SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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PAMELA B. ADER,

Plaintiff,

- v -

JASON ADER, JS PROPERTY HOLDINGS LLC,

Defendants.

INDEX NO. 653917/2024

MOTION DATE 02/10/2025, 06/18/2025

MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 56, 57, 59, 60, 61, 62, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 126

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to AMEND PLEADINGS, STAY PROCEEDINGS, DISQUALIFY, FILE SURREPLY.

Plaintiff Pamela Ader, as Executor of the Estate of Richard H. Ader ("Plaintiff"), seeks summary judgment against Defendants Jason Ader ("Jason") and JS Property Holdings, LLC ("Holdings") (collectively, "Defendants") on the Estate's claims for specific performance, breach of contract, and contractual attorney's fees and expenses. Defendants in turn move for an order (1) permitting them to amend their Answer and Rule 19-a Counterstatement of Facts, (2) disqualifying Plaintiff's counsel, Proskauer Rose, LLP ("Proskauer"), (3) permitting Defendants to file a sur-reply in connection with Plaintiff's motion for summary judgment, and (4) staying Plaintiff's motion for summary judgment pending discovery.

For the reasons stated below, Plaintiff's motion is **granted**, except that further proceedings are required to determine the full amount of damages with respect to Plaintiff's claims for breach of contract and contractual attorney's fees and expenses. Defendants' motion is **granted** only insofar as the Court has considered Defendants' amended Rule 19-a Counterstatement of Facts in connection with Plaintiff's motion for summary judgment, and it is otherwise **denied**.

In short, Defendants' liability under their agreement with Richard Ader is crystal clear. Defendants' opposition consists of a Gatling gun blast of purported defenses and counterclaims seeking to cast blame in every conceivable direction (notably at Jason's ex-wife, mother, and deceased father) save the most obvious one—that is, upon Jason himself for his failure to repay a loan that he could not have received absent his father's assistance and then for his failure to stand by the unambiguous commitments he made to his father (and in turn his father's estate) in the event the loan was not repaid. In those circumstances, Jason's assertions of "unjust enrichment" and "unclean hands" against his parents are particularly risible. Based on the record presented, summary judgment in Plaintiff's favor is warranted.

BACKGROUND

This is a straightforward breach of contract case. Holdings, wholly owned by Jason, owed $7.5 million on a loan from Bank of America ("BofA") secured by a townhouse at 178 East 73rd Street (the "Property"). In 2016, Defendants sought to borrow an additional $5.5 million, but BofA refused unless Jason's father, Richard Ader ("Richard"), agreed to personally guarantee Defendants' obligations under a consolidated loan in the amount of $13 million.

As described in greater detail below, Richard agreed to do so on the condition that Defendants perform all obligations under the loan, treat any sums Richard paid under the loan as interest-bearing loans from Richard to Defendants payable on demand, and that if such loans were not repaid, Defendants would be required to take all steps necessary to sell the Property, and in fact Richard would be able to sell it on his own as Defendants' attorney-in-fact. This agreement was memorialized in writing in March 2020 (NYSCEF 5 ["March 2020 Agreement"]).

Prior to Richard's death in 2023, Defendants remained current on the BofA loan. After Richard's death, however, Defendants defaulted on the loan and thereafter failed to repay Richard's estate for substantial expenditures it incurred in connection with Richard's guarantee of the BoA loan. This action followed.

DISCUSSION

Under CPLR 3212, summary judgment is appropriate when the movant makes a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Stonehill Cap. Mgmt., LLC v Bank of W.*, 28 NY3d 439, 448 [2016]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant makes such a showing, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the disputed issues of material fact requiring a trial (*Stonehill Cap. Mgmt., LLC*, 28 NY3d at 448). Bald conclusory assertions or speculation, devoid of evidentiary facts, and reliance upon conjecture or speculation are insufficient to defeat summary judgment (*id.*; *Alvarez*, 68 NY2d at 324). Likewise, conclusory affirmative defenses,

without more, cannot defeat a motion for summary judgment. (*Bd. of Managers of Ruppert Yorkville Towers Condo. v Hayden*, 169 AD3d 569, 569-70 [1st Dept 2019]).

Plaintiff's Motion is not Premature

As an initial matter, Defendants argue that Plaintiff's motion should be denied as premature for lack of discovery pursuant to CPLR 3212(f). However, "[t]o avail oneself of CPLR 3212(f) to defeat or delay summary judgment, a party must demonstrate that…the party has at least made some attempt to discover facts at variance with the moving party's proof" (*Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [1st Dept 2007]). Here, Defendants propounded no discovery requests until two weeks *after* Plaintiff's summary judgment motion was fully briefed (NYSCEF 110). In addition, much (or all) of the information relevant to Defendants' purported defenses would be in Defendants' possession. Moreover, as discussed below, even if Defendants' allegations in support of his proposed defenses proved to be true, they would not present valid defenses to Plaintiff's claims. Accordingly, Defendants' contention that Plaintiffs' motion should be denied under CPLR 3212(f) is unavailing.

Plaintiff Has Established Prima Facie Entitlement to Judgment on Claims I, III, and IV

Turning to the merits, Defendants admit that Richard agreed to guarantee all of their obligations to BofA in the amount of $13,000,000 on the condition that Jason and Holdings agreed to perform all obligations under the loan documents, be solely responsible for paying all real estate taxes, insurance premiums, and maintenance for the Property, and treat any payments made by Richard in connection with the loan as loans from Richard to Jason and Holdings with

interest at 6% per annum compounded monthly (NYSCEF 109 [Amended Response to SMF] ¶ 7).[1] The parties further agreed that if Jason or Holdings failed to repay such loans from Richard within 60 days of a demand for repayment, Richard could invoke specific remedies, including the sale of the Property or Jason's interest in Holdings, with Jason and Holdings being responsible for taking all actions necessary to effectuate such sales (*id.*). Defendants admit that these terms were memorialized in writing in the March 2020 Agreement, which further provides that "[f]or the purpose of exercising the rights granted by this Agreement...Jason and Holding hereby irrevocably constitute and appoint Richard...their true and lawful attorneys-in-fact, upon and during the existence of any default by Jason or Holding in his or its obligations hereunder, to execute, acknowledge and deliver any instruments and to do and perform any acts in the name of and on behalf of Jason and Holding" (*id.* ¶ 10; NYSCEF 5 § 8).

Defendants also admit that they allowed the insurance on the Property to lapse, defaulted on their loan obligations to BofA, and failed to cure those defaults (NYSCEF 109 ¶¶ 27, 30, 31). Defendants also do not deny that Richard's estate paid outstanding real estate taxes and interest payments on the property thereafter (*id.* ¶ 34).

Defendants further admit that Plaintiff sent multiple demand letters in 2024 notifying them of their defaults under the loan and the March 2020 Agreement (*id.* ¶¶ 35-36). Pursuant to the March 2020 Agreement's terms, if Defendants failed to pay amounts owed to Richard within 60 days from the demand, Richard "shall have the right to require Holding and Jason to sell the

[1] Defendants' motion seeks to supplement their response to Plaintiff's statement of material fact by adding amended responses to statements 32-58. While Defendants provide no explanation for their initial failure to do so or for their delay in seeking to correct this earlier, the Court has taken into account Defendants' proposed additional responses and finds that they do not change its disposition on Plaintiff's motion for summary judgment.

Property…on terms acceptable to Richard in Richard's sole and absolute discretion" (NYSCEF 5 § 5). Defendants do not dispute the expenses incurred by Richard's estate to service the Property—$1,273,802.85 as of January 31, 2025 (NYSCEF 109 ¶ 55).

A. *Plaintiff's first claim for relief (specific performance)*[2]

Plaintiff's first cause of action seeks enforcement of the March 2020 Agreement via a judgment declaring that "(a)…under Paragraph 8 of the March 2020 Agreement, Plaintiff is the true and lawful attorney-in-fact for Defendants for purposes of taking all actions and executing all documents necessary to sell the Property on terms acceptable to Richard's Estate, i.e., immediately retaining a broker acceptable to Richard's Estate, with Richard's Estate having sole control over the timing and terms of any proposed sale of the Property, and with the proceeds of such sale being used to (i) satisfy the $13 Million Loan, transfer taxes incurred in connection with such sale, any third party costs and expenses incurred in connection with such sale of the Property, and reimburse Richard's Estate for all amounts due and owing under the March 2020 Agreement, with (ii) the remaining proceeds (if any) distributed to such person or persons as are lawfully entitled thereto; or (b) in the alternative, requiring Defendants to take all actions and execute all documents necessary to take the above actions." This request is consistent with the terms of the March 2020 Agreement, and the undisputed facts demonstrate Defendants' default and Plaintiff's entitlement to such relief. Accordingly, Plaintiff has established a *prima facie* case for summary judgment on this claim.

[2] Plaintiff asks that if the Court declines to grant summary judgment in her favor on this claim, that it instead grant summary judgment in her favor on her second claim for foreclosure. As summary judgment is granted on the specific performance claim, the foreclosure claim is moot.

B. *Plaintiff's third claim for relief (breach of contract)*

For the reasons described above, Plaintiff has met her burden to demonstrate a *prima facie* case that Defendants breached the March 2020 Agreement resulting in damages from the breach as of January 31, 2025 in the amount of at least $1,273,802.85. However, because Plaintiff seeks compensation for additional sums expended after January 31, 2025, further proceedings will be required to set the full amount of damages.

C. *Plaintiff's fourth claim for relief (contractual attorney's fees and expenses)*

Defendants do not dispute that the March 2020 Agreement provides that Defendants shall be responsible for Plaintiff's costs and expenses to enforce the agreement, including reasonable attorney's fees (NYSCEF 109 ¶ 20; NYSCEF 5 § 9). For the reasons discussed above, Plaintiff has established prima facie entitlement to judgment on this claim as to liability.

Defendants do not dispute the amount of Plaintiff's expenses as of January 31, 2025—$542,029.76—but argue that they are unreasonable (NYSCEF 109 ¶ 56). While Plaintiff submits legal invoices, those invoices do not describe the work performed, the hourly rates, or the attorneys staffed on the matter (NYSCEF 42). To obtain recovery of a sum certain on this claim, Plaintiff must submit a more detailed application for its attorney's fees and expenses.

Defendants' Pleaded (and Proposed) Defenses are Unavailing

In an attempt to avoid summary judgment, Defendants raise myriad defenses largely related to the purported unenforceability of the March 2020 Agreement. Defendants' opposition memorandum focuses in part on defenses they seek leave to add to their Answer. Although leave

to amend is denied for separate reasons (discussed below), for completeness the Court will address the merits of all proposed defenses in evaluating Plaintiff's motion.

As an initial matter, the following group of affirmative defenses were pleaded in a conclusory manner and have no underlying factual allegations—let alone proof in admissible form—to support them: estoppel, waiver, *in pari delicto*, unclean hands, unconscionability, fraudulent inducement, fraud, illegality, violation of public policy. Others are obviously unavailing and/or not a valid defense: the debt is subordinate to BofA's indebtedness, Defendants acted in good faith, alleged conflicts with Plaintiff's counsel.[3] More are contradicted by Defendants' own admissions: failure to mitigate damages,[4] that the estate has suffered no loss, lack of causation, that Defendants did not breach any duty owing to Plaintiff, lack of consideration.

Defendants focus on certain defenses in greater detail in their papers, but these are easily disposed of as well.

A. Impossibility and Unclean hands

With respect to the purported defense of impossibility, Defendants assert that Jason's ex-wife and his parents conspired in 2021 to deprive him of funds he needed (and intended) to

[3] This issue is discussed in more detail below in connection with Defendants' motion to disqualify.

[4] Defendants argue that Plaintiff's breach of contract damages are self-inflicted, in that Plaintiff could have ceased making the payments necessary to avoid a default and allowed BofA to foreclose on the Property. Defendants cite no case for the dubious proposition that a guarantor must breach the terms of its guarantee in order to mitigate damages vis-à-vis the debtor. Simply put, Plaintiff's compliance with the Estate's contractual obligations to BofA is not a failure to mitigate damages.

service the debt. However, Defendants point to no obligation imposed on Richard to ensure Jason maintains sufficient funds to avoid defaulting on the BofA loan. Moreover, as a factual matter, the record demonstrates that performance was not impossible: Defendants continued to meet their obligations until Richard's death in 2023 (NYSCEF 109 ¶¶ 8, 16) and only thereafter failed to do so. Finally, the defense of impossibility is unavailing because "economic inability to perform [their] contractual obligations, even to the extent of insolvency or bankruptcy, is simply not a valid basis for excusing compliance" with the March 2020 Agreement (*Stasyszyn v Sutton E. Assocs.*, 161 AD2d 269, 271 [1st Dept 1990]).

The unclean hands defense likewise fails. The undeniable core fact is that Richard came to his son's aid by helping him secure financing and, in the March 2020 Agreement, simply took reasonable measures to ensure he (or his estate) would be made whole if his son failed to repay the loan, which is all Plaintiff seeks in this case. There is nothing remotely "unclean" or inequitable about Richard's conduct or that of his executor. Defendants' unsubstantiated theory (which, even if true, is of no legal consequence) that Pamela Ader (the executor of the estate) and Jason's ex-wife conspired to orchestrate a default on a loan that *the estate would be forced to repay* defies common sense as well as principles of equity that inform any defense of unclean hands.

B. Lack of capacity

Defendants next contend that the March 2020 Agreement was "executed when Jason's decision-making was impaired by domestic turmoil" (NYSCEF 71 at 1-2). Conclusory assertions that Jason was under great stress in 2020 (even considering Jason's psychiatrist's opinion—which impermissibly testifies as to a legal conclusion that "the circumstances surrounding the

March 6, 2020 agreement satisfy the elements of duress under New York contract law" [NYSCEF 76]) are insufficient to defeat summary judgment, especially here where Jason ratified the agreement by continuing to perform years after it was entered (*see Edison Stone Corp.*, 145 AD2d 249, 253 [1st Dept 1989] [continued performance ratified agreement allegedly procured under duress and "waive[s] any right…to repudiate…obligations thereunder"]).

Remarkably, Defendants also assert that *Richard* lacked capacity to enter the March 2020 Agreement, thus purportedly providing a basis for Defendants to void the contract. Of course, even assuming Richard lacked capacity to enter the agreements at issue, which he did at his son's behest, it is hornbook law that those agreements would be voidable—not void—at *Richard's* election, not Defendants' (*Verstandig v Schlaffer*, 296 NY 62, 64 [1946]). As the estate stands in the shoes of the Richard (*Estate of Schneider v Finmann*, 15 NY3d 306, 309 [2010]), Plaintiff is entitled to enforce the agreement.

C. Economic Duress & Undue Influence

Next, Defendants argue that Jason entered the March 2020 Agreement under economic duress because, without his father's personal guarantee, he risked losing the refinancing needed to avoid foreclosure on the Property. Defendants rely on *Austin Instrument, Inc. v Loral Corp.* (29 NY2d 124 [1971]) for the proposition that an agreement is voidable for economic duress if a party is—as Defendants quote the court—"threatened with financial ruin" (NYSCEF 71 [Defendants' Memorandum in Opposition] at 9). First of all, as Plaintiff points out, that quoted

language appears nowhere in *Austin Instrument*.[5] Instead, that case holds that "[a] contract is voidable on the ground of duress…[if] the party making the claim was forced to agree to it *by means of a wrongful threat* precluding the exercise of free will" (29 NY2d at 130 [emphasis added]). Richard seeking assurances that he would be made whole if Jason defaulted on his obligations to BofA is not a "wrongful threat," and the fact that Jason was otherwise in a difficult financial position is insufficient to establish duress (*see Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249, 256 [1st Dept 1989] ["the existence of financial pressure and an unequal bargaining position are insufficient to constitute economic duress"]; *Brooke v Streit*, 81 Misc3d 1222[A], at *3 [Sup Ct, NY County, Dec. 14, 2023] ["a party's using financial leverage and a person's difficult financial circumstances to the party's advantage does not create economic duress"]).

The standard for undue influence is similar. To establish undue influence, Defendants must prove "that the influence exerted [by Richard] amounted to a moral coercion that restrained independent action and destroyed free agency or that, by importunity that could not be resisted, constrained [Defendants] to do that which was against [their] free will and desire, but which [they were] unable to refuse or too weak to resist (*see Crawford v Smith*, 219 AD3d 691, 693 [2d Dept 2023]). Defendants state that undue influence arose based on Proskauer's involvement in reviewing the March 2020 Agreement, which they state was "essentially dictated by his father's

[5] Plaintiff posits that the concededly inaccurate citations in Defendants' memorandum of law in opposition summary judgment were generated using artificial intelligence (*see* NYSCEF 92-93, 95-101). Whether that is the case is the subject of Plaintiff's pending motion for sanctions. For present purposes, Plaintiff's allegations about opposing counsel's purported brief-writing *methodology* do not by themselves impact the Court's determination of the merits of Defendants' arguments. That being said, the Court will of course examine whether Defendants' propositions of law are supported by their cited authorities, which in the case noted above they clearly are not.

counsel" (NYSCEF 71 at 7). These allegations, even if proven (which they have not been), do not come close to meeting the standard for voiding a contract due to undue influence.

* * * *

In sum, Plaintiff has established a prima facie case for judgment in her favor on the estate's claims for specific performance, breach of contract, and attorneys' fees, and Defendants have not submitted admissible evidence raising disputed issues of fact for trial or supporting any viable defenses. Accordingly, summary judgment in granted to Plaintiff on each claim, subject to additional proceedings with respect to damages for breach of contract (Count III) and the amount of recoverable attorneys' fees and expenses (Count IV). Plaintiff's alternative claim for foreclosure (Count II) is dismissed as moot.

DEFENDANTS' MOTION

Permitting Defendants to amend their Answer would be futile and highly prejudicial, but the Court will consider the amended Rule 19 Counterstatement of Facts

A party may amend its pleading at any time by leave of court, including to conform the pleadings to the evidence (CPLR 3025 [b], [c]). Whether to permit amendment is a matter of discretion (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22 [1st Dept 2003]). "Motions for leave to amend should be freely granted, absent prejudice or surprise ... unless the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010] [citations omitted]). A proposed pleading is devoid of merit if it would not survive a motion to dismiss (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Olam Corp. v Thayer*, 2021 WL 408232 [Sup Ct, NY County 2021]).

Defendants seek to amend their Answer to include defenses of impossibility of performance and lack of capacity of Jason's father, Richard Ader, as well as to assert counterclaims for unjust enrichment, breach of fiduciary duty, tortious interference with business relations, breach of the implied covenant of good faith and fair dealing, and attorney misconduct. Defendants' motion is denied. First, Defendants have not complied with the requirement in CPLR 3025(b) that a motion to amend pleadings must be accompanied by the proposed pleading "clearly showing the changes or additions to be made to the pleading." Further, amendment would be highly prejudicial to Plaintiff, who continues to expend substantial resources on a monthly basis to avoid defaulting on the loan (NYSCEF 33 [Pamela Ader Aff.] ¶ 40). Defendants brought this motion after briefing was complete on Plaintiff's motion for summary judgment—which had already been delayed repeatedly at Defendants' request—and provide no explanation for failing to make this request earlier (*Heller*, 303 AD2d at 24 [party seeking leave to must establish reasonable excuse for extended delay]).

In any event, the proposed amendments are futile. As discussed above, the proposed defenses of impossibility and lack of capacity are patently meritless and would be dismissed as a matter of law. As for the proposed counterclaims, Defendants' claim that Plaintiff breached the implied covenant of good faith and fair dealing with respect to the March 2020 Agreement by failing to ensure Jason had funds to service the loan is similarly meritless as Defendants do not identify any basis for Plaintiff's purported obligation to do so (see *Fesseha v TD Waterhouse Inv. Services, Inc.*, 305 AD2d 268 [1st Dept 2003] [the implied covenant of good faith and fair dealing "cannot be construed so broadly as…to create independent contractual rights"]). There is no obligation (contractual or otherwise) for Defendant Ader's parents to finance his lifestyle as an adult.

Defendants' proposed unjust enrichment claim asserts that "Plaintiff, acting as Executor of Richard's Estate, unilaterally withdrew" the funds at issue from an entity managed by Jason "in or around 2021," thereby depriving Jason of management fees on those funds (NYSCEF 108 ¶ 109). It is undisputed that Richard did not die until 2023—Plaintiff could not have been acting in an executorial capacity at that time. Even if this claim were properly asserted against Pamela Ader in her individual capacity, the dispute (*i.e.*, the propriety of Pamela's withdrawal of her investment in an entity in which she was a limited partner) is governed by the entity's limited partnership agreement such that a claim for unjust enrichment could not lie (NYSCEF 118 [Limited Partnership Agreement] at Article 7 ["Withdrawals from Capital Account; Distributions"]; *see Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012] ["An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim"]). Moreover, this claim is substantively identical to a crossclaim asserted by Jason against his mother in another proceeding (NYSCEF 119 ¶¶ 512-518), which was dismissed with prejudice (*Rimu Capital Ltd. v Ader*, 2025 WL 1268342, at *33 [SD NY May 1, 2025, No. 23-CV-05065 (LJL)] ["The Ader Defendants' crossclaims against…Pamela are threadbare and conclusory in the extreme…Amendment would be futile"]). Permitting amendment as to this claim would be futile on any of those grounds.

Defendants' proposed breach of fiduciary duty counterclaim fails as well. The alleged breach is that Richard and Jason's ex-wife Julie Ader caused certain funds to be distributed to Julie in purported violation of a matrimonial court order. However, the conduct as alleged does not violate the order, which states that funds "*received by either [Jason or Julie]* shall be immediately deposited into an escrow account jointly maintained by counsel for each party, pending further order of this Court" (NYSCEF 78 [emphasis added]). Defendants do not allege

that the distribution to Julie was in violation of any other obligation or otherwise improper. If Julie did not maintain the funds in escrow, Jason may have recourse against her in the matrimonial proceeding, but not against Plaintiff or the Estate in this action.[6] Moreover causation is lacking: the harm alleged is that Jason was unable to use such funds to service his debt, but under Defendants' own theory the funds were supposed to be held in escrow even if they were distributed to Jason.

Defendants' proposed claim for tortious interference with business relations is untimely, as the statute of limitations for this claim is three years and the conduct is alleged to have occurred in 2021 (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]). Other deficiencies with this proposed counterclaim include failure to identify a third party with whom Defendants had a business relationship that was damaged, failure to allege that Plaintiff's motive was sufficiently malicious, and the fact that it is directed at Pamela Ader, who is not a party to this action in her individual capacity (*Valkyrie AI LLC v PriceWaterhouseCoopers LLP*, 233 AD3d 460, 462 [1st Dept 2024]).

Finally, Defendants seek to interpose a claim for "attorney misconduct" that alleges no damages, does not seek to add Proskauer as a party, and recites the same facts underlying Defendants' motion to disqualify. The Court will consider these contentions in connection with Defendants' request to disqualify Plaintiff's counsel but leave to amend is denied, as this is not a cognizable claim for affirmative relief against Plaintiff.

[6] Defendants attach as an exhibit an email chain in which Jason states that the funds at issue were distributed by U.S. Realty, not Plaintiff, and placed in escrow (NYSCEF 79).

Defendants also seek to supplement their response to Plaintiff's statement of material fact by adding responses to statements 32-58. As noted earlier, the Court has considered the amended statement of facts, so that branch of the motion is granted.

Defendants' vague and unsupported argument to disqualify Plaintiff's counsel was waived, and the motion to disqualify is in any event denied

Defendants' motion to disqualify Proskauer as Plaintiff's counsel is denied. Defendants waived any alleged conflict by waiting to seek disqualification until after Plaintiff's motion for summary judgment was fully briefed, nearly ten months after Proskauer appeared in this action (*see St. Barnabas Hosp. v New York City Health and Hosps. Corp.*, 7 AD3d 83, 84 [1st Dept 2004] [finding conflict had been waived after movant waited a year before seeking disqualification]). Defendants do not explain their delay, nor do they contend that new facts came to light regarding Proskauer—who ceased representing Jason in any matters by 2012—in the meantime (NYSCEF 116 [Horowitz Aff.] ¶ 3; NYSCEF 94 [2011 Termination Correspondence]).

In any event, Defendants—who, as discussed above, admit all the facts necessary to establish their liability—fail to articulate what confidential information obtained a decade ago could plausibly be used against Jason in this simple breach of contract action in connection with a guarantee (*see Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 638 [1998] [denying disqualification motion where movant failed to come forward with "information sufficient to determine whether there exists a reasonable probability" that confidential, non-public information was or would be disclosed]; *Patane v Tan*, 188 AD3d 498, 499 [1st Dept 2020] [denying disqualification motion where "defendants fail to identify any material confidential

information that the [lawyer] obtained from the defendants during the prior matters, referencing only generic legal documents and activities"]).

Defendants' motion for leave to file a surreply to Plaintiff's motion for summary judgment is denied

Defendants contend that permitting them to file a surreply is appropriate because Plaintiff raises new arguments in her reply. Not so. The "new arguments" that Defendants refer to either respond to issues raised by Defendants in opposition or point out inaccurate citations in Defendants' opposition brief—they are not related to the merits of the motion. Defendants' counsel will have the opportunity to address the arguments regarding the citations in connection with Plaintiff's pending motion for sanctions.

Defendants' motion to "stay" Plaintiff's motion for summary judgment is denied

Defendants seek to "stay" Plaintiff's motion for summary judgment pursuant to CPLR 3212(f), which provides that "[s]hould it appear…that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion…and may make such other order as may be just." Defendants raise CPLR 3212(f) in opposition to Plaintiff's motion for summary judgment (NYSCEF 71 at 18). As discussed above, Defendants have not satisfied the requirement that "[t]o avail oneself of CPLR 3212(f) to defeat or delay summary judgment, a party must demonstrate that…the party has at least made some attempt to discover facts at variance with the moving party's proof" (*Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [1st Dept 2007]). Further, even if additional discovery proved

Defendants' allegations to be true, those allegations would not establish a viable defense. Defendants' motion is denied.

Accordingly, it is

ORDERED that Defendants' motion is **granted in part** to the extent that the Court has accepted and considered the proposed amended Rule 19 Counterstatement of Facts, and is otherwise **denied**; it is further

ORDERED that summary judgment is granted to Plaintiff as to her first claim for specific performance, and it is accordingly **DECLARED AND ADJUDGED** that Plaintiff is the true and lawful attorney-in-fact for Defendants for purposes of taking all actions and executing all documents necessary to sell the Property on terms acceptable to Richard's Estate, i.e., immediately retaining a broker acceptable to Richard's Estate, with Richard's Estate having sole control over the timing and terms of any proposed sale of the Property, and with the proceeds of such sale being used to (i) satisfy the $13 million loan, transfer taxes incurred in connection with such sale, any third party costs and expenses incurred in connection with such sale of the Property, and reimburse Richard's Estate for all amounts due and owing under the March 2020 Agreement, with (ii) the remaining proceeds (if any) distributed to such person or persons as are lawfully entitled thereto; it is further

ORDERED that summary judgment is granted to Plaintiff as to liability on Plaintiff's third cause of action for breach of contract and fourth cause of action for contractual attorney's fees and expenses, with the amount of damages to be determined by inquest; it is further

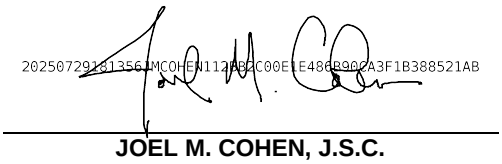
ORDERED that Plaintiff shall make a submission as to the amount of damages with respect to her third and fourth causes of action within 30 days of the date of this order; it is further

ORDERED that Defendants may respond to Plaintiff's submission within 21 days of Plaintiff's filing thereof; it is further

ORDERED that Plaintiff's second cause of action (foreclosure) is dismissed as moot; and it is further

ORDERED that Plaintiff upload a copy of the transcript of the proceedings held on July 17, 2025 to NYSCEF upon receipt.

This constitutes the decision and order of the Court.



7/29/2025
DATE

JOEL M. COHEN, 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**