SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 45

----------X

CASSAFORTE LIMITED, FRF 348 QUINCY LLC, XYZ DEVELOPMENT II LLC, XYZ VAN BUREN LLC, XYZ 1535 PACIFIC LLC,

Plaintiffs,

- v -

BABAK POURTAVOOSI, THE LAW OFFICES OF BABAK POURTAVOOSI, P.C., SHARESTATES INVESTMENTS DACL, LLC, AMTRUST FINANCIAL SERVICES, INC., ATLANTIS NATIONAL SERVICES, INC.,

Defendants.

INDEX NO. 451426/2020

MOTION DATES 11/08/2024, 01/27/2025

MOTION SEQ. NOS. 007 008

DECISION + ORDER ON MOTIONS

----------X

HON. ANAR RATHOD PATEL:

The following e–filed Documents, listed by NYSCEF Document number (Motion 007) 297–355, 377, 380, 395, 398, 400–404 were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e–filed Documents, listed by NYSCEF Document number (Motion 008) 356–376, 381–397, 405–409 were read on this motion to/for RENEWAL.

Plaintiffs Cassaforte Limited ("Cassaforte"), FRF 348 Quincy LLC ("FRF"), XYZ Development II LLC ("XYZ Development"), XYZ 42 Van Buren LLC ("XYZ 42") and XYZ 1535 Pacific LLC ("XYZ 1535") (collectively, "Plaintiffs") move, pursuant to CPLR § 3025, for leave to serve a third amended complaint (Motion 007).

Plaintiffs further move, pursuant to CPLR § 2221(e), for leave to renew the prior motion brought by Defendants Sharestates Investments DACL, LLC ("Sharestates") and Toorak Capital Partners LLC ("Toorak") (together, the "Lender Defendants") to dismiss Plaintiffs' Second Amended Complaint ("SAC") (Motion 008). Motions 007 and 008 are consolidated herein for disposition.

Relevant Factual Background and Procedural History

The Court refers to the Decision and Order on Mot. Seq. 002 and 003 (Chan, J.) for a recitation of the underlying facts in this action (*see Cassaforte Ltd. v Pourtavoosi*, 2022 NY Slip Op 32063[U] [Sup Ct, NY County 2022], *revd* 221 AD3d 525 [1st Dept 2023], *rearg denied* 2024

NY Slip Op 63875[U] [1st Dept 2024], *lv dismissed* 42 NY3d 965 [2024). Additional facts are drawn from the submissions on these motions, including the SAC.

Briefly, in 2017, Cassaforte and nonparty Aaron Johnson ("Johnson") structured an arrangement whereby Cassaforte made mezzanine loans to support the acquisition and development of three residential properties located at 348 Quincy Street, 42 Van Buren Street, and 1535 Pacific Street in Brooklyn, New York (the "Properties") owned separately by three single purpose entities—XYZ Development, XYZ 42, and XYZ 1535 (collectively, the "Owners")—formed for the sole purpose of owning title to them (NYSCEF Doc. No. 361, Matthew I.W. Baker [Baker] Affirmation, Ex. D, ¶¶ 3, 24–26, 28). Under this arrangement, nonparty XYZ Group LLC ("Group"), an entity wholly owned by Johnson, established nonparty XYZ Holdings LLC ("Holdings") to own 100% of the membership interests in the Owners and nonparty XYZ Partners LLC ("Partners") to own 90% of the membership interests in Holdings, with Group owning the remaining 10% (*id.*, ¶¶ 5–6, 27 and 35). Johnson managed Partners (NYSCEF Doc. 303, Baker Affirmation, Ex. 2 at 9–10), and Partners managed Holdings (NYSCEF Doc. No. 304, Baker Affirmation, Ex. 3 at 16). Holdings' operating agreement contained certain limitations on financing and required consent from Cassaforte to modify senior debt on a Property, refinance a Property, or enter into a material agreement with a third–party lender (NYSCEF Doc. No. 304 at 16–18 [§5.2]). Each Owner's operating agreement also contained limitations on financing (NYSCEF Doc. Nos. 305–307, Baker Affirmation, Exs. 4–6 at 3 [§3(a)(xviii)]). Cassaforte executed two deposit loan agreements with XYZ 42 and XYZ 1535 and three loan agreements with Partners for each Property (NYSCEF Doc. No. 308–312, Baker Affirmation, Exs. 7–11). In return, Cassaforte held a security interest in the membership interests in Partners, Holdings, the Owners, and in Johnson's membership interest in Partners as collateral (NYSCEF Doc. No. 361, ¶¶ 29 and 35). FRF became a member and a preferred mezzanine unit owner of Partners in 2018, but only as to XYZ Development (*id.*, ¶¶ 13, 53; NYSCEF Doc. Nos. 316–318, Baker Affirmation, Exs. 15–17).

On April 9, 2019, Johnson, on behalf of each Owner, executed separate consolidation, extension, and modification agreements ("CEMAs") in favor of Sharestates for each Property (NYSCEF Doc. Nos. 340–342, Courtney J. Lerias [Lerias] Affirmation, Exs. A–C). Each CEMA consolidated the existing notes and mortgages encumbering each Property into a single consolidated note and mortgage for each (collectively, "the Sharestates Mortgages") (*id.*). Johnson, on behalf of Group and Partners as the sole members in Holdings, executed member consents and title affidavits consenting to the refinancing with Sharestates (NYSCEF Doc. Nos. 348–351, Lerias Affirmation, Exs. I–L). The refinancing allegedly burdened the Properties with a total of $5.85 million in new debt (NYSCEF Doc. No. 361, ¶¶ 8, 79). Approximately $4.2 million was used to pay off existing debt, leaving $1.65 million in net proceeds distributed as follows: $426,493 for 1535 Pacific Street; $400,913 for 42 Van Buren Street; and $817,000 for 348 Quincy Street (*id.*, ¶¶ 79–80). Defendants Babak Pourtavoosi and The Law Offices of Babak Pourtavoosi, P.C. (together, the "Attorney Defendants") served as counsel for Partners, Holdings, and the Owners on the refinancing transaction (*id.*, ¶ 81).

