SPV-LS LLC v Citron
2018 NY Slip Op 30681(U)
April 16, 2018
Supreme Court, New York County
Docket Number: 152783/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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SPV-LS LLC, FINANCIAL LIFE SERVICES, LLC, SPV II LLC,

Plaintiff,

- v -

ANDREW CITRON, REVAZ CHACHANASHVILI LAW GROUP PLLC, GERALD KROLL, KROLL LAW CORPORATION, ELI FIXLER, DAVID GRAUBARD, KERA & GRAUBARD LLP

Defendant.

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INDEX NO. 152783/2017

MOTION DATE

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 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, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 122, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 147, 150, 151

were read on this application to/for Dismiss

HON. SALIANN SCARPULLA:

In this action for tortious interference with contract, civil conspiracy to commit tortious interference, violation of New York Judiciary Law §487 ("Judiciary Law §487), respondeat superior, negligent misrepresentation, and aiding abetting tortious interference, defendants Andrew Citron ("Citron"), Gerard Kroll ("Kroll"), Kroll Law Corporation ("Kroll Law"), Eli Fixler ("Fixler"), David Graubard ("Graubard"), and Kera & Graubard, LLP ("K&G") (collectively, "Defendants")[1] each move to dismiss the

[1] Defendant Revaz Chachanashvili Law Group PLLC moved to dismiss the complaint, which I granted for the reasons set forth on the record on October 18, 2017.

complaint against them. Plaintiffs SPV-LS, LLC ("SPV"), Financial Life Services LLC ("FLS"), and SPV II LLC ("SPV II") (collectively, "Plaintiffs") oppose each motion. The motions are consolidated for disposition herein.

This action arises out of an underlying dispute over proceeds of a stranger-originated life insurance policy (the "Policy"), which insured the life of Nancy Bergman ("Nancy") for ten million dollars. The underlying dispute has resulted in multiple federal lawsuits across the country. Defendants in this action are purported to have represented or worked with Plaintiffs' adversaries in some capacity prior to and/or in the related federal actions. Because the facts of the underlying dispute have already been set forth in extensive detail in previous decisions in the related federal actions,[2] they will only be briefly repeated in this decision.

Background[3]

In or around October 2006, Nancy obtained the Policy from Transamerica Life Insurance Company ("Transamerica"). Nancy, as grantor, and Nacham Bergman ("Nacham"), as trustee, then created the N Bergman Insurance Trust (the "Trust") and Nancy transferred ownership of the Policy to the Trust. Plaintiffs allege that the premium

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[2] *See, e.g.*, *SPV-LS, LLC v Transamerica Life Ins. Co.*, 2017 WL 3668765 (DSD Aug. 23, 2017); *SPV-LS, LLC v Transamerica Life Ins. Co.*, 2017 WL 1284805 (DSD Apr. 5, 2017); *SPV-LS, LLC v Transamerica Life Ins. Co.*, 2016 WL 1466529 (DSD Apr. 14, 2016); *In re N. Bergman Ins. Tr.*, 2014 WL 1258168 (Bankr EDNY Mar. 26, 2014).

[3] Unless otherwise specified, all facts are taken from the complaint, *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), documents referenced in the complaint, or from court filings and decisions in the underlying federal proceedings, of which I may take judicial notice. *See, RGH Liquidating Tr. v Deloitte & Touche LLP*, 71 AD3d 198, 207 (1st Dept 2009], *revd on other grounds*, 17 NY3d 397 (2011).

payments for the Policy were funded by a group of investors ("Investors") in exchange for either a portion of the proceeds from the sale of the Policy or Nancy's death benefits if she died before the Policy was sold.

Plaintiffs allege that in November 2009, Nacham, as trustee, entered into a Life Insurance Policy Purchase and Sales Agreement (the "Sale Agreement") with FLS, whereby FLS agreed to purchase the Policy from the Trust for $1,350,000. Pursuant to the Sales Agreement, if any of the Trust's material representations or warranties were incorrect, FLS could either require the Trust to repurchase the Policy or move forward with the transaction but reduce the purchase price by half.

In or around December 2009, FLS learned that the Trust failed to make a required premium payment to Transamerica, causing the Policy to enter a grace period, and that some of the Trust's material representations and warranties were false at the time of the sale. Upon learning this information, FLS attempted to either rescind the Sale Agreement or proceed with the purchase at the reduced price, however the Trust refused to comply.

As a result, FLS filed a lawsuit in the United States District Court for the Eastern District of New York, *Financial Life Services, LLC v. N. Bergman Insurance Trust*, Case No. 2:10-cv-04499-DRH-AYS ("EDNY I Action"), against the Trust seeking specific performance under the Sale Agreement in October 2010. On January 9, 2012, an order was issued in the EDNY I Action directing that the sale of the Policy occur by auction by February 7, 2012.

Plaintiffs contend that, on February 6, 2012, the Trust filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the Eastern District of New York, *In re*

N. Bergman Ins. Tr., Case No. 1-12-40822-nhl ("Bankruptcy Action"), to stay the EDNY I Action and stop the auction of the Policy. Plaintiffs alleges that petition in the Bankruptcy Action was fraudulently signed by one of the Investors, Jacob Herbst ("Jacob"), who also falsely testified in that proceeding.

The automatic stay in the Bankruptcy Action was lifted by court order on June 6, 2012, and the Bankruptcy Action was dismissed on August 1, 2012. Subsequently, FLS purchased the Policy through an auction for $1,194,522. The Policy was later transferred to SPV, who is the current owner of the Policy. Plaintiffs allege that, from December 2009 through April 2014, SPV, FLS, and some entities affiliated with FLS paid $2,128,441.52 in Policy premiums.

Plaintiffs claim that in February 2013, the Investors – in furtherance of a purported scheme to prevent Plaintiffs from collecting the Policy proceeds – hired an attorney, Michael Kanzer ("Kanzer") to reopen the Bankruptcy Action and appeal the court order lifting the automatic stay. Plaintiffs believe that, during this time, Fixler acted as a liaison between the Investors and the Trust's attorneys. On June 6, 2013, Kanzer filed a motion on behalf of the Trust to reopen the Bankruptcy Action, which was denied on March 26, 2014. *In re N. Bergman Ins. Tr.*, 2014 WL 1258168 (Bankr EDNY Mar. 26, 2014).

Nancy died on April 6, 2014. On April 10, 2014, Kanzer filed the initial appeal documents to appeal the March 26, 2014 order denying the Trust's motion to reopen the Bankruptcy Action. Afterwards, Graubard was retained as appellate counsel by the Trust to perfect the appeal. Graubaurd filed a motion on May 7, 2014 seeking a temporary restraining order to stay the disbursement of the Policy proceeds pending the disposition

of the appeal; the temporary restraining order was denied on June 5, 2014. Although Graubard was retained to perfect the appeal, he never did – rather, he withdrew the appeal on January 1, 2015.

Meanwhile, Transamerica received competing claims to the Policy proceeds. Plaintiffs allege that on April 22, 2014 Nachman sent Transamerica a letter which was drafted by some of the Investors; in this letter, Nachman claimed that he was the rightful Policy beneficiary, that he never transferred ownership of the Policy, and that he commenced legal proceedings to establish his ownership.

In May 2014, the Investors allegedly conspired to have Jacob's wife, Malka Silberman ("Malka"), appear in the Bankruptcy Action and the EDNY I Action and claim that she was a trustee of the Trust. Malka was then supposed to seek to void the judgments in those actions and the auction sale of the Policy to FLS. Plaintiffs allege that the Investors forged and back-dated trust documents that shows that Nachman resigned as trustee and named Malka as a successor trustee of the Trust.

The plan to have Malka intervene and to forge the trust documents was set out in a series of emails, which Plaintiffs annexed to the complaint as Exhibit A. Graubard and Citron (an attorney advisor for Malka and the Investors) allegedly first learned of this plan on May 20, 2014, when these emails were forwarded to them by one of the Investors. Plaintiffs also allege that, once Graubard became aware of the Investor's plan, Graubard refused to represent Malka in the Bankruptcy Action because he was already representing the Trust.

Plaintiffs allege that on or around May 29, 2014, the Investors drafted and sent a letter from Malka to Transamerica with the forged trust documents claiming that Malka has been the Trust's sole trustee since March 27, 2008, and that the sale of the Policy and subsequent litigation proceedings were fraudulent.

Because of the competing claims to the Policy proceeds, Transamerica refused to distribute the Policy proceeds. On June 13, 2014, SPV initiated a breach of contract action against Transamerica to recover the Policy proceeds in the United States District Court for the District of South Dakota, *SPV-LS, LLC v Transamerica Life Ins. Co.*, Case No. 4:14-cv-04092-LLP ("South Dakota Action"). On June 17, 2014, Transamerica answered the complaint by commencing a third-party interpleader action pursuant to 28 USC §1335 against Plaintiffs, Nachman as the Trust's trustee, Malka as the Trust's successor trustee, and Nancy's Estate.[4]

Shortly thereafter, Transamerica deposited the proceeds into the court in the South Dakota Action pursuant to 28 USC §13325(a)(2). On March 30, 2015, Transamerica's motion to be discharged from the action was preliminarily granted "to the extent that Plaintiff SPV and all Third Party Defendants are enjoined from instituting any action or other proceeding against Transamerica with regard to the Policy benefits at issue here."

[4] Plaintiffs allege that the Nancy's Estate did not exist at the commencement of the South Dakota Action. Rather, the Investors allegedly created the Estate – with the assistance of Fixler and Citron – in early 2015. Kroll was retained to represent the Estate in the South Dakota Action in August 2015.

SPV-LS, LLC v Transamerica Life Ins. Co., 2015 WL 13649173, at *6 (DSD Mar. 30, 2015).[5] By order dated June 14, 2016, Transamerica was discharged from liability as Defendant and Third-Party Plaintiff and was awarded attorney fees. *See* Kowlowitz Aff., Ex. I (NYSCEF 110).

The court in the South Dakota Action ultimately found that Plaintiffs were entitled to the Policy proceeds. *See SPV-LS, LLC v Transamerica Life Ins. Co.*, CV 14-4092, 2017 WL 3668765 (DSD Aug. 23, 2017); *SPV-LS, LLC v Transamerica Life Ins. Co.*, 2017 WL 1284805, (DSD Apr. 5, 2017); *SPV-LS, LLC v Transamerica Life Ins. Co.*, 2016 WL 1466529 (DSD Apr. 14, 2016).

Plaintiffs also commenced an action for fraud against numerous individuals, including Nachman, Malka, Jacob, and Nancy's Estate, in the United States District Court for the Eastern District of New York, *SPV-LS, LLC, et al. v Bergman, et al.*, Case No. 1:15-cv-06231-KAM-CLP ("EDNY II Action") on October 29, 2015.[6]

Plaintiffs allege that Kroll and Citron engaged in numerous acts of discovery misconduct throughout each of the underlying litigations. Plaintiffs brought a motion for

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[5] In granting this relief, the court noted that "there is no indication that Transamerica is independently liable to any claimant" but because the trustees had not yet responded to the motion for discharge, the court directed them "to respond to Transamerica's motion for discharge by indicating whether or not they have any objection to Transamerica's release and discharge from any further liability to any party in this action arising out of the Policy." *Id.* at *5.

[6] In October 2016, Plaintiffs filed a pre-motion letter seeking leave to amend their complaint in the EDNY II Action to add numerous defendants, including Citron, Kroll, Fixler, and Graubard; the proposed claims against Citron, Kroll, Fixler, and Graubard are largely repetitive of the claims asserted here.

sanctions and monetary damages against some of the attorneys representing the Trust and the Estate, including Kroll, in the South Dakota Action. The court denied Plaintiffs' motion for sanctions against the attorneys. *SPV-LS, LLC v Transamerica Life Ins. Co.*, 2017 WL 3668765 (DSD Aug. 23, 2017).

SPV also commenced several collateral discovery actions within the context of the South Dakota Action, including two actions in the Central District of California – *In re: Rule 45 Subpoena Issued to Gerald Kroll*, Case No. 2:16-MC-00115-VAP-AGR and *In re: Rule 45 Subpoena Issued to Gerald Kroll*, Case No. 2:16-MC-00131-VAP-AGR (collectively referred to as the "California Discovery Actions") – where SPV currently has two pending motions for sanctions against Kroll because of his alleged misconduct during discovery in the South Dakota Action. *See SPV-LS, LLC v Transamerica Life Ins. Co*, CV 14-4092, 2017 WL 3668765, at *4 (DSD Aug. 23, 2017). SPV commenced another discovery action in the Southern District of New York related to the South Dakota Action to compel Citron (and others) to comply with a subpoena. *In re: Rule 45 Subpoenas Issued to Nelson Bloom, Stuart Davis, and Andrew Citron*, Case No. 1:16-mc-00156-P1-AJP ("SDNY Discovery Action").

Plaintiffs commenced this action in March 2017. In the complaint, Plaintiffs assert causes of action for: (1) tortious interference with contract against Citron, Kroll, Graubard, and Fixler; (2) civil conspiracy to commit tortious interference against Citron, Kroll, Graubard, and Fixler; (3) violation of Judiciary Law §487 against Citron, Kroll, and Graubard; (4) respondeat superior against K&G and Kroll Law; (5) negligent

misrepresentation against Citron, Kroll, and Graubard; and (6) aiding and abetting tortious interference with contract against Fixler.

Citron moves to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7) and CPLR 3016(b). Kroll and Kroll Law collectively move to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7). Graubard and K&G collectively move to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), & (7). Fixler moves to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7) and seeks sanctions against Plaintiffs pursuant to 22 NYCRR §130-1.1 for costs and attorneys' fees.

Discussion

On a CPLR 3211 motion to dismiss, "the pleading is to be afforded a liberal construction" – the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87–88 (internal citations omitted); *see also Hedges v E. Riv. Plaza, LLC*, 126 AD3d 582 (1st Dept 2015). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) citing *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994).

I. Tortious Interference with Contract

To plead cause of action for tortious interference with a contract, Plaintiffs must allege "the existence of a valid contract between the plaintiff and a third party,

defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996) (internal citations omitted); *see also Burrowes v Combs*, 25 AD3d 370, 373 (1st Dept 2006).

Here, Plaintiffs' claim for tortious interference with contract against Citron, Kroll, Graubard, and Fixler fails as a matter of law because Transamerica did not breach its contract with SPV by interpleading the Policy proceeds. *See Murataj v Dream Dragon Productions, Inc.*, 72 AD3d 527, 527 (1st Dept 2010); *Marks v Smith*, 65 AD3d 911, 916 (1st Dept 2009). "Where a stakeholder is allowed to bring an interpleader action, rather than choosing between adverse claimants, its failure to choose between the adverse claimants (rather than bringing an interpleader action) cannot itself be a breach of a legal duty." *Prudential Ins. Co. of Am. v Hovis*, 553 F3d 258, 265 (3d Cir 2009) (internal citations omitted); *Union Cent. Life Ins. Co. v Berger*, 2012 WL 4217795, n.13 (SDNY 2012), *affd*, 612 Fed Appx 47 (2d Cir 2015) ("To the extent that these counterclaims seek to predicate liability on [the interpleader's] refusal to pay over the Policy proceeds . . . [they] fail as a matter of law.") (internal citations omitted). *Accord Bank of New York v First Millennium, Inc.*, 2008 WL 953619, at *7 (SDNY 2008); *U.S. Tr. Co. of New York v Alpert*, 10 F Supp 2d 290, 307 (SDNY 1998), *affd sub nom. U.S. Tr. Co. of New York v*

Jenner, 168 F3d 630 (2d Cir 1999); *Clearlake Shipping PTE Ltd. v O.W. Bunker (Switzerland) SA*, 2017 AMC 656 (SDNY 2017).[7]

Plaintiffs' argument that Transamerica conceded that it breached its contract with SPV by utilizing statutory interpleader rather than choosing which adverse claimant is entitled to the Policy proceeds is not supported by facts[8] or law. *See generally Ashton v Josephine Bay Paul and C. Michael Paul Found., Inc.*, 918 F2d 1065, 1069 (2d Cir 1990) ("Neither the language of Section 1335 nor the resultant case law limits interpleader jurisdiction to cases in which the plaintiff has conceded liability to one or all of the defendants.").

Moreover, Plaintiffs have failed to allege any breach of contract based on an independent claim of liability. While a stakeholder may be independently liable to an adverse claimant for a breach of a legal duty, any "'independent' claims for relief . . . must be based on wrongful conduct independent from the filing of an interpleader, or the retention of interpleaded assets pending direction from the court." *Bank of New York*, 2008 WL 953619, at *7 (internal citation omitted); *Union Cent. Life Ins. Co.*, 2012 WL 4217795, at *11.

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[7] "It is immaterial that . . . [the] breach of contract claim against [the stakeholder] was brought in a separately-filed action, rather than as a counterclaim. To allow such a claim to proceed 'would run counter to the very idea behind interpleader remedy.' Because [the stakeholder] has brought an appropriate interpleader action, it is shielded from liability as to . . . [the] breach of contract claim." *Reliance Std. Life Ins. Co. v Winiarski*, 2012 WL 1564540, at *3 (WD Pa 2012) quoting *Prudential Ins. Co. of Am.*, 553 F.3d at 265.

[8] In the South Dakota Action, Transamerica expressly denied the allegations that it breached its contract with SPV. Nunberg Aff, Ex. H (NYSCEF 82).

Plaintiffs' allegations that Transamerica should have paid SPV the Policy proceeds "rather than instituting the interpleader is not an 'independent' claim -- it is a claim to the stake itself." *Clearlake Shipping PTE Ltd. v O.W. Bunker (Switzerland) SA*, 2017 AMC 656, 666 (SDNY 2017) (internal citations omitted). Accordingly, Plaintiffs' first cause of action for tortious interference with contract is dismissed in its entirety.

Because Plaintiffs' claim for tortious interference fails as a matter of law, Plaintiffs' second claim for civil conspiracy to commit tortious interference against Citron, Kroll, Graubard, and Fixler and sixth claim for aiding and abetting tortious interference against Fixler must also be dismissed. *See, e.g.*, *Genger v Genger*, 121 AD3d 270, 279 (1st Dept 2014); *Waggoner v Caruso*, 68 AD3d 1, 6 (1st Dept 2009), *affd*, 14 NY3d 874 (2010) ("[T]he State of New York does not recognize an independent cause of action in tort for conspiracy.") (internal citations omitted).

II. Judiciary Law §487

An attorney may be civilly liable for treble damages to an injured party for a violation of Judiciary Law §487 if the attorney is found to be "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." Judiciary Law §487(1). Allegations of the defendant attorney's deceit "must be stated with particularity." *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 (1st Dept 2015) (internal citation omitted); *Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297 (1st Dept 2004).

Relief under this statute "'is not lightly given' and requires a showing of 'egregious conduct or a chronic and extreme pattern of behavior' on the part of the

defendant attorneys that caused damages." *Facebook, Inc.*, 134 AD3d at 615 citing *Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600, 601 (1st Dept 2014) and *Savitt v. Greenberg Traurig, LLP*, 126 A.D.3d 506, 507 (1st Dept 2015); *see also Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 (1st Dept 2008); *Solow Mgt. Corp. v Seltzer*, 18 AD3d 399, 399-400 (1st Dept 2005).

For conduct to be actionable under Judiciary Law §487, the alleged deceit must have either been directed at a court or have occurred during the pendency of a judicial proceeding. *Costalas v Amalfitano*, 305 AD2d 202, 204 (1st Dept 2003); *see also Jacobs v Kay*, 50 AD3d 526, 527 (1st Dept 2008). Further, the "reach of [Judiciary Law §487] extends only to misconduct by attorneys in connection with proceedings before New York courts." *All. Network, LLC v Sidley Austin LLP*, 43 Misc 3d 848, 864-65 (Sup Ct, NY County 2014) (internal citations omitted) citing *Schertenleib v Traum*, 589 F2d 1156, 1166 (2d Cir 1978); *Weksler v. Kessler*, 2008 WL 2563483 (Sup Ct, NY County 2008); *S. Blvd. Sound, Inc. v Felix Storch, Inc.*, 165 Misc 2d 341, 344 (Civ Ct, NY County 1995), *affd as mod*, 167 Misc 2d 731 (App Term, 1st Dept 1996).[9]

a. Citron

Plaintiffs allege that Citron violated Judiciary Law §487 by: (1) assisting Malka prepare a false claim to the Policy proceeds in May 2014; (2) preparing and drafting

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[9] *Accord A.R.K. Patent Intern., LLC v Levy*, 50 Misc 3d 1204(A) (Sup Ct, Monroe County 2014), *affd sub nom. A.R.K. Patent Intern., L.L.C. v Levy*, 134 AD3d 1460 (4th Dept 2015); *Kaye Scholer LLP v CNA Holdings, Inc.*, 2010 WL 1779917, at *1 (SDNY 2010); *Cindy Royce Creations, Ltd. v Simmons & Simmons*, 1993 WL 288291, at *5 (SDNY 1993); *Nardella v Braff*, 621 F Supp 1170, 1172 (SDNY 1985). *But see Cinao v. Reers*, 27 Misc 3d 195 (Sup Ct, Kings County 2010).

pleadings for Nacham and Malka which were allegedly based on false information and were filed in the South Dakota Action; and (3) by stonewalling discovery requests and withholding relevant responsive documents in the South Dakota Action and the EDNY II Action.

Judiciary Law §487 does not pertain to any of Plaintiffs' allegations regarding Citron's May 2014 conduct in assisting Malka file a claim with Transamerica for the Policy proceeds, because the conduct was neither directed at a court nor did it occur during the pendency of any judicial proceeding. *See Costalas*, 305 AD2d at 204 (allegations that defendant attorney deceived client to enter into sham corporate agreement was not directed at the court); *Hansen v Caffry*, 280 AD2d 704, 705 (3d Dept 2001) ("defendant's preparation of deeds in connection with a real estate transaction, conduct that is not directed at a court").

Likewise, Plaintiffs' allegations, that Citron deceived the court in the South Dakota Action by preparing – but not filing – pleadings based on false information, are not within the bounds of Judiciary Law §487. *See, e.g.*, *All. Network, LLC*, 43 Misc 3d at 864-65; *Schertenleib* 589 F2d at 1166. Although Plaintiffs allege that Citron acted with the intent to deceive Plaintiffs and the courts in the EDNY I, EDNY II, Bankruptcy, and South Dakota Actions, the complaint does not contain any allegations that Citron's conduct was directed at the courts or during the EDNY I or Bankruptcy Actions. Moreover, while Plaintiffs allege that Citron assisted in stonewalling discovery requests in the EDNY II Action, Plaintiffs fail to support the allegation with any particularity.

The only specifically alleged discovery misconduct by Citron is regarding his compliance with a subpoena in the SDNY Discovery Action, which was brought as a related proceeding to the South Dakota Action. SPV already moved the court in the SDNY Discovery Action for sanctions and contempt against Citron for this alleged noncompliance. In a decision dated June 29, 2016, the court in the SDNY Discovery Action ordered Citron to appear for another deposition but did not hold him in contempt nor did it order sanctions against him. *In re: Rule 45 Subpoenas Issued to Nelson Bloom, Stuart Davis, and Andrew Citron*, Case No. 1:16-mc-00156-P1-AJP, June 29, 2016 Order (ECF Docket No. 41). By order dated September 2, 2016, the court ordered Citron to complete the outstanding document production or face contempt and sanctions. *Id.*, September 2, 2016 Order (ECF Docket No. 74).

As such, Plaintiffs are precluded from re-litigating Citron's conduct in the SDNY Action.[10] As discussed above, Plaintiffs have failed to state a cause of action against Citron for violating Judiciary Law §487, and it must be dismissed.

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[10] "[I]f the allegations of the Judiciary Law § 487 claim are predicated upon the same conduct of the underlying lawsuit and a full and fair opportunity to contest the alleged wrongful conduct was given, they would be barred by the doctrines of res judicata and collateral estoppel." *Gillen v. McCarron*, 2013 WL 10569075 (Sup Ct, Suffolk County 2013), *affd*, 126 AD3d 670 (2d Dept 2015). *See also Doscher v Mannatt, Phelps & Phillips, LLP*, 148 AD3d 523, 523–24 (1st Dept 2017); *Pentalpha Enterprises, Ltd. v Cooper & Dunham LLP*, 91 AD3d 451, 451–52 (1st Dept 2012); *Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297 (1st Dept 2004); *Fagan v. Moerdler*, 2011 WL 939275 (Sup Ct, NY County 2011).

b. Kroll

Plaintiffs allege that, although Kroll represented the Estate in the South Dakota Action, Kroll had a secret agreement with the Trust's investors to also advocate on behalf of the Trust's interests; this created a conflict of interest for Kroll because the Trust and the Estate were making competing claims to the Policy proceeds and, as a result, Kroll was unable to ethically represent the Estate in the South Dakota Action. Plaintiffs also allege that Kroll attempted to conceal his relationship with the Trust from Plaintiffs during discovery by significantly delaying discovery production and producing a forged retainer agreement in the California Discovery Actions that are related to the South Dakota Action.

Essentially all the allegations regarding Kroll's misconduct during discovery have been the subject of prior motions for sanctions in the South Dakota Action and the California Discovery Actions. On August 23, 2017, the court in the South Dakota Action denied Plaintiffs' motion for sanctions against Kroll because there was "no willful abuse of the judicial process." *SPV-LS, LLC v Transamerica Life Ins. Co.*, CV 14-4092, 2017 WL 3668765, at *4 (DSD Aug. 23, 2017).[11] There, the court noted that "the Estate did ultimately substantially comply [with discovery] in the proceedings," *id.* at *1, and that

[11] Although this finding did not relate to the claim that Kroll "forged a retainer agreement and provided that forgery in discovery," *id.*, the retainer agreement is currently at issue and being litigated in SPV's motion for sanctions against Kroll in the California Discovery Actions. *In re: Rule 45 Subpoena Issued to Gerald Kroll*, Case No. 2:16-MC-00115-VAP-AGR, Transcript of June 23, 2017 hearing for motion for sanctions (ECF Docket No. 106).

the "lack of candor of the Defendants themselves necessitated extensive discovery." *Id.* at *6.

Even assuming that Plaintiffs are not precluded from bringing a claim here against Kroll based on identical conduct that was already litigated and decided, Kroll's alleged deceit and misconduct that occurred outside of New York, within the context of the South Dakota Action or the California Discovery Actions, are not within the purview of Judiciary Law §487. *See, e.g., All. Network, LLC*, 43 Misc 3d at 864-65; *Schertenleib* 589 F2d at 1166.

Plaintiffs also allege that Kroll appeared in depositions held in New York County,[12] but the only specific allegations regarding Kroll's alleged deceit during the depositions in New York was during the deposition of Jacob, which was held in the Southern District of New York. During that deposition, Plaintiffs allege that Kroll "held himself out as adverse to Jacob Herbst, cross-examining him as if Attorney Kroll were opposing counsel." Compl. ¶294.

This single allegation is neither egregious nor does it rise to the level of a "chronic and extreme pattern of legal delinquency" and is thus insufficient to support a claim for a violation of Judiciary Law §487. *Solow Mgt. Corp*, 18 AD3d at 399-400 (internal citations omitted); *see also Strumwasser v Zeiderman*, 102 AD3d 630, 631 (1st Dept 2013); *Solow Mgt. Corp*, 18 AD3d at 399-400. Further, Plaintiffs have failed to allege

[12] The complaint does not specify whether these depositions were related to the South Dakota Action or the EDNY II Action.

any damages proximately caused by any of Kroll's alleged misconduct.[13] *See Strumwasser*, 102 AD3d at 631; *Kaminsky*, 59 AD3d at 13. Therefore, Plaintiffs' Judiciary Law §487 claim against Kroll is dismissed.

c. Graubard

On May 7, 2014, Graubard filed a temporary restraining order in the Bankruptcy Action to stay the disbursement of the Policy proceeds, pending the determination of another of the Trust's attorney's motion to stay the proceedings pending the appeal of the court's denial to reopen the Bankruptcy Action, both of which were denied. *See* Nunberg Aff., Exs. B & C (NYSCEF 76 & 77). Graubard never perfected the appeal and withdrew it on January 1, 2015.

Plaintiffs allege that after Graubard filed the temporary restraining order, he learned of the fraudulent scheme to forge trust documents; to support this allegation, Plaintiffs rely on a series of emails annexed to the complaint as Exhibit A that elucidates the scheme and which was forwarded to Graubard on May 20, 2014. Plaintiffs do not allege that Graubard's single court filing in the Bankruptcy Action contained any misrepresentations or false statements. Rather, Plaintiffs assert that Graubard's

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[13] *See SPV-LS, LLC*, CV 14-4092, 2017 WL 3668765 (DSD Aug. 23, 2017) ("It is speculation to say whether or not the Court would have granted summary judgment at some earlier date if discovery had been more forthcoming.") (The dispute over the allegedly forged retainer agreement "did not prevent nor delay SPV from getting summary judgment in its favor."); *SPV-LS, LLC Transamerica Life Ins. Co.*, CV 14-4092, 2017 WL 899882, at *8 (DSD Mar. 6, 2017) ("the Court does not find that the existence of an agreement between the Estate and Trust is relevant to the subject matter of the claims at issue").

knowledge of the fraudulent scheme to forge trust documents and his failure to inform the court in the Bankruptcy Action of this scheme gives rise to liability under Judiciary Law §487.

Plaintiffs argue that, where an attorney has knowledge of a client's fraud and fails to inform the court of that fraud, that attorney's failure is sufficient to state a claim under Judiciary Law § 487. However, the cases that Plaintiffs rely on are inapposite. Unlike the defendant attorneys in *Schindler v Issler & Schrage, P.C.*, 262 AD2d 226 (1st Dept 1999) and *Guardian Life Ins. Co. of Am. v Handel*, 190 AD2d 57, 61 (1st Dept 1993) – both of whom had knowledge of their clients' alleged fraud *before* commencing the actions – Plaintiffs allege that Graubard learned of his clients' alleged fraudulent intent *after* filing the temporary restraining order in the Bankruptcy Action. *See Facebook, Inc.*, 134 AD3d at 615 (failure to state cause of action under Judiciary Law §487 where record shows that defendant attorney learned of fraud two days after filing an amended complaint).

Even if Graubard did know of the alleged fraudulent scheme before filing the temporary restraining order, Plaintiffs' fail to allege that this single filing contained any misrepresentations. As alleged, Graubard's conduct was neither egregious nor chronic and extreme. Plaintiffs failed to state a cause of action under Judiciary Law §487 against Graubard and it must be dismissed.

III. Negligent Misrepresentation

To state a cause of action for negligent misrepresentation, a plaintiff must plead: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was

incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007) (internal citations omitted).

Plaintiffs allege Citron, Kroll, and Graubard made false statements regarding the Policy throughout the course of each underlying litigation, which Plaintiffs relied on; as a result, Plaintiffs were forced to conduct investigations, discovery, and draft and file motions to determine the accuracy of the representations, which ultimately cost Plaintiffs millions of dollars in costs, fees, and expenses.

Plaintiffs argue that as attorneys, Citron, Kroll, and Graubard have a duty to impart correct information to an adversary when representing a client in litigation. However, "[b]efore [this] duty can be imposed . . . an allegation of negligent misrepresentation must be based on a special [or privity-like] relationship between the parties." *Delcor Labs., Inc. v Cosmair, Inc.*, 169 AD2d 639 (1st Dept 1991) (internal citation and quotation marks omitted); *see generally Aglira v Julien & Schlesinger, P.C.*, 214 AD2d 178, 183 (1st Dept 1995) ("An attorney does not owe a duty of care to his adversary or one with whom he is not in privity.") (internal citation omitted).

Plaintiffs fail to allege the existence of "either privity of contract between" themselves and Citron, Kroll, and Graubard "or a relationship so close as to approach that of privity." *Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 372 (2010) (internal citations and quotation marks omitted); *see AG Capital Funding Partners, L.P. v State St. Bank and Tr. Co.*, 5 NY3d 582, 595 (2005).

No privity or special relationship arises from Citron, Kroll, and Graubard representing Plaintiffs' adversaries in the underlying actions. *See, e.g., AG Capital*

Funding Partners, L.P., 5NY3d at 595 (no actual or near privity between plaintiff and attorney for plaintiff's adversary in underlying litigation); *Natl. Westminster Bank USA v Weksel*, 124 AD2d 144, 146 (1st Dept 1987) (dismissing negligence claim against defendant law firm because "an attorney may not be held liable for negligence in the provision of professional services adversely affecting one with whom the attorney is not in contractual privity") (internal citations omitted); *Raghavendra v. Brill*, 2014 WL 413810 (Sup Ct, NY County 2014) (internal citations omitted) (dismissing claim for negligent misrepresentation upon a finding that "no special duty of care" was owed to plaintiff by defendant as an adversary in litigation, absent the existence of a fiduciary relationship); *Anderson v Azzaro*, 31 Misc 3d 1222(A) (Sup Ct, Nassau County 2011) (no privity because plaintiff and adversary's attorney had a "typical adversarial relationship").

Because Plaintiffs fail to allege the existence of privity or a special relationship with Citron, Kroll, or Graubard, they have failed to state a cause of action negligent misrepresentation. Therefore, Plaintiffs' fifth cause of action for negligent misrepresentation against Citron, Kroll, and Graubard is dismissed.

IV. Respondeat Superior

Because all claims have been dismissed against Kroll and Graubard, Plaintiffs' fourth cause of action for respondeat superior against K&G and Kroll Law must also be dismissed.

V. Sanctions

Finally, although Plaintiffs have been seeking sanctions against Defendants in the context of many other proceedings, I find that Plaintiffs conduct in commencing this action against Fixler was not sufficiently frivolous to merit sanctions. Therefore, I deny Fixler's request for sanctions pursuant to 22 NYCRR §130-1.1.

In accordance with the foregoing it is

ORDERED that the motions to dismiss the complaint are granted, and the complaint is dismissed in its entirety against defendants Andrew Citron, Gerard Kroll, Kroll Law Corporation, Eli Fixler, David Graubard, and Kera & Graubard, LLP; and it is further

ORDERED that defendant Eli Fixler's motion for sanctions is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

4/16/18
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE