SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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JEAN-PASCAL SIMON,

Plaintiff,

- v -

FRANCINVEST, S.A. (NOMINAL DEFENDANT), JJS GROUP, INC.,FRENCH-AMERICAN SURGERY CENTER, INC.,FRENCH AMERICAN CLINIC, INC.,JEAN-FRANCOIS SIMON, CHARLES RAAB, GEORGE KESSLER,

Defendant.

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INDEX NO. 162867/2014

MOTION DATE 04/04/2023

MOTION SEQ. NO. 026

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 026) 1155, 1156, 1157, 1158, 1159, 1250, 1251, 1252, 1253, 1254, 1262, 1263, 1264, 1265, 1266, 1267, 1280, 1283, 1286, 1516, 1525, 1526, 1527, 1528, 1535, 1536, 1537, 1541, 1542, 1543, 1544, 1545, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1609, 1610, 1617, 1618

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Plaintiff Jean-Pascal Simon ("Plaintiff" or "Pascal") originally moved for partial summary judgment as to liability against Defendants Jean-Francois Simon ("Francois") and George Kessler ("Kessler") on September 28, 2021. The court stayed the action pending bankruptcy proceedings involving Francois. After the bankruptcy court approved a settlement between Plaintiff and Francois, Plaintiff renewed this motion only as to Kessler (February 3, 2023 Letter to Court, NYSCEF Doc. No. 1535). Plaintiff has also moved to strike all of Kessler's affirmative defenses and counterclaims from his answer to the third amended complaint. Additionally, Plaintiff has moved to compel Kessler to produce FrancInvest bank statements for HSBC accounts from 2002 to the present and for an award of attorneys' fees and costs. For the following reasons, Plaintiff's motion is denied in its entirety.

FACTUAL AND PROCEDURAL HISTORY

The operative complaint in this 2014 action contains eighteen causes of action against numerous Defendants. This motion, however, only relates to the eleventh cause of action against Kessler for aiding and abetting fraud. The case generally involves claims of fraud that Plaintiff brought both directly and derivatively[1] against his brother Francois and others based on an alleged scheme by Francois to defraud the rest of the family in relation to the family's surgical center and associated premises.

The third amended complaint alleges that Jean-Jacques Simon ("Jean-Jacques"), the father of Pascal and Francois, was an OB/GYN doctor who started a practice called the French-American Clinic ("FAC") out of the premises at 1049 Fifth Avenue ("Premises") in 1982 (TAC, ¶¶ 67-68). Pascal worked to complete his residency requirements and then joined his father in 1988 to open the French-American Surgery Center ("FASC") (TAC, ¶¶ 91-92). Over the course of a number of years, Pascal allegedly made substantial financial contributions to FASC, investing a total of at least $1,239,000.00 (TAC, ¶¶ 103-104).

In 1995, Jean-Jacques formed JJS to purchase the Premises (TAC, ¶ 120). At the time of JJS's formation, FrancInvest[2]—a closely held corporation that Jean-Jacques previously created to bestow his wealth to his children (TAC, ¶ 5)—owned 80% of JJS, and Jean-Jacques owned 20% of JJS, individually (TAC, ¶ 121). Until December 2003, JJS leased the Premises to FAC, that in turn subleased the Premises to FASC (TAC, ¶¶ 122-123).

[1] Plaintiff brought the eleventh cause of action for aiding and abetting fraud double derivatively on behalf of JJS (Third Amended Complaint ["TAC"], NYSCEF Doc. No. 543, ¶¶ 380-388).
[2] The third amended complaint alleges that at the time of its formation, FrancInvest had 530 shares divided as follows: Estate of Jean-Jacques – 51 shares; Pascal – 163 shares; Anne-Valerie –155 shares; Francois – 159 shares; and Gaston Cahen – 1 share (TAC, ¶ 53).

To put the complex interplay of corporate entities in simple terms as relevant for this motion: through FrancInvest, the family jointly controlled JJS, that in turn controlled an extremely valuable piece of real estate on Fifth Avenue.

According to the third amended complaint, after Jean-Jacques died without a will in 2002, his entire estate passed to his wife, Francine Simon ("Francine"), who became the sole shareholder and President of FAC (TAC, ¶¶ 6, 125-128). Francois then allegedly engaged in a scheme to take control of FrancInvest and JJS. In particular, Francois allegedly induced his sister Valerie to transfer her shares of FrancInvest to him for minimal consideration (TAC, ¶¶ 152-153). Additionally, Francois allegedly induced his mother Francine to sign a document giving him power of attorney (TAC, ¶ 219). Plaintiff asserts that the power of attorney was written only in English even though Francine does not sufficiently understand English (*see id.*; *see also* July 14, 2021 Francine Simon Letter, NYSCEF Doc. No. 1000). Kessler, an attorney who has represented members of the family and the various corporate entities, allegedly prepared the power of attorney (TAC, ¶ 221; *see also* June 23, 2011 Power of Attorney, NYSCEF Doc. No. 635). Francois allegedly then used his control over FrancInvest to induce JJS to engage in transactions beneficial to him personally, ultimately culminating in an allegedly self-dealing sale of the surgery center as well as a series of mortgage refinancings of the Premises (*see* TAC, ¶¶ 222-227).

As is pertinent to the aiding and abetting fraud claim against Kessler, the third amended complaint alleges that Francois: (1) caused JJS to refinance the mortgage on the Premises multiple times, keeping cash-out proceeds from the mortgages for himself (TAC, ¶¶ 205, 217, 224); (2) used those cash-out proceeds to purchase Kessler's Hallandale, Florida condominium ("Hallandale Condo") for himself (TAC, ¶¶ 224-229); and (3) allowed JJS to enter into a below market lease for the Premises in exchange for personal kickbacks (TAC, ¶ 190). Subsequently, on November 7,

2007, FASC agreed to sell the surgery center to Fifth Avenue Surgery Center, LLC ("FAAA") for $2,300,000.00 pursuant to an asset purchase agreement (TAC, ¶ 257).

By a September 7, 2018 order, the court granted in part Defendants' motion to dismiss the second amended complaint (September 7, 2018 Decision, NYSCEF Doc. No. 539). In particular, the court dismissed the ninth cause of action for fraud against Francois that Plaintiff alleged double derivatively on behalf of JJS, finding that Plaintiff did not plead the cause of action with particularity (*id.* at 19). The court later dismissed the eleventh cause of action against Kessler on November 14, 2019 because of the dismissal of the underlying fraud claim against Francois (November 14, 2019 Decision, NYSCEF Doc. No. 768, p. 4)

However, the First Department reinstated the ninth cause of action in a December 3, 2019 decision, finding that Plaintiff met his burden to plead with particularity that Francois "concealed material facts from JJ.S [sic] shareholders" through the complaint's allegations that Francois "mismanaged JJ.S [sic] funds, including by refinancing the mortgage and keeping the cash-outs for himself, and receiving 'kickbacks' for negotiating a below market rate lease for the property" (*Simon v FrancInvest, S.A.*, 178 AD3d 436, 437 [1st Dept 2019]).

Once the First Department reinstated the cause of action for fraud against Francois, the court also reinstated the eleventh cause of action for aiding and abetting fraud against Kessler. The First Department found that the prior decision reinstating the fraud claim constituted a change in law warranting a renewal motion under CPLR 2221 and that the third amended complaint adequately alleged aiding and abetting fraud against Kessler by alleging that Kessler "negotiated and/or prepared certain documents, including a below-market-rate lease for the property, thereby aiding and abetting Francois in his scheme to gain control of FrancInvest so as ultimately to sell FASC and defraud plaintiff" (*Simon v FrancInvest, S.A.*, 192 AD3d 565, 569-570 [1st Dept 2021]).

On July 9, 2021, Kessler again moved to dismiss the cause of action against him, and Plaintiff cross-moved for summary judgment (MS 23). In particular, Plaintiff argued that Kessler assisted Francois in the fraud against JJS through: (1) helping Francois to refinance the JJS mortgage in 2011 with the knowledge that Francois would use the cash-out proceeds to purchase the Hallandale Condo for himself, usurping the corporate opportunity for JJS; (2) preparing the meeting minutes for a JJS meeting where JJS approved the purchase of the Hallandale Condo but then conveying the condominium to Francois personally instead; and (3) helping Francois to incorporate a second JJS entity to divert rental income (Memo in Support of Cross-Motion, NYSCEF Doc. No. 1030, p. 11). At oral argument, counsel for Kessler defended the conveyance of the condominium to Francois, representing to the court that the condominium's bylaws prevented the sale of the property to anyone other than an individual (September 9, 2021 Oral Argument Transcript, NYSCEF Doc. No. 1142, p. 52). The court was deeply skeptical of this point, demanded that counsel promptly upload the bylaws, and indicated that if the bylaws did not prohibit corporate ownership, "that would be evidence of a breach" (*id.* at 52-53, 63).

The court denied Plaintiff's cross-motion for summary judgment (*id.* at 65) but stated in the decision denying the cross-motion that "[i]f the by-laws do not prohibit corporate ownership . . . the defendants will be deemed to have breached and the plaintiff may renew its cross-motion for summary judgment (September 10, 2021 Decision and Order [Borrok, J.], NYSCEF Doc. No. 1139, p. 3).

The relevant bylaws[3] make clear that corporate ownership was permitted at the time of the alleged conveyance of the condominium (By-Laws of Venetian Park Condominium II Association,

[3] Kessler's attorney filed a copy of the "Rules and Regulations for Venetian Park Condominium Two," that were only "Revised and Accepted" on 7/20/2021, nearly a decade after the sale of the Hallandale Condo (NYSCEF Doc. No. 1137; Warranty Deed, NYSCEF Doc. No. 1004). Kessler's attorney did not file the bylaws, as instructed to do so by

Inc., NYSCEF Doc. No. 1157, p. 10 of Ex. 4 ["If more than one person **or a corporation** own a unit, they shall file a certificate with the Secretary naming the person authorized to vote for said unit."] [emphasis added]). In light of this, Plaintiff renewed the motion for partial summary judgment on the ninth and eleventh causes of action on September 28, 2021—initiating the motion sequence that the court resolves with this decision—and for the court to direct entry of judgment against Francois and Kessler in the amount of $11,191,294.30 (September 28, 2021 Order to Show Cause, NYSCEF Doc. No. 1155). Plaintiff then filed a supplemental affirmation on January 14, 2022, in support of the summary judgment motion, with purportedly new evidence showing that Francois received proceeds of one of the mortgage refinancings (Supplemental Affirmation, NYSCEF Doc. No. 1250).

The court subsequently issued an order requiring Francois to quit claim the Premises to JJS and holding Francois in contempt (January 31, 2022 Order, NYSCEF Doc. No. 1290), as well as an order adjudging Francois liable to JJS in the amount of $19,343,811.92 (March 1, 2022 Interlocutory Judgment, NYSCEF Doc. No. 1313).

However, on June 24, 2022, Francois filed his notice informing the court that he had filed a petition for Chapter 11 bankruptcy in the Southern District of Florida (Notice of Bankruptcy, NYSCEF Doc. No. 1418). The proceedings here as they related to Francois were automatically stayed pending the bankruptcy proceedings.

Subsequently, on September 20, 2022, the bankruptcy court issued an order explicitly allowing claims against Kessler to be carved out from the stay, stating that "Section 362 of the Bankruptcy Code does not enjoin further prosecution of any claims that JJS Group, Inc. or Jean-Pascal Simon have asserted or may hereafter assert against any party other than the Debtor,

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the court. However, Plaintiff filed the relevant bylaws. The court is only considering those bylaws, and not the irrelevant Rules and Regulations that Kessler filed.

including, but not limited to, George Kessler, Charles Raab, or French-American Clinic, Inc., in the matter entitled *Jean-Pascal Simon v FrancInvest, S.A. et al.*, Index No. 162867/2014 (Sup. Ct. N.Y. County)" (*In re Jean Francois Bruno Simon, Debtor*, Case No. 22-14894-EPK [Bankr. SD Fla.], Doc. No. 112]). Counsel for JJS then filed a letter with this court on January 27, 2023, informing the court that there was "no longer any bar to the instant action proceeding against any of the remaining defendants," both because of the bankruptcy court's carve-out of the claims against Kessler and because the bankruptcy court had confirmed a reorganization plan on December 22, 2022 that settled the claims between JJS and Francois (January 27, 2023 Letter to Court, NYSCEF Doc. No. 1510).

This court then issued an order on January 30, 2023, stating that the "Chapter 11 automatic bankruptcy stay ended on December 22, 2022," the date that the bankruptcy court confirmed the reorganization plan (Order Lifting Stay, NYSCEF Doc. No. 1517). Counsel for Plaintiff then re-filed the motion for partial summary judgment against Kessler (Supporting Papers to OSC, NYSCEF Doc. No. 1527). Counsel for Plaintiff also filed a corrected order to show cause that sought relief **solely** against Kessler because Plaintiff had reached a settlement with Francois in the bankruptcy proceeding (Amended Order to Show Cause, NYSCEF Doc. No. 1543; February 3, 2023 Letter to Court).

Thus, the case against Francois for fraud is over. All that remains for the court on this motion is the eleventh cause of action against Kessler for aiding and abetting that fraud. The primary grounds for Plaintiff's claim of aiding and abetting fraud against Kessler are that:

- Kessler prepared the invalid power of attorney signed by Francine that allowed Francois to take control of JJS;
- Kessler prepared documents for the 2011 mortgage refinancing from which Francois improperly took cash-out proceeds;
- Kessler took part in the decision by JJS to purchase the Hallandale Condo, but then sold to Francois personally instead, allowing Francois to usurp the corporate opportunity; and

- Kessler took part in the execution of a below-market lease for the Premises for which Francois received kickbacks.

Plaintiff's order to show cause seeks the following relief:

- Partial summary judgment on the eleventh cause of action for aiding and abetting fraud, and an order striking all of Kessler's affirmative defenses and counterclaims in his October 16, 2018 answer;
- An order compelling Kessler to produce to Plaintiff and the Receiver all FrancInvest bank statements for all HSBC accounts, worldwide, from 2002 to present; and
- An order awarding Plaintiff attorneys' fees pursuant to BCL 626(e) and costs related to the motion.

For the following reasons, Plaintiff's motion is denied in its entirety.

DISCUSSION

I. Motion for Partial Summary Judgment

Summary judgment is a drastic remedy that a court will grant only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *DeCintio v Lawrence Hosp.*, 33 AD3d 329, 329 [1st Dept 2006]; *Orphan v Pilnik*, 66 AD3d 543, 544 [1st Dept 2009]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]; *Branda v MV Public Transp., Inc.*, 139 AD3d 636, 637 [1st Dept 2016]). If the party seeking summary judgment fails to meet their burden, the court must deny summary judgment "regardless of the sufficiency of the opposition papers" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]).

The court may also grant partial summary judgment in a plaintiff's favor as to liability where the plaintiff meets its initial burden on summary judgment and the defendant fails to provide more than an unsupported affidavit to negate plaintiff's claims (*see Life Sourcing Co., Ltd. v Shoez, Inc.*, 179 AD3d 439 [1st Dept 2020]).

In order to hold a defendant liable for aiding and abetting fraud, a plaintiff must establish: "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud" (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009] [citations and internal quotation marks omitted]; *Ginsburg Development Companies, LLC v Carbone*, 134 AD3d 890, 894 [2d Dept 2015]). Where issues of fact remain as to the defendant's "actual knowledge" of the fraud, the court must deny a motion for summary judgment (*see Arbor Asset Management, LLC v Singh*, 189 AD3d 527, 529 [1st Dept 2020]; *but see Priestly v Panmedix, Inc.*, 202 AD3d 417, 419 [1st Dept 2022] [finding that summary judgment was properly awarded to plaintiff on aiding and abetting fraud claim based on security agreement where it was "undisputed" that the defendant drafted the agreement and where a federal court already had determined that the agreement had no valid "bona fide purpose"]).

1. Underlying Fraud

Here, Plaintiff has established that Francois committed an underlying fraud. By a January 31, 2022 order, the court struck Francois's pleadings and ordered Pascal to enter judgment on notice (January 31, 2022 Order). The court then entered a judgment against Francois on a number of causes of action, including the fraud cause of action, in the total sum of $19,343,811.92 (March 1, 2022 Interlocutory Judgment).

Even if the court had not already found Francois liable for fraud, Plaintiff has provided documentation supporting the fraud cause of action. In order to establish the element of an underlying fraud, a plaintiff is required to show a "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material

omission, and injury" (*see William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 503 [1st Dept 2018]). Here, Plaintiff has provided documentation, including checks and bank statements, to illustrate that Francois made material misrepresentations of fact in order to cause JJS to distribute proceeds from the 2011 mortgage refinancing to himself. In particular, after Francois executed the mortgage refinancing on behalf of JJS (NYSCEF Doc. No. 123), First Choice Bank issued an August 3, 2011 check for $688,788.72 in "Loan Proceeds" to JJS (NYSCEF Doc. No. 1089, p. 1). JJS then purportedly issued a loan to FAC (NYSCEF Doc. No. 1089, pp. 9-10) that, as Plaintiff contended at oral argument, was **not** reflected on tax returns and was **never** actually issued (April 4, 2023 Oral Argument Transcript, NYSCEF Doc. No. 1646, pp. 25-27).[4] Rather, JJS ultimately transferred money directly to Francois personally through two checks:

- JJS Check #1115, dated March 5, 2012, for $192,365.61 to JF Simon to "Repay Loan Thru 12/31/11"
- JJS Check #103, dated January 24, 2012, for $261,339.18 to Jean Francois Simon

(NYSCEF Doc. No. 673, pp. 1-2). Thus, to put it simply, Plaintiff has provided evidence showing that Francois materially misrepresented that JJS used mortgage refinancing proceeds to make a loan in order to extract those proceeds for himself to the detriment of JJS.

Additionally, Plaintiff has provided support for the underlying fraud claim as it relates to the improperly executed power of attorney for Francine that Francois then used to enter into the 2011 purchase of the Hallandale Condo.[5] It is undisputed that the 2011 power of attorney was not translated into French for Francine (*see* June 23, 2011 Power of Attorney). Plaintiff has also established that Francine did not sufficiently understand English through referring to a letter that

[4] The court notes that while the Form 1120 filings of FAC and JJS reflect a "Loan Payable" to JJS as an FAC liability and a "Loan Receivable" from FAC as a JJS asset, the numbers clearly do not match up (NYSCEF Doc. No. 1089, pp. 11, 13 [reflecting a "Loan Payable" of $814,260 and a "Loan Receivable" of $291,565]).

[5] The JJS board minutes signed by Francine Simon that approved the purchase of the Hallandale Condo were acknowledged on June 30, 2011 (June 2011 Board Minutes, NYSCEF Doc. No. 1003), a week after she signed the relevant power of attorney (June 23, 2011 Power of Attorney).

Francine wrote seeking the avoidance of a different power of attorney that Francois induced her to enter into (*see* July 14, 2021 Francine Simon Letter ["I am asking you to do everything you can to void a power of attorney that Jean Francois had me sign . . . he asked me to accompany him to an appointment and he had me sign a document whose meaning I did not understand because I do not speak enough English"]).

Thus, at the very least, the evidence has already established that Francois defrauded JJS out of mortgage refinancing proceeds and fraudulently induced Francine to enter into a power of attorney so that he could cause JJS to agree to purchase the Hallandale Condo—a corporate opportunity that he ultimately purloined for himself.

2. Substantial Assistance

Plaintiff has also established that Kessler provided substantial assistance to Francois to perpetrate the fraud. Substantial assistance exists where "(1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated" (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]; *William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 504 [1st Dept 2018]; *see also Betz v Blatt*, 160 AD3d 696, 700 [2d Dept 2018] [finding that substantial assistance "requires an affirmative act on the defendant's part" and that "[m]ere inaction by an alleged aider or abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff"]).

Here, Plaintiff has provided evidence of a number of ways in which Kessler substantially assisted with Francois's fraud. First, Plaintiff has provided the court with a copy of the power of attorney that Francine signed showing that it was returnable to Kessler (June 23, 2011 Power of

Attorney). While Kessler testified that he assisted with a 2002 power of attorney but that he "had nothing to do with" several others that Francine executed subsequently (April 4, 2023 Oral Argument Transcript, pp. 41-42), he did not specifically deny involvement with the 2011 power of attorney. In any event, such self-serving testimony is insufficient to raise an issue of fact where it is clearly contradicted by the documentary evidence (*see Katsky Korins LLP v Moskovits*, 198 AD3d 566, 567 [1st Dept 2021]). The power of attorney was critical to Francois's fraud as Francois used it to cause JJS to enter into alleged self-dealing transactions. Thus, Plaintiff has established that Kessler provided affirmative assistance that proximately caused harm associated with the underlying fraud.

Plaintiff further established other instances in which Kessler provided substantial assistance to Francois's fraudulent scheme. Included among these instances are: (1) Kessler drafting an opinion letter on the 2011 mortgage (*see* August 3, 2011 Letter, NYSCEF Doc. No. 1039); (2) Kessler conveying the Hallandale Condo in 2011 to Francois personally—rather than to JJS—by warranty deed (Warranty Deed); and (3) Kessler negotiating the First Amended Administrative Services Agreement that allegedly functioned as a kickback for Francois entering into a below-market lease on the Premises (*see* Email from Kessler to Francois, NYSCEF Doc. No. 1093, pp. 1-2). All of these are examples of Kessler providing substantial assistance that contributed directly to the fraud. Therefore, Plaintiff has met his burden to establish this element, and Kessler has failed to negate any of Plaintiff's evidence on this issue.

3. Actual Knowledge of Fraud

However, Plaintiff has failed to establish as a matter of law that Kessler had knowledge of the underlying fraud. In order to establish a cause of action for aiding and abetting fraud, a plaintiff must show that the defendant had "**actual knowledge** of the fraud" (*Arbor Asset Management,*

LLC v Singh, 189 AD3d 527, 529 [1st Dept 2020] [emphasis added]). Mere "constructive knowledge" is insufficient for a cause of action for aiding and abetting fraud (*Gaughan v Russo*, 214 AD3d 592, 592 [1st Dept 2023]; *see also Oster v Kirschner*, 77 AD3d 51, 56 [1st Dept 2010] [finding that the requisite intent to commit fraud is not "constructive knowledge, but actual knowledge of the fraud as discerned from the surrounding circumstances"]). A "high degree of scienter is necessary to extend fraud liability under an aiding and abetting theory" (*VFP Investments I LLC v Foot Locker, Inc.*, 49 Misc3d 1210(A), *4 [Sup Ct, NY County Oct 22, 2015] [finding that plaintiff's conclusory allegations that defendant "knew" or "should have known" of defendant's misrepresentations were insufficient to overcome motion to dismiss] [citing *National Westminster Bank USA v Weksel*, 124 AD2d 144, 150 [1st Dept 1987]).

Here, the evidence that Plaintiff has provided to set forth Kessler's knowledge of the fraud leaves open a number of material questions of fact. In particular, the documents that Plaintiff provides in support of the claim that Kessler assisted with the fraudulent purchase of the Hallandale Condo fail to establish Kessler's actual knowledge of the fraud. Plaintiff refers the court to a June 18, 2011 resolution of the board and JJS's shareholders approving the purchase of Kessler's condominium (*see* June 2011 Board Minutes). However, as Plaintiff acknowledged at oral argument, it is undisputed that Kessler is not listed on the board resolution. Rather, Kessler's common-law partner Lynn Rosenberg is listed as a signatory. At oral argument, Plaintiff's counsel suggested that this was not a problem because Kessler "**would have** drafted [the] corporate resolution because he was the attorney for JJS" (April 4, 2023 Oral Argument Transcript, p. 13 [emphasis added]). Speculative claims such as this—however plausible they may sound—are not enough to succeed on summary judgment. Plaintiff has failed to meet his burden to establish that: (1) Kessler actually was the one who drafted the document approving JJS's purchase; and (2) even

if Kessler did draft it, he was aware that the document was part of a scheme by Francois to usurp the corporate opportunity of the Hallandale Condo for himself.

Nor did Plaintiff meet his burden through attaching the opinion letter on the 2011 mortgage refinancing (*see* August 3, 2011 Letter). Unlike the corporate resolution, the August 3, 2011 opinion letter was clearly written by Kessler, as it is on Kessler's letterhead and signed by Kessler (*id.*). However, the opinion letter makes no mention of the cash-out proceeds that Francois obtained from the refinancing or the Hallandale Condo that Francois allegedly purchased with those proceeds (*id.*). While Plaintiff has provided the court with the warranty deed from November 2011 showing that Kessler conveyed the Hallandale Condo to Francois (Warranty Deed), Plaintiff has not provided the court with clear evidence establishing that Kessler was part of JJS's decision to purchase the Hallandale Condo or that Kessler was aware that the 2011 mortgage refinancing would provide Francois with funds that Francois would use to usurp the corporate opportunity.

The newly produced condominium bylaws do not change this conclusion. During the oral argument on Plaintiff's prior motion for summary judgment, the court expressed great skepticism at Kessler's explanation for the conveyance of the property to Francois. Kessler had asserted that the condominium bylaws prohibited the sale of the property to anyone other than an individual (September 9, 2021 Oral Argument Transcript, pp. 52-53). In the September 10, 2021 order, the court required Kessler to produce the bylaws and ruled that if the bylaws "do not prohibit corporate ownership . . . the defendants will be deemed to have breached and the plaintiff may renew its cross-motion for summary judgment" (September 10, 2021 Decision and Order, pp. 2-3). While Kessler did not produce the bylaws, Plaintiff was able to provide the court with the bylaws, that clearly did not prohibit corporate ownership at the relevant time (By-Laws of Venetian Park Condominium II Association, Inc., p. 10 of Ex. 4). However, while this evidence is deeply

damaging to Kessler's explanation for the transaction, it does nothing to remedy the core defects in Plaintiff's assertion that Kessler had **actual knowledge** of fraud.

Plaintiff has presented nothing to indicate definitively that: (1) Kessler was part of the JJS decision to purchase the Hallandale Condo for itself; (2) Kessler knew that Francois was using proceeds from a fraudulent mortgage refinancing to purchase the condominium; and (3) Kessler, **at the time of the conveyance**, was actually aware that corporate ownership was permitted.[6]

Plaintiff additionally failed to meet his burden of establishing actual knowledge of fraud based on the power of attorney for Francine. The power of attorney, as recorded with the New York Department of Finance, shows that it was returnable to George Kessler (June 23, 2011 Power of Attorney). Additionally, Francine has, since signing the 2011 power of attorney, submitted a letter relating to a different power of attorney indicating that she "did not understand [the document] because she [did] not speak enough English" (July 14, 2021 Francine Simon Letter). However, Plaintiff has submitted no evidence indicating that Kessler was aware that Francine did not speak English sufficiently to understand the power of attorney. Further, Kessler testified at oral argument with respect to a 2002 power of attorney that he prepared for Francine that he "explained to her what the ramifications were" and that she "understood them entirely" (April 4, 2023 Oral Argument Transcript, p. 41). Thus, even if Plaintiff had met his initial burden on this point, Kessler's testimony would have raised an issue of fact as to his knowledge of Francine's capacity to understand the 2011 power of attorney.

[6] Rather, Kessler testified at the April 4, 2023 hearing that he "had inquired from one of the officers of the condominium organization could [he] sell to a corporation, [and] they said it would not be approved" (April 4, 2023 Oral Argument Transcript, p. 42). Whether or not this testimony is credible is not a matter for summary judgment (*see Mutual Benefits Offshore Fund, Ltd. v Zeltser*, 172 AD3d 648, 651 [1st Dept 2019] [finding that affidavits raised an "issue of credibility not to be resolved on a motion for summary judgment"]). Thus, Kessler would have raised an issue of fact as to this point even if Plaintiff had met his prima facie burden.

Similarly, Plaintiff did not establish that Kessler had actual knowledge of Francois's alleged scheme to receive kickbacks for negotiating a below-market lease for the Premises. Plaintiff asserts that Kessler negotiated the First Amended Administrative Services Agreement dated April 8, 2009, that provided Francois with a salary of $227,471 from an affiliate of the tenant for a "no-show job" (Reply Aff., ¶ 16). However, while Plaintiff is correct that the First Amended Administrative Services Agreement does indicate that notices should be sent to Kessler (First Amended Administrative Services Agreement, NYSCEF Doc. No. 1037, § 11), and while Plaintiff does appear to be correct that Kessler was involved in negotiating the agreement (*see* Email from Kessler to Francois, NYSCEF Doc. No. 1093, p. 2), Plaintiff has provided no evidence showing that Kessler had actual knowledge that this salary was in exchange for a below-market lease.

Therefore, Plaintiff's motion for partial summary judgment as to liability is denied.

II. Motion to Strike Kessler's Affirmative Defenses and Counterclaims, Motion to Compel, and Motion for Attorneys' Fees

In addition to partial summary judgment, Plaintiff's order to show cause also seeks: (1) an order striking all of Kessler's affirmative defenses and counterclaims; (2) an order compelling Kessler to produce all FrancInvest bank statements for HSBC accounts from 2002 to present; and (3) an order awarding Plaintiff attorneys' fees, pursuant to BCL 626(e), and costs (Amended Order to Show Cause). However, the court denies Plaintiff's motion to the extent it seeks to compel production of these documents as Plaintiff fails to provide substantive arguments in support of this vastly broad request for relief.[7]

[7] Plaintiff makes only cursory references in his opening papers to the request to compel production and appears to seek a much narrower date range than set forth in the order to show cause (*see* Supporting Papers, ¶ 28 ["Defendants were Ordered to produce an Independent Audit of the disposition of [relevant funds], which they did not do. Yet Defendants have no excuse not to simply produce the actual bank statements, for each month, from January 1, **2021** to present, of the HSBC Paris bank account to which those monies were sent"] [emphasis added]; *see also* ¶ 35).

Additionally, Plaintiff's request for attorneys' fees is denied as premature. BCL 626(e) allows a plaintiff in a derivative action to recover reasonable attorneys' fees, "[i]f the action on behalf of the corporation was successful, in whole or in part" (BCL 626[e]; *Board of Managers of 28 Cliff Street Condominium v Maguire*, 191 AD3d 25, 34 [1st Dept 2020]). Because the court denied Plaintiff's motion for partial summary judgment, Plaintiff has not prevailed on his eleventh cause of action against Kessler. Therefore, Plaintiff's motion is denied without prejudice to the extent it seeks attorneys' fees.

After making no argument in support of dismissing Kessler's counterclaims in the opening papers, Plaintiff argues on reply that Kessler's counterclaims should be dismissed because "[S]tockholders suing derivatively are not subject to counterclaim against them as individuals" (Reply Aff., pp. 12-13 [citing *Binon v Boel*, 66 NYS2d 425 (1st Dept 1946)]). The court need not consider this argument, that was raised for the first time on reply (*see Miller v Icon Group LLC*, 107 AD3d 585 [1st Dept 2013]). In any event, the third amended complaint to which Kessler counterclaimed contains both direct and derivative causes of action. Further, the court cannot determine as a matter of law that it was improper for Kessler to counterclaim against Pascal individually, particularly because JJS is a closely held corporation and its interests are tied closely with Pascal's own interests (*see Conant v Schnall*, 33 AD2d 326, 328 [3d Dept 1970] [citing general rule that a "shareholder bringing a derivative action is not subject to counterclaims against him individually" but then finding that the rule does not apply where the representative "is also the real party in interest" as the "sole shareholder, officer and director of the corporation"]).

Lastly, the court denies Plaintiff's motion to strike Kessler's answer. Striking an answer is an "extreme" penalty that requires a showing of "willful and contumacious" conduct by the defendant (*see Oppenheim & Macnow, P.C. v Worth*, 103 AD2d 687, 687 [1st Dept 1984]; *Harry*

Winston, Inc. v Eclipse Jewelry, Corp., 215 AD3d 421, 422 [1st Dept 2023] ["[S]triking a pleading is a drastic sanction in the absence of willful or contumacious conduct."]). Plaintiff has failed to make any arguments whatsoever to show that this standard has been met. Therefore, Plaintiff's request for this relief is denied.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Motion Seq. No. 26 is denied in its entirety; and it is further

ORDERED that there shall be no further motions whatsoever without prior conference with the court, Plaintiff is precluded from making any other motions for summary judgment until after the note of issue is filed and is precluded from making any further motions for summary judgement at all against Defendant Kessler.

07/07/2023
DATE

MELISSA CRANE, 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**