On September 5, 2019, Cassaforte successfully bid on the membership interests in Holdings, Partners, and Johnson's membership interest in Partners at a Uniform Commercial Code foreclosure sale, and assigned its winning bid to nonparty Duke Property Administrators (*id.*, ¶¶ 90 and 92; NYSCEF Doc. Nos. 329–330, Baker Affirmation, Exs. C–D).

In October 2019, Cassaforte and FRF commenced this action against the Attorney Defendants, Sharestates, Amtrust Financial Services, Inc. ("Amtrust"), Sharestates' title insurance company, and Atlantis National Services, Inc. ("Atlantis") (Amtrust's title agent) seeking damages as a result of the refinancing[1] (NYSCEF Doc. No. 331, Baker Affirmation, Ex. E). Cassaforte and FRF later served a supplemental Summons and Amended Complaint, adding the Owners as Plaintiffs (NYSCEF Doc. No. 332, Baker Affirmation, Ex. F). Plaintiffs have since discontinued the action against Amtrust and Atlantis (NYSCEF Doc. No. 149).

Plaintiffs' motion for leave to serve the SAC to add Toorak—an entity to whom Sharestates had assigned the Sharestates Mortgages encumbering 42 Van Buren Street and 1535 Pacific Street (NYSCEF Doc. No. 112; NYSCEF Doc. Nos. 346–347, Lerias Affirmation, Exs. G–H)—as a defendant was granted (NYSCEF Doc. No. 361). According to the SAC, Johnson controlled each Owner's day–to–day business and controlled Partners and Holdings (*id.*, ¶¶ 5–6, 35, 83). Johnson allegedly completed the refinancing in contravention of the operating agreements for Partners and Holdings, and the loan agreements with the Owners, all of which required Cassaforte's written consent, and against Cassaforte's express instruction not to pursue the transaction (*id.*, ¶¶ 1, 42, 44, 49, 59, 72–73, 77).

The SAC pleaded nine causes of action for: (1) breach of fiduciary duty by all Plaintiffs against the Attorney Defendants; (2) professional negligence by the Owners against the Attorney Defendants; (3) a violation of Rules of Professional Conduct (22 NYCRR 1200.0) Rule 1.13; (4) aiding and abetting breach of fiduciary duty by all Plaintiffs against the Attorney Defendants; (5) negligence by Cassaforte and FRF against the Attorney Defendants; (6) tortious interference with contract by all Plaintiffs against the Attorney Defendants; (7) contribution by the Owners against the Attorney Defendants; (8) indemnification by the Owners against the Attorney Defendants; and (9) for a judgment in favor of the Owners against the Lender Defendants that due to the lack of actual or apparent authority on the part of Johnson, Partners, Holdings, and the Owners, the Sharestates Mortgages are null and void, and the mortgages recorded against the Properties are invalid and did not constitute encumbrances against the Properties (*id.*, ¶¶ 78–128).

The Lender Defendants and the Attorney Defendants moved separately to dismiss the SAC. The Court (Chan, J.) partially granted the Attorneys Defendants' motion and dismissed the first cause of action brought by Cassaforte and FRF, the third cause of action, the fourth cause of action brought by Cassaforte, the fifth and sixth causes of action brought by FRF and the Owners, and otherwise denied the balance of the motion[2] (*see Cassaforte Ltd.*, 2022 NY Slip Op 32063[U],

[1] Cassaforte and FRF had commenced an action against the Attorney Defendants, the Lender Defendants, Amtrust, and Atlantis captioned *Cassaforte Ltd. v Pourtavoosi*, Sup Ct, Nassau County, index No. 614558/2019, which was transferred to New York County and consolidated with an action Cassaforte had brought against Johnson, Group, the Owners, and others captioned *Cassaforte Ltd. v Johnson*, Sup Ct, NY County, Index No. 653387/2019 (the "Johnson Action") (NYSCEF Doc No. 333, Baker Affirmation, Ex. G). The Johnson Action and this action have been consolidated for discovery (NYSCEF Doc. No. 254).

[2] Although the decretals state that the part of the sixth cause of action brought by Cassaforte had been dismissed, the text of the decision clearly states that "[t]he allegations in the Complaint are sufficient to state a claim for tortious interference with contract, but only with respect to Cassaforte's claim" (*Cassaforte Ltd.*, 2022 NY Slip Op 32063[U], *12 and 15).

*15). The Court denied the Lender Defendants' motion in its entirety (*id.*). Defendants filed notices of appeal (NYSCEF Doc. Nos. 248–249).

The Appellate Division, First Department reversed the denial of the Lender Defendants' motion and dismissed the ninth cause of action for a declaratory judgment (*see Cassaforte Ltd. v Pourtavoosi*, 221 AD3d 525, 525 [1st Dept 2023], *rearg denied* 2024 NY Slip Op 63875[U] [1st Dept 2024], *lv dismissed* 42 NY3d 965 [2024]). The Court concluded that the Lender Defendants had established the defense of *equitable estoppel* through the submission of United States Department of Housing and Urban Development (HUD) settlement statements, which showed that the Owners had received the proceeds from the refinancing (*id.*). The Court held that the Owners "have not offered to return any part of the loan proceeds; thus they are deemed to have assented to the transactions and are equitably estopped from impeaching them" (*id.* at 526). The Attorney Defendants withdrew their appeal (*see Cassaforte Ltd. v Pourtavoosi*, 2023 NY Slip Op 68184[U] [1st Dept 2023]).

Plaintiffs now move for leave to serve a third amended complaint ("TAC") to plead new facts and new claims against Defendants. The Attorney and Lender Defendants oppose.

By separate motion, Plaintiffs move to renew the Lender Defendants' prior motion to dismiss the SAC. The Lender Defendants oppose.

Legal Discussion

I. *Plaintiffs' Motion to Renew (Motion 008)*

Plaintiffs move to renew the Lender Defendants' earlier motion to dismiss on the ground that evidence produced in pretrial discovery precludes the Lender Defendants from invoking *equitable estoppel* as a defense. Plaintiffs argue that documentary evidence establishes that Sharestates possessed the operating agreements for Holdings and Partners at the time of the refinancing (NYSCEF Doc. No. 368, Baker Affirmation, Ex. K). As such, the Lender Defendants were aware that Cassaforte's written consent was required, but they chose to ignore this red flag. Johnson testified at his deposition that he knew Cassaforte's consent was necessary before modifying any senior debt on the Properties, and that he moved forward with the refinancing without Cassaforte's written authorization (NYSCEF Doc. No. 370, Baker Affirmation, Ex. M, Johnson Tr. at 295–296). Johnson admitted that the surplus proceeds from the refinancing were deposited into each Owner's bank account on April 9, 2019, and that he then transferred those funds to an account for Group that same date (*id.* at 310–315). Plaintiffs also learned that Johnson had a preexisting relationship with Sharestates, who had lent money to Johnson for three real estate projects in Utah (*id.* at 322–325). In addition, Sharestates, as "seller," and Toorak, as "purchaser," had previously executed a master loan purchase agreement (the "MLPA") under which Sharestates agreed to "sell … from time to time … certain fixed-rate or adjustable-rate loans, each secured by a first lien on one or more residential dwellings or mixed used buildings" to Toorak (NYSCEF Doc. No. 326, Baker Affirmation, Ex. 25 at 1). Plaintiffs thus claim that Sharestates had a monetary incentive to ignore the requirements in Partners' and Holdings' operating agreements and enter into the refinancing transaction with the Owners. Plaintiffs submit that this new evidence overcomes the Lender Defendants' *equitable estoppel* defense, especially because the Owners did not receive any benefit from the Sharestates Mortgages.

The Lender Defendants urge the Court to deny the motion because Plaintiffs delayed moving for relief and failed to exercise due diligence. The First Department issued its decision on November 2023, but Plaintiffs did not move for renewal until January 2025. The Lender Defendants also contend that the new evidence does not alter the prior determination. They posit that *equitable estoppel* applies because the Owners executed the CEMAs, and under the *in pari delicto* doctrine, the Owners cannot profit from their own wrongdoing as the bank statements establish that each Owner received the benefits from the refinancing.

CPLR § 2221(e)(2) and (3) state that a motion for leave to renew shall be granted if it is based on "new facts not offered on the prior motion that would change the prior determination" and the movant has demonstrated "reasonable justification for the failure to present such facts on the prior motion." A motion to renew is addressed to the court's discretion (*see Law Off. of Ronald D. Weiss, P.C. v Piltan*, 241 AD3d 671, 673 [2d Dept 2025]; *MB Fin. Bank, N.A. v 56 Walker LLC*, 238 AD3d 605, 605 [1st Dept 2025]). "Renewal is granted sparingly and 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (*Acevedo v Nurmamatov*, 206 AD3d 488, 488 [1st Dept 2022] [citation omitted]).

To begin, the argument that Plaintiffs failed to exercise due diligence is unpersuasive. The evidence upon which Plaintiffs rely could not have been produced at the time the Lender Defendants first moved for dismissal. The Lender Defendants acknowledge that the documentary evidence, including an April 3, 2019 e-mail in which a Sharestates representative forwarded the operating agreements for Partners and Holdings to Atlantis (NYSCEF Doc. No. 368), was produced in April and September 2023, and Johnson's deposition took place nearly three years later. This three–year delay between the time the Court rendered its decision in June 2022 to January 2025, when Plaintiffs served the motion, is not so lengthy to warrant denial (*but see Matter of Duval v Centerlight Health Sys., Inc*., 216 AD3d 529, 530 [1st Dept 2023] [denying motion to renew based on three–year delay from date of prior decision]). Furthermore, the Court has discretion to relax the requirement that the party seeking renewal show it was diligent in obtaining the new evidence and provide a reasonable justification for failing to submit this evidence earlier (*see Forbes v City of New York*, 241 AD3d 411, 411 [1st Dept 2025]).

Nevertheless, Plaintiffs have failed to demonstrate that the newly discovered evidence would change the prior determination. It is well settled that "[t]he purpose of *equitable estoppel* is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). The HUD settlement statements demonstrate that proceeds from the Sharestates Mortgages were used to satisfy senior mortgages encumbering each Property (NYSCEF Doc. Nos. 385–387, Lerias Affirmation, Exs. 3–5), and the Owners' bank statements demonstrate that each received the cash surplus (NYSCEF Doc. No. 361, ¶ 80; NYSCEF Doc. No. 370 at 310–315; NYSCEF Doc. Nos. 371–373, Baker Affirmation, Exs. O–Q).

Plaintiffs maintain that the Lender Defendants were aware Cassaforte's written consent was required. Plaintiffs, though, made this same argument, unsuccessfully, twice before the First Department (NYSCEF Doc. No. 389, Lerias Affirmation, Ex. 7 at 13 ["Plaintiffs state that the Lender Defendants possession of the Fee Owners' Operating Agreements, Holdings Operating Agreement, and Mezzanine Loan Agreements put Lender Defendants on notice that Cassaforte's

written consent was required to refinance the Senior Debt Facility"]; NYSCEF Doc. No. 391, Lerias Affirmation, Ex. 9 at 16–17 ["Plaintiffs have specifically alleged that Sharestates could not have justifiably relied on any representations made by Johnson because Sharestates was in possession of documents that specifically contradicted Johnson's authority to authorize the refinance transactions" and "Sharestates has conceded that they received certain of these Operating Agreements establishing that Cassaforte's consent was required"]). As has already been determined, "[h]aving received the benefits of the loans, the [Owner] Plaintiffs are estopped from contesting the validity of the mortgages, because otherwise they would obtain an 'unconscientious advantage'" (*Cassaforte Ltd.*, 221 AD3d at 525–526, quoting *Bernard v Citibank, N.A.*, 195 AD3d 783, 787–788 [2d Dept 2021]). That the Owners are no longer in possession of the surplus loan proceeds, as Johnson and Group are alleged to have absconded with those funds, does not negate the fact that the Owners received those funds in their accounts. Moreover, Plaintiffs do not dispute that Johnson, by virtue of his positions within Partners and Holdings, controlled the Owners at the time of the refinancing. Plaintiffs' assertion that Sharestates had incentive to enter into the CEMAs based on the MLPA with Toorak or its prior relationship with Johnson is also speculative. In any event, any motive Sharestates may have had at the time of the refinancing does not refute the documentary evidence showing "that the proceeds of the loans made by Sharestates were actually distributed to and received by the [Owners]" (*Cassaforte Ltd.*, 221 AD3d at 525). Accordingly, Plaintiffs' motion to renew the Lender Defendants' prior motion to dismiss the SAC is denied.

II. *Plaintiffs' Motion to Amend (Motion 007)*

Plaintiffs seek to serve a TAC to plead additional facts, plead new claims, and modify existing claims based on new facts. The proposed TAC seeks to plead 10 causes of action for: (1) breach of fiduciary duty by the Owners against the Attorney Defendants; (2) professional negligence by the Owners against the Attorney Defendants; (3) aiding and abetting breach of fiduciary duty by FRF and the Owners against the Attorney Defendants and Sharestates; (4) tortious interference with contract by Cassaforte and the Owners against the Attorney Defendants and Sharestates; (5) malicious interference with a contractual relationship by Cassaforte and the Owners against the Attorney Defendants and Sharestates; (6) rescission and cancellation of the Sharestates Mortgages by the Owners against all Defendants; (7) unjust enrichment by all Plaintiffs against all Defendants; (8) contribution by the Owners against the Attorney Defendants and Sharestates; (9) indemnification by the Owners against the Attorney Defendants; and (10) a judgment in favor of the Owners against the Lender Defendants declaring that the Sharestates Mortgages are null and void at least as to the $1.6 million surplus, and that the Sharestates Mortgages recorded against the Properties should be amended to reflect this fact (NYSCEF Doc. No. 301, Baker Affirmation, Ex. A).

The Lender Defendants counter that the proposed new claims are barred by the doctrine of *res judicata* and that many the new claims are time-barred. The Lender Defendants also contend that the amendments are substantively without merit. The Attorney Defendants contend that the proposed new claims lack merit or are redundant.

Leave to amend a pleading under CPLR § 3025 (b) "shall be freely given … absent prejudice or surprise to the opposing party" (*Favourite Ltd. v Cico*, 42 NY3d 250, 256 [2024] [internal quotation marks and citation omitted]) and where "the proposed amendment is not palpably insufficient or palpably devoid of merit" (*Norguard Ins. Co. v 148 W. Owner LLC*, 241

AD3d 1025, 1025 [1st Dept 2025]; *see also Maya's Black Cr., LLC v Angelo Balbo Realty Corp.*, 82 AD3d 1175, 1175–1176 [2d Dept 2011]). The movant "need not establish the merit of its proposed new allegations" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Rather, "[t]he court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face" (*Hospital for Joint Diseases Orthopaedic Inst. v James Katsikis Envtl. Contrs.*, 173 AD2d 210, 210 [1st Dept 1991]).

A. Whether *Res Judicata* Applies to the Proposed New Claims

"Under *res judicata*, or claim preclusion, a valid final judgment bars relitigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or a series of transactions that either were raised or could have been raised in the prior proceeding" (*Gulf LNG Energy, LLC v Eni S.p.A.*, 232 AD3d 183, 191 [1st Dept 2024], *lv denied* 44 NY3d 902 [2025]). The party invoking claim preclusion bears the burden of demonstrating that a prior judgment on the merits exists between the parties (*see Nationstar Mtge., LLC v Davis*, 240 AD3d 790, 792 [2d Dept 2025]; *Seabrook v City of New York*, 306 AD2d 68, 68 [1st Dept 2003]).

The Lender Defendants have failed to meet this burden. As set forth above, claim preclusion applies when there has been a prior action or proceeding between the parties. In this case, there is no prior action that resulted in a final judgment in the Lender Defendants' favor. As Plaintiffs point out, the Lender Defendants asserted four counterclaims for: (1) a judgment under Article 15 of the RPAPL declaring that the Sharestates Mortgages are valid and enforceable; (2) equitable subrogation; (3) unjust enrichment against the Owners; and (4) fraud against the Owners and Johnson (NYSCEF Doc. No. 252, Lender Defendants' answer ¶¶ 199–217). The Lender Defendants have not discontinued the counterclaims nor have the counterclaims been dismissed. Thus, the Lender Defendants are still parties to the present action (*see Favourite Ltd.*, 42 NY3d at 257 [granting a motion to amend after the complaint had been dismissed because the defendants' counterclaims against the plaintiffs remained pending]). Furthermore, the Court of Appeals denied Plaintiffs' motion for leave to appeal the First Department's decision because "the orders sought to be appealed from do not finally determine the action" (*Cassaforte Ltd. v Pourtavoosi*, 42 NY3d 965, 965 [2024]; *see also Favourite Ltd.*, 42 NY3d at 257–258 [stating that "the Appellate Division order also did not render the case final for purposes of appealability, as no appeal to the Court of Appeals may be taken from an order which leaves claims pending in the action between the same parties"]).

B. Whether the Proposed Claims Are Time–Barred

The Lender Defendants contend that four of the proposed causes of action—aiding and abetting breach of fiduciary duty, tortious interference with contract, malicious interference with a contractual relationship, and unjust enrichment—are all subject to a three–year statute of limitations. Because the Owners entered into the Sharestates Mortgages in April 2019, the Lender Defendants assert that the new claims are time–barred. They further submit that the relation back doctrine is inapplicable because they are not united in interest with the Attorney Defendants. Plaintiffs reject the contention that the proposed new claims are untimely.

CPLR § 203 (f) provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." The proposed causes of action need not be the same as those in the prior pleading, so long as the prior pleading gave the adverse party notice of the transactions and occurrences at issue (*see Lazar v Mor*, 235 AD3d 408, 409 [1st Dept 2025]). The Court may only look within the four corners of the original pleading because "matters unearthed during discovery have no bearing on whether an untimely claim relates back under section 203 (f)" (*34–06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 51 [2022]).

Here, the SAC contains extensive allegations concerning the lack of Cassaforte's consent to the refinancing with Sharestates and includes pertinent excerpts from the operating agreements for the Owners, Partners and Holdings (NYSCEF Doc. No. 361, ¶¶ 30–64). The SAC also alleges:

> "148. Sharestates was not a bona fide Lender for value to the Fee Owners. Upon information and belief, Sharestates knew that the Johnson Entities had no actual or apparent authority to cause the XYZ Entities and the Fee Owners to enter the unlawful Sharestates Mortgages. Alternatively, Sharestates should have known that the Johnson Entities had no actual or apparent authority to cause the XYZ Entities and the Fee Owners to enter the unlawful Sharestates Mortgages.
>
> 149. At the time Sharestates assigned the 1535 Pacific Mortgage and the 42 Van Buren Mortgage to Toorak, this case had been filed in the Nassau County Supreme Court, thus Toorak knew or should have known of Plaintiffs' claims" (*id.*, ¶¶ 148–149).

These allegations are sufficient to place the Lender Defendants on notice of the transactions giving rise to the proposed claims (*see O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 87–88 [1st Dept 2017] [stating that "[d]efendants need not have been put on notice of every factual allegation on which the subsequent claims depend, because the original complaint put them on notice of the occurrences that underlie those claims"]). In addition, both the original complaint and the first amended complaint ("FAC"), which Plaintiffs submitted on this motion, alleged that "Sharestates … knowingly facilitated the refinancing, and thereby aided and abetted Aaron Johnson and Pourtavoosi's breaches of fiduciary duty" and that "Sharestates … knowingly and substantially participated in the subterfuge" (NYSCEF Doc. No. 331, ¶¶ 2,10; NYSCEF Doc. No. 332, Baker Affirmation, Ex. F, ¶¶ 2,10). The prior pleadings had asserted claims for aiding and abetting breach of fiduciary duty and tortious interference with contract against Sharestates arising out of the same conduct (NYSCEF Doc. No. 331, ¶¶ 106–110,115–119; NYSCEF Doc. 332, ¶¶ 109–114,119–123). As such, the Lender Defendants cannot claim surprise (*see Bargil Assoc., LLC v Crites*, 173 AD3d 956, 957 [2d Dept 2019]).

C. Whether the Proposed Claims Are Palpably Insufficient or Patently Devoid of Merit

1. Breach of Fiduciary Duty and Professional Negligence

The Owners' motion as to the first cause of action for breach of fiduciary duty and the second cause of action for professional negligence against the Attorney Defendants is granted. These claims brought by the Owners have not been dismissed, the Owners have not made any substantive changes to the allegations in support of these claims in the proposed TAC, and the Attorney Defendants have not addressed these two causes of action in their opposition.

2. Aiding and Abetting Breach of Fiduciary Duty

As a proposed third cause of action, FRF and the Owners seek to plead an aiding and abetting breach of fiduciary duty claim against the Attorney Defendants and Sharestates.

A cause of action for aiding and abetting breach of fiduciary duty requires the plaintiff to plead "(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]). The plaintiff must plead facts alleging that the defendant had actual knowledge of the breach, as constructive knowledge is insufficient (*id.*). In addition, the aider and abettor must have furnished substantial assistance to the primary violator (*id.* at 126).

The motion to amend this cause of action against the Attorney Defendants is granted. In accordance with the decision on the Attorney Defendants' motion to dismiss the SAC (*see Cassaforte*, 2022 NY Slip Op 32063[U], *10), the proposed TAC removes Cassaforte as a plaintiff on this cause of action.

FRF's and the Owners' aiding and abetting breach of fiduciary duty claim against the Lender Defendants also is not palpably insufficient or patently devoid of merit (*see Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 678, 680 [2d Dept 2017]). The proposed TAC alleges that Partners and Holdings, who were both under the control of Johnson or Group when the refinancing took place, owed FRF and the Owners fiduciary duties by virtue of the operating agreements for Partners, Holdings and the Owners, and that FRF and the Owners were damaged by at least $1.6 million as a result (NYSCEF Doc. No. 301, ¶¶ 135–136,140). The proposed TAC further alleges that Sharestates knew the Owners, *via* Holdings, could not refinance the Properties without Cassaforte's consent (*id.*, ¶¶ 6, 11, 136 and 138–140). It is alleged that "prior to and during the refinance transactions, Sharestates was in possession of the operating agreements for XYZ Partners and XYZ Holdings" and that "a Sharestates representative e-mailed copies of the operating agreements for XYZ Partners and XYZ Holdings to various recipients involved in the refinance transactions" (*id.*, ¶¶ 101–102). Sharestates substantially assisted and affirmatively enabled Johnson and Group to breach their fiduciary duties "by agreeing to the Sharestates Mortgages—including issuance of the relevant loan proceeds and receipt of mortgages on the Properties—without Cassaforte's consent," which was detrimental to FRF's and the Owners' interests (*id.*, ¶ 140). These allegations are sufficient to plead an aiding and abetting breach of fiduciary duty claim on a motion to amend (*see Smallberg v Raich Ende Malter & Co., LLP*, 140 AD3d 942, 944 [2d Dept 2016]; *Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008]).

3. Tortious Interference with Contract

Cassaforte and the Owners seek to plead tortious interference with contract against the Attorney Defendants and Sharestates as a fourth cause of action. The proposed TAC alleges that the "Transaction Documents"[3] constitute valid, enforceable contracts between Cassaforte, Holdings, Partners, and the Owners and—to the extent the Owners are not parties—they are third-party beneficiaries of those agreements (NYSCEF Doc. No. 301, ¶¶ 142 and 176). The proposed TAC claims that the Attorney Defendants and Sharestates had actual, direct knowledge of the Transaction Documents and "intentionally and without justification committed one or more acts that were significant factors in causing the breach of the Transaction Documents, including, but not limited to, assisting Johnson in his clandestine and illicit attempt to refinance the Projects, without the required written consent from Cassaforte" (*id.*, ¶¶ 143–145).

The elements for a cause of action for tortious inference with contract are "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third–party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). The complaint must allege that "but for" the defendant's actions, the contract at issue would not have been breached (*Avamer 57 Fee LLC v Hunter Boot USA LLC*, 241 AD3d 401, 406 [1st Dept 2025]). Speculative allegations will not suffice (*Chestnut Hill Partners, LLC v Van Raalte*, 45 AD3d 434, 435 [1st Dept 2007]).

The tortious interference claim asserted by Cassaforte against the Attorney Defendants in the SAC was not previously dismissed (*see Cassaforte*, 2022 NY Slip Op 32063[U], *12). Therefore, leave to amend this claim against the Attorney Defendants is granted.

The prior tortious interference claim asserted by FRF and the Owners against the Attorney Defendants, though, was dismissed because "[t]he existence of a valid contract is pled only with respect to Cassaforte (*Cassaforte*, 2022 NY Slip Op 32063[U], *13). The Owners now seek to correct this defect by alleging that they were third–party beneficiaries of the Transaction Documents (NYSCEF Doc. No. 301, ¶ 142). Because the Attorney Defendants have not addressed whether this amendment is palpably insufficient or devoid the merit, FRF and the Owners are granted leave plead a tortious interference with contract claim against the Attorney Defendants.

As for Sharestates, the proposed TAC fails to plead facts that it intentionally procured a breach and fails to plead any allegation that but for its actions, the alleged breach would not have occurred (*see Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1036–1037 [2d Dept 2011]; *Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006], *rearg denied* 2006 NY Slip Op 64321[U] [1st Dept 2006], *appeal denied* 7 NY3d 704 [2006] [stating that "[s]pecifically, a plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct"]). The proposed TAC alleges only that Sharestates' actions were a "factor" in causing a breach (NYSCEF Doc. No. 301, ¶ 145). As such, the proposed amendment against Sharestates is

[3] The proposed TAC defines "Transaction Documents" as the operating agreements for the Owners, Partners and Holdings, deposit loan and deposit services agreements for 42 Van Buren and 1535 Pacific, pledge and security agreements, and other documents (NYSCEF Doc. No. 301, ¶ 37).

palpably insufficient (*see KIND Operations Inc. v AUA Private Equity Partners, LLC*, 215 AD3d 556, 558 [1st Dept 2023]).

4. Malicious Interference with a Contractual Relationship

Cassaforte and the Owners seek to plead a malicious interference with a contractual relationship against all Defendants as a fifth cause of action.

A cause of action for malicious interference with a contractual relationship exists where "one maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other" (*Lamb v Cheney & Son*, 227 NY 418, 421 [1920]; *see also Hornstein v Podwitz*, 254 NY 443, 448 [1930] [stating that "one who, having knowledge of an existing valid contract between others, intentionally, knowingly and without reasonable justification or excuse, induces one of the parties to the contract to breach it to the damage of the other party"]). The term "malice" when used in connection with a cause of action for malicious interference with contract "'does not necessarily mean actual malice or ill will but the intentional doing of a wrongful act without legal or social justification'" (*154 Nassau Street Realty Co. v Pinkerton's Natl. Detective Agency*, 17 AD2d 292, 294 [1st Dept 1962], *affd* 12 NY2d 1084 [1963], quoting *Campbell v Gates*, 236 NY 457, 460 [1923]).

The proposed cause of action for malicious interference with a contractual relationship is duplicative of the tortious interference with contract claim as the elements are identical (*compare Lama Holding Co.*, 88 NY2d at 424 with *Hornstein*, 254 NY at 448). Indeed, the allegations pleaded in support are similar. On both claims, the proposed TAC alleges that Defendants had actual, direct knowledge of the Transaction Documents and "intentionally and without justification" committed an act that caused a breach or "induced and aided and abetted a breach" (NYSCEF Doc. No. 301, ¶¶ 143–145 and 149–151). Accordingly, leave to plead a claim for malicious interference with a contractual relationship is denied.

5. Rescission

The Owners seek to plead rescission and cancellation of the Sharestates Mortgages based on mutual mistake as a proposed sixth cause of action against all Defendants. The proposed TAC alleges the parties to the refinancing mistakenly believed that Cassaforte's consent was unnecessary or had been provided, that this mistake existed at that time, and the transaction does not represent a meeting of the minds of the parties (NYSCEF Doc. No. 301, ¶¶ 154–155). The proposed TAC further alleges the Lender Defendants would be unjustly enriched if the Sharestates Mortgages were not rescinded (*id.*, ¶ 156).

Leave to plead a rescission claim against the Attorney Defendants is denied. "[R]escission is an equitable remedy … [that] may only be asserted against a person who is a party to the contract" (*Will B. Sandler Disclaimer Trust v Swersky*, — AD3d —, 2025 NY Slip Op 05909, *1 [1st Dept 2025]). Because the Attorney Defendants were not parties to the CEMAs or the Sharestates Mortgages, the proposed rescission claim against them is palpably insufficient.

Leave to plead a rescission claim against the Lender Defendants is also denied. "A contract entered into under mutual mistake of fact is generally subject to rescission" (*Symphony Space v*

Pergola Props., 88 NY2d 466, 484 [1996]). The mistake must be substantial and must exist at the time the parties entered into the contract (*Simkin v Blank*, 19 NY3d 46, 52 [2012]). "The premise underlying the doctrine of mutual mistake is that 'the agreement as expressed, in some material respect, does not represent the meeting of the minds of the parties'" (*id.* at 53 [citation omitted]). Stated another way, the parties must be mistaken as to the "subject of the exchange" (*Highmount Olympic Fund, LLC v PIPE Equity Partners, LLC*, 93 AD3d 444, 445 [1st Dept 2012]; *see also Simkin*, 19 NY3d at 52, quoting *Da Silva v Musso*, 53 NY2d 543, 552 [1981] [reasoning that "the mistake must be 'so material that … it goes to the foundation of the agreement'"]). The alleged mistake, identified as the "existence or the necessity of Cassaforte's written consent" (NYSCEF Doc. No. 301, ¶ 155), is not addressed to the subject of the Sharestates Mortgages. The subject of the Sharestates Mortgages (and the CEMAs) is the agreement by Sharestates to lend money to each Owner secured by a mortgage on each Property (NYSCEF Doc. No. 301, ¶ 167). Consequently, the proposed amendment is palpably insufficient against the Lender Defendants (*see IKB Deutsche Industriebank AG v Credit Suisse Sec. (USA) LLC*, 188 AD3d 489, 490–491 [1st Dept 2020] [denying motion to amend to plead a claim for rescission]). Additionally, the proposed TAC alleges that Sharestates had actual, direct knowledge of the material terms in the Transaction Documents "which prohibited entrance into the Sharestates Mortgages without Cassaforte's written consent" (NYSCEF Doc. No. 301, ¶ 144). Thus, Sharestates cannot have been mistaken as to whether Cassaforte's consent was required.

Nor does the proposed TAC plead a claim for rescission based on a unilateral mistake, as Plaintiffs have argued. "A court of equity may … rescind a contract for unilateral mistake if the failure to do so would enrich one party at the other's expense, and the parties can be returned to the status quo without prejudice" (*Quattro Parent LLC v Rakib*, 181 AD3d 518, 518–519 [1st Dept 2020]). Here, the proposed TAC alleges that $4.2 million from the Sharestates Mortgages was "used to pay off the old debt," leaving $1.6 million in surplus loan proceeds distributed to the Owners, which Johnson then allegedly embezzled (NYSCEF Doc. No. 301, ¶ 86). As discussed above, the First Department previously stated that the Owners had not offered to repay any of the loan proceeds (*see Cassaforte Ltd.*, 221 AD3d at 525). Thus, Plaintiffs have not pleaded whether rescission of the Sharestates Mortgages would return the parties to the status quo.

6. Unjust Enrichment

As an alternative to the proposed cause of action for rescission, all Plaintiffs seek to plead a claim for unjust enrichment as a new seventh cause of action against all Defendants. The proposed TAC alleges that none of the Plaintiffs received a benefit from the *ultra vires* Sharestates Mortgages, whereas Defendants were unjustly enriched by their roles in the refinancing. The Lender Defendants obtained rights as secured creditors, and the Attorney Defendants, upon information and belief, received their attorneys' fees from the proceeds of the refinancing (NYSCEF Doc. No. 301, ¶¶ 92,163–167).

A cause of action for unjust enrichment requires the plaintiff to plead "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). Unjust enrichment also requires the plaintiff to plead that it had "a sufficiently close relationship with the other party" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

Here, the proposed TAC is devoid of any factual allegations that Cassaforte or FRF had any direct dealings with any Defendant on the refinancing that could have caused their reliance or inducement (*see Rational Special Situations Income Fund v Bank of N.Y. Mellon*, 238 AD3d 616, 618 [1st Dept 2025]; *Compass Concierge, LLC v 142 Duane Realty Corp*., 222 AD3d 428, 429 [1st Dept 2023]). Because Cassaforte's and FRF's proposed unjust enrichment claim against Defendants is palpably insufficient on its face, leave to amend is denied.

The proposed unjust enrichment claim brought by the Owners against the Lender Defendants is also palpably insufficient. An unjust enrichment claim does not lie where a valid and enforceable written contract governs the dispute at issue (*see Simkin*, 19 NY3d at 55), and here, the CEMAs (NYSCEF Doc. Nos. 320–322) govern the dispute between the Owners and the Lender Defendants.

The Court reaches a contrary result against the Attorney Defendants. The Attorney Defendants argue that the proposed unjust enrichment claim fails because "Attorney Pourtavoosi was paid a flat fee by the Fee Owners for the refinancing, pursuant to his retention by the Fee Owners, Plaintiffs in this action" and that he performed pursuant to a valid agreement (NYSCEF Doc. No. 354, Attorney Defendants' Mem. of Law at 7). While the existence of an enforceable contract generally precludes an unjust enrichment claim, the Attorney Defendants have not produced the contract at issue. The Owners' motion insofar as it seeks to plead a claim for unjust enrichment against the Attorney Defendants is granted.

8. Contribution

The Owners seek to plead contribution against the Attorney Defendants and Sharestates as a proposed eighth cause of action.

This part of the Owners' motion against the Attorney Defendants is granted. The contribution claim pleaded in the SAC against the Attorney Defendants has not been dismissed (*see Cassaforte Ltd.*, 2022 NY Slip Op 32063[U], *14), and the proposed TAC does not make any substantive changes to this claim against them.

The proposed TAC also adequately pleads a claim for contribution against Sharestates. CPLR § 1401 specifies that "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them." The party from whom contribution is sought must have breached a duty running from the contributor to the injured plaintiff or to the defendant, and that this breach caused or augmented, at least in part, the claimed injury (*see Trump Vill. Section 3, Inc. v N.Y. State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]). Contribution is unavailable when the underlying claims seeks to recover for a purely economic loss (*see Children's Corner Learning Ctr. v A. Miranda Contr. Corp*., 64 AD3d 318, 323–324 [1st Dept 2009]).

As applied here, the proposed TAC alleges that Sharestates aided and abetted Johnson, Group, Partners, and Holdings in obtaining the Sharestates Mortgages (NYSCEF Doc. No. 301, ¶¶ 140, 175). The Owners have pleaded that Sharestates aided and abetting Johnson and Group, who controlled Partners and Holdings, in breaching their fiduciary duties to the Owners. To the extent any of the Owners are found liable in the Johnson Action, the Owners may pursue a claim

for contribution against Sharestates (*compare Esteva v Nash*, 55 AD3d 474, 475 [1st Dept 2008] [denying leave to plead contribution where the aiding and abetting breach of fiduciary claim had been dismissed]).

9. Indemnification

Leave to amend this claim against the Attorney Defendants is granted. The Owners renumbered the cause of action for indemnification against the Attorney Defendants to the ninth cause of action in the proposed TAC. The indemnification claim has not been dismissed (*see Cassaforte Ltd.*, 2022 NY Slip Op 32063[U], *14), and the proposed TAC does not make any substantive changes to this claim.

10. Declaratory Judgment

For their proposed tenth cause of action against the Lender Defendants, the Owners seek a judgment declaring that the Sharestates Mortgages are null and void.

Leave to amend is denied for the same reasons that Plaintiffs' motion to renew the Lender Defendants' prior motion to dismiss the SAC has been denied. Leave is denied for the additional reason that the resolution of the Lender Defendants' motion to dismiss on appeal constitutes the law of the case (*see Matter of D.M. v B.L.J.*, — AD3d —, 2025 NY Slip Op 06026, *1 [1st Dept 2025]), and the First Department's decision is binding on this Court.

The Court has considered the parties' remaining contentions and finds them to be unavailing.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for leave to serve a third amended complaint (Motion 007) is granted in part as follows:

1. the first cause of action for breach of fiduciary duty and the second cause of action for professional negligence by Plaintiffs XYZ Development II LLC, XYZ 42 Van Buren LLC and XYZ 1535 Pacific LLC (collectively, the "Owners") against Defendants Babak Pourtavoosi and The Law Offices of Babak Pourtavoosi, P.C. (together, the "Attorney Defendants");

2. the third cause of action for aiding and abetting breach of fiduciary duty by Plaintiff FRF 348 Quincy LLC ("FRF") and the Owners against the Attorney Defendants and Defendant Sharestates Investments DACL, LLC ("Sharestates");

3. the fourth cause of action for tortious inference with contract by Plaintiff Cassaforte Limited ("Cassaforte"), FRF and the Owners against the Attorney Defendants;

4. the seventh cause of action for unjust enrichment by the Owners against the Attorney Defendants;

5. the eighth cause of action for contribution by the Owners against the Attorney Defendants and Sharestates;

6. the ninth cause of action for indemnification by the Owners against the Attorney Defendants; and it is further

ORDERED that the balance of the motion (Motion 007) is otherwise denied; and it is further

ORDERED that, to this extent, the proposed third amended complaint annexed to the moving papers as Ex. A (NYSCEF Doc. No. 301) shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that Defendants shall serve an answer or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that Plaintiffs' motion for leave to renew the motion brought by Defendants Sharestates Investments DACL, LLC and Toorak Capital Partners LLC to dismiss the second amended complaint (Motion 008) is denied; and it is further

ORDERED that the parties shall appear for a status conference **December 11, 2025** at 10:00 a.m. in Courtroom 428 at 60 Centre Street, New York.

11/14/2025
DATE

ANAR R. PATEL, A.J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**