implied covenant of good faith and fair dealing (Complaint, ¶¶ 96-102). The moving defendants argue that they had the legal right to seek rent and accept it from the Arkin Kaplan Firm, which had previously been held liable under the Sublease, and that Landlord's motive in doing so is irrelevant and not a breach of the Sublease. Further, they claim, Kaplan and Rice lack standing to assert such a breach because they are no longer parties to the Sublease. Finally, they assert that the Sublease does not require Landlord to scrutinize rent payments. In response, Kaplan and Rice argue that Landlord misappropriated funds from the Arkin Kaplan Firm by using their partnership assets to fulfill the Arkin Kaplan Firm's rent obligation, thus establishing standing and a breach of the Sublease.

Breach of contract requires proof of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Generally, only the parties to a contract can sue for a breach of its terms (*Parker & Waichman v Napoli*, 29 AD3d 396, 399 [1st Dept 2006]).

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Here, the terms of the Sublease plainly released Kaplan and Rice, not only from obligations under the Sublease, but also from all rights thereunder (Sublease, § 24[b]). The Sublease provides that, upon withdrawal, withdrawing partners shall “be deemed released from this sublease as of the Withdrawal date and shall have no further rights or obligations . . . from and after the Withdrawal date” (*id.*). Upon withdrawing from the Arkin Kaplan Firm, Kaplan and Rice ceased to be parties to the Sublease, and, thus, cannot sue for breach of its terms based on alleged actions that occurred after their withdrawal (*Parker & Waichman*, 29 AD3d at 399).

Even if they could make such a claim, Kaplan and Rice have improperly conflated the actions of three parties in their complaint: Arkin’s withdrawal of funds to pay rent in November 2012; Landlord’s acceptance of rent from Arkin and its subsequent drawdowns of the letter of credit; and Signature Bank’s removal of funds from the Arkin Kaplan Firm’s account following the drawdowns. Nothing in the Sublease, or any of the decisions in the Arkin Kaplan or S Bank Actions, requires Landlord to refuse a rent payment on the basis of where the money comes from or to forgo a contractual remedy for the same reason. Moreover, in the Arkin Kaplan Action, the court refused a previous request to transfer funds out of the partnership account to prevent Landlord or Signature Bank from drawing on or paying under the letter of credit (the Arkin Kaplan Action, NYSCEF Doc. No. 238, tr dated 4/1/13 at 6-7). Further, in the Signature Bank Action, it was later determined that it was proper for Landlord to draw on the letter of credit to cover rent defaults (Signature Bank Action, NYSCEF Doc No. 62, Judgment entered 3/10/14). The court’s decisions in both these actions were affirmed by the Appellate Division, First Department (*Ladenburg Thalmann & Co. Inc.*, 128 AD3d at 45-46; *Arkin Kaplan Rice LLP*, 120 AD3d at 428). As recently as last year, Judge Oing denied Kaplan and Rice’s motion to compel Arkin to return the money withdrawn from the Arkin Kaplan Firm’s account (*Arkin Kaplan Rice*

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LLP, 2016 NY Slip Op 30845[U] at \*19). Judge Oing referred to his prior decision in the Arkin Kaplan Action, in which it held that “the \$884,351.47 paid to [Landlord] was taken by the [Arkin Kaplan Firm's] bank to pay for the draw down on the LOC, and that [Landlord] had the right to that money” (*id.* at \*18). This decision was never appealed.

Thus, the Sublease does not bar Landlord’s actions, and the prior decisions recounted above affirm that Landlord had a legal right to act as it did. While Landlord’s exercise of its rights to seek rent and to drawdown the letter of credit may have injured Kaplan and Rice to the extent that they have a claim on funds in the Arkin Kaplan Firm’s account, they cannot claim damages against Landlord based on Landlord’s exercise of its legal right (*Transit Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23, 30 [1st Dept 2017] [“Simply put, an intent to put TFA out of business cannot justify a lawsuit for a claimed breach of the covenant where the express provisions of the agreement allowed Capital One to act as it did”]).

Accordingly, the first cause of action for breach of contract is dismissed.

## II. Tortious Interference with Contract against Lorber, Lampen, and Signature Bank (Second Cause of Action)

For their second cause of action, Kaplan and Rice assert that Lorber and Lampen were aware of the provisions of the Sublease and procured Landlord’s breach thereof (Complaint, ¶¶ 104-110). The moving defendants argue that, because Landlord did not breach the Sublease, the claim that the other defendants tortiously interfered with the Sublease must fail. Further, they claim, Lorber and Lampen could only have been acting in their capacities as agents of LTF Parent, and, thus, cannot be individually liable for inducing Landlord to breach. Finally, to the extent this claim relates to the November 2012 withdrawal, the moving defendants contend that, it is time-barred by the three-year statute of limitations applicable to the claim.

In response, Kaplan and Rice argue that they have adequately alleged a breach of the

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Sublease, as well as Lorber and Lampen's conduct in procuring the breach. Further, they claim, Lorber and Lampen's actions were not for a legitimate corporate purpose, and, therefore, they may be liable in their individual capacities.

"In a contract interference case . . . 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 [2007]). Without an underlying breach of the contract, there can be no claim for tortious interference (*Murataj v Dream Dragon Prods., Inc.*, 72 AD3d 527, 527 [1st Dept 2010] ["Since, as the record demonstrates, there was no breach of the contract between plaintiff and his crew, plaintiff's claim of tortious interference with contract fails as a matter of law"]). Here, as stated above, Kaplan and Rice fail to allege a breach of the Sublease, and so their claim of tortious interference with the Sublease must fail. This being the case, it is unnecessary to address the parties remaining contentions related to this cause of action.

Accordingly, the second cause of action for tortious interference with contract is dismissed.

### III. Conversion against Landlord and Signature Bank (Third Cause of Action)

For their third cause of action, Kaplan and Rice assert that Ladenburg improperly converted Kaplan and Rice's partnership assets by accepting the November 2012 rent payment and by drawing on the letter of credit (verified complaint, ¶¶ 112-116). The moving defendants argue that Landlord did not transfer money out of the partnership account; Arkin and Signature Bank did. Further, they say, Landlord's actions were proper under the court decisions recounted above. Finally, they assert, the claim is duplicative of the failed breach of contract claim, and time-barred with respect to the November 2012 transfer.

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In response, Kaplan and Rice argue that the issue of whether the transferred funds taken belonged to Kaplan and Rice, or to the Arkin Kaplan Firm, is unresolved, and, thus, the transfers cannot be deemed authorized under the prior court orders. They point out that Arkin was ordered by both the Judge Sherwood and the Appellate Division to return the money that was withdrawn in November 2012. Further, Kaplan and Rice assert that the letter of credit expired in 2013, and that none of the decisions in the Arkin Kaplan and S Bank Actions address their allegations that it was improperly renewed. Regarding the statute of limitations, Kaplan and Rice claim that, as they have alleged claims sounding in fraud, a six-year statute of limitations should apply. Finally, they assert that the breach of contract and conversion claims are distinct from each other.

“Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights” (*Komolov v Segal*, 144 AD3d 487, 488 [1st Dept 2016] [internal quotation marks and citation omitted]). Where a conversion claim relies on the same conduct as a breach of contract claim, it is impermissibly duplicative (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [“a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated”]). “[T]ort liability arises out of catastrophic consequences that . . . flow from [a party]’s failure to perform its contractual obligations with due care. It does not result from an injury that . . . is solely financial and not typical of [harm] arising from tort” (*Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 182 [1st Dept 2011] [internal quotation marks and citations omitted]).

Here, the breach of contract and conversion claims rest upon the same set of facts, specifically, that Landlord received roughly \$1.4 million from the partnership account as

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payment for rent, which was the sole obligation of the Arkin Kaplan Firm and Arkin (*compare* Complaint, ¶¶ 97-99 *with id.*, ¶¶ 112-114). Contrary to Kaplan and Rice's argument, they have not alleged a separate legal duty that was violated by Landlord's actions. Moreover, they misstate the provisions of the letter of credit, which renews automatically every year at the discretion of Signature Bank until its final expiration date of June 29, 2015 (letter of credit and amendments at 2, 11).<sup>4</sup> The drawdown under the letter of credit was approved by the court in the Signature Bank Action and by the Appellate Division, First Department, as set forth above. Further, the Arkin Kaplan court denied Kaplan and Rice's motion to compel Arkin to return the money removed from the partnership account, because the Arkin Kaplan Firm remained liable for rent under the Sublease. Finally, plaintiffs provide no authority for their contention that the payment of rent by a tenant to a landlord pursuant to a contract can be a conversion.

Accordingly, the third cause of action for conversion is dismissed. The parties' remaining contentions with regard to this claim need not be evaluated.

#### IV. Aiding and Abetting Breach of Fiduciary Duty against Landlord, Lorber, Lampen, and Signature Bank (Fourth Cause of Action)

For their fourth cause of action, Kaplan and Rice assert that Landlord, Lorber, and Lampen aided and abetted Arkin's various breaches of his fiduciary duty, as the wind-up partner of the Arkin Kaplan Firm, to Kaplan and Rice (Complaint, ¶¶ 118-122). The moving defendants argue that the Complaint contains no allegations against Lorber and Lampen with respect to this cause of action. Further, they assert that Arkin's fiduciary duty ceased once the firm dissolved on May 17, 2012, and, thus, no claim can survive for aiding and abetting its breach. Moreover, they say, Kaplan and Rice have failed to sufficiently plead substantial

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<sup>4</sup> Plaintiffs argue that Signature Bank admitted in its answer to the verified complaint that the letter of credit was not renewed in 2013. A review of the cited paragraph of the answer does not support that argument.

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assistance of the breach, and, to the extent that the claim relates to the November 2012 withdrawal, it is time-barred. Finally, they claim that the court has already held that Arkin did not breach any fiduciary duties owed.

In response, Kaplan and Rice argue that they adequately alleged conduct by Lorber and Lampen. Further, they state that the court must assume, as true, their allegation that Arkin owed Kaplan and Rice a continuing duty after dissolution as wind-up partner. Moreover, they claim that the appropriate statute of limitations is six years, not three, and that the question of substantial assistance cannot be resolved on a motion to dismiss. Finally, they assert that the court's prior order is not dispositive.

“A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach” (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). “A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator” (*id.* at 126 [internal quotation marks and citations omitted]). “[W]here 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” (*id.* at 118 [internal quotation marks and citations omitted]).

As an initial matter, the three-year statute of limitations applicable to this action bars any aiding and abetting claim prior to November 28, 2013. The gravamen of the complaint is for breach of contract and various financial torts. “[W]here an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of [the] Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name”

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(*Kaufman*, 307 AD2d at 119 [internal quotation marks and citation omitted]). As the essence of this action is only for money damages, the three-year statute of limitations applies.

Kaplan and Rice allege six separate breaches of Arkin's fiduciary duty: (i) Arkin's withdrawal of roughly \$500,000 from the partnership account in November 2012 to pay rent; (ii) the two renewals of the letter of credit after the Arkin Kaplan Firm was dissolved, done with the intent to use Kaplan and Rice's partnership funds to pay rent when Landlord drew on the letter of credit; (iii) Arkin's refusal to reimburse the Arkin Kaplan Firm for money used to pay his personal expenses; (iv) the Arkin Kaplan Firm's default on the Sublease, and Arkin's decision to use Kaplan and Rice's partnership assets to make up the shortfall; (v) Arkin's refusal to comply with court orders in the Arkin Kaplan Action; and (vi) Arkin's adoption of litigation positions to benefit himself, to the detriment of the Arkin Kaplan Firm, Kaplan and Rice (Complaint, ¶ 120). Assuming, arguendo, that Kaplan and Rice have adequately alleged that Arkin breached his fiduciary duty to them and damaged them by these actions,<sup>5</sup> they fail to allege that Landlord, Lorber, or Lampen provided substantial assistance. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (*Kaufman*, 307 AD2d at 126). "Exercising a contractual right conferred by a contract signed by plaintiff cannot be construed as substantial assistance to a breach of fiduciary duty" (*Katan Group LLC v CPC Resources, Inc.*, 2014 NY Slip Op 30120[U], \*7 [Sup Ct, NY County 2014], *affd* 127 AD3d 550 [2015]; *Stanfield Offshore Leveraged Assets, Ltd. v Life Ins. Co.*, 2008 NY Slip Op 31179[U], \*8 [Sup Ct, NY County 2008] ["Defendants correctly point out that demanding and pressuring a debtor for repayment of a bona fide debt does not amount to a corrupt inducement, participation, or substantial assistance

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<sup>5</sup> These allegations relate to claims that plaintiffs may have against Arkin after the accounting in the Arkin Kaplan Action is concluded, and are not resolved herein.

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necessary to give rise to aider and abettor liability”]).

Here, the claim relating to the November 2012 rent payment is time-barred. With respect to the remaining five alleged breaches, the Complaint contains no actionable allegations of substantial assistance rendered by Landlord, Lorber, and Lampen. Moreover, as previously discussed, the court determined that Landlord had a right to drawdown on the letter of credit, which was affirmed by the Appellate Division, First Department (*see Ladenburg Thalmann & Co. Inc.*, 128 AD3d at 45-46). Landlord’s exercise of its legal rights cannot be construed as “substantial assistance.” Kaplan and Rice argue that the issue of substantial assistance cannot be resolved on a motion to dismiss, but provide no authority for their contention.

Accordingly, the fourth cause of action for aiding and abetting breach of fiduciary duty is dismissed. Thus, the parties’ remaining contentions with regard to this claim need not be evaluated.

V. Fraudulent Conveyance Pursuant to DCL § 276, 276-a, and 278 against Landlord and/or Signature Bank (Fifth and Sixth Causes of Action)

For their fifth and sixth causes of action, Kaplan and Rice assert that the November 2012 withdrawal and the March 26, 2015 transfer of funds out of the partnership account, following Landlord’s drawdown on the letter of credit, constitute intentional fraudulent conveyances under the DCL (verified complaint, ¶¶ 124-131, 133-140). Moving defendants argue that because these claims are alleged against Landlord and/or Signature Bank, they are not pleaded with sufficient specificity under CPLR 3016 (b). Further, they claim, Kaplan and Rice insufficiently allege the “badges of fraud” necessary to show fraudulent intent. Finally, with respect to the sixth cause of action, moving defendants argue that Signature Bank was obligated to pay the drawdowns, and, thus, those conveyances cannot be fraudulent.

In response, Kaplan and Rice argue that they became creditors of the Arkin Kaplan Firm

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when they withdrew from it, and that the transfers were fraudulent because they were intended to defraud them. Moreover, they assert that they have adequately pleaded “badges of fraud” sufficient to survive the motion.

“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors” (DCL § 276).

“Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on ‘badges of fraud’ to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. Among such circumstances are: a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance”

(*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [internal quotation marks and citations omitted]).

Here, Kaplan and Rice seek to attack, as fraudulent transfers, both the payments of rent to Landlord, for which Arkin and the Arkin Kaplan Firm are obligated under the Sublease and the court's decisions in the Arkin Kaplan Action (*Arkin Kaplan Rice LLP*, 120 AD3d at 427), and the drawdowns on the letter of credit that were authorized by the Appellate Division, First Department in Signature Bank Action (*Ladenburg Thalmann & Co. Inc.*, 128 AD3d at 45-46). The allegations that the transfers were fraudulent, based on the alleged communications and relationships among Arkin, Landlord, Lorber, Lampen, and Signature Bank, do not override the documentary evidence and prior court decisions establishing the legal obligations under which the transfers were made. In any case, Kaplan and Rice provide no authority for their contention that payments made pursuant to a valid lease or judgment may be considered fraudulent.

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Accordingly, the fifth and sixth causes of action for fraudulent conveyance are dismissed.

**VI. Breach of Warranty against Landlord (Seventh Cause of Action)**

For their seventh cause of action, Kaplan and Rice assert that Landlord breached a warranty by presenting the letter of credit to Signature Bank and using it to appropriate funds that they had an interest in. Landlord moves to dismiss this claim, and Kaplan and Rice fail to make any argument in opposition. Accordingly, the seventh cause of action for breach of warranty is dismissed.

**VII. Declaratory Judgment against Landlord (Eighth Cause of Action)**

For their eighth cause of action, Kaplan and Rice seek a declaration that Landlord is bound by the prior decisions of this court and the Appellate Division, First Department in the Arkin Kaplan Action that Kaplan and Rice are not liable under the Sublease after the date of their withdrawal from the Arkin Kaplan Firm (Complaint, ¶¶ 150-152). Landlord argues that it cannot be bound by decisions in an action to which it was not party, and that this claim is an impermissible collateral attack on the judgment in the Signature Bank Action. In response, Kaplan and Rice argue that Landlord was in privity with Arkin, who was a party to the Arkin Kaplan Action, and that the issue to be decided is identical. Moreover, Kaplan and Rice claim that Landlord and Arkin had a shared legal strategy in the Arkin Kaplan Action, and, thus, Landlord has had a full and fair opportunity to litigate this issue.

The parties' arguments regarding this claim address technical aspects of Kaplan and Rice's entitlement to a declaratory judgment. Given the court's ruling on Kaplan and Rice's claim for breach of the Sublease, however, there is no longer a justiciable controversy as to whether Landlord breached the Sublease by accepting rent from Arkin and drawing down on the letter of credit. Moreover, as stated above during the court's discussion of that claim, the prior

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decisions, holding that Kaplan and Rice's partnership interests could not be used to pay the Arkin Kaplan Firm's rent, are not inconsistent with the Arkin Kaplan Firm's obligation to pay rent. Finally, to the extent the declaration sought would invalidate the judgment in the Signature Bank Action, authorizing Landlord to drawdown on the letter of credit, it is an impermissible collateral attack (*Citizens for St. Patrick's v Saint Patrick's Church of W. Troy*, 117 AD3d 1213, 1214 [3d Dept 2014] [holding that declaratory judgment action challenging sale of church was impermissible collateral attack on judgment authorizing sale]).

Accordingly, the eighth cause of action for a declaratory judgment is dismissed.

A. *The Motions for Sanctions (Mot. Seq. Nos. 002 and 003)*

Lastly, the moving defendants seek sanctions against Kaplan and Rice, pursuant to 22 NYCRR 130-1.1 (a), for frivolous conduct in bringing this lawsuit. Specifically, the moving defendants argue that Kaplan and Rice have asserted meritless claims, made false statements, sought to relitigate issues that have previously been decided, and challenged payments that were made under valid contracts. In response, Kaplan and Rice argue that they made no false statements; that prior decisions in the Arkin Kaplan and S Bank Actions do not resolve the claims and issues raised in the Complaint; and that their claims are not meritless.

"The court, in its discretion, may award to any party or attorney in any civil action or proceeding . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1 [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" (22 NYCRR 130-1.1 [c]; see *Premier*

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*Capital v Damon Realty Corp.*, 299 AD2d 158, 158 [1st Dept 2002]). The court has discretion as to both the imposition and amount of sanctions (*Seldon v Bruno*, 204 AD2d 180, 180 [1st Dept 1994]), and such discretion should rarely be disturbed (*Matter of Metamorphosis Constr. Corp. v Glekel*, 247 AD2d 231, 231 [1st Dept 1998]).

Here, the alleged false statements referenced by the moving defendants were made with regard to the third cause of action for conversion, which is pleaded against both Landlord and Signature Bank. Specifically, it is alleged that Landlord and Signature Bank converted Kaplan and Rice's assets by

“a. [t]ransferring approximately \$500,000 from [the Arkin Kaplan Firm's] account at [S] Bank to [Landlord] in violation of numerous court orders;

“b. [t]ransferring approximately \$884,000 from [the Arkin Kaplan Firm's] account at [S] Bank to [Landlord] in violation of numerous court orders; and

“c. [p]aying [S] Bank LOC renewal fees in August 2012 and August 2014 in violation of the Court's orders”

(Complaint, ¶ 112). While the moving defendants interpret these allegations as false claims that Landlord transferred funds and paid renewal fees when Kaplan and Rice separately attributed those acts to Signature Bank, a less inflammatory reading of the allegations shows that they are pleaded to encompass the separate roles that Landlord and Signature Bank played in the alleged transactions, albeit pleaded inartfully. As such, these statements are not a basis for sanctions.

As to the remainder of the moving defendants' proffered grounds for sanctions, the prior decisions in the Arkin Kaplan and S Bank Actions hold the following: Arkin may not use Kaplan and Rice's partnership assets to pay rent; the Arkin Kaplan Firm was liable for rent under the Sublease, prior to the Sublease's expiration on June 29, 2015; and Landlord's drawdowns on the letter of credit were proper. While these three holdings, read together, suggest that Landlord, Lorber, and Lampen are not the proper parties from which Kaplan and Rice may recoup their

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lost partnership assets, they do not explicitly compel that position. To the extent that Kaplan and Rice proffer a misinterpretation of the letter of credit to support their claims, assert arguments that they arguably have lost in the Arkin Kaplan Action, and assert claims that are time-barred, in part, Kaplan and Rice tread close to the line of filing meritless claims. As set forth above, however, Kaplan and Rice's conduct in bringing this action dot not rise to the level of frivolous. Thus, the court chooses to exercise its discretion not to impose sanctions at this time.

Accordingly, it is hereby,

ORDERED that the branch of the motion of Stanley S. Arkin and Arkin Kaplan Rice LLP to intervene (Mot. Seq. No. 003) is granted, and that Stanley S. Arkin and Arkin Kaplan Rice LLP be permitted to intervene in this action as party defendants; and it is further

ORDERED that the summons and complaint in this action be amended by adding Stanley S. Arkin and Arkin Kaplan Rice LLP thereto as party defendants and listing Stanley S. Arkin and Arkin Kaplan Rice LLP as the last defendants in the caption; and it is further

ORDERED that the attorney for Stanley S. Arkin and Arkin Kaplan Rice LLP shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect these changes in the caption herein; and it is further

ORDERED that the motions of defendants Ladenburg Thalmann & Co., Inc., Howard M. Lorber, and Richard J. Lampen (Mot. Seq. No. 002), and of Stanley S. Arkin, and Arkin Kaplan Rice LLP (Mot. Seq. No. 003), to dismiss the complaint is granted and the complaint is dismissed in its entirety as against these defendants, with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of these defendants; and it is further

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ORDERED that the action is severed and continued against the remaining defendant

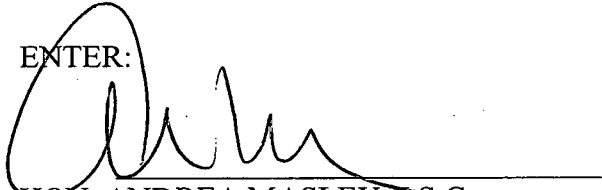
Signature Bank; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 242, 60

Centre Street, on November 15, 2017, at 10:30 AM/PM.

Dated: October 19, 2017

ENTER:



HON. ANDREA MASLEY, J.S.C.

**HON. ANDREA MASLEY  
J.S.C.**