Fierro v Yellen
2022 NY Slip Op 32959(U)
August 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 523796/2021
Judge: Ingrid Joseph

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of August, 2022.

P R E S E N T:

HON. INGRID JOSEPH,
Justice.

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PATSY FIERRO and DENISE ZUCARO as Administrator of the Estate of LUIGI ZUCARO,

Plaintiffs,

-against-

Index No.: 523796/2021

Mot. Seq. Nos. 1, 2, 3 & 4

RICHARD L. YELLEN, ESQ., BRENDAN C. KOMBOL, ESQ., RICHARD L. YELLEN & ASSOCIATES, LLP, MONICA E. KIPINIAK, ESQ., J.C. RYAN EBCO/H&G LLC and DANA F. SCHNIPPER,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	13-25 26-51 53-83 85-98
Opposing Affidavits (Affirmations)	106-109 110-113 114-117 124
Affidavits/ Affirmations in Reply	123 120-122
Memoranda of Law	52 84

Upon the foregoing papers, in this action by plaintiffs Patsy Fierro ("Fierro") and Denise Zucaro, as administrator of the estate of Luigi Zucaro ("Zucaro")[1] (collectively "plaintiffs") against defendants Brendan C. Kombol, Esq. ("Kombol"), Richard L. Yellen, Esq. ("Yellen"), Richard L. Yellen & Associates, LLP ("the Yellen firm"), J.C. Ryan EBCO/H&G LLC ("J.C. Ryan"), Dana F. Schnipper ("Schnipper"), and Monica E.

[1] On August 22, 2016, Luigi Zucaro died. Plaintiff Denise Zucaro, Luigi Zucaro's wife, was appointed as the administrator of Luigi Zucaro's estate.

Kipiniak, Esq. ("Kipiniak") (collectively, "defendants") for violation of Judiciary Law § 487, conspiracy to violate Judiciary Law § 487, and common-law fraud and deceit, Kombol, appearing pro se, moves (Motion Seq. 1) for an order, pursuant to CPLR § 3211, including but not limited to subsections (a) (1) and (7), dismissing plaintiffs' complaint as against him. Yellen (appearing pro se), the Yellen firm, J.C. Ryan, and Schnipper move (Motion Seq. 2), for an order, pursuant to CPLR § 3211 (a) (1), (5), and (7), CPLR § 213 (8), and CPLR § 3016 (b), dismissing plaintiffs' complaint as against them. Kipiniak moves (Motion Seq. 3) for an order, pursuant to CPLR § 3211 (a) (1), (5), and (7), CPLR § 213 (8), and CPLR § 3016 (b), dismissing plaintiffs' complaint as against her. Plaintiffs move, by order to show cause (Motion Seq. 4) for an order: (1) disqualifying the Yellen firm from representing J. C. Ryan in this action based on the ground of collateral estoppel; (2) disqualifying the Yellen firm from representing J.C. Ryan, Schnipper, and Kipiniak in this action based on the grounds that such representation violates Rule 3.7 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0), known as the advocate-witness rule; and (3) sanctioning the Yellen firm for attempting to represent J.C. Ryan after it was previously disqualified from representing J.C. Ryan by a predecessor Justice, the late Honorable Johnny Lee Baynes.

On August 2, 2000, Cyber-Struct, Inc. ("Cyberstruct")[2], as general contractor, entered into a Standard Form of Agreement ("the contract") with Dean Boerum Owners, Inc. ("DBO"), as the owner, to construct a new, three-story building containing 21 apartments at 119-125 Boerum Place, 42 Dean Street, in Brooklyn, New York ("the

[2]Luigi Zacarro (who is now deceased) and Patsy Fierro were the principals of Cyberstruct.

property"). Pursuant to the contract, Cyberstruct was responsible for the coordination of the construction of the project, and its responsibilities included retaining subcontractors and material suppliers, as necessary, and paying them for their work and the materials provided by them. Cyberstruct alone (not DBO) was to compensate its subcontractors and material suppliers by using funds paid to Cyberstruct by DBO. Cyberstruct's contract with DBO required Cyberstruct to complete an American Institute of Architects Application and Certificate for payment at the end of each pay period in order to be paid by DBO. Once Cyberstruct received its funds from DBO, it was obligated, pursuant to the contract and the Lien Law, to forward the appropriate payment to each subcontractor or materialman who applied for payment.

DBO terminated the contract with Cyberstruct in April 2002. According to plaintiffs, at that time, DBO owed Cyberstruct $328,286.49 on the contract. Approximately $160,000 of said sum was retainage, i.e., money earned by the general contractor, but held by the owner, pending job completion. At a meeting held in April 2002 between DBO and Cyberstruct, Cyberstruct presented Philip Mendlow ("Mendlow"), the president of DBO, with a spreadsheet dated April 25, 2002, which indicated that 19 of its subcontractors, suppliers, and/or vendors were owed $353,566.93. Cyberstruct, however, alleges that this amount was the amount owed only if the contract had been fully performed.

Plaintiffs allege that Mendlow entered into a series of executed assignments with not less than eight of Cyberstruct's subcontractors and suppliers, one of whom was J.C. Ryan, a supplier of architectural doors, frames, and finish hardware. The assignment

between J.C. Ryan and DBO was dated May 2, 2002 (NYSCEF Doc No. 89), and was executed by Schnipper, who was J.C. Ryan's President and Chief Executive Officer. There was also an assignment dated May 2, 2002 by A&A Cibco Construction Inc., an assignment dated May 2, 2002 by Alta Recycling, an assignment dated May 2, 2002 by Bay Ridge Mechanical Corp., an assignment dated May 7, 2002 by Express Contracting Corp., an assignment dated May 6, 2002 by Kamco Supply Co., an assignment dated May 2002 by Empire Restoration Corp., and an assignment dated June 21, 2002 by Professional Tile Contracting Corp.

Each of these assignments by the subcontractors and suppliers (NYSCEF Doc No. 18) set forth that Cyberstruct did not have adequate funds to pay materialmen, laborers, subcontractors, and other miscellaneous vendors, who had supplied services and/or material in connection with the contract, and that DBO desired to avoid further delay in the completion of the building. The assignments further set forth that upon request of the subcontractors, who had not been paid by Cyberstruct, that DBO may, from time to time, pay or cause to be paid, such subcontractors as it deems appropriate and necessary, in its sole discretion, to facilitate the timely completion of the building. It was also contemplated that to the extent that payments were received from DBO, the Subcontractors assigned all right title and interest in their claims against Cyberstruct related to the building and would cooperate with DBO in any action brought by DBO for the recovery of such sums from Cyberstruct. It was further stipulated that the agreement, or the payment of any sums by DBO to subcontractors, would not interfere with the contractual relationship between Cyberstruct and the subcontractors, nor would it

constitute a contractual relationship between any subcontractor and DBO, but that the agreement was made solely for the purpose of facilitating the completion of the construction of the Building. It was also agreed that all such payments made or caused to be made by DBO would be without prejudice to any claims that the parties may have against one another or any third party.

Plaintiffs allege that three of the subcontractors and suppliers, including J.C. Ryan, filed mechanic's liens against the property. Plaintiffs state that since J.C. Ryan received $28,000 from Mendlow, it filed a mechanic's lien dated September 24, 2002 against the property in the reduced amount of $42,598 (NYSCEF Doc No. 90), and hired Mark Allen, Esq., a collection specialist with ALK Industries, Inc., a collection firm located in New Bern, North Carolina, to pursue DBO for the balance of money it was owed. According to plaintiffs, in response to the mechanic's lien filed by J.C. Ryan and the collection attempts, Yellen, who was Mendlow and DBO's counsel and the founding partner of the Yellen firm, made a deal, or arrangement, with the collection agent, Mark Allen, Esq., in which DBO agreed to pay J.C. Ryan the sum of $10,000 to settle its mechanic's lien against the property, and J.C. Ryan agreed to release its mechanic's lien, give DBO a general release, and retain Yellen to commence a class action against Cyberstruct, Zucaro, Fierro, and Damon Coromilas ("Coromilas"), who is Cyberstruct's controller, for violation of article 3-A of the Lien Law.

In a letter dated February 27, 2003 (NYSCEF Doc No. 91) to Mark Allen, Esq., Yellen enclosed the $10,000 to hold in escrow pending the release of J.C. Ryan's mechanic's lien and general release. This letter stated that Cyberstruct was in violation of

the Lien Law and that the subcontractor who has been harmed by this violation had the right to bring an action on behalf of itself and all other subcontractors similarly situated. This letter provided that J.C. Ryan would retain Yellen, as its attorney, to commence an action against Cyberstruct and its principals and that all costs and expenses would be paid solely by DBO with the understanding that between J.C. Ryan and DBO, that the first $10,000 recovered would be paid to DBO as reimbursement for the monies paid therewith.

On May 19, 2003, J.C. Ryan, as the named plaintiff, on behalf of itself and all other subcontractors similarly situated, commenced a class action against Cyberstruct, Zucaro,[3] Fierro, and Coromilas, as defendants, pursuant to article 3-A of the Lien Law to recover damages for diversion of trust assets (Sup Ct, Kings County, Index No. 18549/2003[4]) ("the class action"). The class action complaint was filed by Yellen, who, along with the Yellen firm, represented J.C. Ryan. The complaint in the class action alleged, among other things, that Cyberstruct, Zucaro, and Fierro violated the Lien Law by diverting monies paid to them by DBO for purposes other than the payment of subcontractors. Specifically, the complaint alleged that after entering into the contract, Cyberstruct commenced work on the project, and then ultimately abandoned its responsibilities following the conversion of substantial Lien Law trust funds intended to be paid to the various subcontractors, laborers, and material suppliers engaged by Cyberstruct.

[3] Zucaro's name was spelled Zuccaro in the caption of the class action and his first name was listed as Louis instead of Luigi.
[4] The Yellen firm was not formed until 2004. Kombol is a partner in the Yellen firm.

On June 16, 2003, Cyberstruct, Zucaro, and Fierro all answered the complaint in the class action. They denied that they converted trust funds, and contended that DBO had agreed that upon termination of the contract, it would complete the project and would pay the subcontractors for all outstanding claims. They thus contended that after April 25, 2000, DBO acted as the general contractor for the project and assumed liability for paying the subcontractors. Coromilas never answered the complaint.

Plaintiffs contend that J.C. Ryan and the other subcontractors were "figureheads" in the class action and that the class action was actually controlled by DBO and the Yellen firm. After issue was joined in the class action, the parties engaged in discovery and subsequent motion practice. Cyberstruct, Zucaro, and Fierro were, throughout this period, represented by the law firm of Dunnington, Bartholow & Miller, LLP (the Dunnington firm). In October 2005, the Dunnington firm moved to be relieved as counsel, due to, among other things, non-payment. The Dunnington firm's application was granted pursuant to a court order entered on December 16, 2005.

A motion by J.C. Ryan to certify the action as a class action was granted, without opposition, in May 2006. Plaintiffs claim that the motion was mailed to Cyberstruct's former address, and, as a result, none of the intended recipients received it.

In February 2008, J.C. Ryan moved for summary judgment in the class action, which was served upon Cyberstruct, Zucaro, and Fierro at their former and last known address (which had been set forth in their answer in the class action). There were no opposition papers submitted by Cyberstruct, Zucaro, or Fierro. On May 9, 2008, a judgment was entered against Cyberstruct, Fierro, Zucaro, and Coromilas on default in

the amount of $619,289.92 (the 2008 judgment). Included in the 2008 judgment was an award of professional fees to the Yellen firm of $78,600.

In October 2012, the Yellen firm retained the Law Offices of Bernard D'Orazio & Associates, P.C. to collect on the 2008 judgment. Plaintiffs claim that it was at that time that Fierro, Zucaro, and Coromilas first learned that a judgment had been entered against them, and in response, all of them moved to vacate the judgment on the grounds that the motion for summary judgment had not been properly served on them and that they had a reasonable excuse for not answering the motion. The motion by Cyberstruct, Fierro, and Zucaro to vacate the 2008 judgment based on improper service was denied on September 20, 2013. The order denying that motion was affirmed by the Appellate Division, Second Department, on December 16, 2015. On March 27, 2014, Zucaro and Fierro filed a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District ("the bankruptcy court").

During the time that the appeal was pending, Cyberstruct, Zucaro, and Fierro filed a new motion to vacate the 2008 judgment. They also made a motion to disqualify the Yellen firm from representing J.C. Ryan. On September 24, 2015, now retired Justice Yvonne Lewis denied the motion to vacate the 2008 judgment and denied as moot the motion to disqualify the Yellen firm.

Zucaro died in August 2016, and Denise Zucaro, as administrator of his estate, was substituted as a defendant in the class action. Fierro and Denise Zucaro made a motion to reargue and renew Justice Lewis' rulings. Due to Justice Lewis' departure from the bench at the end of 2015, the motions were assigned to Justice Johnny Lee Baynes (who

is now deceased). On October 31, 2016, Justice Baynes granted the motion to reargue and renew and vacated the 2008 judgment. Justice Baynes also granted the motion to disqualify the Yellen firm from representing J. C. Ryan in an order dated November 29, 2016.

J.C. Ryan thereafter retained new counsel, both in this court and in the bankruptcy court. J. C. Ryan's new state court counsel duly filed notices of appeal from both the decision and order granting reargument and renewal, and vacating the 2008 judgment, as well as from the decision and order disqualifying the Yellen firm from representing J.C. Ryan. In addition, counsel filed a notice of appeal from a subsequent order by Justice Baynes vacating Justice Lewis' order that certified the class, and a notice of appeal from an order of Justice Baynes modifying his decision and order granting reargument and renewal, and vacating the 2008 judgment.

The four appeals were perfected in April 2018. That same month, plaintiffs filed an adversary proceeding in the bankruptcy court against Kombol, Yellen, the Yellen firm, Kipiniak, and another attorney named Gail Elston. The complaint contained a cause of action for violation of Judiciary Law § 487, and a cause of action for sanctions. The cause of action for violation of Judiciary Law § 487 was dismissed by the bankruptcy court. The cause of action for sanctions was dismissed, without prejudice to plaintiffs' right to file an amended complaint against Kombol, Yellen, and the Yellen firm for fraud on the bankruptcy court. Plaintiffs filed the amended complaint on November 10, 2020. Kombol, Yellen, and the Yellen firm, by their attorneys, filed a motion to dismiss the

amended complaint, which, as of the time of submission of the instant motion, has not yet been decided.

On July 17, 2019, Justice Lawrence Knipel ordered J.C. Ryan to file a note of issue in the class action within 10 days. Upon J.C. Ryan's failure to do so, plaintiffs moved to dismiss the class action. On January 22, 2020, that motion was granted, without opposition and on J.C. Ryan's consent. Once the class action was dismissed, plaintiffs moved to dismiss the four pending appeals on the ground that such appeals were moot, and that motion was granted, without opposition, on September 14, 2020. Five months later, J.C. Ryan retained Kipiniak, who represented J.C. Ryan in the bankruptcy court cases, to also represent J.C. Ryan in the class action. Upon her retention, Kipiniak moved to vacate the order of the Appellate Division dismissing the appeals. Kipiniak also moved to vacate the order dismissing the class action. The motion to vacate the order dismissing the appeals was denied by the Appellate Division on September 8, 2021.

J.C. Ryan's motion to vacate the order dismissing the class action was denied by this court's decision and order dated November 23, 2021. Plaintiffs have moved to dismiss the appeal on the grounds that the Yellen firm did not have standing to file the notice of appeal on behalf of J.C. Ryan as a result of the decision and order of Justice Baynes disqualifying the Yellen firm from representing J. C. Ryan and on the ground that the class had been decertified by Justice Baynes. That motion was submitted to the Appellate Division on February 14, 2022, without opposition, and has not yet been determined. At present, the default judgment against plaintiffs has been vacated and there is no judgment against them.

On September 20, 2021, plaintiffs filed the instant action. Plaintiffs' complaint alleges a first cause of action against Yellen, Kombol, and Kipiniak for violation of Judiciary Law § 487, a second cause of action against Yellen, Kombol, and Kipiniak for conspiracy to violate Judiciary Law § 487, and a third cause of action against Yellen, Kombol, Kipiniak, Ryan, and Schipper for fraud and deceit. Plaintiffs allege that they have been damaged in their business and property, and seek at least $4.8 million on their first and second causes of action, and at least $1.6 million on their third cause of action.

Kombol filed motion sequence 1 (NYSCEF Doc No. 13) on October 25, 2021. Yellen, the Yellen firm, J.C. Ryan, and Schnipper, filed motion sequence 2 (NYSCEF Doc No. 26) on November 8, 2021. Kipiniak filed motion sequence 3 (NYSCEF Doc No. 53) On November 16, 2021, and plaintiffs filed motion sequence 4 (NYSCEF Doc No. 98) on December 15. 2021.

Initially, the court notes that plaintiffs' contention that motion sequence numbers one and two are fatally defective because Kombol and Yellen only submitted their affirmations, rather than signed notarized affidavits by them, lacks merit. Such affidavits are not required on a motion to dismiss that is addressed to the facial sufficiency of the complaint, and raises the defenses of failure to state a cause of action, the statute of limitations, and res judicata, which are based on the documentary evidence of the record of the proceedings in the class action (*see Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017] [noting that judicial records constitute documentary evidence]; *Scanlon v Long Beach Pub. Schools*, 197 AD2d 567, 567 [2d Dept 1993] [placing proof before the

court by annexing documentary evidence to an attorney's affirmation does not render papers defective]).

As to the statute of limitations defense, a cause of action for fraud must be commenced within six years of the date that the cause of action accrued, or within two years of the time that the plaintiffs discovered the fraud with reasonable diligence, whichever is greater (CPLR § 213 [8]). Plaintiffs' third cause of action for fraud is predicated on the assignments given by J.C. Ryan and the other subcontractors to DBO in 2002. Plaintiffs contend that based on these assignments, it was DBO and Yellen who were the ones controlling the class action and that there were no actual class members. However, the very assignments at issue which plaintiffs claim were concealed by defendants were, as plaintiffs admit, exchanged and provided to them through discovery in the class action. Additionally, in an affidavit dated December 4, 2003, Zucaro stated: "it does not appear that there is any class to protect herein, [and] the only party seeking money in this action is DBO, under assignments it took from subcontractors" (NYSCEF Doc No. 31). In another affidavit dated July 7, 2005, Zucaro not only raised the subcontractors' assignments to DBO as a defense to the claims set forth in the complaint in the class action, but also attached them as an exhibit (NYSCEF Doc No. 32). This affidavit establishes that plaintiffs were aware of the assignments by no later than 2003, and had actual physical copies of the assignments by no later than 2005.

Thus, the fraud alleged by plaintiffs accrued well over six years before this action was commenced on September 20, 2021, and well over two years from the time that plaintiffs had already discovered the alleged fraud. Furthermore, to the extent that

plaintiffs assert that the 2008 judgment was fraudulently obtained, the May 9, 2008 judgment was entered over 13 years prior to the commencement of this action on September 20, 2021.

Plaintiffs argue, however, that their fraud claim with respect to Yellen accrued on September 24, 2015, when Yellen "lied" to Justice Lewis during the oral argument of Cyberstruct, Fierro, and Zucaro's second motion to vacate the judgment. Plaintiffs contend that their fraud claim as against Yellen was, therefore, timely since this action was commenced on September 20, 2021, four days prior to the expiration of the six-year statute of limitations period. Plaintiffs' third cause of action for fraud also alleges that Kombol made false and misleading statements in affirmations submitted to Justice Baynes and the Appellate Division in 2016, and that Kipiniak made false and misleading statements in affirmations submitted to the Appellate Division and this court in 2021.

This argument is unavailing since plaintiffs' third cause of action for fraud had already accrued at the time of Yellen's oral argument opposing a second motion to vacate that judgment, as well as at the time of Kombol and Kipiniak's submission of affirmations. Plaintiffs cannot extend the statute of limitations by relying on arguments made by these attorneys on already accrued fraud claims in affirmations which further advocated their client's position.

Plaintiffs further argue that as to any claims of fraud that accrued prior to September 20, 2015, they are also not time-barred "because there really is no statute of limitations when it comes to a fraud on the court." This argument is also rejected since

there is a statute of limitations for a fraud claim. Consequently, the court finds that the plaintiffs' third cause of action for fraud is time-barred (*see* CPLR § 3211 [a] [5]).

The statute of limitations is also six years for plaintiffs' first cause of action for violation of Judiciary Law § 487 (*see* CPLR § 213 [1]; *Melcher v Greenberg Traurig, LLP*, 23 NY3d 10, 15 [2014], *rearg denied* 23 NY3d 998 [2014]). Since this cause of action accrued at the same time as plaintiffs' third cause of action for fraud, it similarly is time-barred, warranting its dismissal (*see* CPLR 3211 [a] [5]).

The defendants rely on the doctrines of res judicata and collateral estoppel as a further basis for dismissal. However, "under the doctrine of res judicata, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (*Montoute v Wells Fargo Bank, N.A.*, __ AD3d __, 2022 NY Slip Op 04800 [2d Dept Aug. 3, 2022], *quoting Chapman Steamer Collective, LLC v KeyBank N.A.*, 163 AD3d 760, 761 [2d Dept 2018]; *see also Eaddy v U.S. Bank N.A.*, 180 AD3d 756, 758 [2d Dept 2020]). That is, "the doctrine of res judicata bars a party from relitigating any claim which could have been or should have been litigated in a prior proceeding" (*Chapman Steamer Collective, LLC*, 163 AD3d at 761, *quoting Matter of Board of Fire Commrs. of the Fairview Fire Dist. v Town of Poughkeepsie Planning Bd.*, 156 AD3d 624, 627 [2d Dept 2017]; *see also Jacobson Dev. Group, LLC v Grossman*, 198 AD3d 956, 959 [2d Dept 2021]; *Bauhouse Group I, Inc. v Kalikow*, 190 AD3d 401, 402 [1st Dept 2021]).

"The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a

prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of actions are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *see also Bauhouse Group I, Inc.*, 190 AD3d at 402). "The two requirements for its application are: first, the identical issue necessarily must have been decided in the prior action and be decisive in the present action, and second, the party to be precluded must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *Gillen v McCarron*, 126 AD3d 670, 671 [2d Dept 2015]; *Matter of Abady*, 22 AD3d 71, 81 [1st Dept 2005]).

A review of the record reveals that the class action came to a final conclusion as a result of the January 22, 2020 decision and order dismissing the class action, with prejudice, for failure to file a note of issue. The order was granted on consent, as evinced by each attorney's signature on the order (NYSCEF Doc No. 122). Plaintiffs' amended answer in the class action contained the same factual allegations now raised by them in this action (NYSCEF Doc No. 20). Specifically, the amended answer alleges, among other things, that the class action was "a sham from the start" (*id.*). Additionally, plaintiffs brought a motion to amend their answer to allege a counterclaim for fraud, which contained the same allegations regarding the assignments now raised by them. That motion was initially denied by a decision and order dated March 8, 2018 by Justice Baynes, without prejudice to renew (NYSCEF Doc No. 19). Plaintiffs' proposed amended answer alleged a second counterclaim for fraud on the court, specifically alleging that false representations were made by Yellen and Kombol (*id.*). When plaintiffs brought a motion to renew their request to amend their answer to assert a

counterclaim for fraud in the class action, it was denied by a decision and order dated November 2, 2018, wherein Justice Baynes found that no reasonable justification for the failure to present such facts on the prior motion was given and no new facts or law were asserted (NYSCEF Doc No. 21). The same allegations in plaintiffs' proposed answer have been raised again in this action. These claims were or should have been litigated in the class action. Thus, since plaintiffs are seeking to relitigate issues which were raised in the class action, at least with respect to J.C. Ryan, which was a party in the class action, the doctrine of res judicata applies to bar such fraud claims in this action. Furthermore, Yellen and Kombol are in privity with J.C. Ryan.

Similarly, since plaintiffs' first cause of action pursuant to Judiciary Law § 487 is predicated on the same transactions and could have been raised in the class action, this cause of action is also barred by the doctrine of res judicata. In this regard, it is noted that plaintiffs' Judiciary Law § 487 claim was specifically raised by them in the bankruptcy proceeding, and the bankruptcy court, in a decision and order dated March 31, 2020, ruled that plaintiffs should have sought their remed[y] in the case in which the wrongdoing allegedly was committed (NYSCEF Doc No. 24 at 15, *In re Fierro*, 616 BR 596, 608 [Bankr ED NY 2020], *quoting Alliance Network, LLC v Sidley Austin LLP*, 43 Misc 3d 848, 858 [Sup Ct, NY County 2014]). It is binding precedent that the rules of res judicata apply to the decisions of a bankruptcy court" (*Winkler v Weiss*, 294 AD2d 428, 429 [2d Dept 2002]).

Moreover, the requisite elements of a fraud claim are: "(1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance,

(4) justifiable reliance by the plaintiff, and (5) damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Failure to meet any one of the elements will result in dismissal of the claim (*see Hense v Baxter*, 79 AD3d 814, 816 [2d Dept 2010]). Here, plaintiffs have failed to allege the element of justifiable reliance. That is, plaintiffs do not claim that they were unaware of the assignments, or relied on a representation that J.C. Ryan had standing to bring the class action. In fact, plaintiffs disputed this issue of standing and pointed to the assignments in the class action. Thus, the court finds that plaintiffs' fraud cause of action fails to state a viable claim.

Furthermore, Judiciary Law § 487 (1) provides, in pertinent part, that "[a]n attorney or counselor who . . . [i]Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages, to be recovered in a civil action." It is understood that "relief under a cause of action based upon Judiciary Law § 487 'is not lightly given'" (*Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 615 [1st Dept 2015], *lv denied* 28 NY3d 903 [2015], quoting *Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 601 [1st Dept 2014]). To warrant such relief, the plaintiff must make a showing of "egregious conduct or a chronic and extreme pattern of behavior" on the part of the defendant attorneys that caused damages (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 [1st Dept 2015]). Moreover, "allegations regarding an act of deceit or intent to deceive must be stated with particularity" (*Facebook, Inc.*, 134 AD3d at 615), and "the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient" (*id.*; *see also Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297-298 [1st

Dept 2004], *lv denied* 4 NY3d 707 [2005]; *Agostini v Sobol*, 304 AD2d 395, 396 [1st Dept 2003]). This court, upon consideration, does not find that plaintiffs sufficiently allege such "egregious conduct or a chronic and extreme pattern of behavior" on the part of the defendant attorneys to state a viable claim under Judiciary Law § 487 (*see* CPLR 3211 [a] [7]; *Savitt*, 126 AD3d at 507).

As to plaintiffs' second cause of action for conspiracy to violate Judiciary Law § 487, New York does not recognize an independent cause of action for civil conspiracy (*see Li v Shih*, __ AD3d __, 2022 NY Slip Op 04293, [2d Dept July 6, 2022]; *Palmieri v Perry, Van Etten, Rozanski & Primavera, LLP*, 200 AD3d 785, 788 [2d Dept 2021]; *McSpedon v Levine*, 158 AD3d 618, 621 [2d Dept 2018]). The court acknowledges that "a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme" (*Blanco v Polanco*, 116 AD3d 892, 896 [2d Dept 2014], *quoting Litras v Litras*, 254 AD2d 395, 396 [2d Dept 1998]). However, "[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement" (*Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2012]). Here, since plaintiffs' first cause of action for violation of Judiciary Law § 487 must be dismissed, there cannot be any conspiracy to commit a violation of it and consequently, plaintiffs' second cause of action for conspiracy to commit a violation of Judiciary Law § 487 must likewise be dismissed (*see Palmieri*, 200

AD3d at 788; *McSpedon*, 158 AD3d at 621; *Williams v Williams*, 149 AD3d 1145, 1146 [2d Dept 2017], *lv denied* 30 NY3d 913 [2018]).

Plaintiffs' motion (motion sequence 4) seeks to disqualify the Yellen firm from representing J.C. Ryan based on the doctrine of collateral estoppel due to Justice Bayne's November 29, 2016 decision and order which disqualified the Yellen firm from representing J.C. Ryan in the class action pursuant to the advocate-witness rule (NYSCEF Doc No. 87). Plaintiffs' motion further seeks to disqualify the Yellen firm from representing J.C. Ryan, Schnipper, and Kipiniak in the instant action based on the ground that members of the Yellen firm are likely to be called as witness to testify about J.C. Ryan's fraud and deceit. Plaintiffs also seek the imposition of sanctions on the Yellen firm for attempting to represent J.C. Ryan based on the fact that Justice Baynes previously disqualified it from representing J.C. Ryan in the class action.

Rule 3.7 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that, unless certain exceptions apply, "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." However, since this court finds that this action must be dismissed, this disqualification motion is moot since there will be no need for the members of the Yellen firm to be called as witnesses.

With respect to whether sanctions should be imposed in this action, it is noted that Justice Baynes ruled, in his November 29, 2016 decision and order (NYSCEF Doc No. 87), that there appeared to be, if not conflicts of interest, an appearance of impropriety if the Yellen firm continued to represent both DBO and J.C. Ryan in the class action

because it appeared likely that at least some members of the Yellen firm would be called upon to testify in the class action. While the disqualification of the Yellen firm from representing J.C. Ryan, Schnipper, and Kipiniak would have been warranted if not for dismissal of this action, the court declines to impose any sanctions, in view of (1) the early, pre-answer stage of this action, the fact that this is a different action from the class action, and the fact that DBO has not been named as a defendant in this action.

Based upon the foregoing, it is hereby

ORDERED, that defendants' motions (motion sequences 1, 2 and 3) for an order dismissing plaintiffs' complaint as against them are granted, and it is further

ORDERED, that plaintiffs' motion (Motion Seq. 4) is denied.

This constitutes the decision and order of the court.

E N T E R

HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice