

**Savitt v Krinsky**

2020 NY Slip Op 31590(U)

May 27, 2020

Supreme Court, New York County

Docket Number: 154052/2019

Judge: W. Franc Perry

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

RICHARD SAVITT,

Plaintiff,

- v -

PERY KRINSKY, CHRISTINA TROIANO, MICHELLE
KLIEGMAN, SCOTT SAVITT, KRINSKY PLLC

Defendant.

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INDEX NO. 154052/2019
MOTION DATE 11/20/2019
MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 16, 17, 25, 26

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 18, 19, 22, 23, 24

were read on this motion to/for AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 14, 15, 20, 21, 27

were read on this motion to/for DISMISS

In this defamation action defendants Pery Krinsky and Krinsky PLLC (collectively, the Krinsky defendants) move in Motion Seq. 001 (Doc No. 3)<sup>1</sup> to dismiss the Complaint (the Complaint) (Doc No. 1) on the grounds of lack of personal jurisdiction (CPLR 3211 [a] [8] and CPLR 308 [2]), failure to state a cause of action (CPLR 3211 [a] [7]), and statute of limitations (CPLR 3211 [a] [5]).

In Motion Seq. 002 (Doc No. 12) plaintiff Richard P. Savitt (Savitt) moves to amend the Complaint (CPLR 3025) to add a cause of action for legal malpractice against the Krinsky

<sup>1</sup> References to "Doc No." followed by a number refers to documents filed in NYSCEF.

defendants and for a default judgment (CPLR 3215) against defendants Christina Troiano (Troiano) and Michele Kliegman (Kliegman).

Defendant Scott D. Savitt (Scott), the plaintiff's estranged brother, moves in Motion Seq. 003 (Doc No. 14) to dismiss the Complaint (the Complaint) (Doc No. 1) on the grounds of lack of personal jurisdiction (CPLR 3211 [a] [8] and CPLR 308 [2]), failure to state a cause of action (CPLR 3211 [a] [7]), and statute of limitations (CPLR 3211 [a] [5]).

Motion Seq. Nos. 001, 002, and 003 are consolidated for disposition.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Pursuant to an engagement letter dated May 1, 2015 (the Retainer Agreement) (Exhibit C to Plaintiff's 7/31/19 affidavit) (Doc No. 11), Savitt hired the Krinsky defendants to represent him (Complaint at ¶ 7) in connection with a proceeding before the Departmental Disciplinary Committee for the First Judicial Department (the Disciplinary Matter). The second paragraph of the Retainer Agreement states, in pertinent part:

It is understood that the scope of my firm's guidance and assistance to you will be limited to serving as your ethics counsel in connection with your Disciplinary Matter; and the scope of my firm's representation does not extend to or include any criminal matter or civil-related dispute that has already arisen, or that may arise in the future. It is further understood that the scope of the services that my firm agrees to provide to you extends only to providing assistance and representing you up to the point where the Appellate Division, First Department (including the Departmental Disciplinary Committee), issues its decision. Should you wish to challenge any decision of the Appellate Division (for example, by filing any type of Appeal or Notice of Appeal; making a Motion for Reconsideration; or challenging the Appellate Division's decision by taking the matter to any other court other than the Appellate Division, such as the Court of Appeals or Federal court), then it is understood that such a challenge is outside the scope of my firm's retention herein. If you wish my firm to represent you in any challenge to any decision by the Appellate Division, a separate agreement would first have to be entered into by my firm, but at my sole discretion may be incorporated into the within engagement letter.

(Doc No. 11, Exhibit C) (the Scope of Legal Services Provision). Savitt avers that he terminated the Krinsky defendants as his attorneys “for cause” on or about January 2016 (Complaint at ¶ 11). The Krinsky defendants assert, however, that they “withdrew” as Savitt’s attorneys on January 15, 2016 and closed his file on February 1, 2016 after which they had no further contact with him (Krinsky 7/22/19 affidavit, ¶ 4) (Doc No. 6).

Savitt asserts that when he terminated the Krinsky defendants in 2016, he hired Michael Gentile to represent him in the Disciplinary Matter. Both Scott and the Krinsky defendants interfered in his relationship with the newly hired attorney and as a result of their interference, attorney Michael Gentile withdrew from representing him (Savitt 7/31/19 affidavit at ¶¶ 49-54 and 9/30/19 affidavit at ¶ 40 [Doc No. 20]).

Savitt further alleges that in January or February of 2016 Scott and the Krinsky defendants published by email, text, phone, and social media “horrible, vicious, egregious, [and] false” (Complaint at ¶ 24) defamatory statements claiming that Savitt was “mentally ill” and had a “substance abuse problem” (Complaint at ¶ 68). Savitt contends that these defamatory statements caused personal and professional harm to him (Complaint at ¶¶ 24-25). Plaintiff additionally states that from May 2015 through July 2019 Krinsky and/or Scott have been:

calling, texting, emailing, corresponding and communicating with [his family, friends, colleagues, client's] the New York Grievance Committee, likely the Connecticut Grievance committee, informing them that they had diagnosed [him] as being mentally ill, that they had determined that [he has a] substance abuse problem, that [he] was practicing law without a license, that [he] was a liar, that [he] lied in court, that [he] lied to a Judge, that [he] failed to respond to emails/phone calls, that [he] failed to turn over documents/records that were in [his] possession custody and control, that [he] bounced a check from my IOLA account etc.

(Savitt 7/31/19 affidavit at ¶ 24). Savitt avers that the defamatory statements were made to his parents, whom he will depose, and to his friend David Purpora, who is currently out of the

country and cannot supply an affidavit to the court (Savitt 7/31/19 affidavit at ¶ 87). Savitt also states that Scott and the Krinsky defendants communicated defamatory statements about him to his friends Gary Luciani (Luciani), Dave Pizzuti (Pizzuti) and Attorney Carlos Carvajal, including false claims that Savitt has Alzheimer's, dementia and practiced law without a license (Savitt 8/6/19 affidavit at ¶ 12) (Doc No. 13). In total, Scott and the Krinsky defendants sent “more than 3000 emails and made more than 3000 phone calls” defaming him (Savitt 7/31/19 affidavit at ¶ 42). Savitt asserts he cannot produce the “emails, phone calls, text messages, correspondence and communications” that can prove his claims are timely and meritorious because these documents are in defendants’ “possession, custody and control” (*id.* at ¶ 40). However, he did produce affidavits from his good friends Pizzuti and Luciani, both of whom he's known for over 45 years, attesting that they have personal knowledge of the facts alleged in the Complaint and that the defamatory statements occurred from 2015 through 2019.

Pizzuti states that defendant Scott told him that Savitt was “mentally ill and had a substance abuse problem” and that Scott was out to “destroy” Savitt's career (Pizzuti affidavit at ¶¶ 23-16) (annexed as an Exhibit to Doc No. 11). Luciani claims in his affidavit (annexed as Exhibit A to Savitt's 8/6/19 affidavit), that the Krinsky defendants made patently false statements to him back in 2015 alleging that Savitt was mentally ill and had a substance abuse problem (Luciani affidavit at ¶¶ 10, 19 and 23). Both Pizzuti and Luciani assert that they have turned over to Savitt all documents and correspondence they received from Scott and the Krinsky defendants (Pizzuti affidavit at ¶ 30; and Luciani affidavit at ¶ 25). Although Savitt does annex exhibits to his motion papers, because of the manner in which they are compiled, the court is unable to determine the substantive nature of these exhibits and whether these documents are the same ones Pizzuti and Luciani claimed in their affidavits to have turned over to Savitt.

Based on the aforementioned factual allegations, Savitt, as a pro se litigant, commenced the instant action against defendants alleging the following causes of action: defamation, libel, and slander per se; negligent infliction of emotional distress; intentional infliction of emotional distress; tortious interference; spoliation of evidence, asserting that since 2016 he has requested all emails, documents and records supporting plaintiffs' claims but that the documents have been destroyed by Scott and the Krinsky defendants who must be sanctioned pursuant to CPLR 3126 (Savitt 7/31/19 affidavit at ¶¶ 55-61); aiding and abetting; conspiracy (Complaint at ¶¶ 76-77) to harm him in the Disciplinary Matter (Savitt 7/31/19 affidavit at ¶¶ 62-70); invasion of privacy seeking punitive damages; and breach of contract against the Krinsky defendants for failure to comply with the Scope of Legal Services Provision, because they did not represent him in the Disciplinary Matter and failed to engage in basic legal representation including returning phone calls, meeting with him and reviewing documents (Savitt 7/31/19 Affidavit at ¶¶ 74, 76-84).

The Krinsky defendants did not serve and file an Answer to the Complaint but rather appeared in this action by interposing the within pre-answer motion to dismiss.

Defendant Scott appeared pro se and filed an Answer (Doc No. 10) to the Complaint generally denying the allegations therein and asserting the following affirmative defenses: (1) failure to state a cause of action; (2) lack of personal jurisdiction/ insufficiency of service of process; and (3) laches, estoppel, waiver, ratification, unclean hands and statute of limitations.

No appearances, or responsive pleadings to the Complaint, were made by defendants Troiano and Kliegman (collectively, the non-appearing Defendants).

#### MOTION SEQ. NO. 001

The Krinsky defendants contend that the court must use February 1, 2016 as the commencement date of any statute of limitations calculation period and argue that the Complaint

must be dismissed for failure to state a claim generally, and on the grounds that: (1) plaintiff contradicts when the allegedly defamatory, libelous, and slanderous statements were published asserting at ¶ 24 of the Complaint that it was in 2016 and then at ¶ 38 of the Complaint that it was within the year of commencement of this action; (2) the one-year statute of limitations pursuant to CPLR 215 (3) bars Savitt's claims for defamation, libel, and slander per se; (3) plaintiff failed set forth the specific damage to plaintiff's trade/profession to sustain a per se defamation claim; (4) the claims for negligent infliction of emotional distress and intentional infliction of emotional distress must be dismissed as time-barred by the three-year statute of limitations period pursuant to CPLR 214 (3) and the one-year statute of limitations period pursuant to CPLR 215 (3), respectively; (5) the claims for tortious interference, spoliation of evidence, aiding and abetting, conspiracy, invasion of privacy and breach of contract must be dismissed as they are not recognized civil causes of action in the State of New York and/or fail to state a proper cause of action. Additionally, the Krinsky defendants contend that the court lacks personal jurisdiction over them because Savitt filed proof of service of the Complaint 43 days after service was allegedly performed rather "within twenty days" from the date service was performed in accordance with CPLR 308 (2).

In opposition to the Krinsky defendants' motion, Savitt submitted four different affidavits (Doc Nos. 11, 13, 16, and 25<sup>2</sup>) arguing that the court must deny the application to dismiss the Complaint because: (1) all his claims state a cause of action ; (2) the Complaint was "date stamped" January 9, 2019, not April of 2019, and therefore the action is timely; (3) a late filing

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<sup>2</sup> The Court did not consider Doc No. 25 because: (a) the affidavit was uploaded to NYSCEF after the papers in Motion Seq. 001 was marked fully submitted; and (b) leave to submit supplemental affidavits was not granted by the court.

of the proof of service is permissible; and (4) the breach of contract claim was timely commenced within the six-year statute of limitations period.

In reply, the Krinsky defendants reiterate their original basis for dismissal of the Complaint and additionally: (1) object to Savitt's representation that this action was commenced in January of 2016; and (2) contend that the court must reject Savitt's affidavits in opposition (Doc Nos. 16 and 25) on grounds that they were supplemental affidavits submitted without leave of court, and were untimely pursuant to CPLR 2214 (b).

MOTION SEQ. NO. 002

Savitt argues that the court must grant his motion to amend the Complaint (CPLR 3025) to add a legal malpractice cause of action against the Krinsky defendants as proposed in Exhibit A to Motion Seq. 002. Additionally, since he served the non-appearing Defendants with the Complaint and they failed to answer, Savitt contends he is entitled to a default judgment against them.

The Krinsky defendants contend that the motion to amend the Complaint must be denied because: (a) the motion is deficient as it fails to include a supporting affidavit; and (b) the proposed cause of action lacks merit and fails to set forth the three necessary elements of a legal malpractice claim.

In reply<sup>3</sup> Savitt argues the court must grant his motion to amend the Complaint because motions to amend must be "freely given" in accordance with CPLR 3025 and 1003.

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<sup>3</sup> By Notice dated October 4, 2019 (Doc No. 23), the Krinsky defendants rejected Savitt's reply papers (Doc No. 22) on grounds that it was submitted outside the permitted statutory timeframe. However, the Krinsky defendants failed to demonstrate any prejudice were the court to consider Savitt's reply papers.



MOTION SEQ. NO. 003

In his motion, defendant Scott, a Michigan resident, contends that the action must be dismissed against him pursuant to CPLR 3211 (a) (8) because Savitt failed to adequately allege long-arm jurisdiction over Scott in accordance with CPLR 302. Scott further argues that the Complaint must be dismissed against him, with prejudice, because: (1) the claim for defamation, libel and slander is time-barred by the one-year statute of limitations pursuant to CPLR 215 (3), as are the claims for negligent infliction of emotional distress and intentional infliction of emotional distress, which all fail to state a cause of action; and (2) the State of New York does not recognize a stand-alone cause of action for tortious interference, spoliation of evidence, aiding and abetting, civil conspiracy, or invasion of privacy.

In opposition, Savitt submits three separate affidavits (Doc Nos. 20, 21, and 27), reiterating the arguments he previously submitted in opposition to the Krinsky defendants' motion to dismiss contending that his causes of actions have been timely interposed and properly state a cause of action. Moreover, Savitt contends that long-arm jurisdiction over his estranged brother Scott exists, pursuant to CPLR 302 (1)(2)(3)(i)(ii) and (4), because Scott's actions and defamatory statement against him took place in New York and because Scott has substantial connections to New York having transacted business here selling more than 10,000 copies of his book (Savitt 10/1/19 affidavit at 13), having a literary agent with corporate offices in New York (*id.* at 12), having traveled extensively to New York promoting himself as a writer (*id.* at 15), and being an in-house translator at the New York Times (*id.* 16). No reply papers were submitted by defendant Scott.

## DISCUSSION

### MOTIONS TO DISMISS

#### JURISDICTION

A party may move to dismiss a cause of action on grounds that “the court has no jurisdiction of the person of the defendant” (CPLR 3211 [a] [8]). Here, defendant Scott’s motion to dismiss the Complaint for lack of personal jurisdiction on grounds that Savitt failed to obtain long-arm jurisdiction over Scott, pursuant to CPLR 302, is granted. Savitt does not deny that defendant Scott resides in the State of Michigan. Although the factual assertions alleged by Savitt that defendant Scott transacts business in New York were not rebutted, Savitt failed to establish how selling books in New York and/or having a literary agent here has a “substantial relationship” to the alleged defamation and other claims asserted in the Complaint (*see Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014]; *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]; *Wang v LSUC*, 137 AD3d 520, 521 [1st Dept 2016]). Savitt’s self-serving statement that all the acts of defamation took place in New York equally fails as a basis for jurisdiction over defendant Scott because New York’s long-arm jurisdiction statute cannot serve as a basis for personal jurisdiction on claims for defamation (*see CPLR 302[a][2]*; *SPCA of Upstate N.Y., Inc. v Am. Working Collie Ass’n.*, 18 NY3d 400, 403 [2012]).

To the extent that the court lacks jurisdiction over defendant Scott for the reasons herein stated, Scott’s additional grounds for dismissal of the Complaint is denied, as moot. The court notes that Savitt did not address Scott’s application for dismissal “with prejudice.”

The Krinsky defendants’ motion to dismiss for lack of jurisdiction, is denied. There is no dispute that Savitt filed proof of service of the Complaint against the Krinsky defendants some

43 days after service was allegedly performed (see Admission of Service, Doc No. 2). CPLR 308

(2) states, in pertinent part:

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or
2. by delivering the summons within the state to a person of suitable age and discretion ...; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery

... .

Although “[s]trict compliance with all the service dictates of CPLR 308 ... is required in order to obtain jurisdiction” (*Persaud v Teaneck Nursing Ctr.*, 290 AD2d 350, 351 [1st Dept 2002]), the failure to timely file proof of service is a “mere irregularity” without jurisdictional implications (*Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]). Non-compliance with the time frame set forth in CPLR 308 (2) does not render the service invalid because defendants are not prejudiced by its untimely filing since the time to answer the Complaint does not begin to run until service is complete on the date proof of service is actually filed (see CPLR 320 [a]).

#### STATUTE OF LIMITATIONS

Preliminarily, it is noted that CPLR 304 (a) states, in pertinent part:

(a) An action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter. ...

(c) For purposes of this section, and for purposes of section two hundred of this chapter and section three hundred six-a of this article, filing shall mean the delivery of the summons with notice, summons and complaint or petition to the clerk of the court in the county in which the action or special proceeding is brought or any other person designated by the clerk of the court for that purpose.

In this case, the Complaint was filed by electronic means with the New York County Clerk and Clerk of the Supreme Court on April 10, 2019 and that is the date this action was commenced (see generally, NY R UNIF TRIAL CTS § 202.5-bb).

Initially, the court rejects the Krinsky defendants' argument for dismissal of the Complaint on grounds that the defamation, libel and slander *per se* claims are time-barred by CPLR 215 (3). There is no dispute that these claims are governed by a one-year statute of limitations period. However, as the Krinsky defendants admit, the Complaint states that the defamatory statements were communicated/published as late as 2018. Savitt's friends, Pizzuti and Luciani, also assert in their affidavits that the defamatory statements were made to them personally as late as 2019 – months before this action was commenced. These are not necessarily discrepancies, but an unresolved factual dispute on whether the complained of alleged defamatory statements were ongoing from 2016 through 2019, or only occurred in 2016, as the Krinsky defendants propose.

CPLR 3211 (a) (7)

When deciding whether or not to dismiss an action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (*D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 168 AD3d 505, 506 [1st Dept 2019]; *World Wide Adj. Bur. v Gordon Co.*, 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, the court must also consider the allegations made in both the complaint and the accompanying affidavit(s) submitted in opposition to the motion as true and resolve all inferences which reasonably flow therefrom in favor of the plaintiffs (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016], citing *Goshen v Mutual Life Ins. Co. of N.Y.* 98 NY2d 314, 326 [2002]). On a 3211 (a) (7) motion, the court need not determine the truth of the allegations (see *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995]).

The sufficiency of a pleading to state a cause of action depends upon whether there is substantial compliance with CPLR 3013, which requires that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” CPLR 3026 also requires that pleadings be liberally construed, and defects ignored if a substantial right of a party is not prejudiced, placing the burden upon the one who attacks a pleading for deficiencies in its allegations to show they are prejudiced. It is further noted that a defamation claim, as is the case here, is subject to the heightened pleading standard of CPLR 3016 (a) which states that “... the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally” (*see Rubin v Napoli Bern Ripka Shkolnik, LLP*, 151 AD3d 603, 604 [1st Dept 2017]).

In order for the court to conduct its review, the plaintiff must set forth exact words of the offending statements (*Offor v Mercy Med. Ctr.*, 171 AD3d 502, 502 [1st Dept 2019]; *Rubin*, 151 AD3d 603, at 604 [1st Dept 2017]). Failure to allege the offending words in *haec verba*, or the use of paraphrasing, requires dismissal (*BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 [1st Dept 2009]). Moreover, “[a]ny qualification in the pleading thereof by use of the words ‘to the effect’, ‘substantially’, or words of similar import generally renders the complaint defective” (*Gardner v Alexander Rent-A-Car, Inc.*, 28 AD2d 667, 667 [1st Dept 1967]). The plaintiff is further required to provide the “time, place and manner of the purported defamation” (*Offor*, 171 AD3d 502, at 503, *quoting Buxbaum v Castro*, 104 AD3d 895, 895 [2d Dept 2013]).

The cause of action for defamation, libel and slander *per se* must be dismissed for failure to state a cause of action. The statements that defendants claimed Savitt was “mentally ill” and had a “substance abuse problem” alone are insufficient to satisfy the strict pleading requirements

necessary to state these claims against defendants (CPLR 3016; *see, Rubin*, 151 AD3d at 604). Indeed, Savitt admits that he does not have possession of any documents to substantiate his claims, and even after his friends stated in their affidavits that they turned over to him all documents proving Scott and the Krinsky defendants' defamatory statements communicated to them, plaintiff did not refer to those documents in the Complaint, nor did he produce them in the motion papers in support of his claims for defamation, libel and slander *per se*. Savitt also failed to allege special damages for the alleged *per se* defamatory statements, rendering the Complaint fatally deficient (*Rall v Hellman*, 284 AD2d 113, 114 [1st Dept 2001]).

Savitt's cause of action for negligent infliction of emotion distress is dismissed for failure to allege the requisite essential element of an "extreme and outrageous" conduct by defendants to sustain this cause of action (*see, Xenias v Roosevelt Hosp.*, 180 AD3d 588, 589 [1st Dept 2020]). Similarly, the Complaint fails to set forth the four elements of "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" to sustain a cause of action for intentional infliction of emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121–122 [1993]).

The court will interpret Savitt's claim for "tortious interference" to be one for "tortious interference with a contract." Savitt failed to set forth the elements of a claim for tortious interference with a contract and in fact the allegations in the Complaint respecting this cause of action are conclusory and speculative, warranting dismissal (*L.Y.E. Diamonds, Ltd. v Gemological Inst. of Am., Inc.*, 169 AD3d 589, 591 [1st Dept 2019]).

The cause of action for spoliation of evidence has been repeatedly rejected in New York Courts (*MetLife Auto & Home v Joe Basil Chevrolet*, 1 NY3d 478, 483 [2004]), and sanctions

pursuant to CPLR 3126 are not available because Savitt did not allege that defendants were provided notice that the documents requested may be needed for this “future” litigation (*id.* at 483 and 484). Accordingly, this cause of action is dismissed.

The claim for “aiding and abetting” and “civil conspiracy” are dismissed as the underlying alleged tortious conduct (*e.g.* the aforementioned causes of action) have been dismissed (*Dickinson v Igoni*, 76 AD3d 943, 944 [2d Dept 2010]). Moreover, New York does not recognize an “invasion of privacy” claim as alleged by Savitt (*see, Fleischer v NYP Holdings, Inc.*, 104 AD3d 536 [1st Dept 2013]), nor “an independent cause of action for conspiracy to commit a civil tort” (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]), resulting the dismissal of both these stated claims in the Complaint.

#### **MOTION TO AMEND COMPLAINT**

Savitt’s motion to amend the Complaint, pursuant to CPLR 3025, is denied. Leave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay (CPLR 3025 [b]). “[W]hether the pleading was sufficient to state a cause of action for legal malpractice posed a question of law which could be determined on a motion to dismiss” (*see Rosner v Paley*, 65 NY2d 736, 738 1985).

Here, there is no dispute that the purported legal malpractice occurred on or about February 1, 2016, the time Savitt “terminated” and/or the Krinsky defendants “withdrew” their representation of Savitt in the Disciplinary Matter. “An action to recover damages arising from an attorney’s malpractice must be commenced within three years of accrual, and the claim accrues when the malpractice is committed” (*see Marzario v Snitow Kanfer Holzer & Millus, LLP* 178 AD3d 527, 527 [1st Dept 2019]; CPLR 214 [6] [internal citations omitted]). This action was commenced on April 10, 2019 as reflected in the court’s docket as the date the Summons

and Complaint was filed. The malpractice claim must have been commenced no later than February 1, 2019, three years after the alleged malpractice and therefore the proposed action for legal malpractice is time-barred having commenced this action in April of 2019. Moreover, Savitt failed to state a cause of action for legal malpractice in his proposed amended complaint. “An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff’s losses; and (3) proof of actual damages” (*Excelsior Capitol LLC v. K&L Gates LLP*, 138 AD3d 492, 492 [1st Dept 2016]). Additionally, to the extent that the breach of contract claim is alleged and based on the same factual assertions supporting the proposed legal malpractice claim, said cause of action must be dismissed as it is a duplicative claim and/or a claim guised as a breach of contract but is in fact alleging legal malpractice (*see Courtney v McDonald*, 176 AD3d 645 [1st Dept 2019]).

#### APPLICATION FOR A DEFAULT JUDGMENT

This action against the non-appearing Defendants is dismissed. The court is without authority to grant Savitt’s relief sought for a default judgment against the non-appearing Defendants because the Complaint fails to state any facts and/or causes of action against these individually named parties to this action (*see, Ray v Chen*, 148 AD3d 568 [1st Dept 2017]). Indeed, the only statement made in the Complaint regarding the non-appearing Defendant is as follows: “I have never met Defendants Troiano, Kliegman ... .” (Complaint at ¶ 12).

#### **CONCLUSION**

Accordingly, it is hereby

**ORDERED** that defendants’, Pery Krinsky and Krinsky PLLC, Motion Sequence Number 001, for dismissal of the Complaint is granted, and the Clerk of the Court shall enter judgment in



defendants' Perry Krinsky and Krinsky P PLLC favor and against plaintiff Richard P. Savitt dismissing the Complaint against them; and it is further

**ORDERED** that plaintiff's, Richard P. Savitt, Motion Sequence number 002, to amend the Complaint and for a default judgment against defendants Christina Troiano and Michele Kliegman, is denied in its entirety; and it is further

**ORDERED** that defendant's, Scott D. Savitt, Motion Sequence number 003, to dismiss the Complaint, is granted for lack of jurisdiction and the Clerk of the Court shall enter judgment in defendant Scott D. Savitt's favor and against plaintiff Richard P. Savitt dismissing the complaint against him, with prejudice.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/27/2020  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
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<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: