

<b>ESG Kullen, LLC v Kullen King Props., LLC</b>
2026 NY Slip Op 31386(U)
April 6, 2026
Supreme Court, New York County
Docket Number: Index No. 654350/2025
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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ESG KULLEN, LLC,

Plaintiff,

- v -

KULLEN KING PROPERTIES, LLC, THOMAS DELPONTI,

Defendant.

INDEX NO. 654350/2025

MOTION DATE 10/30/2025,  
12/31/2025

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON  
MOTION**

-----X

KULLEN KING PROPERTIES, LLC, THOMAS DELPONTI

Plaintiff,

-against-

ERIC GRANOWSKY, OLD MILL I, LLC, BEATA  
TRUSKOLASKA, ALFONSO MARTINEZ, MICHAEL  
STRAUSS, GREG MAZIARZ, MARTA GUMIENIAK

Defendant.

Third-Party  
Index No. 595884/2025

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 31, 32, 37

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 57, 77, 78, 79, 82, 86

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and for the reasons set forth on the record (*tr.* 4.3.26), the Plaintiff’s motion (Mtn. Seq. No. 001) to dismiss the TPC (hereinafter defined) without prejudice or sever the TPC pursuant to CPLR § 1010 is GRANTED to the extent that the TPC is severed, and (ii) the Third-Party Defendants’ motion (Mtn. Seq. No. 002) to (x) dismiss the TPC pursuant

to CPLR §§ 3211(a)(7), 3016(b) and 3013, and (y) strike scandalous and prejudicial material pursuant to CPLR § 3024(b) is GRANTED in part.

### THE RELEVANT FACTS AND CIRCUMSTANCES

ESG Kullen, LLC (**ESG Kullen**) is a limited liability company with two 50% members, Kullen King Properties, LLC (**Kullen King**) and Old Mill I, LLC (**Old Mill**) (NYSCEF Doc. No. 1 ¶¶ 3, 10-11). Pursuant to ESG Kullen's Operating Agreement (the **Operating Agreement**; NYSCEF Doc. No. 10), dated December 1, 2012, Old Mill is ESG Kullen's managing member, and Eric Granowsky, the principal and owner of Old Mill, serves as ESG Kullen's manager (*id.* at 10, 12).

On July 21, 2025, ESG Kullen commenced this action against Kullen King and Thomas Delponti, Kullen King's principal and owner (collectively, the **Third-Party Plaintiffs**), alleging that (i) the Third-Party Plaintiffs took excess distributions between January 1, 2018 through December 31, 2024, (ii) Delponti used ESG Kullen's American Express issued credit card to pay his personal expenses between July 6, 2018 through October 18, 2022, and (iii) Delponti forged a promissory note in the principal amount of \$400,000 (NYSCEF Doc. No. 1 ¶¶ 1-2, 17-27).

On September 19, 2025, the Third-Party Plaintiffs filed the Third-Party Complaint (the **TPC**; NYSCEF Doc. No. 9) against Granowsky, Old Mill, Beata Truskolaska, Alfonso Martinez, Michael Strauss, Greg Maziarz, and Marta Gumieniak (collectively, the **Third-Party Defendants**). According to the TPC, Granowsky engaged in an intimate relationship with Gumieniak (who worked for Granowsky at non-party ESG Equities), who subsequently

recommended Truskolaska to manage ESG Kullen's financial affairs, even though she lacked any qualifications and was not authorized to work in the United States (*id.* ¶¶ 30-34). The Third-Party Plaintiffs allege that Granowsky, Gumieniak, and Truskolaska thereafter engaged in a fraudulent scheme to misappropriate millions of dollars from ESG Kullen through credit card abuse, usurious lending, falsification of business records, tax fraud, and other misconduct (*id.* ¶¶ 35-62). As discussed below, their allegations in support of their fraud claims do not satisfy CPLR § 3016(b) and require dismissal without prejudice.

More specifically, in the TPC, the Third-Party Plaintiffs asserted causes of action for (i) fraud against Truskolaska, Old Mill, and Granowsky, (ii) conspiracy to defraud against Granowsky and Truskolaska, (iii) violation of the Uniform Voidable Transactions Act and Uniform Fraudulent Transfer Act against all Third-Party Defendants, (iv) conversion against all Third-Party Defendants, (v) an accounting and imposed trust of all ESG Kullen assets against Granowsky, Old Mill, and Truskolaska, (vi) breach of contract against Old Mill and Granowsky, (vii) unjust enrichment against all Third-Party Defendants, (viii) negligence against Granowsky, Old Mill, and Truskolaska, (ix) gross negligence against Granowsky, Old Mill, and Truskolaska, (x) breach of fiduciary duty against Granowsky, Old Mill, and Truskolaska, (xi) libel and slander against Granowsky, Old Mill, and Truskolaska, and (xii) tortious interference with prospective business relations against all Third-Party Defendants (*id.* ¶¶ 63-126).

On October 30, 2025, the Plaintiff filed a motion to dismiss the TPC without prejudice or to sever the TPC pursuant to CPLR § 1010. On December 31, 2025, the Third-Party Defendants

filed a motion to (i) dismiss the TPC pursuant to CPLR §§ 3211(a)(7), 3016(b) and 3013, and (ii) strike scandalous and prejudicial material pursuant to CPLR § 3024(b).

## DISCUSSION

### I. The TPC is Severed (Mtn. Seq. No. 001)

Pursuant to CPLR § 1007, a defendant may implead a nonparty by filing a third-party summons and complaint against any person who is or may be liable to that defendant for all or part of the plaintiff's claim. However, CPLR § 1010 vests the court with broad discretion to dismiss such a third-party complaint without prejudice or sever it where its inclusion would unduly delay the main action or prejudice the substantial rights of any party.

The Third-Party Plaintiffs (*i.e.*, the Defendants) are not correct that the Plaintiff lacks standing to seek dismissal of the TPC. Their motion is proper (CPLR § 1010). However, the Third-Party Plaintiffs fail to allege that the Third-Party Defendants are or may be liable to the Third-Party Plaintiffs for all or part of the Plaintiff's claims (*see* CPLR § 1007). Rather than asserting claims for indemnification or contribution, or otherwise pleading liability that arises from or is conditioned upon the Third-Party Plaintiffs' potential liability in the main action, the TPC asserts independent causes of action (fraud, breach of contract, tort, etc.) that do not depend upon the outcome of the main action and therefore fall outside the permissible scope of third-party practice. As such, the branch of the motion seeking to have the TPC severed is GRANTED.

### II. With Respect to the Severed Action, the Third-Party Plaintiffs' Claims Are Dismissed Without Prejudice (Mtn. Seq. No. 002)

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

In determining whether a claim is direct or derivative, courts apply the two-part test articulated by the Delaware Supreme Court in *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031 (Del 2001) and adopted by New York courts in *Serino v Lipper*, 123 AD3d 34 (1st Dept 2014): (1) who suffered the alleged harm (the corporation or the suing stockholders individually), and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually) (*Serino*, 123 AD3d at 40). A claim is direct where the harm and potential recovery belong to the stockholders individually, and derivative where both belong to the corporation. *Serino* further recognizes that if the alleged harm is to the individual rather than the corporation, a direct action may proceed (*id.*).

The Third-Party Defendants argue that the lawsuit must be dismissed because the Third-Party Plaintiffs' claims for fraud, conspiracy to defraud, violation of the Uniform Voidable Transactions Act and Uniform Fraudulent Transfer Act, conversion, an accounting and imposed trust, breach of contract, unjust enrichment, negligence, gross negligence, and breach of fiduciary duty (the first ten causes of action) are improperly asserted as direct claims when they

are in fact derivative claims. In their opposition papers, the Third-Party Plaintiffs argue that the claims for breach of contract (sixth cause of action), unjust enrichment (seventh cause of action), and breach of fiduciary duty (tenth cause of action) are direct claims but otherwise concede that the other causes of action are derivative. As to the breach of contract, unjust enrichment and breach of fiduciary duty claims, the Third-Party Plaintiffs are not correct. These claims are derivative as well.

The breach of contract claim (sixth cause of action) alleges that Old Mill and Granowsky breached the Operating Agreement by, among other things, failing to maintain proper books and records, commingling funds, and disregarding corporate formalities, and seeks damages sustained by Kullen King in an amount no less than \$8 million (NYSCEF Doc. No. 9 ¶¶ 91-97). These allegations concern the alleged mismanagement of ESG Kullen and failures in corporate governance – *i.e.*, injuries to the entity itself rather than to any individual member (*see Abrams v Donati*, 66 NY2d 951, 953 [1985] [“[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually”]). Thus, as the harm alleged is suffered by ESG Kullen, and ESG Kullen would receive the benefit of any recovery, the claim is derivative, not direct. Accordingly, the breach of contract cause of action (sixth cause of action) is dismissed without prejudice.

The unjust enrichment claim (seventh cause of action) alleges that the Third-Party Defendants improperly diverted or misappropriated ESG Kullen funds (NYSCEF Doc. No. 9 ¶¶ 98-101). Claims of diversion and waste of corporate assets are quintessentially derivative claims. They

allege injury to ESG Kullen's assets as a whole. As such, this claim too must be dismissed without prejudice.

The breach of fiduciary duty claim (tenth cause of action) is predicated on the same underlying allegations of mismanagement, self-dealing, and diversion of ESG Kullen assets, and does not identify any duty owed specifically and independently to the Third-Party Plaintiffs separate from duties owed to ESG Kullen (*id.* ¶¶ 111-115). Thus, this claim too is derivative, not direct, and it also must be dismissed without prejudice. For the avoidance of doubt, to the extent the Third-Party Plaintiffs attempt to characterize these claims as seeking unpaid distributions or individualized harm, the Third-Party Plaintiffs never allege the failure to pay distributions to them that were paid to others in the TPC or anything like that. Thus, these claims are dismissed without prejudice.

The fraud claims also fail because they lack specificity (CPLR § 3016[b]). To state a cause of action for fraud, a plaintiff must allege (1) a material misrepresentation of fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages (*Eurycleia Partners L.P. v Seward & Kissel, LLP*, 12 NY3d 553 [2009]). “Although under section 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct” (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]).

Although the Third-Party Plaintiffs generally allege that misrepresentations were made regarding the use of ESG Kullen funds and financial records, the TPC fails to specify the time, place, and manner of the alleged misrepresentations or identify with sufficient detail the particular statements upon which reliance is claimed. Unlike in *Pludeman*, where certain facts may have been unavailable to the plaintiffs prior to discovery, the information concerning what was said to these Third-Party Plaintiffs and upon which they relied is not within the exclusive possession of Third-Party Defendants and simply is not pled. As such, the fraud cause of action must also be dismissed without prejudice (CPLR § 3016[b]).

The conspiracy to commit fraud claim (second cause of action) is likewise dismissed. New York does not recognize an independent cause of action for civil conspiracy, which may be pleaded only to connect otherwise actionable torts (*see Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424, 425 [1st Dept 2006]). Since the underlying fraud claim is dismissed, the conspiracy claim is also dismissed without prejudice.

A cause of action for fraudulent conveyance pursuant to the Uniform Voidable Transactions Act requires that the plaintiff is a creditor with a right to payment and that the defendant made transfers without fair consideration that rendered the transferor insolvent or were made with actual intent to hinder, delay, or defraud creditors (UVTA §§ 273-274, 276; *In re Sharp Int'l Corp.*, 403 F3d 43, 56 [2d Cir 2005]). The plaintiff must plead the allegedly fraudulent transfers with sufficient particularity (*S & M Heating Corp. v Macaluso*, 37 Misc 3D 1231[A] [Sup Ct, Suffolk County 2012] [“A fraudulent transfer cause of action must identify the alleged transfers at issue and cannot simply allude generally to alleged transfers that may have taken place.”]).

With respect to the fraudulent conveyance claim (third cause of action), the TPC alleges that the Third-Party Defendants engaged in a scheme to transfer funds out of ESG Kullen for their personal benefit (at least \$8 million), thereby leaving ESG Kullen unable to satisfy its obligations to creditors, including the Third-Party Plaintiffs. The TPC further alleges circumstances indicative of fraudulent intent, including a pattern of transfers and efforts to conceal the misconduct. Although, and discussed above, the claim is dismissed without prejudice because it was asserted as a direct claim and not a derivative claim, it would appear that the TPC, if asserted as a derivative claim, would otherwise state a claim for fraudulent conveyance on behalf of ESG Kullen.

Pursuant to CPLR § 3013, a pleading must set forth statements with sufficient particularity to provide the court and the parties with notice of the transactions or occurrences to be proved, as well as the material elements of each asserted cause of action or defense.

To state a claim for conversion, a plaintiff must allege a possessory interest in property and defendants' unauthorized dominion over that property (*Colavito v New York Organ Donor Network*, 8 NY3d 43, 49-50 [2006]). With respect to the conversion claim (fourth cause of action), the TPC alleges that the Third-Party Defendants exercised unauthorized control over identifiable funds belonging to ESG Kullen, including by diverting company funds for personal use, commingling accounts, and failing to remit monies owed. The problem however is that as a direct claim (and not derivative claim), the Third-Party Plaintiffs do not have a superior right of interest in the funds allegedly converted (*Paley v Curious Holdings, LLC*, 233 AD3d 590, 592 [1st Dept 2024]). It would however appear that the allegations are sufficient to state a derivative

claim for conversion on behalf of ESG Kullen. In any event, the claim is dismissed without prejudice.

The claims for unjust enrichment (seventh cause of action), negligence (eighth cause of action), and gross negligence (ninth cause of action) are however dismissed as duplicative of the breach of contract claim. Each claim is premised on the same alleged misconduct (the improper use of ESG Kullen funds) and does not allege the breach of any duty independent of the Operating Agreement (*see Fada Intl. Corp. v Cheung*, 57 AD3d 406, 406 [1st Dept 2008]).

To plead a cause of action for breach of fiduciary duty (tenth cause of action), a plaintiff must allege (i) the existence of a fiduciary relationship, (ii) misconduct by the defendant, and (iii) damages directly caused by the defendant's misconduct (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). In addition to being dismissed because it is improperly asserted as a direct claim, the breach of fiduciary duty claim requires additional specificity as to the time, place, and manner of the alleged misconduct to otherwise satisfy CPLR § 3016(b). As such, it is dismissed for this reason as well without prejudice.

To plead a cause of action for defamation (eleventh cause of action), a plaintiff must allege “(a) a false and defamatory statement concerning another, (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 88 [1st Dept 2015]). With respect to the defamation claim (eleventh cause of action), the TPC does not set forth the alleged

defamatory statements with the requisite specificity, nor does it adequately allege the time, place, and manner of the purported publication. As such, it too is dismissed without prejudice.

To plead a cause of action for tortious interference with prospective business relations (twelfth cause of action), “a plaintiff must allege (1) business relations with a third party, (2) the defendant's interference with those business relations, (3) the defendant acted for the sole purpose of harming plaintiff or used wrongful means, and (4) injury to the business relationship.” (*Valkyrie AI LLC v PriceWaterhouseCoopers LLP*, 233 AD3d 460, 460 [1st Dept 2024]). Finally, with respect to the tortious interference with prospective business relations claim (twelfth cause of action), the Third-Party Plaintiffs fail to identify any specific business relationships with which the Third-Party Defendants allegedly interfered, or to allege facts demonstrating wrongful means or conduct directed at a particular third party. Thus, the tortious interference with prospective business relations claim is also dismissed without prejudice.

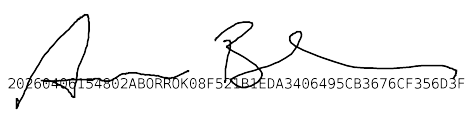
The branch of the Third-Party Defendants’ motion seeking to strike scandalous and prejudicial material fails. CPLR § 3024(b) provides that “[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” In applying this rule, the Appellate Division has stated that “[a] motion to strike scandalous or prejudicial material from a pleading will be denied if the allegations are relevant to a cause of action” (*New York City Health and Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391, 391 [1st Dept 2005] [citations omitted], cited by Patrick M. Connors, *Prac Commentaries*, McKinney’s Cons Laws of NY, CPLR § C3024:4 “[W]e may conclude that ‘unnecessarily’ means ‘irrelevant’. ... Generally speaking, if the item would be admissible at the trial under the evidentiary rules of relevancy, its

inclusion in the pleading, whether or not it constitutes ideal pleading, should not ordinarily justify a motion to strike under CPLR § 3024[b]’)]. The challenged allegations bear relevance to the claims asserted and therefore do not warrant striking pursuant to CPLR § 3024(b).

The Court has considered the parties’ remaining arguments and finds them unavailing.

Accordingly, it is hereby ORDERED that the Plaintiff’s motion to dismiss the TPC without prejudice or sever the TPC pursuant to CPLR § 1010 is GRANTED to the extent that the TPC is severed; and it is further

ORDERED that the Third-Party Defendants’ motion to (i) dismiss the TPC pursuant to CPLR §§ 3211(a)(7), 3016(b) and 3013, and (ii) strike scandalous and prejudicial material pursuant to CPLR § 3024(b) is GRANTED in part.



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<u>4/6/2026</u> <b>DATE</b>		<u>ANDREW BORROK, J.S.C.</u> <b>ANDREW BORROK, J.S.C.</b>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <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