

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

2025 NY Slip Op 31365(U)

April 10, 2025

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,

Plaintiff,

**INDEX NO.** 655124/2021

**MOTION DATE** 10/28/2024

**MOTION SEQ. NO.** 012

- v -

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

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1026, 1027

were read on this motion to/for DISCOVERY

This action relates to a transaction for the sale of a condominium unit which was never completed. The plaintiff, Katzman 2008 Grat 1 Portion II Trust UAD 8/29/2008, by Chris Serbagi and Richard Katzman, as Trustees (Katzman), planned to purchase the unit from defendants Vikram Prasad and Pooja Goyal pursuant to an agreement between the parties. The parties dispute why the transaction was never completed, whether plaintiff is entitled to specific performance of the agreement, and whether defendant sellers may retain the plaintiff's down payment.

In this motion, plaintiff seeks (1) to depose defendant's counsel, Bryan W. Kushner; (2) a finding that defendants have waived attorney client privilege on certain topics; and (3) a holding that Kushner and the defendants may be deposed about their communications with each other about the underlying transaction and to extend the close of fact discovery to allow for the disclosure described above. Plaintiff contends Kushner's testimony is central to the dispute, as he

was defendants' transactional counsel and negotiated on their behalf and he knows the most about what happened to thwart the closing and why. Plaintiff also argues defendants have waived attorney-client privilege, as defendants voluntarily testified at their depositions about their conversations with and instructions to counsel regarding the planned closing. According to plaintiff, the information possessed solely by Kushner is vital because it goes to the essence of the case, why the closing never occurred, and who bears the fault for the failure.

Defendants, in a grossly oversized memorandum of law filed without leave of court, include arguments better suited for a motion for summary judgment, rehash the extensive history of the case, and contend the request for Kushner's testimony should be denied because his testimony is not relevant to the major issues in this litigation, whatever he knows can be obtained from other sources, and his deposition is being sought to harass and disqualify counsel. Defendants further contend they did not waive privilege.

CPLR 310(a) provides that "[there] shall be full disclosure of all evidence material and necessary to the prosecution or defense of an action." This provision has been accorded a liberal interpretation in favor of disclosure (*see Nitz v Prudential – Bache Secs.*, 102 AD2d 914, 915 [1st Dept 1984]). The Court of Appeals has declared that exceptions to the rule are to be interpreted narrowly (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). However, the attorney-client privilege is well established and enables one seeking legal advice to communicate with counsel for that purpose secure in the knowledge that the contents of that communication with counsel will not be later revealed against the wishes of the client (*see People v Mitchell*, 58 NY2d 368, 373 [1983]).

Depositions of opposing counsel are disfavored. The Appellate Division, First Department has established a requirement that the party seeking opposing counsel's deposition make a showing that the information sought is material and necessary [and] must demonstrate good cause, in order to rule out the possibility that the deposition is sought as a tactic intended solely to disqualify counsel or for some other illegitimate purpose" (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 406 [1st Dept 2018]). Further, they must show the

information is not available elsewhere (*id.*). To that end, an earlier motion to quash a subpoena for Kushner's deposition was granted without prejudice to allow the defendants' depositions to proceed first (Decision and Order dated May 21, 2024, NYSCEF Doc. No. 804). In their depositions, defendants repeatedly deferred to counsel and lacked information about the transaction negotiations and communications with plaintiff about the closing. Plaintiff has now made the required showing that the information possessed by defendants' counsel is material and necessary and not available elsewhere. Kushner's communications with plaintiff or the condominium board, for example, are not privileged.

As to the issue of attorney-client privileged matter, "[s]ubject matter waiver of a privilege occurs when 'a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information'" (*U.S. Bank N.A. as Tr. for Registered Holders of Wachovia Bank Commercial Mtge. Tr. Commercial Mtge. Pass-Through Certificates, Series 2007-ESH v Lightstone Holdings LLC*, 196 AD3d 445, 447 [1st Dept 2021] quoting *Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 64, 837 N.Y.S.2d 15 [1st Dept. 2007]). The Court must consider whether the defendants have "waived the attorney-client privilege by placing the subject matter of counsel's advice in issue and by making selective disclosure of such advice" (*Orco Bank, N.V. v Proteinas Del Pacifico, S.A.*, 179 AD2d 390, 390 [1st Dept 1992]). Plaintiff argues the defendants revealed privileged communications to counsel in their depositions, waiving the protection of the attorney/client privilege, regarding: their desire and instructions to close on the contract; entering into a post-purchase possession agreement; and Kushner's advice the contract could not be unilaterally cancelled. These statements do not rise to the level of waiver of the attorney/client privilege. The fact that defendants desired to close and told their attorney to pursue that end is not placing that communication at issue in this litigation, for example. However, plaintiff may inquire of Kushner what conversations he had with other entities or what documents he sent out to effectuate that end. Plaintiff may inquire similarly about whether and how Kushner communicated with them or other entities regarding the


cancellation of the contract closing and/or the creating of a post-purchase possession agreement and/or the events of the day of the planned and failed closing, among other topics.

The Court has considered the parties' other arguments and found them without merit. For the reasons discussed above, it is hereby

ORDERED that the motion is GRANTED to the extent Bryan W. Kishner shall appear for his deposition within 30 days of the date of the filing of this order, and the motion is otherwise DENIED; and it is further

ORDERED that the deadline for filing the Note of Issue is hereby extended to May 30, 2025. Counsel shall meet and confer and attempt to come to an agreement regarding the schedule for post-NOI expert discovery and the briefing of the pending motion for summary judgment (Motion Seq. No. 11).

This constitutes the Decision and Order of the Court.

<u>4/10/2025</u> DATE	 ALEXANDER M. TISCH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE