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| <b>Gamez v Lopez</b>                                                                                                                                                                                                           |
| 2021 NY Slip Op 34340(U)                                                                                                                                                                                                       |
| March 10, 2021                                                                                                                                                                                                                 |
| Supreme Court, Nassau County                                                                                                                                                                                                   |
| Docket Number: Index No. 607732/2020                                                                                                                                                                                           |
| Judge: Denise L. Sher                                                                                                                                                                                                          |
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**SHORT FORM ORDER****SUPREME COURT OF THE STATE OF NEW YORK**

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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JOSE GAMEZ,

Plaintiff,

- against -

HUMBERTO LOPEZ,

Defendant.

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TRIAL/IAS PART 30  
NASSAU COUNTY

Index No.: 607732/2020  
Motion Seq. Nos.: 01, 02  
Motion Dates: 12/01/2020  
12/15/2020

**The following papers have been read on these motions:**

|                                                                                                              | Papers Numbered |
|--------------------------------------------------------------------------------------------------------------|-----------------|
| <u>Notice of Motion (Seq. No. 01), Affirmation and Exhibits</u>                                              | <u>1</u>        |
| <u>Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits</u>                                        | <u>2</u>        |
| <u>Affidavit in Opposition to Cross-Motion (Seq. No. 02), Affirmation and Exhibits and Memorandum of Law</u> | <u>3</u>        |
| <u>Reply Affirmation to Cross-Motion (Seq. No. 02) and Exhibits</u>                                          | <u>4</u>        |

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant moves (Seq. No. 01), pursuant the advocate-witness rule set forth in Rule 3.7 of the Rules of Professional Conduct 22 NYCRR 1200.0, for an order directing, Ivan E. Guerrero, Esq. ("Guerrero") to withdraw as plaintiff's trial counsel in the instant action.

Plaintiff opposes the motion (Seq. No. 01) and cross-moves (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment to enforce the terms and provisions of a settlement agreement in a prior action. Defendant opposes the cross-motion.

In support of the motion (Seq. No. 01), counsel for defendant submits, in pertinent part, that, "[o]n July 29, 2020, the plaintiff JOSE GAMEZ ('Gamez') by his attorney, Guerrero Law Offices, P.C. commenced this action by filing a summons and complaint. Upon information and

belief, Guerrero Law Offices, P.C, is solely owned by Mr. Ivan E. Guerrero, Esq. Gamez alleges in the complaint that Lopez violated a settlement agreement entered into before the Hon. Denise L. Sher on April 16, 2015 (the 'Settlement Agreement'). Gamez demands judgment ordering Lopez to transfer ownership of a house located in Levittown, New York (the 'Premises'), and \$20,000 in escrow held by Lopez's former attorney, Mr. Christopher Thompson.... On September 30, 2020, I filed Lopez's answer and counterclaim. Lopez requests, among other things, rescission of the Settlement Agreement since Gamez concealed material facts (judgments filed against the Premises), and obstructed Lopez's performance under the Settlement Agreement.... On October 19, 2020, Mr. Guerrero filed a reply to the counterclaim.... Issue has recently been joined. Discovery demands have not been served. I file this motion since Mr. Guerrero will be a fact witness to the instant action." *See* Defendant's Affirmation in Support of Motion (Seq. No. 01) Exhibits A-C.

Counsel for defendant further asserts, in pertinent part, that, "Mr. Guerrero will be a fact witness in this action. The core consideration for the Settlement Agreement concerned a foreclosure action filed by Argent Mortgage Company ('Argent') against Gamez (the 'Foreclosure Action'). Lopez and Gamez jointly owned and lived in the Premises. Pursuant to the Settlement Agreement, Gamez would transfer the Premises to Lopez in consideration of Lopez causing Agent to discontinue the Foreclosure Action against Gamez. Lopez would also pay Gamez \$20,000 held in an escrow account.... Prior to the Settlement Agreement, Mr. Thompson (Lopez's prior attorney) and Mr. Guerrero had detailed discussions concerning the Premises. Gamez does not speak English. Mr. Guerrero, who is fluent in Spanish, spoke on behalf of Gamez. Specifically, Mr. Thompson told Mr. Guerrero that he needed information

regarding Gamez's expenses, debts, and liens. Mr. Thompson told Mr. Guerrero that Lopez intended to refinance the Premises. By refinancing the Premises, Lopez would be able to obtain necessary funds to pay Gamez's debt – causing Argent to dismiss the Foreclosure Action. Although he knew that Lopez intended to refinance the Premises, Mr. Guerrero failed to disclose that Toyota Motor Credit Corporation ("Toyota") and New York State filed judgments against Gamez. These judgments created a lien against the Premises. Particularly, Toyota entered a \$21,651.59 judgment against Gamez approximately two (2) years before the Settlement Agreement.... As a result of not disclosing the judgments, Lopez entered into the Settlement Agreement since he believed that Argent's mortgage was the only lien against the Premises. The judgments filed against the Premises (especially the Toyota judgment) adversely affecting (*sic*) Lopez's ability to perform under the Settlement Agreement. Despite Mr. Thompson's request, Mr. Guerrero wrote that "Gamez is not going to move to clear the judgment lien on title."... Mr. Guerrero's failure to disclose the judgments, and then sending an email that Gamez will not remove the lien, is the basis for the first cause of action in the counterclaim (fraudulent inducement through omission of material fact). As a result, I will be calling Mr. Thompson and Mr. Guerrero to testify in the instant action. Lopez's second counterclaim concerning Gamez's failure to perform necessary acts to allow Lopez to perform under the Settlement Agreement – a breach of his implied covenant of good faith and fair dealing.... After entering into the Settlement Agreement, Mr. Thompson repeatedly e-mailed and spoke to Mr. Guerrero about Gamez signing a draft contract. Lopez's bank required a contract to refinance the Premises. Despite Mr. Thompson's repeated requests, Gamez failed to return a signed documents.... Furthermore, Argent's attorney, Ms. Alina Levi, Esq., needed Gamez to execute documents to

discontinue the Foreclosure Action. Despite Ms. Levi sending e-mails and speaking to Mr. Guerrero multiple times, Gamez refused to sign the necessary documents. It is well settled that any doubts concerning an attorney being called as a witness 'should be resolved in favor of disqualifying the lawyer' [citation omitted]. Mr. Guerrero will be called to testify about communication concerning Gamez's failure to perform – in good faith – under the Settlement Agreement. Despite my request, Mr. Guerrero refuses to withdraw as an attorney." *See* Defendant's Affirmation in Support of Motion (Seq. No. 01) Exhibits D-I.

In opposition to the motion (Seq. No. 01) and in support of the cross-motion (Seq. No. 02), counsel for plaintiff submits, in pertinent part, that, "Gamez commenced this action by summons and complaint dated July 29, 2020, by and through the undersigned counsel as his attorney. The complaint essentially seeks to enforce the terms and provisions of a stipulation of settlement in a prior action, namely Lopez, Plaintiff v. Gamez, Defendant, Index No. 020059/2010 (the 'First Action'). Further, the Honorable Denise L. Sher entered an Order dated November 21, 2017 and entered on November 22, 2017.... Lopez filed his Answer and Counterclaim, by and through his attorney Michael A. Markowitz, P.C. dated September 30, 2020.... Gamez, through the undersigned counsel, filed his Reply to Counterclaims dated October 19, 2020.... Lopez filed the current motion seeking to cause the undersigned counsel to be disqualified as attorney dated October 30, 2020. Gamez is now filing his opposition to the motion to disqualify Guerrero as counsel and his cross-motion for summary judgment." *See* Plaintiff's Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibits A-C.

Counsel for plaintiff further asserts, in pertinent part, that, “[a] brief history of this action is in order. Lopez and Gamez and their families resided and continue to reside in the same house known as 99 Jerusalem Avenue, Levittown, New York (the ‘Property’); the Property is a one (1) family dwelling..... However, there was and continue (*sic*) to be tremendous consternation between the two (2) families. The First Action sought the partition of the Property between and among Lopez and Gamez and the eviction therefrom of Gamez and his family. The First Action was resolved by the verbal stipulation of agreement placed on the record by the attorney for Lopez, Christopher Thompson, Esq. (‘Thompson’), which agreement was subsequently approved by the parties and the Court on April 16, 2015.... **The settlement transcript, which Thompson claimed was complete on behalf of Lopez never mentioned anything about a second mortgage, outstanding liens or judicial liens, if any, notwithstanding that the judgment liens were in the amount of \$21,651.59 and docketed against the property on January 3, 2013. January 3, 2013 was greater than two (2) years prior to the settlement agreement being placed on the record on April 16, 2015. Accordingly, the judgments were a matter of public record as of the time of the settlement and Lopez and/or Thompson knew or should have known of said judgment liens.... The Lopez Order to Show Cause under the prior case Index # 20059/2010, filed by Thompson, sought among other relief, the rescission and/or modification of the settlement agreement in the First Action dated April 16, 2015 and an extension of time for Lopez to settle the litigation with Senior Mortgage. In resolving the motion, the Honorable Denise L. Sher, [issued an] Order dated November 21, 2017.... Given the failure of Lopez to convey his interest in the Property to Gamez and/or cause the release of the \$20,000 of escrowed moneys pursuant to the terms and provisions of the settlement agreement, within the thirty (30)**

month time frame, and because Lopez has refused to pay his portion of the utility bills, Gamez commenced this action against Lopez by summons and complaint dated July 29, 2020. Specifically, Lopez has violated the terms and provisions of the settlement agreement as set forth in Paragraph No. 6 of the complaint (failure to resolve the pending mortgage foreclosure action and to close on his acquisition of Gamez's 50% interest in the Real Property and to deliver the \$20,000 in escrow held by Mr. Thompson in the thirty (30) month time frame), No. 7 (Lopez's failure to pay his 40% share of utilities); and No. 8 of the complaint (discussed in greater detail in the next sentence). Paragraph 8 of the complaint alleged that Lopez violated the terms and provisions of the settlement stipulation by his failure to close within the thirty (30) month period set forth in the stipulation of settlement and/or to pay the \$20,000 escrow moneys to Gamez)... Lopez filed the Answer and Counterclaim dated September 30, 2020. It is important to note that in Paragraph No. 5 of the Answer and Counterclaim, Lopez admitted to entering into the stipulation of settlement, but denied its content notwithstanding a transcript of the settlement stipulation was annexed to the complaint. And Lopez further admitted the existence of the Order dated November 21, 2017 but denied the content thereof notwithstanding that a copy of the Order was annexed to the complaint." *See id.*

Counsel for plaintiff argues, in pertinent part, that, "Judge Sher made findings of the following facts and conclusions of law [in the November 21, 2017 Decision and Order of this Court]: a. there was a valid, legal agreement between Gamez and Lopez as set forth in the record; b. the agreement as set forth in the record was complete as set forth by Thompson in the record and could not be varied or modified in any matter; c. the information as to the judicial liens against Gamez was a matter of public record for at least two (2) years prior to the

agreement placed on the record which could have been easily discovered by Thompson notwithstanding any statements/representations to the contrary by Gamez and/or the undersigned counsel (please note that both Gamez (only speaks the Spanish language) and the undersigned counsel deny making any representations pertaining to the judicial liens); and d. that Lopez failed to pay his required share of the utility bills. The agreement further stated that Lopez had up to 30 months from the date that the agreement was placed on the record to settle and/or dismiss the underlying foreclosure action pending in Supreme Court Nassau County under Index Number 8613/2014. And if Lopez was unable to enter into an agreement with the foreclosing bank, Lopez would release his 50 percent share of ownership to Gamez making Gamez the one hundred percent (100%) owner of the property, at which point the \$20,000 will be released to Lopez less certain expenses and the parties will separate as if mutual general releases had been exchanged. And as was addressed by Judge Sher, the agreement had to be interpreted as set forth in the record. And thirty (30) months have now passed since the agreement was placed on the record, which was April 16, 2015. Accordingly, Gamez is entitled to the 100% ownership of the Property, without an ownership interest by Lopez and Lopez must depart the Property. And upon the departure of Lopez from the Property, Lopez was entitled to the release of the \$20,000 in escrowed moneys less certain enumerated expenses. It is rudimentary that the Order dated November 21, 2017 must be given preclusive effect in accordance with the equitable doctrine of collateral estoppel and/or law of the case.... Herein, all of the pertinent issues were necessarily decided and/or could have been litigated in the First Action in which the Order dated November 21, 2017 addressed and confirmed (the findings of fact and conclusions of law are set forth above).... There was not even one affirmative defense or counterclaim that was not determined

and/or could not have been determined in the First Action, especially in Lopez's motion for a modification of the agreement placed on the record, as determined by Judge Sher. Further, please note that Lopez never filed a timely appeal of Judge Sher's order and thus, any and all findings of fact and conclusions of law made by Judge Sher in the Order dated November 21, 2017 must be given preclusive effect.... Here, there cannot be a material issue of fact in dispute as all of the issues of fact and issues of law were resolved by Judge Sher in the Order dated November 21, 2017. Accordingly, Gamez must be granted summary judgment, with prejudice,..."

Counsel for plaintiff also contends, in pertinent part, "Lopez also seeks to take the deposition of the undersigned counsel and have the undersigned counsel disqualified from representing his client, Gamez. First, as demonstrated above, there are no outstanding issues to be determined in this second action seeking essentially to enforce the terms and provisions set forth in the agreement placed on the record. And, interestingly, Lopez has failed to state with specificity any line of questioning that is pertinent hereto to the defense of this cross-motion for summary judgment. Lopez continually harps on the fact that the judicial liens were not disclosed to him and/or his prior attorney, Mr. Thompson; however, Lopez failed to note that Judge Sher has already found that the judicial liens were a matter of public record and apparently, Mr. Thompson and/or Lopez failed to conduct a lien search; therefore, Lopez had no right to rely on any representations thereof made by Gamez and/or the undersigned counsel; in fact, the undersigned counsel denies that Gamez (only speaks the Spanish language) or the undersigned counsel ever made any representations to Thompson pertaining to the judicial liens. And interestingly, Lopez failed to annex an affidavit from Thompson where he specifically stated that the undersigned counsel made any references to the outstanding liens in the negotiation of the

terms and provisions of the agreement placed on the record by Thompson. And, in fact, when the Court asked Thompson whether the agreement was complete, he never stated that it was subject to any contingency pertaining to the outstanding judicial liens.... Further, any and all communications that the undersigned counsel had with his client, Gamez, in English or Spanish, is (*sic*) not discoverable as it (*sic*) is protected under the attorney-client privilege.... Herein, the undersigned counsel represented Gamez in an attorney-client capacity in the First Action and that any and all communications among us, especially concerning any facts or discussion pertaining to the First Action were confidential and privileged and said privilege was never waived. Therefore, said communications are not discoverable by Lopez. Further, any communications between the undersigned counsel and Thompson are now the subject of Judge Sher's order. And thus, the doctrine of equitable estoppel prohibits the variance or modification of the agreement placed on the record by Thompson. This is especially true as Lopez has failed to issue a subpoena for the deposition of the undersigned counsel or paid the undersigned counsel a witness fee. Accordingly, even assuming *arguendo* that summary judgment is not granted in favor of Gamez, Lopez has not proffered any reasonable explanation as to the granting of the severe penalty of the removal of the undersigned counsel as attorney for Gamez."

In opposition to plaintiff's cross-motion (Seq. No. 02), counsel for defendant asserts, in pertinent part, that, "[i]n his motion for summary judgment, the plaintiff relies on the doctrine of collateral estoppel. However, the plaintiff waived the affirmative defense by failing to plead 'collateral estoppel' in his reply to the counterclaim. Since collateral estoppel is not a bar to defendant's opposition, plaintiff's motion for summary judgment should be denied since there are multiple triable issues of fact. Pursuant to the stipulation entered in court on April 16, 2015

(the 'Settlement Agreement'), the defendant agreed to settle litigation (the 'Foreclosure Action') filed by Argent Mortgage Company ('Argent') to foreclose on a house (the 'Premises'), jointly owned with the plaintiff. There is a triable issue whether the plaintiff prevented defendant's performance by refusing to sign Argent's settlement documents. There is a triable issue whether the plaintiff failed to perform in good faith under the Settlement Agreement by obstructing the defendant's financing allowing payment to Argent to discontinue the Foreclosure Action. The plaintiff refused to vacate or satisfy judgments that were a lien against the Premises. The plaintiff failed to sign and return a basic contract. The plaintiff refused to remove an illegal shed or place smoke detectors in the Premises. There is a triable issue whether the plaintiff fraudulently induced the defendant to enter into the Settlement Agreement. As set forth in the affidavit in opposition to summary judgment, the plaintiff falsely represented that he had no liens against (*sic*) Premises knowing that the defendant had to obtain a loan to perform under the Settlement Agreement. Finally, plaintiff filed his summary judgment motion prior to any discovery conducted by the parties. There are unavailable facts concerning discussions between attorney's, and plaintiff's performance under the Settlement Agreement. As a result, summary judgment should be denied...."

Counsel for defendant further contends, in pertinent part, that, "[i]n support of his motion for summary judgment, the plaintiff's attorney, Mr. Ivan Guerrero, argues that the defendant is collaterally estopped from asserting opposition since 'all of the pertinent issues was (*sic*) necessarily decided and/or could have been litigated in the First Action....' However, the plaintiff failed to plead 'collateral estoppel' as an affirmative defense to the counterclaim. Consequently, he waived his rights pursuant to NY CPLR 3211(e). The doctrine of collateral

estoppel is an affirmative defense that must be set forth in a responsive pleading [citation omitted]. In the instant action, the plaintiff never plead (*sic*) ‘collateral estoppel’ as an affirmative defense to the counterclaim. Instead, he alleges that the defendant ‘is barred from recovery on its Counterclaims based upon the doctrine of *equitable estoppel*’ .... Equitable estoppel is different than collateral estoppel. ‘The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in an subsequent action or proceeding an issue clearly raised in a prior action and decided against that party or those in privity, whether or not the tribunals or causes of action are the same’ [citation omitted]. ‘Equitable estoppel ‘is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party’s words or conduct, has been mislead into acting upon the belief that such enforcement would not be sought’’ [citations omitted]. The doctrine of equitable estoppel generally concerns a statute of limitations defense [citation omitted], or a party’s prohibition from engaging in conduct such as prevention of denial of insurance coverage [citation omitted] or denial of paternity [citation omitted].... The plaintiff failed to plead – or even use the words ‘collateral estoppel’ – in his affirmative defense to the counterclaim. Therefore, as a matter of law, the plaintiff waived his right to use the doctrine of collateral estoppel to prevent the defendant from introducing facts in opposition to plaintiff’s summary judgment motion.”

Counsel for plaintiff asserts, in pertinent part, that, “[p]ursuant to the Lopez Affidavit, the defendant settled the Foreclosure Action. Yet, the plaintiff frustrated the settlement when presented with Argent’s ‘Confidential Settlement and Release Agreement.’ Specifically, the

defendant's former attorney, Mr. Christopher Thompson, e-mailed Argent's Confidential Settlement and Release Agreement to Mr. Ivan Guerrero with instructions to have his client sign and return. Despite multiple requests, the plaintiff refused to execute the agreement – blocking defendant's effort to discontinue the Foreclosure Action pursuant to the Settlement Agreement. Since the plaintiff prevented the defendant from settling the Foreclosure Action – a condition precedent in the Settlement Agreement – plaintiff's motion for summary judgment should be denied by this Court. There is a triable issue whether the plaintiff performed in good faith under the Settlement Agreement. As with all contracts, there is a covenant of good faith and fair dealing implied in stipulations of settlement [citation omitted]. . . . In the instant action, the plaintiff acted in bad faith by intentionally obstructing the defendant's loan application. Pursuant to the Lopez Affidavit, the plaintiff refused to vacate or satisfy his judgments filed against the Premises. Although a condition for the loan, the plaintiff failed to sign and return a basic contract concerning the transfer of the Premises to the defendant. The plaintiff refused to remove an illegal shed or correctly place smoke detectors in the Premises. Combined, the plaintiff's actions completely frustrated defendant's attempt to secure a loan to make the required payments under the Settlement Agreement. There is also a triable issue concerning the defendant's failure to account pursuant to the Settlement Agreement. Pursuant to the Lopez Affidavit, most of the bills (ex. electricity, water, and oil) are in the plaintiff's name. The plaintiff failed to perform in good faith by refusing to provide the defendant with a copy of the bills and proof of payment. Since there are triable issues of fact concerning plaintiff's performance under the Settlement Agreement, plaintiff's motion for summary judgment should be denied by this Court. . . . As set forth in the Lopez Affidavit, Mr. Thompson and Mr. Guerrero had extensive settlement

discussions concerning the defendant paying money to Argent to discontinue the Foreclosure Action. They spoke about how the plaintiff would obtain money for the Premises. Everyone understood that the defendant would have to apply for refinancing from a bank. To obtain financing, the defendant needed information from the plaintiff concerning his expenses, debts, and liens against the Premises. During the settlement conference, the defendant represented that he had no judgments that would be a lien against the Premises. The defendant relied on plaintiff's representation. However, the plaintiff's representation was false. The plaintiff had three judgments – the largest being over \$21,000 owed to Toyota Motor Credit Corporation. The judgments caused an issue with the defendant's financing. There is a triable issue whether the Settlement Agreement should be wholly or partially rescinded as a result of the plaintiff failing to disclose judgments – despite requests made by the defendant. Therefore, it is submitted that plaintiff's motion for summary judgment should be denied by this Court."

In further opposition to plaintiff's cross-motion (Seq. No. 02), defendant submits his own Affidavit, and submits the affirmation of his prior attorney, Christopher Thompson, Esq.. See Defendant's Affidavit and Affirmation in Opposition to Cross-Motion (Seq. No. 02).

The Court will first address plaintiff's cross-motion (Seq. No. 02) for summary judgment.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988);

*Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212(b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. See *Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Although summary judgment is a drastic remedy (see *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974)), nevertheless, a "court must evaluate whether the alleged factual

issues presented are genuine or unsubstantiated” (*see Assing v. United Rubber Supply Co., Inc.*, 126 A.D.2d 590, 511 N.Y.S.2d 31 (2d Dept. 1987); *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141 (1978)) and where there is nothing left to be resolved at trial, the case should be summarily decided. *See Andre v. Pomeroy, supra* at 364.

The Court does not find that there are any issues of fact with respect to the issue of the liens and/or judgments against the subject property, as the Court has previously ruled on this issue in its November 21, 2017 Decision and Order in the prior matter. However, based upon the arguments detailed above, and viewing the evidence in the light most favorable to defendant, the Court finds that there are triable issues of fact with respect to the claims that plaintiff prevented performance of the Settlement Agreement by not executing the Confidential Settlement and Release Agreement, thereby allegedly blocking defendant’s effort to discontinue the Foreclosure Action pursuant to the Settlement Agreement, and by allegedly failing to provide an accounting as per the Settlement Agreement. Said issues of fact preclude the granting of summary judgment.

Therefore, plaintiff’s cross-motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment to enforce the terms and provisions of a settlement agreement in a prior action, is hereby **DENIED**.

The Court will now address defendant’s motion (Seq. No. 01) to disqualify plaintiff’s counsel.

A lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

- (1) the testimony relates solely to an uncontested issue;
- (2) the testimony relates solely to the nature and value of legal services rendered in the matter;

- (3) disqualification of the lawyer would work substantial hardship on the client;
- (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
- (5) the testimony is authorized by the tribunal.

See Rules of Professional Conduct 22 NYCRR §1200.29, Rule 3.7- Lawyer as Witness.

The disqualification of an attorney is a matter that rests within the sound discretion of the Supreme Court. See *Midwood Chayim Aruchim Dialysis Associates, Inc. v. Brooklyn Dialysis, LLC*, 82 A.D.3d 1177, 919 N.Y.S.2d 397 (2d Dept. 2011); *Falk v. Gallo*, 73 A.D.3d 685, 901 N.Y.S.2d 99 (2d Dept. 2010). A party's right to be represented in ongoing litigation by counsel of its choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted. See *Falk v. Gallo*, *supra*; *Goldstein v. Held*, 52 A.D.3d 471, 859 N.Y.S.2d 707 (2d Dept. 2008); *Bentvena v. Edelman*, 47 A.D.3d 651, 849 N.Y.S.2d 626 (2d Dept. 2008); *Aryeh v. Aryeh*, 14 A.D.3d 634, 788 N.Y.S.2d 622 (2d Dept. 2005). Thus, the party seeking to disqualify an attorney bears the burden on the motion. See *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 515 N.Y.S.2d 735 (1987); *Hudson Valley Marine, Inc. v. Town of Cortlandt*, 54 A.D.3d 999, 865 N.Y.S.2d 122 (2d Dept. 2008).

In determining whether the attorney's testimony is necessary, the court must consider the relevance of the expected testimony and must "take[] into account such facts as the significance of the matters, weight of the testimony, and availability of other evidence." See *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, *supra* at 446; *Hudson Valley Marine, Inc. v. Town of Cortlandt*, *supra*.

The advocate-witness rules contained in the Code of Professional Responsibility, which have been superseded by the Rules of Professional Conduct, provide guidance, but are not

binding authority, for the courts in determining whether a party's attorney should be disqualified during litigation. *See S & S Hotel Ventures Ltd Partnership v. 777 S.H. Corp.*, *supra*. Rule 3.7 of the Rules of Professional Conduct provides that, unless certain exceptions apply, "[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." *See* Rules of Professional Conduct 22 NYCRR 1200.0 Rule 3.7(a).

"The reasons for the prohibition against the lawyer as witness" provision of the Code are described in Simon's Code of Professional Responsibility Annotated (*Professor Roy Simon, 2004 Edition at 579*). As set forth, the rule avoids several potential effects on the trier of fact, which are inevitable when the advocate becomes a fact witness, including either discounting or bolstering the lawyer's testimony. The rule also avoids any potential conflict between the attorney and his client resulting from the lawyer's desire to place himself in the best light and the 'unseemly sight of arguing to a judge or jury about his own credibility...' *Id.* The prohibition prevents any unfairness arising from the lawyer presenting his case twice to the trier of fact, through his own testimony. Finally, the regulation avoids the evident practical awkwardness of bringing in a new advocate to question the lawyer-witness." *Richard L. v. Flora L.*, 6 Misc.3d 1014(A), 355 N.Y.S.2d 355 (Sup. Ct. Suffolk County 2005). *See also Scannapieco v. Scannapieco*, 30 Misc.3d 1226(A), 926 N.Y.S.2d 347 (Sup. Ct. Nassau County 2011); *Losquadro v. Carlton on the Park, Ltd.*, 24 Misc.3d 1235(A), 901 N.Y.S.2d 900 (Sup. Ct. Nassau County 2009); *Paladino v. Skate Safe, Inc.*, 28 Misc.3d 1227(A), 958 N.Y.S.2d 62 (Sup. Ct. Nassau County 2010); *Smolenski v. T.G.I. Friday's Inc.*, 15 Misc.3d 792, 834 N.Y.S.2d 436 (Sup. Ct. Nassau County 2007).

Applying these principles to the case at bar, defendant has met his burden of demonstrating that plaintiff's counsel testimony is necessary and would be prejudicial to plaintiff. *See Midwood Chayim Aruchin Dialysis Associates v. Brooklyn Dialysis LLC, supra; Campell v. McKeon*, 75 A.D.3d 479, 905 N.Y.S.2d 589 (1<sup>st</sup> Dept. 2010); *Hudson Valley Marine, Inc. v. Town of Cortlandt, supra; Goldstein v. Held, supra; Bentvena v. Edelman, supra.*

Accordingly, defendant's motion (Seq. No. 01), pursuant the advocate-witness rule set forth in Rule 3.7 of the Rules of Professional Conduct 22 NYCRR 1200.0, for an order directing, Ivan E. Guerrero, Esq. to withdraw as plaintiff's trial counsel in the instant action, is hereby **GRANTED**. Ivan E. Guerrero, Esq. is hereby disqualified from his continued representation of plaintiff in this matter.

It is further ordered that a Preliminary Conference is scheduled to be held on April 26, 2021, by the filing of a Proposed Preliminary Conference Order. The parties are hereby directed to the court website (<http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml>) where they will find a fillable PC form with instructions on how to fill it out and when and how to return it. There will be no adjournments, except by formal application pursuant to 22-NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTERED

DENISE L. SHER, A.J.S.C.

**ENTERED**

**Mar 12 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

Dated: Mineola, New York  
March 10, 2021