SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **53**

Justice

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BAPAZ NYC WEST 46 ST GROUP LLC,

Plaintiff,

- v -

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

Defendant.

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INDEX NO. 652456/2018

MOTION DATE N/A

MOTION SEQ. NO. 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 321, 322, 323, 324, 325, 326, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337

were read on this motion to/for DISQUALIFY COUNSEL.

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.[1]

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.

[1] The Remaining Agreement (NYSCEF Doc. No. 173) is dated November 15, 2015.

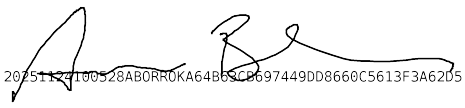
Rule 3.7(a) of New York's Rules of Professional Conduct provides that "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." Nonetheless, a party in a dispute has a valued right to representation by counsel of 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. Hershkowtiz and Dafnawho can now appear at a deposition before trial and can be subpeonaed 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.[2] 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.



11/24/2025
DATE

ANDREW BORROK, J.S.C.

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

[2] It is thus of no moment that previously the Plaintiff was not able to adduce testimony or an affidavit from them.