

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

2024 NY Slip Op 31843(U)

May 21, 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*

-----X

KATZMAN 2008 GRAT 1 PORTION II TRUST UAD  
8/29/2008, BY CHRIS SERBAGI AND RICHARD  
KATZMAN, AS TRUSTEES,

Plaintiffs,

- v -

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

Defendants.

-----X

INDEX NO. 655124/2021  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 007, 009, 010

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 424-63, 539, 639, 698-731, 752-79

were read on this motion to/for AMEND COMPLAINT

The following e-filed documents, listed by NYSCEF document number (Motion 009) 593-641, 746-51

were read on this motion to/for STAY

The following e-filed documents, listed by NYSCEF document number (Motion 010) 540-82, 736-45, 780-81

were read on this motion to/for COMPEL DEPOSITION

**I. Motion to Amend the Complaint (007)**

In Motion Sequence Number 007, plaintiff trust, by trustees Christopher Serbagi and Richard Katzman, moves to amend the complaint and the caption of the case. Plaintiff seeks to add extensive additional allegations, add a claim for breach of the implied covenant of good faith and fair dealing, and to change the caption by substituting Daniel Weiner as Katzman’s co-trustee instead of Serbagi, as Serbagi resigned as trustee on April 22, 2022, and Weiner was installed as a co-trustee on June 13, 2022.

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]). Rather, 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]).

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is 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 their proposed claims’ merits but defendants, as the parties opposing the motion, “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]). Where there has been extended delay in seeking leave to amend, the party seeking to amend a pleading must establish a reasonable excuse for the delay (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]).

Many of the additional allegations proposed by the plaintiff are irrelevant to the claims proposed, including several allegations included about the defendants’ attorney. As far as plaintiff seeks to add a claim for breach of the implied covenant of good faith and fair dealing, a

“claim that defendants breached the implied covenant of good faith and fair dealing [may be] properly dismissed as duplicative of the breach of contract claim [when] both claims arise from the same facts” (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]; *BML Properties Ltd. v China Constr. Am., Inc.*, 2024 WL 1774515, at \*2 [1st Dept, Apr. 25, 2024]). As the breach of contract claims and the claim for breach of the implied covenant of good faith and fair dealing are based on the same alleged conduct, defendant’s declaration of plaintiff’s breach and defendants’ failure to complete the closing, and seek the same damages, the claims are duplicative, and the proposed additional claim is palpably lacking in merit. Therefore, as far as the motion seeks to amend the complaint to add this new cause of action, the motion is denied.

As to the portion of plaintiff’s motion which seeks to change the caption of the case to reflect the change in the trustees, plaintiff and co-trustee Serbagi states that he resigned as co-trustee by email on April 22, 2022, and was replaced by a new co-trustee, Weiner on June 13, 2022. The purported resignation email (attached as Exhibit 4 to the Affirmation of Serbagi, NYSCEF Doc. No 453) consists of an email exchange in which Katzman asks “I can just use this letter and update it to have you resign and Julie come on to replace you?” and Serbagi replies “Is that a question? I don’t know. It’s trust law stuff.” Pursuant to New York Estates Powers and Trusts Law § 7-2.6, the Supreme Court has the power to accept a trustee’s resignation and discharge the trustee. Exhibit 4 does not establish that has been done or that Serbagi is seeking that relief from the Court. Nor does plaintiff provide the Trust Agreement to establish the existence of an alternate method for resignation. As far as plaintiff points to the “Appointment of Co-Independent Trustee, Acceptance of Co-Independent Trustee and Resignation of Trustee (attached as Exhibit 5 to the Serbagi Aff., NYSCEF Doc. No. 454), that document, signed on June 13, 2022, by Weiner, lists Serbagi as a trustee. The appointment agreement is not signed by

Serbagi or Katzman and does not establish Serbagi's valid resignation. Therefore, the motion to amend the caption to change plaintiffs is denied.

## II. For a Stay (009)

In Motion Sequence Number 009, plaintiff moves to (i) combine this action with a newly filed related action *Katzman 2008 Grat 1 Portion II Trust UAD 8/29/2008, by Daniel Weiner and Richard Katzman, as Trustees v Bryan Kishner et al*, index number 152124/2024; (ii) stay discovery for thirty days while defendants get new counsel; (iii) extend fact discovery for 60 days; (iv) sanction defendant's attorney; and (v) for a protective order stopping the deposition of plaintiff co-trustee and lead trial counsel Serbagi. Plaintiff has withdrawn items (i) through (iv), leaving only the protective order regarding the Serbagi deposition. Plaintiff argues that the deposition of lead counsel is highly unusual and frowned upon, contending defendants have not shown Serbagi would be able to provide relevant information they cannot obtain elsewhere. Serbagi further takes the position that he had no knowledge or involvement with the underlying transaction, that he only signed documents put in front of him, so a deposition would be useless.

Plaintiff relies significantly on *Liberty Petroleum Realty, LLC v Gulf Oil, L.P.* (164 AD3d 401, 402 [1st Dept 2018]). In *Liberty Petroleum*, the defense attorney, whose deposition was at issue, had not represented the defendants at the time of the events at issue in the case. Nor did that case foreclose the possibility of taking the attorney's deposition, "without prejudice to counsel's objection to specific questions the answers to which would reveal privileged or otherwise protected information" (*id.* at 403). Serbagi was a co-trustee of the trust, signed documents related to the sale at issue, and is a plaintiff in this case. Plaintiff's request for a protective order is denied, without prejudice to objections to specific questions on the basis of privilege.

### III. Compel Deposition (010)

In Motion Sequence Number 10, defendants move to compel Serbagi to appear for a deposition, withdraw as counsel, and provide a *Jackson* affidavit, and also seek sanctions against plaintiff including striking the complaint or awarding defendants their attorneys' fees and costs expended bringing this motion and due to plaintiff's failures to comply with discovery obligations. For the reasons discussed above, the motion to compel Serbagi to appear for a deposition is granted.

As far as defendants move to disqualify Serbagi as counsel, the party seeking disqualification "bears the burden of establishing that such a drastic remedy is warranted" (*O'Donnell, Fox & Gartner. P.C. v R-2000 Corp.*, 198 AD2d 154 [1st Dept 1993]; *NYK Line (N. Am.) Inc. v Mitsubishi Bank, Ltd.*, 171 AD2d 486, 488 [1st Dept 1991]). This burden is particularly high when a moving party has delayed unnecessarily in bringing the motion as "inordinate delay in moving for such relief is an indication that the motion has been made to gain a tactical advantage in the litigation, or for purposes of delay" (*Saint Barnabas Hosp. v New York City Health & Hosps. Corp.*, 7 AD3d 83, 94-95 [1st Dept 2004]). Defendants contend Serbagi should be disqualified from representing plaintiff pursuant to the Advocate-Witness Rule (New York Rules of Professional Conduct § 3.7). That rule provides that an attorney "shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness or a significant issue of fact unless" the testimony relates to an uncontested issue, relates only the nature and value of legal services, substantial hardship to the plaintiff, the testimony is merely a formality, or the tribunal permits the testimony. Serbagi has represented that he was not a significant participant in the underlying transaction and will not be able to testify to much about it. It is possible his testimony will not be needed at trial. Therefore, this portion of the motion is denied

without prejudice to seeking this relief after the defendants have taken the Serbagi deposition and it is clearer whether Serbagi's testimony is needed.

As to the defendant's motion seeking a *Jackson* Affidavit from Serbagi, Serbagi has supplied the affidavit (Exhibit 38 to the Affidavit of Bryan W. Kishner, NYSCEF Doc. No. 579). The affidavit states Serbagi searched his email account for documents dated between August 15, 2015, and August 23, 2021, and provided responsive documents.

Defendants also request sanctions. The Administrative Rules of the Unified Court System provide that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part" (22 N. Y.C.R.R. 130-1.1[a]). Frivolous conduct is defined as follows:

- "(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."

(*Id.* at 130-1.1[c]). The Court declines to use its discretion to grant sanctions at this time.

For the reasons discussed above, it is hereby


ORDERED that Motion Sequence 007, plaintiff's motion to amend the complaint and the caption of the case is hereby DENIED; and it is further

ORDERED that Motion Sequence 009, plaintiff's request for a protective order against the deposition of Christopher Serbagi, is hereby DENIED; and it is further

ORDERED that Motion Sequence 010, defendants' motion to compel Christopher Serbagi to appear for a deposition, withdraw as counsel, and provide a *Jackson* affidavit, and for sanctions, is GRANTED IN PART and DENIED IN PART. Christopher Serbagi shall appear

for his deposition within 30 days of the date of the filing of this order, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

5/21/2024			
DATE			ALEXANDER M. TISCH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE