

**Katzman 2008 GRAT 1 Portion II Trust UAD
8/29/2008 v Prasad**

2024 NY Slip Op 30174(U)

January 11, 2024

Supreme Court, New York County

Docket Number: Index No. 655124/2021

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH PART 18

Justice

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KATZMAN 2008 GRAT 1 PORTION II TRUST UAD
8/29/2008, BY CHRIS SERBAGI AND RICHARD
KATZMAN, AS TRUSTEES, INDEX NO. 655124/2021
MOTION DATE N/A, N/A
MOTION SEQ. NO. 003 004

Plaintiff,

- v -

VIKRAM PRASAD, POOJA GOYAL, KISHNER MILLER
HIMES P.C. AS ESCROW AGENT

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 201, 202, 203, 204,
205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225,
226, 227, 228, 229, 230, 231, 232, 233, 234, 235

were read on this motion to/for

AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 236, 237, 238, 239,
240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260,
261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281,
282, 284, 285, 321

were read on this motion to/for

SANCTIONS

In Motion Sequence Number 003, plaintiff seeks to amend its complaint to add a claim for fraud and supporting allegations. Leave to amend a pleading pursuant to CPLR § 3025 “shall be freely given,” in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see Ciarelli v Lynch*, 46 AD3d 1039 [3d Dept 2007]). However, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958

[1983]). Prejudice in this context is shown where the nonmoving party is “hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]). Here, there is no prejudice. While this case was filed in 2021, the deadline for taking depositions has not yet passed, and the plaintiff’s early motion for summary judgment has been denied. The motion to amend is deemed timely.

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is also mandated (*Thompson, supra*, 24 AD3d at 205; *Zaid, supra*, 18 AD3d at 355). Leave will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1st Dept 2010]; *Thompson, supra*, 24 AD3d at 205). As the party seeking the amendment, plaintiff has the burden in the first instance to demonstrate the proposed claims’ merits, but defendants, as the parties opposing the motion, then “must overcome a presumption of validity in the moving party’s favor, and demonstrate that the facts alleged in the moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 W. 40th St. LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

Plaintiff seeks to add a cause of action for fraud, alleging defendants decided they did not wish to complete the sale of a cooperative apartment to plaintiff, but falsely communicated deadline extensions to plaintiff so that plaintiff would not close the sale by the date stated in the contract and so that defendants could claim plaintiff’s breach of contract and keep the plaintiff’s down payment. Defendants contend the fraud claim fails as duplicative of the breach of contract claim and because plaintiff has failed to allege the elements of fraud.

“To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury” (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). A fraud claim is barred as duplicative of a claim for breach of contract when the only fraud alleged is a promise to perform the contract or when the plaintiff seeks only damages which would be recoverable under the breach of contract cause of action (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 453-54 [1st Dept 2008]). Here, plaintiff’s asserted injury from the alleged fraud is that defendants refused to close on the sale of the cooperative apartment or return his down payment, the same damages alleged in the first and second claims for breach of contract. Accordingly, the proposed fraud claim is duplicative of the breach of contract claim and lacks merit, so the motion for leave to amend is hereby denied.

In Motion Sequence Number 004, plaintiff seeks sanctions against defendants pursuant to NYCRR Section 130-1.1(c)(3), claiming defendants’ counsel made false statements to the Court regarding the evidence presented and plaintiff’s fulfilment of its discovery obligations in the court of arguing plaintiff’s motion for summary judgment. Section 130-1.1 gives the Court discretion to award sanctions resulting from frivolous conduct, including asserting false material factual statements. Many of the statements relied upon by the plaintiff in making this motion, such as whether plaintiff proved it was ready, willing, and able to close, or when and how certain documents were provided and received, are issues of disputed material fact or ultimate issues in the case. The Court declines to use its discretion to grant sanctions at this time.

Therefore it is hereby

ORDERED that the plaintiff's motion to amend the complaint (Motion Sequence Number 003) is hereby denied; and it is further

ORDERED that the plaintiff's motion for sanctions (Motion Sequence Number 004) is hereby denied. Counsel shall appear for a compliance conference by Microsoft Teams on January 31, 2024, at noon.

This constitutes the decision and order of the Court.

1/11/2024

DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: