Louis v Fear
2021 NY Slip Op 32462(U)
June 17, 2021
Supreme Court, New York County
Docket Number: Index No. 657646/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA ANNE CRANE **PART** IAS MOTION 60

Justice

---X

LOUIS, PATRICK

Plaintiff,

- v -

FEAR, ESQ, ALEXANDER MARRIOTT

Defendant.

---X

INDEX NO. 657646/2019

MOTION DATE 10/30/2020, 10/30/2020, 10/30/2020, 12/08/2020, 10/04/2020, N/A, N/A, 05/10/2021

MOTION SEQ. NO. 001 002 003 004 005 006 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 70, 71, 72, 73, 74, 181, 182, 183, 184, 185, 186, 187, 188, 189, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 58, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 83, 84, 149, 150, 151, 152, 153, 154, 155, 156, 157, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 89, 90, 91, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 233, 234, 235, 236, 237, 238, 239, 240

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 110, 111, 112, 113, 114, 166

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 165, 168, 170, 172, 173, 174, 175, 176, 177, 178, 179, 180

were read on this motion to/for APPOINT - REFEREE.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing documents, it is

This action arises out of plaintiff Patrick Louis's ("Louis") investment in March 2015 of $320,000 in defendant Infinity Restaurant Group, Inc. ("Infinity"), a venture with nonparty Jeremy Gomes ("Gomes"). (Amended Complaint, ¶¶ 1-2 [NYSCEF Doc. No. 59].) Plaintiff appears in this action *pro se*. (*Id.*, Parties, ¶ 1.) Motion Sequence Numbers 001-004 and 006-008 are consolidated here for purpose of disposition. In Motion Sequence Number 001, defendant Kenneth F. McCallion ("McCallion") moves to dismiss the original complaint, and in Motion Sequence Number 003, McCallion and defendant McCallion & Associates, LLP ("McCallion & Associates" and, collectively, the "McCallion Defendants") move to dismiss the amended complaint. (*See* Notices of Motion, Mot. Seq. Nos. 001, 003 [NYSCEF Doc. Nos. 38, 77].) In Motion Sequence Numbers 002 and 004, defendant Alexander Marriott Fear ("Fear") moves to dismiss the original complaint and the amended complaint respectively, and for an order prohibiting plaintiff from commencing future actions or filing future motions against Fear, and for attorney's fees. (*See* Notices of Motion, Mot. Seq. Nos. 002, 004 [NYSCEF Doc. Nos. 44, 85].) In Motion Sequence Number 006, plaintiff moves by order to show cause for an order striking filings made by defendants in a related action captioned *Gomes v Mafrey*, Index No. 653310/2015 (the "MaFrey Litigation"), naming plaintiff the permanent receiver of Infinity, and awarding sanctions against defendants. (*See* Order to Show Cause, Mot. Seq. No. 006 [NYSCEF

Doc. No. 165].) In Motion Sequence Number 007, plaintiff moves by order to show cause to amend the caption to name Infinity as a plaintiff and remove Infinity as a defendant, to change the name of McCallion & Associates in the caption, and to deem documents from discovery in a related action pending in Supreme Court, Kings County, captioned *Louis v Gomes*, Index No. 510515/2016 (the "Louis Litigation") admitted in this action.[1] (*See* Order to Show Cause, Mot. Seq. No. 007 [NYSCEF Doc. No. 116].) In Motion Sequence Number 008, plaintiff moves by order to show cause to consolidate this action with the Louis Litigation for all purposes and to consolidate this action with the MaFrey Litigation for purposes of a trial on plaintiff's cause of action for a declaratory judgment. (*See* Order to Show Cause, Mot. Seq. No. 008 [NYSCEF Doc. No. 287].)

Background

Plaintiff alleges that the funds he invested in Infinity were "obtained under false pretenses" and used by Gomes and others to "fund their own personal lives and lifestyles of luxurious excess with impunity." (Amended Complaint, ¶ 5.) This action is one of several arising from plaintiff's investment and Infinity's business dealings. Infinity entered negotiations in 2015, represented by nonparty Jean Chou ("Chou"), to purchase a restaurant operated by nonparty MaFrey Corporation ("MaFrey"). (*Id.*, ¶ 12.) Chou was "relieved of her duties" in June 2015 and Louis commenced an action against her in 2018, caption *Louis v Chou*, Index No. 100767/2018 (the "Chou Litigation"). (*Id.*, ¶¶ 17, 21; *see* Chou Litigation Complaint [NYSCEF Doc. No. 6].) In the Chou Litigation, Louis alleged, among other things, breach of contract, negligence, and breach of fiduciary duty in connection with the negotiations with MaFrey. (Chou Litigation Complaint, ¶¶ 32-45.)

[1] This order to show cause was never signed.

Plaintiff alleges that in October 2015, Gomes commenced the MaFrey Litigation against MaFrey on behalf of himself and Infinity. (Amended Complaint, ¶¶ 23, 25.) Plaintiff also alleges that Gomes was represented in that action by the McCallion Defendants. (*Id.*, ¶ 25.) Plaintiff alleges that defendant Kristian Karl Larsen ("Larsen") served in an "Of Counsel" capacity at McCallion & Associates. (*Id.*) Plaintiff alleges that because he was a shareholder and co-director of Infinity, the McCallion Defendants owed him a duty of care in their representation of Infinity in the MaFrey Litigation. (*Id.*, ¶¶ 25, 30.) Plaintiff further asserts that McCallion was engaged as corporate counsel to Infinity, and that, during the course of his engagement, he received improper payments. (*Id.*, ¶¶ 7-11.) Fear represented defendants in the MaFrey litigation (*Id.*, ¶ 34.) Plaintiff appears to assert that Fear colluded with Gomes and the McCallion defendants to perpetuate fraud on plaintiff, based on a payment made by Infinity to Fear for legal fees and a stipulation of adjournment due to a medical emergency, signed only by Fear. (*Id.*, ¶¶ 43, 62, 71-73, 86-87.) The MaFrey Litigation was discontinued by stipulation dated March 27, 2018. (McCallion Aff. In Supp., Exh. 1, Mot. Seq. No. 003 [NYSCEF Doc. No. 79].) This court denied a subsequent motion by plaintiff to intervene in the MaFrey Litigation, holding that it was a new action for which a new index number needed to be obtained and new parties needed to be served. (March 19, 2019 Order [NYSCEF Doc. No. 80].)

Plaintiff commenced the Louis Litigation against Gomes and Infinity in Kings County in 2016. Gomes hired Larsen to represent him in the Louis Litigation. (Larsen Aff. In Supp., ¶ 5 [NYSCEF Doc. No. 181].) After the Court in the Louis Litigation held that the amended complaint had been withdrawn, plaintiff moved to vacate the order. In denying the motion to vacate, the Kings County Court "prohibit[ed] the plaintiff from filing any more motions in this lawsuit or any new lawsuit against either the defendant or Mr. Cargile [a non-party in this

action], or th[ei]r counsels without prior judicial approval . . . ." (J. Ruchelsman September 7, 2018 Order, at 4 [NYSCEF Doc. No. 184] [internal citations omitted].)

Discussion

Motion Sequence Number 001-004

Motion Sequence Number 001-004 are four motions to dismiss. "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [internal citation omitted].) When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Id.*, at 87-88.) Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. (*Id.*) The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . ." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].)

There are four motions to dismiss pending before the court: two to dismiss the original complaint and two to dismiss the amended complaint. Defendants have not withdrawn the motions to dismiss the original complaint. Nor have they indicated that the motions to dismiss the amended complaint have mooted the motions to dismiss the original complaint. Plaintiff, however, asserts that "Motion Seq 1 & 2 are both moot as [a] result of Plaintiff's Amended Complaint at Docket 59." (Louis Aff. In Opp., Mot. Seq. No. 001 [NYSCEF Doc. No. 223].) Because plaintiff does not attempt to defend the original complaint, but rather amended the

complaint, the court will consider those motions to dismiss directed at the amended complaint. (*See DiPasquale v Security Mut. Life Ins. Co. of New York*, 293 AD2d 394, 395 [1st Dept 2002].) The court will accordingly deny the motions to dismiss the original complaint as moot, as the the amended complaint has superseded the original complaint. The court notes, however, that Larsen filed papers under Motion Sequence Number 001, seeking to join the motions of McCallion and Fear to dismiss. These papers will therefore be considered in conjunction with Motion Sequence Numbers 003 and 004.

As an initial matter, the McCallion Defendants and Larsen argue that this court lacks jurisdiction over them because they were never properly served. (McCallion Aff. In Supp., ¶ 6 [NYSCEF Doc. No. 78]; Larsen Aff. In Supp., ¶ 2.) McCallion says that he was never personally served with "the Amended Complaint or any other legal papers" in this action. (*Id.*, at 3.) Plaintiff filed an affidavit of service of the original summons and complaint on McCallion. (Aff. of Service [NYSCEF Doc. No. 31].) McCallion does not dispute this service. Nor does he establish that the electronic filing of the amended complaint is insufficient service. The court finds that it has personal jurisdiction over McCallion. McCallion & Associates was not named as a defendant in the initial complaint. Plaintiff fails to provide an affidavit of service of the amended complaint upon McCallion & Associates, and thus has failed to establish that this court has jurisdiction over the corporation. Plaintiff similarly fails to establish that it has jurisdiction over Larsen. Plaintiff never filed an affidavit of service for Larsen, and the proof of service he filed does not state what was mailed. Nor does it even bear Larsen's name. Even if this mailing had been accomplished, it would be insufficient on its own to constitute proper service. (*See* CPLR 308.) While the court may extend the time for service (*see* CPLR 306-b), the court declines to do so here. While allowances are normally made for *pro se* litigants (*Corsini v U-*

Haul Intern., Inc., 212 AD2d 288, 291 [1st Dept 1995]), allowance here is improper where the amended complaint, in any event, would ultimately be dismissed as against McCallion & Associates and Larsen for the substantive reasons discussed below.

Plaintiff submits a joint affidavit in opposition to both motions to dismiss, and accordingly they will be discussed together. The McCallion Defendants assert that, of the five causes of action listed in the amended complaint, three are directed against the McCallion Defendants: The first cause of action for declaratory judgment, the second cause of action for negligent misrepresentation, and the fifth cause of action for attorney misconduct pursuant to New York Judiciary Law (Judiciary Law) § 487. (McCallion Aff. In Supp., ¶ 9.) They accordingly seek dismissal of these three causes of action, as well as the third cause of action for civil conspiracy and the fourth cause of action for fraudulent misrepresentation. (*Id.*) They assert that, because the third and fourth causes of action are alleged against Larsen who, during the relevant time period was acting as "of counsel" to McCallion & Associates, they may seek dismissal. (*Id.*) Larsen, however, has appeared in this action and, as discussed above, has submitted papers on this motion. Because the McCallion Defendants are not representing Larsen in this action, and because the third and fourth causes of action are not alleged as against the McCallion Defendants, the court need not and will not consider their arguments for the dismissal of those causes of action.

The McCallion Defendants assert that plaintiff lacks standing to bring a derivative suit, and that, even if he had such standing, he fails to seek anything on behalf of Infinity. (*Id.*, ¶ 17.)[2] As to the first cause of action, the McCallion Defendants argue that plaintiff fails to allege any facts to support a declaratory judgment regarding fraud. (*Id.*, ¶ 18.)[3] As to the second cause of

[2] Several paragraphs in this affidavit are misnumbered or duplicated. This citation is to paragraph 17 on page 8.
[3] This citation is to paragraph 18 on page 11.

action, they argue that plaintiff fails to establish a special relationship between the parties, the communication of any incorrect information between the McCallion Defendants and plaintiff, and reasonable reliance on the part of plaintiff. (*Id.*, ¶¶ 21-24.) As to the fifth cause of action, they argue that a cause of action brought under Judiciary Law § 487 "is, at its core, a fraud claim" and that plaintiff fails to allege fraud or misrepresentation. (*Id.*, ¶¶ 31, 33-34.)

Plaintiff alleges the first, third, fourth, and fifth causes of action against Fear. Fear argues that plaintiff has "failed to set forth any specificity with respect to what actions, individually or when taken together, could constitute the alleged fraud upon the court" necessary to maintain any of the causes of action. (Fear Aff. In Supp., ¶ 26 [NYSCEF Doc. No. 86] [internal quotation marks omitted].) Larsen seeks to join the motions of McCallion and Fear to dismiss. (Larsen Aff. In Supp., ¶ 1.) Plaintiff alleges the first, third, fourth, a fifth causes of action against Larsen. Larsen argues that, by bringing this action against him, plaintiff violated the September 7, 2018 order of Justice Ruchelsman in the Louis Litigation, that "prohibits [Louis] from filing any more motions in this lawsuit or any new lawsuit against either the defendant or Mr. Cargile, or th[ei]r counsels without prior judicial approval." (J. Ruchelsman September 7, 2018 Order, at 4.)

Plaintiff in his joint affidavit in opposition fails to rebut any of defendants' arguments, but rather reiterates arguments previously made in his amended complaint. He also accuses this court of "making empty promises to get elected, how sad and disingenuous" (Louis Aff. In Opp., ¶ 28 [NYSCEF Doc. No. 190]) in apparent continuation of a pattern that, as Justice Ruchelsman characterized, is "so bereft of evidence and so outlandish and insulting that the court will not further comment upon it." (J. Ruchelsman September 7, 2018 Order, at 4.) Additional affidavits, one submitted in opposition to Motion Sequence Number 004 and one in opposition to

Larsen's affirmation to join the motions to dismiss, are similarly devoid of rebuttal to defendants' arguments and contain comments that, as Justice Ruchelsman noted, are "inappropriate at best and slanderous at worst." (*Id.*, at 3.)

First Cause of Action – Declaratory Judgment

Plaintiff seeks a declaratory judgment "of Fraud Upon the Court by Defendant . . . McCallion, Defendant . . . Larsen, . . . and Defendant . . . Fear as relates to their actions and omissions in the [MaFrey Litigation].) (Amended Complaint, ¶ 284.) As an initial matter, plaintiff does not have standing to bring this cause of action. Plaintiff asserts that, as co-director and derivative shareholder of Infinity, he has a legally protectable interest in the MaFrey Litigation, and that he can bring this cause of action pursuant to New York Business Corporation Law ("BCL") § 626. (*Id.*, ¶¶ 255-256.) BCL § 626 states that an action "may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor . . . ." (BCL § 626 [a].) It further states that in any such action, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." (BCL § 626 [c].) Plaintiff has failed to meet these two requirements. This cause of action is asserted to secure a judgment in plaintiff's own favor, not the corporation's. Plaintiff asserts that he individually has "a legally protectable interest" because he financed Infinity and that he individually "has sustained extensive damages" as a result of defendants' actions. (Amended Complaint, ¶¶ 256, 281.) He makes no assertion on behalf of Infinity. He also fails entirely to detail efforts to secure initiation of this action by the board or to explain his failure to do so.

Even if plaintiff had properly pleaded this cause of action under BCL § 626, he fails to identify anything that could reasonably constitute fraud upon the court. He asserts that

defendants perpetuated fraud upon the court because, among other things, McCallion moved for summary judgment in the MaFrey Litigation early on and Fear asserted a statute of frauds affirmative defense. Neither of these constitute a fraud. The court notes that the statute of frauds, as embodied in New York General Obligations Law § 5-701, is a requirement that certain agreements be in writing. It is not, as plaintiff seems to suggest, an indication that a party knew of fraud or the potential for fraud.

Plaintiff also asserts that Fear perpetuated fraud upon the court by failing to disclose a Settlement Agreement between Infinity and the defendants in the MaFrey Litigation. (Amended Complaint, ¶ 263.) The Settlement Agreement, among other things, provides for the provision of attorney's fees to MaFrey for damages arising from the term of the Agreement. (Settlement Agreement [NYSCEF Doc. No. 68].) Plaintiff argues that this agreement superseded the Purchase Agreement between the parties to the MaFrey Litigation and indemnified MaFrey of legal fees before the MaFrey Litigation even commenced. (Amended Complaint, ¶¶ 266, 275.) Plaintiff claims that a payment of $8,500 to Fear for the fees of the MaFrey Litigation defendants supports this argument. The Settlement Agreement on its face states that it is "made to induce the Parties to adjourn the Closing" of the sale of the restaurant, pursuant to the Purchase Agreement. (Settlement Agreement, at 1.) It does not supersede the Purchase Agreement, and only provides for attorney's fees for the "term of the Agreement," which is the adjournment of the closing. (*Id.*) The payment of $8,500, according to the lawyers representing plaintiff at the time, was made in conjunction for a further request to adjourn the closing and for legal fees incurred in connection with the continued adjournment. (Helbraun Letter [NYSCEF Doc. No. 88].) Plaintiff's assertions that Fear was indemnified for attorney's fees in connection with the MaFrey Litigation and that the $8,500 payment was improper are entirely unfounded.

Plaintiff finally alleges that Larsen committed fraud upon the court by allegedly misrepresenting that his mother was ill. (Amended Complaint, ¶ 268.) In his affidavit opposing Larsen's request to join the motions to dismiss, plaintiff asserts that Larsen was lying about his mother's cancer preventing him from appearing at a conference in March 2016, because he appeared in court in July 2016 and December 2016. (Louis Aff. In Opp., at 2-3 [NYSCEF Doc. No. 223].) This assertion lacks any sense of logic and is inappropriate at best. Plaintiff has failed to establish standing to bring a cause of action for a declaratory judgment and has failed to identify any possible fraud. Thus, the court dismisses the first cause of action.

Second Cause of Action – Negligent Misrepresentation

Plaintiff asserts a cause of action against the McCallion Defendants for negligent misrepresentation. A cause of action for negligent misrepresentation "requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011].) Plaintiff admits that "neither McCallion nor Larsen communicated with the Plaintiff . . . ." (Amended Complaint, ¶ 296.) Plaintiff does not assert that he relied on any incorrect information from the McCallion Defendants. Rather, he asserts that he relied "on their ability to prosecute the lawsuit," meaning the MaFrey Litigation. (*Id.*, ¶ 293.) This fails to give rise to a cause of action for negligent misrepresentation, and the second cause of action is, therefore, dismissed.

Third Cause of Action – Civil Conspiracy

Plaintiff asserts a cause of action for civil conspiracy against Larsen and Fear, apparently in connection with a stipulation of adjournment that only Fear signed (Amended Complaint, ¶ 300.)

> "New York does not recognize an independent cause of action for civil conspiracy, which may only be asserted to connect actions of separate defendants to an underlying tort. To assert a civil conspiracy claim, the complaint must allege a cognizable cause of action, agreement among the conspirators, an overt act in furtherance of the agreement, intentional participation by the conspirators in furtherance of a plan or purpose, and damages. Bare, conclusory allegations of conspiracy are insufficient."

(*Kovkov v Law Firm of Dayrel Sewell, PLLC*, 182 AD3d 418, 418-419 [1st Dept 2020].) Plaintiff fails to connect the alleged conspiratorial actions to any underlying tort, and fails to show any agreement, act, or participation that would give rise to civil conspiracy. Plaintiff makes the conclusory assertion that Larsen's failure to sign the stipulation of adjournment "was [] purposely conducted and was conducted in furtherance of a plan to deceive both the trial court and the Plaintiff . . . ." (Amended Complaint, ¶ 301.) Plaintiff fails to make any showing of civil conspiracy, and the third cause of action is dismissed.

<u>Fourth Cause of Action – Fraudulent Misrepresentation</u>

Plaintiff asserts a cause of action for fraudulent misrepresentation against Larsen and Fear. To maintain a cause of action for fraudulent misrepresentation, "a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 178.) This cause of action is alleged against Larsen in connection with the stipulation of adjournment due to Larsen's mother's medical emergency and against Fear in connection with the Settlement Agreement for the adjournment of the closing

between Infinity and the MaFrey defendants, as discussed above, and his alleged knowledge of Landmark violations. (Amended Complaint, ¶¶ 307-313.) Plaintiff's assertion that Larsen lied about his mother's medical emergency lacks any support is rejected for the same reasons as above. Plaintiff's assertions as against Fear also lacks any support and are also rejected. These assertions further fail because plaintiff could not justifiably rely on Fear's representations in the MaFrey litigation, as he represented adverse parties to Infinity and, therefore, adverse to plaintiff's interests. The fourth cause of action is, accordingly, dismissed.

Fifth Cause of Action – Judiciary Law § 487

Plaintiff asserts a fifth cause of action against all individual defendants, except for Infinity, for violation of Judiciary Law § 487. This statute provides:

> "An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

To plead a cause of action under Judiciary Law § 487, a plaintiff must "plead the essential elements of a cause of action under the statute, i.e., intentional deceit and damages proximately caused by the deceit." (*Jean v Chinitz*, 163 AD3d 497, 497 [1st Dept 2018].) Relief under this statute "is not lightly given . . . and requires a showing of egregious conduct or a chronic and extreme pattern of behavior on the part of the defendant attorneys . . . ." (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015] [internal quotation marks and citations omitted].) Because the statute "has a criminal component, it must be interpreted narrowly."

(*Doscher v Mannatt, Phelps & Phillips, LLP*, 148 AD3d 523, 524 [1st Dept 2017] [internal citations omitted].)

Plaintiff alleges that Fear violated this statute by asserting a statute of frauds affirmative defense, by entering into the Settlement Agreement with Infinity for adjournment of the closing, and by accepting the $8,500 payment for legal fees. (Amended Complaint, ¶¶ 337-341.) As discussed above, these actions do not give rise to fraud upon the court or fraudulent misrepresentation. They accordingly also fail to meet the heightened standard for violation of Judiciary Law § 487. Plaintiff further alleges that the McCallion Defendants violated the statute by writing a deceptive and careless complaint in the MaFrey Litigation, by discontinuing that action, and by failing to present evidence regarding Landmark violations during the pendency of that action. (Amended Complaint, ¶¶ 329-335.) Plaintiff fails to identify any intentional deceit or damages necessary to plead a cause of action. Nor does he plead any egregious conduct necessary to maintain this cause of action. Finally, plaintiff appears to allege that the adjournment Larsen sought due to his mother's medical emergency constitutes a violation of the statute (*id.*, ¶ 336). The court rejects that argument for the same reasons as above. The fifth cause of action is, accordingly, dismissed.

Sanctions and Attorney's Fees

Defendants ask for sanctions and attorney's fees in connection with their defense of this action. The McCallion Defendants argue that plaintiff has submitted "a blizzard of baseless, *ad hominem* attacks and scurrilous insults and that, although "the Amended Complaint is entirely devoid of any real merit, Plaintiff uses it in a totally improper manner to personally defame the individual defendant Kenneth F. McCallion with regard to his honesty and professionalism." (McCallion Aff. In Supp., ¶¶ 35-36.) Fear argues that the amended complaint "has, without

merit, sullied and defamed the name and character of [Fear] and Plaintiff should be sanctioned by this Court as a result thereof." (Fear Aff. In Supp., ¶ 49.) Larsen argues that plaintiff "continues to publish defamatory and troubling written statements to and to repeat his false and preposterous accusation" concerning Larsen's mother's illness. (Larsen Aff. In Supp., ¶ 23.) Defendants also allege that plaintiff violated Justice Ruchelsman's order in the Louis Litigation by bringing this action. Plaintiff argues that, because defendants "have seen fit to bring the Ruchelsman Decision and Order into the record, Plaintiff feels it is appropriate to enter into the record the previous misconduct of McCallion," citing a complaint in which McCallion was sued for his representation of a client in another case and a transcript of a motion to confirm an arbitration award.

Uniform Rule 130-1.1 allows the court to award "costs in the form of reimbursement of actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." (22 NYCRR 130-1.1 [a].) "In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part . . . ." (*Id.*) For purposes of this Part, conduct is frivolous if:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false."

(22 NYCRR 130-1.1 [c].) In determining whether to award attorney's fees or sanctions, the court should consider "whether the conduct was continued when it became apparent, or should have been apparent, that the conduct was frivolous" and "what remedy is dictated by

considerations of fairness and equity . . . ." (*Levy v Carol Management Corp.*, 260 AD2d 27, 34 [1st Dept 1999] [internal citations omitted].)

As previously discussed, Justice Ruchelsman issued an order in the Louis Litigation on September 7, 2018, that both characterized plaintiff's manner in pursuing litigation and prohibited him from pursuing certain litigation without prior judicial approval. (J. Ruchelsman September 7, 2018.) As Justice Ruchelsman noted, although plaintiff is entitled to some latitude as he is appearing *pro se*, he "acquires no greater right than any other litigant and such appearance may not be used to deprive the defendants of the same rights enjoyed by other defendants." (*Id.*, at 2, quoting *Roundtree v Singh*, 143 AD2d 995, 996 [2d Dept 1988].) Justice Ruchelsman stated in the Louis Litigation that "plaintiff's repeated and consistent non-legal rhetoric contained within it's papers is inappropriate" and noted that plaintiff's comments were "inappropriate at best and slanderous at worst. They have no place in legal arguments presented, regardless of the experience or even the pro se status of the movant." Plaintiff has continued to present non-legal arguments that are inappropriate and sometimes malicious.

Justice Ruchelsman also prohibited "plaintiff from filing any more motions in this lawsuit or any new lawsuit against either the defendant or Mr. Cargile, or th[ei]r counsels without prior judicial approval." (J. Ruchelsman September 7, 2018, at 4.) Plaintiff argues that this court authorized him to bring this action by order dated March 19, 2019. (Louis Aff. In Opp., ¶ 14.) That order was issued because the court declined to sign plaintiff's order to show cause to intervene in the MaFrey Litigation. It was not judicial approval that Justice Ruchelsman's order allowed a lawsuit against any of the parties protected under that order. It is undisputed that Larsen was counsel for defendant in the Louis Litigation. The court accordingly finds that plaintiff violated Justice Ruchelsman's order by bringing this lawsuit as against Larsen. While

plaintiff's actions in bringing and pursuing this litigation border on sanctionable, the court will not impose sanctions upon him here. The court will, however, issue a protective order of the kind Justice Ruchelsman issued and prohibit plaintiff from pursuing further litigation against defendants. Plaintiff should take notice that further efforts to pursue litigation against defendants may result in the imposition of sanctions.

Motion Sequence Number 006

Motion Sequence Number 006 is a motion to strike pleadings in the MaFrey Litigation, to name plaintiff permanent receiver of Infinity, and to impose sanctions against defendants. The amended complaint alleges two causes of action against Infinity, one to appoint plaintiff as permanent receiver and one for judicial dissolution of Infinity. (Amended Complaint, ¶¶ 351-360.) Plaintiff also submits a petition seeking the same relief. (Petition [NYSCEF Doc. No. 94].)

As an initial matter, the court will not strike any pleadings from the MaFrey Litigation. Plaintiff in his order to show cause made such a request "upon a finding that the aforementioned [pleadings] may constitute a Fraud Upon the Court." (Order to Show Cause [NYSCEF Doc. No. 165].) As discussed above, the court dismisses plaintiff's cause of action for a declaratory judgment of fraud upon the court. There is accordingly no basis to strike pleadings on that ground. The court also declines to impose sanctions against defendants, as there has been no showing that their actions meet the standards for sanctions.

Plaintiff moves pursuant to CPLR 6401 and BCL § 1203 for an order naming him permanent receiver of Infinity. CPLR 6401 allows the court to appoint a temporary receiver over "property which is the subject of an action . . . where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." "The drastic remedy of

appointment of a receiver is to be invoked only where necessary for the protection of the parties. There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established." (*Matter of Armienti v Brooks*, 309 AD2d 659, 661 [1st Dept 2003].) BCL § 1203 provides that the court may appoint a receiver "of the property of the corporation" at any stage before final judgment "in an action or special proceeding brought under this article . . . ."

Plaintiff has not established his right to a receivership here. As an initial matter, the property of Infinity is not the subject matter of this action, and a request for receivership is accordingly not appropriate under CPLR 6401. Nor is the request for a receivership proper under BCL § 1203, as plaintiff did not bring this action under Article 12 of the BCL and has not commenced a special proceeding under such Article. The petition that plaintiff attempts to submit in support of his request for a receivership is insufficient to comport with the requirements of BCL § 1203.

Plaintiff's petition seeks judicial dissolution of Infinity pursuant to BCL § 1104-a, although this request is not made in the order to show cause. Under BCL § 1104-a, a shareholder of at least 20% of a corporation's shares may seek dissolution if "those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders" or if the "property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers, or those in control of the corporation. Such a petition must strictly comply with the requirements of BCL §§ 1105 and 1106. (*See Corner Furniture Discount Center, Inc. v Sapirstein*, 2019 WL 3531616, at *2 [Sup Ct, NY County 2019].) The petition and order to show cause plainly do not comport with the requirements of these provisions.

However, plaintiff should be afforded the opportunity to seek judicial dissolution of Infinity and a receivership over the company's property. Therefore, court will deny the motion without prejudice to plaintiff bringing a petition in a special proceeding and under a new index number to seek judicial dissolution of Infinity pursuant to BCL § 1104-a and a receivership over Infinity's property pursuant to BCL § 1202. In accordance with Justice Ruchelsman's order, the court will allow plaintiff to name Gomes as a party in such a proceeding solely for the purpose of a petition for judicial dissolution and appointment of a receiver. Plaintiff shall not name any defendants in this action as party to such proceeding.

Motion Sequence Numbers 007-008

Motion Sequence Number 007 is a motion to name Infinity as a plaintiff in this action and remove Infinity as a defendant, to change the name of McCallion & Associates in the caption, and to deem documents from discovery in the Louis Litigation admitted in this action. Motion Sequence Number 008 is a motion to consolidate this action with the Louis Litigation for all purposes and to consolidate this action with the MaFrey Litigation for purposes of a trial on plaintiff's cause of action for a declaratory judgment. These motions must both be denied, as the complaint against all defendants is dismissed.

It is accordingly hereby

ORDERED that motion sequence numbers 001 and 002 are denied as moot; and it is further

ORDERED that Motion Sequence Number 003 is granted to the extent of dismissing the amended complaint as against defendants Kenneth F. McCallion, Esq. and McCallion & Associates, LLP; and it is further

ORDERED that Motion Sequence Number 004 is granted to the extent of dismissing the amended complaint as against defendant Alexander Marriott Fear, Esq.; and it is further

ORDERED that, to the extent defendant Kristian Karl Larsen, Esq. has joined co-defendants in Motion Sequence Numbers 003 and 004, those motions are also granted to the extent of dismissing the complaint as against Kristian Karl Larsen, Esq.; and it is further

ORDERED that, other than to appeal this decision and order, Patrick Louis is prohibited from filing any more motions in this action or commencing any new litigation against Alexander Marriott Fear, Esq., or any law firm of which he is a member or with which he is associated, Kenneth F. McCallion, Esq., or any law firm of which he is a member or with which he is associated, or Kristian Karl Larsen, Esq., or any law firm of which he is a member or with which he is associated, without prior judicial approval explicitly authorizing such action; and it is further

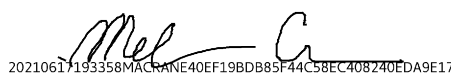
ORDERED that Motion Sequence Number 006 is denied without prejudice to plaintiff's right to bring a petition in a special proceeding to seek judicial dissolution of Infinity and a receivership of the company's property; and it is further

ORDERED that plaintiff may name Gomes as a party in such special proceeding solely for the purpose of pursuing judicial dissolution of Infinity and receivership of the company's property; and it is further

ORDERED that Motion Sequence Numbers 007 and 008 are denied in their entirety.

This constitutes the decision and order of the court.

Any relief not expressly granted herein is denied.



6/17/2021
DATE

MELISSA ANNE CRANE, J.S.C.