

**Schwartzman v Pliskin, Rubano, Baum & Vitulli**

2019 NY Slip Op 30419(U)

January 14, 2019

Supreme Court, Queens County

Docket Number: 714510/2017

Judge: Joseph Risi

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI  
Acting Supreme Court Justice

IA Part 3

-----X  
PHILIP S. SCHWARTZMAN, INC. and JOHN  
SCHWARTZMAN,

Index  
Number 714510/2017

Plaintiffs,

**DECISION / ORDER**

-against-

Motion Seq. #1 and #2

PLISKIN, RUBANO, BAUM & VITULLI, JOSEPH D.  
VITULLI, ESQ., JOSEPH VITULLI, JR., JJ REALTY  
OF NY LLC and LINDEN STREET REALTY OF NY,  
LLC,

Defendants.

-----X

**FILED**  
JAN 18 2019  
COUNTY CLERK  
QUEENS COUNTY

The following numbered papers read on these separate motions by defendants Pliskin, Rubano, Baum & Vitulli ("PRBV") and Joseph D. Vitulli, Esq. ("Vitulli, Esq.") pursuant to CPLR §3211 (a) (1) to dismiss plaintiffs' complaint as against them based upon the documentary evidence; pursuant to CPLR §3211 (a) (3) to dismiss all claims asserted by plaintiff John Schwartzman based on his lack of legal capacity to sue individually; pursuant to CPLR §3211 (a) (5) to dismiss all claims against defendants PRBV and Vitulli, Esq. based on the doctrine of judicial estoppel; and pursuant to CPLR §3211 (a) (7) to dismiss plaintiffs' complaint against defendants PRBV and Vitulli, Esq. based upon plaintiffs' failure to state any viable causes of action, and by defendants Joseph Vitulli, Jr. ("Vitulli, Jr.") and JJ Realty of NY LLC ("JJ") and Linden Street Realty of NY LLC ("Linden") to dismiss plaintiffs' complaint with prejudice: (a) pursuant to CPLR §3211 (a) (1) and (7), on the grounds that a defense is founded upon documentary evidence and that the complaint fails to state a valid cause of action; (b) pursuant to CPLR §3211 (a) (3) on the ground that plaintiff John Schwartzman lacks the legal capacity to maintain this action; and (c) pursuant to CPLR §§3013 and 3016 (b), on the ground that the complaint is not pled with sufficient particularity so as to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proven and the material elements of each cause of action, and pursuant to 22 NYCRR § 130-1.1, to award costs and sanctions against plaintiffs for having commenced this frivolous action against them and for having refused to discontinue it after demand.

	<u>Papers</u>
	<u>Numbered</u>
Notices of Motion - Affidavits - Exhibits .....	12-43
Answering Affidavits - Exhibits .....	46-66
Reply Affidavits .....	67-71

Upon the foregoing papers it is ordered that the motions are consolidated and determined as follows:

This action arises from the October 16, 2014 sale of commercial property located at 136-01 35<sup>th</sup> Avenue, Flushing, New York (the premises) by its owner, plaintiff Philip S. Schwartzman, Inc. ("PSSI"), the principal and sole shareholder of which is plaintiff John Schwartzman ("John"), to purchaser, defendant Linden.

Plaintiff PSSI owned the premises from 1988 until the October 2014 sale to defendant Linden. Prior to 1988, the premises were owned by Philip Schwartzman ("Philip"), the former principal of PSSI and plaintiff John's father. In 1998, nonparty Philip sold part of a business he operated at the premises to one of its tenants, nonparty Tabco Auto Body Supply Inc. ("Tabco") whose principal is nonparty S. Alex Beroukhim.

Philip ran all aspects of plaintiff PSSI's business until his death in January of 2013. Prior to his death, Philip transferred his stock ownership in plaintiff PSSI to his son, plaintiff John, who after such transfer and until the October 2014 sale to defendant Linden, was employed by the tenant, nonparty Tabco, as a stock person. Nonparty Tabco is still a tenant of the premises pursuant to a 40-year lease extension executed by plaintiff John on behalf of plaintiff PSSI and nonparty Beroukhim on behalf of Tabco, on the day before the sale of the premises to defendant Linden.

Prior to the sale of the premises to defendant Linden, nonparty Beroukhim, had expressed nonparty Tabco's interest in buying the premises for \$1,000,000.00, and wanted PSSI to hold a purchase-money mortgage. Plaintiff John brought this offer by Tabco to defendant Vitulli, Esq., of defendant PRBV, which had been plaintiff PSSI's counsel for more than thirty years for discussion and advice. Defendant Vitulli, Esq. introduced plaintiff John to his father, defendant Vitulli, Jr., who owned real estate in the area. Defendant Vitulli, Jr. made an all cash offer \$100,000.00 above the amount offered by Tabco for the premises.

Plaintiff John advised nonparty Beroukhim of this competing offer by defendant Vitulli, Jr. and gave Beroukhim an opportunity to revise Tabco's earlier offer. Beroukhim thereafter sent a proposed contract to Vitulli, Esq., which contained substantially the same terms as the original offer.<sup>1</sup>

---

<sup>1</sup> The terms of the new offer were a purchase price of \$1,000,000.00, with a down payment of \$25,000.00 at contract signing, contingent upon plaintiff PSSI giving a purchase money mortgage in the amount of \$700,000.00.

Plaintiff PSSI rejected this offer. Plaintiff PSSI instead accepted defendant Vitulli, Jr.'s offer which was increased by an additional \$100,000.00, and entered into a contract with defendant JJ, one of defendant Vitulli, Jr.'s business entities, at that higher purchase price of \$1,200,000.00.

Prior to entering this contract, plaintiff PSSI's counsel, defendant Vitulli, Esq., of defendant PRBV, disclosed to plaintiff John that he was a member of defendant JJ. Plaintiff John signed a sworn disclosure statement on behalf of defendant PSSI noting that PSSI was advised by its counsel defendants PRBV and Vitulli, Esq. of defendant Vitulli, Esq.'s interest in the purchasing company, defendant JJ, and consented to the transaction. In that disclosure statement, plaintiff PSSI further noted that the purchase and sale agreement was fair and equitable, and that although advised to seek independent counsel, plaintiff PSSI consented to its counsel, defendants PRBV and Vitulli, Esq., representing its interests in the sale of the premises.

Plaintiffs allege that despite plaintiff John's execution of this statement of disclosure on behalf of plaintiff PSSI, defendant Vitulli, Esq.'s conflict of interest cannot be waived. Plaintiffs also allege that prior to the subject sale, defendant Vitulli, Esq., acting as counsel for his father, defendant Vitulli, Jr., formed a new limited liability corporation, defendant Linden, for the purpose of purchasing the premises.

It is undisputed that defendant JJ assigned its rights in the contract of sale of the premises with plaintiff PSSI to defendant Linden pursuant to a written Assignment of Contract. The closing of the sale was held on October 16, 2014, at which plaintiff PSSI signed the deed of the premises over to defendant Linden. At the closing, the parties agreed that \$200,000.00 of the purchase price of \$1,200,000.00 would be held in escrow because plaintiff John on behalf of plaintiff PSSI had encumbered the premises by entering into that long term lease with nonparty Tabco on the eve of the closing.

The escrow agreement provides that in the event that the purchaser, defendant Linden, is able to void and cancel the lease extension, then the seller, plaintiff PSSI, shall be entitled to \$200,000.00 less any costs and expenses, including reasonable attorneys' fees. The escrow agreement further provides that in the event that the purchaser, defendant Linden, is not able to void and cancel the lease extension, then the contract price shall be reduced to one million dollars and the buyer, defendant Linden, shall be entitled to the \$200,000.00 held in escrow.

Thereafter, in or about December of 2014, PSSI and Linden commenced an action against Tabco seeking to have Tabco's lease extension declared void (the Tabco action). Defendant Vitulli, Esq., represented PSSI in that action. PSSI and Linden made a cross motion to discontinue the Tabco action, which motion was granted. In an affidavit by plaintiff John submitted in support of that cross motion, he denied any wrongdoing by PSSI's attorney, defendant Vitulli, Esq., and averred the following: that PSSI and Linden were seeking to discontinue the action to avoid a lengthy and costly litigation; that he knew that defendant Vitulli, Esq.'s father owned the company, Linden, which purchased the premises; that although advised by defendant Vitulli, Esq. to seek independent counsel, he declined to do so; that he entered the sale of the premises with defendant Linden freely

and voluntarily with full disclosure of all the facts and circumstances surrounding the transaction; and that Linden's offer was far superior to the offer of nonparty Tabco.

Plaintiffs allege in the complaint in the instant action that six months after the Tabco action was discontinued, plaintiff PSSI was given a check for \$100,000.00 from the monies held in escrow without explanation other than that PSSI would shortly receive the remainder.

Tabco's principal, Beroukhim, subsequently commenced an action in New York County against defendants Linden and Vitulli, Esq. sounding in fraud, tortious interference with prospective economic relations and prima facie tort (the Beroukhim action), claiming that he sustained damages because Tabco did not get to purchase the premises. Defendant Linden moved to dismiss the action against it, which motion was granted by the Hon. Eileen A. Rakower, after oral argument.

In an affidavit in support of Linden's motion, plaintiff John as President of plaintiff PSSI, which was not a party in that action, averred that PSSI did not accept the terms of the offer of Beroukhim for the premises which it found unacceptable; that his attorney, defendant Vitulli, Esq., introduced him to his father, defendant Vitulli, Jr., who was prepared to pay all cash at a higher price for the premises; that PSSI accepted that offer and signed an agreement with defendant JJ, which assigned that agreement to defendant Linden, a company formed by defendant Vitulli, Jr., which ultimately purchased the subject premises; that he signed a conflict waiver so that PSSI's counsel, defendants PRBV and Vitulli, Esq., could continue to represent PSSI in the sale of the premises; and that defendant Linden and its principal, defendant Vitulli, Jr., were represented by different counsel, namely, Joseph Angelo, Esq., in the sale of the premises.

In her decision granting Linden's motion to dismiss the action against it, Justice Rakower noted that Beroukhim failed to allege any misrepresentation by Vitulli, Jr., who was the sole owner and member of the purchaser of the premises, Linden; that Beroukhim failed to allege anything actionable on the part of Linden which merely outbid Beroukhim for the premises; and that Vitulli, Jr.'s son, Vitulli, Esq., had no interest in and was never a member of defendant Linden.

In their complaint in the instant action, plaintiffs allege, among other things, that defendants PRBV and Vitulli, Esq. in representing plaintiff PSSI in the sale of its premises to defendant Linden, made certain misrepresentations to plaintiff John, as principal of plaintiff PSSI, in order to obtain the premises at a below market price for the benefit of both defendant Vitulli, Esq., and his father, defendant Vitulli, Jr. The complaint contains ten causes of action. Four of these causes of action are asserted against all of the defendants, PRBV, Vitulli, Esq., Vitulli, Jr., JJ and Linden. They are unjust enrichment (fourth), fraud (sixth), to rescind the contract (eighth) and conspiracy (ninth). The remaining causes of action are asserted against defendants PRBV and Vitulli, Esq., only. They are legal malpractice (first), breach of fiduciary duty as attorney (second), violation of Judiciary Law § 487 (third), fraud (fifth), misrepresentation (seventh) and breach of fiduciary duty as broker (tenth).

Defendants PRBV and Vitulli, Esq. now move to dismiss all causes of action in the complaint as against them and defendants Vitulli, Jr., JJ and Linden separately move to dismiss all

causes of action in the complaint as against them.

Initially the branches of the motions of defendants PRBV and Vitulli, Esq. and defendants Vitulli, Jr., JJ and Linden to dismiss all claims of plaintiff John are granted.

It is well settled that an action in which a corporate shareholder alleges a wrong to the corporation is an action that must be brought in the shareholder's derivative capacity, on behalf of the corporation. (*See Abrams v Donati*, 66 NY2d 951 [1985]; *see also Barbaro v Spinelli*, 121 AD3d 727 [2014]; *Yudell v Gilbert*, 99 AD3d 108 [2012].) Direct claims may be asserted by the shareholder where the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation. (*See Abrams v Donati, supra*; *see also Serino v Lipper*, 123 AD3d 34 [2014].) In order to determine whether claims are derivative or individual, "a court should consider (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." (*Yudell v Gilbert, supra* at 114 [internal quotation marks omitted].) Further, where a plaintiff's allegations in the complaint confuse a shareholder's derivative and individual rights, the complaint will be dismissed. (*See Abrams v Donati, supra*.)

Plaintiff John, here, is not suing in a derivative capacity. Rather, the allegations in plaintiffs' complaint are that the defendants defrauded the corporation PSSI, the former owner/seller of the subject premises, and as such, the claims are derivative as they alleged harm to the corporation, rather than harm to plaintiff John, individually. (*See Yudell v Gilbert, supra*.) Thus, all claims of plaintiff John against the defendants brought in his individual capacity are dismissed.

Next, on a pre-answer motion to dismiss pursuant to CPLR §3211 (a) (7), the court should "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 v Martinez*, 84 NY2d 83, 87-88[1994]; *see Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2010].) Such a motion should be granted where, even viewing the allegations as true, the plaintiff cannot establish a cause of action. (*See Parekh v Cain*, 96 AD3d 812 [2012]; *see also Morales v Copy Right, Inc.*, 28 AD3d 440 [2006].) In order to prevail on a motion to dismiss a complaint pursuant to CPLR §3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims. (*See Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]; *see also Barker v Amorini*, 121 AD3d 823; *Parekh v Cain, supra*.)

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages." (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007], quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]). To establish causation, a plaintiff must show that he or she would have received more advantageous

result, would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence. (*See Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, supra.*)

In this case, defendants PRBV and Vitulli, Esq. demonstrated their entitlement to dismissal of the legal malpractice cause of action pursuant to CPLR §3211(a)(1). Plaintiff John's statements on behalf of PSSI in the aforementioned affidavits from the Tabco and Beroukhim actions, that he was not deceived into selling the premises to defendant Linden; that defendant Vitulli, Esq. properly advised that he had an interest in defendant JJ, which originally contracted with PSSI to purchase its premises; that PSSI was advised to obtain independent counsel for the sale of the premises, but declined to do so; that defendant Vitulli, Esq. had no interest in the purchaser, defendant Linden; and that defendant Linden was not represented by defendants Vitulli, Esq. or PRBV, in the sale of the premises, but rather had its own independent counsel, belie plaintiffs' claims in the instant action that defendants PRBV and Vitulli, Esq. were negligent in their representation of PSSI and committed legal malpractice. Those statements constitute informal judicial admissions and documentary evidence warranting the dismissal of plaintiffs' legal malpractice claim. (*See CPLR 3211[a][1]; see also Morgenthau & Latham v Bank of N.Y. Co.*, 305 AD2d 74 [2003].) Moreover, the complaint failed to state a cause of action to recover damages for legal malpractice as plaintiffs' allegations regarding the consequences and damages flowing from the alleged failure of defendants PRBV and Vitulli, Esq. to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession in their advice and representation of them in the underlying transaction were too speculative to permit a trier of fact to find that same caused actual and ascertainable damages. (*See Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox*, 112 AD3d 909 [2013].)

Accordingly, the branch of the motion of defendants PRBV and Vitulli, Esq. to dismiss the first cause of action for legal malpractice against them is granted.

The branches of the motion of defendants PRBV and Vitulli, Esq. to dismiss the second and tenth causes of action for breach of fiduciary duty are also granted since these causes of action are based on the same facts underlying the legal malpractice cause of action and do not allege distinct damages. (*See Maroulis v Sari M. Friedman, P.C.*, 153 AD3d 1250 [2017]; *see also Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox, supra; Rosenbaum v Sheresky Aronson Mayefsky & Sloan, LLP*, 100 AD3d 731 [2012].) In addition, accepting the facts as alleged in the complaint as true and according plaintiffs the benefit of every possible favorable inference, plaintiffs have failed to state a cause of action for breach of fiduciary duty as attorneys or real estate brokers against defendants PRBV and Vitulli, Esq. Moreover, the statements in plaintiff John's affidavits from the Tabco and Beroukhim actions constitute informal judicial admissions and documentary evidence also warranting dismissal of plaintiffs' misrepresentation claims. (*See CPLR 3211[a][1]; see also Morgenthau & Latham v Bank of N.Y. Co., supra.*)

Section 487 of the Judiciary Law broadly provides for a private civil cause of action for treble damages against lawyers who deceive any party or the court. Relief under this statute, however, is reserved for a chronic, extreme pattern of legal delinquency (*see Bridges v 725 Riverside Drive, Inc.*,

119 AD2d 789 [1986]; *see also Wiggin v Gordon*, 115 Misc. 2d 1071 [1982]), or for misconduct that is chronic. (*See Bridges v 725 Riverside Drive, Inc.*, *supra*.) Furthermore, to recover under Section 487, a plaintiff must plead and prove both actual deceit by the attorney and causation, that is, that the deceit or collusion actually caused the plaintiff's damages. (*See Maroulis v Sari M. Friedman, P.C.*, *supra*; *see also Gumarova v Law Offs. of Paul A. Boronow, P.C.*, 129 AD3d 911 [2015]; *Mizuno v Barak*, 113 AD3d 825 [2014]). Thus, even egregious misconduct will not rise to the level of a violation of Section 487 if there is no pattern of intentional deceit or wrongdoing.

Here, defendants PRBV and Vitulli, Esq. demonstrated that plaintiffs failed to state a cause of action for violation of Judiciary Law §487 as plaintiffs did not allege the requisite pattern of wrongdoing or deceit necessary to sustain such claim. (*See CPLR §3211 [a][7]*.) Defendants PRBV and Vitulli, Esq. further demonstrated that plaintiff John's statements in his affidavits submitted in the Tabco and Beroukhim actions constitute informal judicial admissions and documentary evidence warranting the dismissal of plaintiffs' claim of violation of Judiciary Law §487. (*See CPLR §3211[a][1]*; *see also Morgenthau & Latham v Bank of N.Y. Co.*, *supra*.)

Accordingly, that branch of the motion of defendants PRBV and Vitulli, Esq. which seeks dismissal of plaintiffs' third cause of action for violation of Judiciary Law §487 is granted.

To plead a cause of action for actual fraud, a plaintiff must allege (1) that the defendant made a representation or an omission as to a material fact that was false and known to be false; (2) that the misrepresentation or omission was made for the purpose of inducing the plaintiff to rely upon it; (3) that the plaintiff justifiably relied on the misrepresentation or material omission; and (4) that the plaintiff suffered an injury as a result of such reliance. (*See Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *see also Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914 [2009]; *Spector v Wendy*, 63 AD3d 820 [2009].) Moreover, CPLR 3016 (b) requires that the circumstances of the fraud must be stated in detail, including specific dates and other items. (*See Stein v Doukas*, 98 AD3d 1024 [2012]; *see also Scott v Fields*, 92 AD3d 666 [2012]; *Moore v Liberty Power Corp., LLC*, 72 AD3d 660 [2010].) Conclusory assertions and/or sweeping references to acts by all or some of the defendants will not suffice. (*See Scott v Fields, supra*; *see also Quinones v Schaap*, 91 AD3d 739 [2012]; *Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708 [2011].)

In this case, plaintiffs failed to plead the requisite elements of fraud with particularity as to all defendants. (*See Reichenbaum v Cilmi*, 64 AD3d 693 [2009]; *see also Hartford Cas. Ins. Co. v Vengroff Williams & Assocs., Inc.*, 306 AD2d 435 [2003]; *Kline v Taukpoint Realty Corp.*, 302 AD2d 433 [2003].) In addition, plaintiff John's statements in his prior affidavits from the Tabco and Beroukhim actions, that is, there was no wrongdoing by his attorney, defendant Vitulli, Esq.; he knew that defendant Vitulli, Esq.'s father owned the company, Linden, which purchased the premises; he was advised by defendant Vitulli, Esq. to seek independent counsel and declined to do so; he entered the sale of the premises with defendant Linden freely and voluntarily with full disclosure of all the facts and circumstances surrounding the transaction; he agreed to the terms of the sale, which were better than the terms offered by nonparty Tabco; he signed a conflict waiver so that PSSI's counsel, defendant Vitulli, Esq., could continue to represent PSSI in the transaction; and

defendant Linden and its principal, defendant Vitulli, Jr., were represented by different counsel, Joseph Angelo, Esq., in the transaction, belie plaintiffs' claims in the instant action of fraud. (*See Morgenthau & Latham v Bank of N.Y. Co., supra.*)

Accordingly, the branches of the motions of defendants PRBV and Vitulli, Esq. and Vitulli, Jr., JJ and Linden to dismiss plaintiffs' fifth and sixth causes of action for fraud are granted.

The branch of the motion of defendants PRBV and Vitulli, Esq. to dismiss plaintiffs' seventh cause of action for misrepresentation is also granted.

Plaintiffs failed to plead their cause of action for misrepresentation with sufficient particularity. (*See CPLR 3016 [b].*) In addition, accepting the facts as alleged in the complaint as true and according plaintiffs the benefit of every possible favorable inference, plaintiffs failed to state a cause of action for misrepresentation. (*See CPLR 3211 [a] [7].*)

Defendants PRBV, Vitulli, Esq., Vitulli, Jr., JJ and Linden demonstrated that plaintiffs' complaint does not properly state a cause of action for rescission as plaintiffs failed to allege that there is lacking a complete and adequate remedy at law. (*See Rudman v Cowles Communications, 30 NY2d 1 [1972].*) Rather, plaintiffs may be fully compensated by monetary damages. (*See MBIA Ins. Corp. v Lynch, 81 AD3d 419 [2011].*)

Accordingly, the branches of the motions of defendants PRBV and Vitulli, Esq. and Vitulli, Jr., JJ and Linden to dismiss plaintiffs' eighth cause of action for rescission are granted.

The branches of the motions of defendants PRBV and Vitulli, Esq. and Vitulli, Jr., JJ and Linden to dismiss plaintiffs ninth cause of action for conspiracy are granted.

New York does not recognize civil conspiracy to commit a tort as an independent cause of action. (*See Alexander & Alexander of N.Y. v Fritzen, 68 NY2d 968 [1986]; see also Dickinson v Igoni, 76 AD3d 943 [2010]; Salvatore v Kumar, 45 AD3d 560 [2007].*) 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. (*See Litras v Litras, 254 AD2d 395 [1997].*) "In 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 [2012].*)

Inasmuch as the underlying causes of action for fraud have been dismissed, plaintiffs' cause of action alleging civil conspiracy to commit fraud is also dismissed, since it stands or falls with the underlying tort. (*See McSpedon v Levine, 158 AD3d 618 [2018]; see also Romano v Romano, 2 AD3d 430 [2003]; Sokol v Addison, 293 AD2d 600 [2002].*)

The branches of the motions of defendants PRBV and Vitulli, Esq. and Vitulli, Jr., JJ and

Linden to dismiss plaintiffs' fourth cause of action for unjust enrichment are granted as said cause of action is duplicative of plaintiffs' legal malpractice and fraud causes of action, and does not allege distinct damages. Moreover, the statements in plaintiff John's affidavits from the Tabco and Beroukhim actions constitute informal judicial admissions and documentary evidence warranting dismissal of plaintiffs' claim of unjust enrichment (*See CPLR 3211[a][1]; see also Morgenthau & Latham v Bank of N.Y. Co., supra.*)

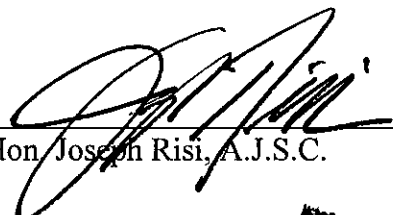
The branches of the motions of defendants PRBV and Vitulli, Esq. and Vitulli, Jr., JJ and Linden seeking to dismiss plaintiffs' claims for punitive damages are granted.

Accordingly, the motions of defendants PRBV and Vitulli, Esq. and Vitulli, Jr., JJ and Linden to dismiss are granted and plaintiffs' complaint is dismissed in its entirety against all defendants.

The part of the motion of defendants Vitulli, Jr., JJ and Linden seeking an award of costs and to impose sanctions against plaintiffs is denied as the conduct of plaintiffs in bringing the action against them cannot be said to rise to the level of "frivolous" within the meaning of 22 NYCRR § 130-1.1.

This is the decision and order of the Court.

Date: January 14, 2019

  
Hon. Joseph Risi, A.J.S.C.

**FILED**  
JAN 18 2019  
COUNTY CLERK  
QUEENS COUNTY