

Bapaz NYC W. 46 St Group LLC v Assa Props. Inc.

2026 NY Slip Op 30502(U)

February 9, 2026

Supreme Court, New York County

Docket Number: Index No. 652456/2018

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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BAPAZ NYC WEST 46 ST GROUP LLC,

INDEX NO. 652456/2018

Plaintiff,

08/11/2025,
12/08/2025,
12/08/2025

- v -

MOTION DATE

ASSA PROPERTIES INC., SALIM ASSA, SOLY ASSA,
WEST 46TH STREET INVESTORS LLC, WEST 46TH
STREET EQUITY LLC, WEST 46TH STREET
MANAGEMENT CORP., NYC 46TH STREET LLC, BEN
SUKY, MEITAL SUKY, ABRAHAM LAVI

MOTION SEQ. NO. 013 014 015

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 338, 339, 340, 341, 342, 343, 345, 346, 347, 348, 349, 350, 351, 352, 353

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 376, 377, 378, 379, 380, 381, 382, 387, 390, 391, 392, 393

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 383, 384, 385, 386, 388, 397

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, (i) Bapaz NYC West 46th Street Group LLC (the **Plaintiff**)’s motion (Mtn. Seq. No. 013) to quash the Subpoena Duces Tecum and Ad Testificandum (the **Castro Subpoena**; NYSCEF Doc. No. 340) issued by Salim Assa, Soly Assa, West 46th Street Equity LLC, and West 46th Street Management Corp. (collectively, the **Defendants**) to non-party Claude Castro, Esq. is **GRANTED**, and (ii) the Defendants’ cross-motion to compel Mr. Castro to comply with the Castro Subpoena is **DENIED**.

The Plaintiff's motion (Mtn. Seq. No. 014) to compel the Defendants to produce documents responsive to the 2025 Demand (hereinafter defined) is GRANTED to the extent set forth below.

The Defendants' motion (Mtn. Seq. No. 015) to compel the Plaintiff to produce its tax returns for 2015, 2016, and 2017 is DENIED.

DISCUSSION

CPLR § 3101 requires “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” As a guiding principle, the words “material and necessary” are to be “interpreted liberally to require disclosure of . . . any facts bearing on the controversy” (*Rivera v NYP Holdings Inc.*, 63 AD3d 469, 469 [1st Dept 2009], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). A party seeking to avoid disclosure bears the burden of showing that the disclosure sought is improper (*Roman Catholic Church of the Good Shepherd v Tempco Systems*, 202 AD2d 257, 258 [1st Dept 1994]).

I. The Plaintiff's Motion to Quash is Granted and the Defendants' Cross-Motion to Compel is Denied (Mtn. Seq. No. 013)

A motion to quash should be granted where “the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry” (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]). CPLR § 3101 authorizes a party to obtain discovery from “a party, or the officer, director, member, agent or employee of a party,” or “any other person” (CPLR § 3101 [a] [1], [4]).

Pursuant to the Castro Subpoena, the Defendants seek to compel Mr. Castro's deposition and certain documents related to Mr. Castro's purported negotiation of the Related Agreement, arguing, among other things, that Mr. Castro negotiated the Remaining Agreement and that he is the Plaintiff's sole witness regarding the Remaining Agreement.

This is not the first time that the Defendants have advanced this narrative mischaracterizing Mr. Castro's actual role as he has described in his prior affirmations and clarified the same to this Court. Previously, the Defendants sought to disqualify Mr. Castro, the Plaintiff's lawyer, arguing that the Plaintiff could not prove its case without Mr. Castro's testimony and that he negotiated the Remaining Agreement. As discussed in a Decision and Order of the Court (the **Prior Decision**; NYSCEF Doc. No. 371), dated November 24, 2025, denying the Defendants' motion, this simply is not so:

Upon the foregoing documents, the Defendants' motion (Mtn. Seq. No. 012) to disqualify Claude Castro, Esq. as the attorney for the Plaintiff is DENIED.

Reference is made to a Decision and Order of the Appellate Decision captioned *Bapaz NYC West 46 St Group LLC v ASSA Properties Inc.*, 328 AD3d 654 [1st Dept 2025] (NYSCEF Doc. No. 319), dated May 29, 2025, which provides:

Judgment, Supreme Court, New York County (Andrew Borrok, J.), entered May 9, 2024 in plaintiff's favor and against defendants in the amount \$1,700,000 plus interest for a total amount of \$2,984,758.45, unanimously modified, on the law, to vacate so much of the judgment as pertains to the award of \$700,000 (plus interest) for breach of the Remaining Agreement, to direct a trial on the corporate defendants' liability thereon, and to grant defendant Salim Assa summary judgment to the extent of any liability in connection with the alleged breach of the Remaining Agreement, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about March 12, 2024, which, inter alia, denied defendants' motion for summary judgment dismissing plaintiff's claims and granted plaintiff's cross-motion for summary judgment on those claims, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

A document submitted for the first time at the argument on summary judgment should ordinarily not be considered (*see e.g. Benedetto v Hyatt Corp.*, 203 AD3d 505, 506-507 [1st Dept 2022]). However, the court was justified in considering the document because e-mails attached as exhibits to plaintiff's cross-motion related to ongoing settlement negotiations that resulted in the Lavi settlement agreement, and the agreement had been in defendants' possession. Moreover, defendants had made false statements in affidavits and court filings concerning the facts set forth in the document. Additionally, because the court relied only on facts from the document, which was a settlement agreement in another action involving these defendants and the same company and property, the document was not precluded by CPLR 4547 (*see Central Petroleum Corp. v Kyriakoudes*, 121 AD2d 165, 165 [1st Dept 1986], *lv denied* 68 NY2d 807 [1986]).

The court properly found that defendants had breached the warranty in the parties' Purchase and Sale Agreement for 49% of the company. Moreover, given the documentary proof of payment in the form of a check from plaintiff's attorney's escrow account to defendants, in the full amount of the purchase price, there was no issue of fact as to whether plaintiff had paid the funds. Whether the money originally came from plaintiff LLC or from its principal or affiliate is of no moment, and this is not a case of an entity attempting to pierce its own corporate veil (*compare Matter of Colin v Altman*, 39 AD2d 200, 201 [1st Dept 1972]).

However, plaintiff failed to establish that it paid \$700,000 to defendants under the parties' Remaining Agreement, as there was no direct proof of payment. The schedule prepared by defendants did not definitively attribute payments to a party or transaction. Furthermore, given that there was no written indication of plaintiff having decided to exercise its option under the Remaining Agreement, other than the disputed payments and a single post-hoc email, neither side is entitled to summary [*2] judgment on those claims.

While a purchaser cannot rely on a warranty it knows to be false at the time of execution (*see Siemens Solar Indus. v Atlantic Richfield Co.*, 251 AD2d 82, 82 [1st Dept 1998], *lv denied* 92 NY2d 814 [1998]), here, defendants never revealed the true nature of the breach to plaintiff or its agents. Defendants falsely stated there was no dispute with a prior investor in the company and property, when in fact there was an ongoing dispute that led to litigation by that investor, and a settlement that directly contravened the warranties in plaintiff's agreement. Defendants are also incorrect that the failure of defendant NYC 46th Street LLC to consent to the return of the purchase price barred that claim. As plaintiff does not seek rescission, the motion court did not grant

rescission, and the judgment appealed from is for money damages, NYC 46th Street LLC's consent is not necessary.

Defendant Assa was entitled to summary judgment for any claims arising from the alleged breach of the Remaining Agreement. The Joinder of Guaranty he provided contained a sole remedy clause. That clause limited plaintiff to return of the purchase price for the "Transaction." This term was defined in the Purchase and Sale Agreement as the purchase of the 49% interest. The Remaining Agreement, in contrast, concerned the purchase of the remaining 51% (*see J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 118 [2012]).

We have considered the remaining arguments and find them unavailing. The Decision and Order of this Court entered herein on October 22, 2024 is hereby recalled and vacated (*see* M-2025-00327 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE
SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

The Defendants now seek to disqualify Mr. Castro from representing the Plaintiff on the grounds that “in order for Plaintiff to prove that it actually entered into an enforceable Remaining Agreement, Castro will have to testify about the negotiations for that agreement” (NYSCEF Doc. No. 326 at 9) and that this is the precise situation that Rule 3.7 is designed to address. The argument fails.

Rule 3.7(a) of New York’s Rules of Professional Conduct provides that “[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact.” Nonetheless, a party in a dispute has a valued right to representation by counsel of its choice and a party moving to restrict that right has a heavy burden and must be carefully scrutinized (*Ullman-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 470 [1st Dept 2013]). Whether a motion to disqualify should be granted rests in the discretion of the court (*Mayers v Stone Castle Partners, LLC*, 126 A.D.3d 1, 6 [1st Dept 2015], citing *Macy's Inc. v J.C. Penny Corp., Inc.*, 107 AD3d 616, 617 [1st Dept 2013]).

Initially, the Court notes that the Plaintiff indicates that it will not call Claude Castro as a witness. The Defendants do not say that they intend to call him either. Instead, and as set forth above, they say that the Plaintiff needs to call him as a witness to prove their claim and that because they can not prove their claim without calling him as a witness, he must be disqualified. Even if true that Mr. Castro is a necessary witness for the Plaintiff (and as discussed below it does not appear to be the case) and he does not testify, the result would simply be that the Plaintiff does not meet its burden at trial.

For clarity, Mr. Castro previously affirmed that he was retained in mid-2016 – i.e., after the Remaining Agreement was executed (see NYSCEF Doc. No. 167). In that affirmation, Mr. Castro describes what he learned after the documents were executed and in connection with the due diligence for the closing and the role of many others involved in addressing the need for the Lender’s consent to the proposed transfer and the Lavi lawsuit, including Andrew Albstein, Esq. (Mr. Israeli’s transactional attorney of the law firm Goldberg Weprin Finkel Goldstein LLP), David Israeli, Michael Hershkowitz, Esq., Tomer Dafna, Assa, Assa’s in-house counsel, Richard Migliaccio, Esq., and Michael Lubin, Esq. (id.). Nothing in the record indicates that these other individuals remain unavailable to testify on the relevant issue identified by the Appellate Division (including Messrs. Hershkowitz and Dafna who can now appear at a deposition before trial and can be subpoenaed for trial as the Plaintiff indicates that they have pled guilty) as to whether the \$700,000 was paid and whether the Plaintiff exercised its option under the Remaining Agreement. Thus, and because Mr. Castro is not “likely to be a witness on a significant issue of fact,” the defendant does not meet its burden that disqualification is warranted (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7[a]).

Accordingly, it is hereby ORDERED that the Defendants’ motion (Mtn. Seq. No. 012) to disqualify Claude Castro, Esq. as the attorney for the Plaintiff is DENIED.

(NYSCEF Doc. No. 371 at 3-5, quoting *Bapaz NYC West 46 St Group LLC v ASSA Properties Inc.*, 328 AD3d 654 [1st Dept 2025] [footnotes omitted; emphasis added]).

As discussed in the Prior Decision, Mr. Castro affirmed that he was retained in mid-2016 – i.e., after the Remaining Agreement was executed (see NYSCEF Doc. No. 167). His knowledge is based entirely on what he learned after the Remaining Agreement was executed in his interactions with others. Those others – including Andrew Albstein, Esq., David Israeli, Michael Hershkowitz, Esq., Tomer Dafna, Salim Assa, Richard Migliaccio, Esq., and Michael Lubin, Esq., -- who were involved in the Remaining Agreement and whether the money was paid, are available to testify on the relevant issues, including whether the \$700,000 was paid and whether the Plaintiff exercised its option pursuant to the Remaining Agreement. Although certain of these witnesses may not have previously been available to testify, they are now. According to

the Plaintiff, Mr. Israeli funded payments made from the escrow account of Mr. Hershkowitz, including the \$1,000,000 payment to the Defendants for the 49% membership interest in the company and the subsequent \$700,000 paid toward the contemplated purchase of the remaining 51% membership interest (*see* NYSCEF Doc. No. 167). According to the Defendants, although they do not dispute that they received \$700,000, they claim it was for rent and not pursuant to the Remaining Agreement (NYSCEF Doc. No. 139 ¶ 61). In any event, Mr. Castro is not the sole witness who can testify.

In addition, the Court notes that Mr. Castro was previously deposed by the Defendants at which time he testified that he had turned over his entire file to the Plaintiff's then lawyer (*see* NYSCEF Doc. No. 342). All relevant and responsive documents from Mr. Castro's file were subsequently produced to the Defendants by the Plaintiff's then lawyer during discovery (NYSCEF Doc. No. 352 ¶¶ 44-46). As all the documents sought by the Castro Subpoena were previously requested and produced, and the Defendants raised no objection to the Plaintiff's document production, the Defendants are not entitled to a second bite at the apple now (*see Intl. Plaza Assocs., L.P. v Lacher*, 104 AD3d 578, 578-579).

Thus, inasmuch as the Defendants have already deposed Mr. Castro (it does not matter that the Defendants' current lawyer wishes its previous lawyer had asked other questions), Mr. Castro produced his entire file previously, and there are other witnesses who can now testify as to the remaining issues in this case – *i.e.*, whether the \$700,000 was paid pursuant to the Remaining Agreement and whether the purchase option was exercised, the Castro Subpoena fails to set forth

any legitimate “circumstances or reasons” demonstrating why the requested disclosure is sought or required (*see* CPLR § 3101[a][4]). Accordingly, the motion to quash is GRANTED.

II. The Plaintiff’s Motion to Compel is Granted (Mtn. Seq. No. 014)

The Plaintiff moves to compel the Defendants to comply with the Plaintiff’s Demand for Discovery and Inspection (the **2025 Demand**; NYSCEF Doc. No. 378), dated October 14, 2025, which requests certain documents related to the \$700,000 payment at issue. The Defendants only oppose the Plaintiff’s motion with respect to paragraphs 20 and 22 through 28 of the Demand.

As discussed above, the remaining issue in this case is whether the \$700,000 was paid and whether the Plaintiff exercised its option pursuant to the Remaining Agreement. The Defendants have previously indicated that they had received \$700,000 from Mr. Hershkowitz as payment of rent (*see* NYSCEF Doc. No. 156; NYSCEF Doc. No. 139 ¶ 61). However, the leases at issue had not been entered into at the time the funds were received (*see* NYSCEF Doc. No. 74). Accordingly, the Plaintiff in this case is entitled to explore whether the \$700,000 was in fact for rent, as the Defendant claim, or instead constituted payments toward the Remaining Agreement.

It does not matter that paragraphs 20 and 22 through 28 were previously requested (NYSCEF Doc. No. 392) ¶¶ 26, 28-35, 38-43). Inasmuch as the Plaintiff contends that the Defendants did not produce the relevant documents requested (*i.e.*, communications surrounding the Remaining Agreement and funds received pursuant to the Remaining Agreement and communications surrounding the \$700,000 received and what it was applied to or what the response was to Mr.

Hershkowitz's correspondence as to the "the agreement in place for Tomer to pay down the current debt of \$300,000.00 over the course of 10 weeks at \$25,000.00 per week" and the "breakdown of funds received so that we are all on the same page" [the **Hershkowitz Email**; NYSCEF Doc. No. 332]) the Defendants shall produce (i) a Jackson Affidavit explaining their search and collection procedures for the documents requested in the 2025 Demand, (ii) documents responsive to paragraphs 1 through 19 and 21 of the 2025 Demand, and (iii) shall otherwise produce all documents and correspondence between the Assa Defendants, Ben Suky, the Plaintiff, including any of their respective employees or agents, Michael Lubin, Richard Migliaccio, Mr. Hershkowitz, and Mr. Castro (and all evidence of the source and application of the \$700,000 that they acknowledge that received) including any internal communications as to Mr. Hershkowitz's Email and responses to such email within 30 days of this Order.

III. The Defendants' Motion to Compel is Denied (Mtn. Seq. No. 015)

The Defendants move to compel the Plaintiff to produce its tax returns for the years 2015, 2016, and 2017 arguing that they are entitled to the tax returns because the Plaintiff asserted that it does not have other financial records for the pertinent period when the \$700,000 payment was made to the Defendants.

As discussed above, the Defendants previously admitted that they received \$700,000 (*see* NYSCEF Doc. No. 156; NYSCEF Doc. No. 139 ¶ 61). They dispute that the \$700,000 was for the Remaining Agreement. According to them, this money was for something else – rent – and for leases that had not yet been entered into (NYSCEF Doc. No. 139 ¶ 61; NYSCEF Doc. No. 74). Inasmuch as the Plaintiff indicates that its tax returns do not include relevant information

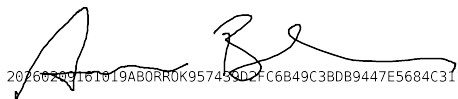
(NYSCEF Doc. No. 397 ¶ 14), disclosure of the tax returns is simply not warranted. As such, the Defendants’ motion to compel is denied. However, for completeness the Plaintiff shall produce an affidavit confirming that the \$700,000 payment does not appear on the Plaintiff’s tax return and otherwise explaining how the \$700,000 was paid within 30 days of this Order.

Accordingly, it is hereby ORDERED that the Plaintiff’s motion to quash is GRANTED, and the Defendants’ cross-motion to compel is DENIED; and it is further

ORDERED that the Plaintiff’s motion to compel is GRANTED to the extent set forth above; and it is further

ORDERED that the Defendants’ motion to compel is DENIED; and it is further

ORDERED that the Plaintiff shall produce an affidavit confirming that the \$700,000 payment does not appear on the Plaintiff’s tax return and otherwise explaining how the \$700,000 was paid within 30 days of this Order.



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2/9/2026
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE