

1. The Motion for Summary Judgment as to Count IV (Defamation/Slander) against Roy Cohen, Esquire in the Amended Third-Party Joinder Complaint is **GRANTED**.

2. The Motion for Summary Judgment as to Count III (Breach of Contract) against John Greenhall, Esquire and Lane Kelman, Esquire in the Amended Third-Party Joinder Complaint is **GRANTED**.

3. The Motion for Summary as to Count III (Breach of Contract) against Roy Cohen, Esquire in the Amended Third-Party Joinder Complaint is **GRANTED** as to the claim for breach of an implied contract only. The Motion for Summary Judgment as to the Structure Tone Litigation is **DENIED**.

4. The Motion for Summary Judgment as to Count III (Breach of Contract) of M. Cohen & Sons Inc.'s Counterclaim against Cohen Seglias Pallas Greenhall & Furman PC is **GRANTED** as to the claim for breach of an implied contract only. The Motion for Summary Judgment as to the Structure Tone Litigation is **DENIED**.

5. The Motion for Summary Judgment based on Statute of Limitations as it pertains to Defendants Lane Kelman, Esquire and John Greenhall, Esquire, specifically the claims for professional negligence (Count I) and breach of fiduciary duty (Count II), is **DENIED**. Questions of fact exist as to when M. Cohen & Sons, Inc. discovered that Defendants Lane Kelman, Esquire and John Greenhall, Esquire breached any duty owed to M. Cohen & Sons, Inc.

6. The Motion for Summary seeking to dismiss allegedly different and new theories pled in the Amended Third-Party Complaint as Time-Barred is **DENIED** as any amendments amplify the causes of action pled which is permitted by Pa. R. Civ. P. 1033.

7. The Request to Stay these proceedings is **DENIED**.

BY THE COURT:



PAULA A. PATRICK, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

COHEN SEGLIAS PALLAS GREENHALL & FURMAN PC	:	April Term 2020
	:	
Plaintiff	:	No. 402
v.	:	
ALLEN COHEN and SUSAN COHEN	:	Commerce Program
Defendants.	:	

COHEN SEGLIAS PALLAS GREENHALL & FURMAN PC	:	April Term 2020
	:	
Plaintiff	:	No. 405
v.	:	
ALLEN COHEN	:	Commerce Program
Defendant.	:	

COHEN SEGLIAS PALLAS GREENHALL & FURMAN PC	:	June Term 2020
	:	
Plaintiff	:	No. 121
v.	:	
M. COHEN & SONS, INC.	:	Commerce Program
Defendant	:	
v.	:	Control Number 22063857
ROY S. COHEN, ESQUIRE, LANE KELMAN, ESQUIRE, and JOHN GREENHALL, ESQUIRE	:	
Third Party Defendants.	:	

OPINION

Presently before the Court is Plaintiff/Counterclaim Defendant Cohen Seglias Pallas Greenhall & Furman, PC. (“Cohen Seglias”) and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire’s Motion for Summary Judgment.¹ For the reasons set forth below, the Motion for Summary Judgment is granted in part and denied in part.

¹ Also pending before the Court are two additional Motions for Summary Judgment filed by Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire. The Court will issue independent Orders disposing of those motions.

Background²

M. Cohen & Sons, Inc. (“M. Cohen”) is a subcontractor in the construction industry specializing in craftsman and artisan iron and metal work design of stairs, railings and other design details.³ Allen Cohen is the owner and president of M. Cohen.⁴

Cohen Seglias Pallas Greenhall & Furman PC (“Cohen Seglias”) is a law firm based in Philadelphia, PA representing many contractors and subcontractors in the construction industry, including M. Cohen and W. S. Cumby (Cumby).⁵ Roy Cohen, Esquire is a shareholder and founding member of the firm.⁶ John Greenhall, Esquire is the former managing partner of Cohen Seglias and a member of the firm’s conflicts committee.⁷ Lane Kelman, Esquire, is a partner at Cohen Seglias for about twenty (20) years practices construction law and litigates.⁸

In 2011, Cohen Seglias began providing legal services to M. Cohen and its principal Allen Cohen in negotiations, contract review, and representation in contractual disputes and litigation with respect to corporate matters.⁹ In late April or early May 2019, Cohen Seglias undertook to represent M. Cohen and Cumby with respect to a project in Princeton, New Jersey, known as the

² The factual background set forth in this Opinion is solely limited to the facts as they relate to the instant motion.

³ Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire’s Motion for Summary Judgment ¶ 1. M. Cohen’s Response in Opposition ¶ 1.

⁴ Id. at ¶ 4.

⁵ Id. at ¶ ¶ 10, 40.

⁶ Id. at ¶ 41.

⁷ Id. at ¶ 43.

⁸ Id. at ¶ 42.

⁹ Third Party Complaint ¶ ¶10, 12. Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire’s Motion for Summary Judgment ¶ 2. M. Cohen’s Response in Opposition ¶ 2.

IAS Project.¹⁰ Cohen Seglias alleges that it undertook to jointly represent M. Cohen and Cumby, while M. Cohen denies that the representation was joint and alleges that it was never provided with adequate disclosures such that it could provide informed consent or acquiesce in a joint representation.¹¹ Notwithstanding the foregoing, M. Cohen knew as of May 2, 2019, that Cohen Seglias was also representing Cumby.¹²

On May 3, 2019, representatives of Cumby and M. Cohen¹³ met with Roy Cohen, Esquire, Dan Fierstein, Esquire, John Greenhall, Esquire and Lane Kelman, Esquire. Cohen Seglias presented M. Cohen and Cumby with a Common Interest Agreement. However, M. Cohen and Cumby refused to sign the agreement.¹⁴ At all times relevant hereto, M. Cohen had the authority to discharge Cohen Seglias and did express concern that he and/or M. Cohen would be charged for Cohen Seglias' legal representation on the IAS Project.¹⁵

During the May 3, 2019 meeting, Roy Cohen, recognizing that the representation of M. Cohen and Cumby could potentially be adverse, decided that he and Dan Fierstein, Esquire of the firm would represent M. Cohen with respect to the IAS dispute, Lane Kelman, Esquire who represented M. Cohen in past, would continue to represent Cumby in the IAS dispute and that John

¹⁰ Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire's Motion for Summary Judgment ¶ 11. M. Cohen's Response in Opposition ¶ 11.

¹¹ Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire's Motion for Summary Judgment ¶ 11.

¹² M. Cohen's Response in Opposition ¶ 11.

¹³ Allen Cohen and three other individual representatives were present at the meeting on May 3, 2019. M. Cohen's Response in Opposition ¶ 72.

¹⁴ Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire's Motion for Summary Judgment ¶ 13, M. Cohen's Response in Opposition ¶ 13.

¹⁵ Id. ¶14.

Greenhall, Esquire, head of the conflicts committee, would act as neutral.¹⁶ Greenhall's tenure as neutral did not last long as Greenhall was reassigned to represent Cumby in the IAS matter.¹⁷

At the meeting, Cohen Seglias did inform M. Cohen that if and when M. Cohen and Cumby's relationship became adversarial the appropriate course of action would be for the firm to withdraw from its efforts and recommend that M. Cohen secure the services of independent counsel.¹⁸ At no time did Cohen Seglias recommend to M. Cohen or Cumby to seek independent counsel.¹⁹

On June 12, 2019, M. Cohen learned that Cumby was threatening and intending to make a claim under the Performance and Payment Bond issued by Platte River per the terms of the subcontract agreement between M. Cohen and Cumby.²⁰ Cohen Seglias was made of aware by M. Cohen that Cumby was threatening a bond claim. Despite Cumby's threat of a bond claim, Cohen Seglias continued to represent Cumby and M. Cohen with respect to the IAS Project and never informed them to obtain independent counsel.²¹ The representation continued even though John Greenhall, the neutral, believed that Cumby and M. Cohen's interest were not aligned.²²

¹⁶Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire's Motion for Summary Judgment ¶¶ 68, 70, M. Cohen's Response in Opposition ¶¶ 68, 70.

¹⁷ Id.

¹⁸ Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire's Motion for Summary Judgment ¶¶ 15, 74, M. Cohen's Response in Opposition ¶¶ 15, 74.

¹⁹ Id.

²⁰ Id. ¶16.

²¹ Id.

²² Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire's Motion for Summary Judgment ¶ 16, M. Cohen's Response in Opposition ¶ 16.

On October 21, 2019, Cumby served M. Cohen with its first formal notice of default.²³ Thereafter, M. Cohen and Cumby respectively replaced Cohen Seglias with new counsel; M. Cohen hired Fox Rothchild and Cumby hired Duane Morris.²⁴ The parties did meet with representatives of Platte River on November 1, 2019 to resolve the matter. Cumby thereafter issued two additional notices of default on October 25, 2019 and October 29, 2019 and on November 1, 2019 issued a letter regarding additional information allegedly supporting the default notices.²⁵

On November 15, 2019, M. Cohen commenced a lawsuit against Cumby in the Court of Common Pleas of Delaware County, Pennsylvania alleging claims for breach of contract, unjust enrichment and for tortious interference with contract.²⁶ On November 22, 2019, Cumby terminated M. Cohen from the IAS Project.²⁷ On November 25, 2019, Cumby formally asserted a claim under the performance bond issued by Platt River.

Following M. Cohen's termination from the project and after discussions between Platte River, Cumby and M. Cohen, Platte River offered M. Cohen an opportunity to complete the

²³ Id. ¶17.

²⁴ Id.

²⁵ Id. at ¶19.

²⁶ This action was subsequently referred to arbitration. The Court has been informed by the respective parties that the matter has settled. The settlement is the subject to a confidentiality provision.

²⁷ Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire's Motion for Summary Judgment ¶ 19, M. Cohen's Response in Opposition ¶ 19.

project, but M. Cohen refused to complete the project unless it received payment for all outstanding change order requests that amounted to \$500,000.²⁸

On February 27, 2020, M. Cohen filed a lawsuit against Platte River in the United States District Court for the District of New Jersey seeking a preliminary injunction and temporary restraint against Platte River.²⁹ In July 2020, Platte River paid the penal sum on the Bond (in excess of \$3.4 million) to resolve the issue with Cumby and entered into a Tender of Completion Contractor and Release Agreement with Cumby.³⁰

After Cohen Seglias was terminated as counsel for M. Cohen, it sought payment for fees and expenses incurred for multiple representations that had allegedly remained unpaid for some time.³¹ M. Cohen disputes that the fees are due and owing.

After attempts at compromise failed between Cohen Seglias and M. Cohen, Cohen Seglias filed the following actions to collect legal fees for alleged legal services provided:

1. *Cohen Seglias Pallas Greenhall & Furman, PC v. Allen Cohen and Susan Cohen*, April Term 2020 No. 402,
2. *Cohen Seglias Pallas Greenhall & Furman, P.C. v. Allen Cohen*, April Term 2020 No. 405, and
3. *Cohen Seglias Pallas Greenhall & Furman, P.C. v. M. Cohen & Sons Inc.*, June Term 2020 No. 121.³²

²⁸ Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire's Motion for Summary Judgment ¶ 20, M. Cohen's Response in Opposition ¶ 20.

²⁹ Id. ¶ 21. Cumby was also a party to this lawsuit but was dismissed due to the arbitration provision in the Subcontract Agreement.

³⁰ Id. ¶ 22.

³¹ Id. ¶ 24.

³² The Motions for Summary Judgment filed by Counterclaim Defendant Cohen Seglias and Third Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire Motion for Summary Judgment were filed in the action captioned *Cohen Seglias Pallas Greenhall & Furman, P.C. v. M. Cohen & Sons Inc.*, June Term 2020 No. 121.

In August 2020, M. Cohen filed an Answer with New Matter and asserted Counterclaims against Cohen Seglias in the *Cohen Seglias Pallas Greenhall & Furman, P.C. v. M. Cohen & Sons Inc.*, June Term 2020 No. 121 action alleging professional negligence, breach of fiduciary duty, and breach of contract³³ arising from Cohen Seglias dual representation of M. Cohen and adverse parties in various negotiations and contract disputes. M. Cohen alleges that the conflicting dual representation by Cohen Seglias of M. Cohen and Cumby delayed M. Cohen's ability to resolve the issues with Cumby and caused M. Cohen to suffer damages. Additionally, M. Cohen filed a Joinder Complaint against Roy Cohen, Esquire alleging professional negligence, breach of fiduciary duty, breach of contract and defamation/slander.

On November 18, 2021, M. Cohen, with leave of court, filed an Amended Third-Party Complaint in *Cohen Seglias Pallas Greenhall & Furman, P.C. v. M. Cohen & Sons Inc.*, June Term 2020 No. 121. The Amended Third-Party Complaint amended the claims filed against Roy Cohen, Esquire and added Lane Kelman, Esquire, and John Greenhall, Esquire as Third-Party Defendants. M. Cohen asserted claims for professional negligence (count I), breach of fiduciary duty (count II), and breach of contract (count III) against Lane Kelman, Esquire and John Greenhall, Esquire and defamation/slander (count IV) against Roy Cohen, Esquire, only. M. Cohen's Counterclaims and Amended Third Party Complaint are the subject of the present Motion for Summary Judgment.

DISCUSSION

³³ The breach of contract claim also alleges that Cohen Seglias and Roy Cohen expressly promised to provide legal representation regarding the "Structure Tone Litigation" pursuant to the Modified Contingency Agreement and breached that contractual promise by seeking to collect additionally hourly fees beyond the fee agreement. Counterclaim Defendant Cohen Seglias and Third-Party Defendants Roy S. Cohen, Esquire, Lane Kelman, Esquire, and John Greenhall, Esquire's Motion for Summary Judgment ¶ 38, M. Cohen's Response in Opposition ¶ 38.

I. Count III (breach of contract) of the Amended Third-Party Complaint and Count III (breach of contract) of the Counterclaim are dismissed in part.

In Count III of the Amended Third-Party Complaint, M. Cohen purports to state a claim for breach of contract against Defendants Roy Cohen, Esquire, Lane Kelman, Esquire and John Greenhall, Esquire. Specifically, M. Cohen alleges the following:

“that through the conduct alleged in this Third Party Complaint, the Third Party Defendants materially breached their express and implied contractual obligations to M. Cohen that it would take all action legally necessary and appropriate to protect M. Cohen’s interests; that it would perform all legal services with due care and diligence; and that it would provide M. Cohen with professionally competent, skilled and careful lawyers.”³⁴

Additionally, in count III of the Counterclaim, M. Cohen similarly purports to state a claim for breach of contract against Cohen Seglias.³⁵

Traditionally, a claim against an attorney for breach of contract required the client to allege the attorney failed to follow a client's specific instruction or fulfill a specific provision of the contract.³⁶ This however changed when the Superior Court of Pennsylvania held that a breach of contract claim against an attorney does not require proof an attorney failed to follow a specific instruction of the client and a plaintiff need only demonstrate an attorney breached his implied contractual duty “to render legal services in accordance with the profession at large.”³⁷ Now, since *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 68 (Pa. 2014), judicial support for a breach of contract claim based on an implied term in attorney-client contracts has begun to shift

³⁴ Amended Third Party Complaint, ¶ 78.

³⁵ Counterclaim ¶ 78.

³⁶ See *Rogers v. Williams*, 616 A.2d 1031, 1033 (Pa. Super. 1992); *Hoyer v. Frazee*, 470 A.2d 990, 992 (Pa. Super. 1984); *Duke & Co. v. Anderson*, 418 A.2d 613, 616 (Pa. Super. 1980).

³⁷ *Gorski v. Smith*, 812 A.2d 683, 694 (Pa. Super. 2002).

and while the Courts that have considered this question are not precedential authorities, they are persuasive.³⁸

In *Bruno*, plaintiffs alleged their insurer negligently made false reassurances pertaining to the toxicity of mold on their property. In determining whether plaintiffs' claim rested on the breach of a general social duty or contract, the court applied the gist-of-the-action doctrine which bars tort claims committed during the course of a contractual relationship from being refashioned as contract claims when the "gist or gravamen" of the action sounds in tort.³⁹ The court elaborated on the gist-of-the-action doctrine as follows:

If the facts of the particular claim establish the duty breached is one created by the parties by the terms of the contract—i.e., a specific promise to do something that party would not ordinarily have been obligated to do but for the existence of the contract—then the claim would be for breach of contract.... If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.⁴⁰

The Court in *Bruno* found that even though Defendant Erie had contractual obligations under an insurance policy to investigate whether mold was in Plaintiffs' house and to pay for any mold-related damage, the substance of Plaintiffs' allegations was not that Erie "failed to meet

³⁸ *Seidler v. Finkelman*, 2018 WL 4178147 (Pa. Super. 2018), *General Food Services, LLC v. Lipsky, Esquire*, 2019 WL 13146297 (Pa. Com. Pl. 2019); *Outerlimits Technologies, LLC v. Cozen O'Connor*, 2023 WL 2662551 (Ct. Common Pleas- Bucks County 2023); *See, e.g., Johnstone v. Raffaele*, 2020 WL 6375863 (Pa. Super. Oct. 30, 2020) (affirming a preliminary objection to a breach of contract claim where the gist of the action against an attorney for negligent preparation of documents and 'overall exercise of care' was in tort); *Juday v. Sadaka*, 2019 WL 4139089 (E.D. Pa. Aug. 30, 2019) (dismissing Plaintiff's breach of contract claim because counsel failed to abide by the relevant standard of care).

³⁹ *Bruno, supra* at 52-53.

⁴⁰ *Id.* at 68.

these obligations” but that Erie “acted in a negligent manner” in the course of fulfilling its obligations “by making false assurances regarding the toxicity of the mold and affirmatively recommending ... [plaintiffs] continue their renovation efforts, which caused them to suffer physical harm because of their reasonable reliance on those assurances.”⁴¹ The Court held that plaintiffs’ claim was a tort claim under the gist-of-the-action doctrine since plaintiffs’ allegations of negligence “facially concern Erie's alleged breach of a general social duty, not a breach of any duty created by the insurance policy itself.”⁴²

Here, there is no record evidence that Lane Kelman, Esquire and John Greenhall, Esquire individually contracted with M. Cohen to provide any type of legal services. While the Amended Third Party Complaint alleges the existence of an express contract, the only contract in the record is an Engagement Letter which was entered into between M. Cohen and Cohen Seglias on March 25, 2011. As there is no express contract between Lane Kelman, Esquire and John Greenhall, Esquire individually and M. Cohen, the claim for breach of express contact fails.

Additionally, the Amended Third Party Complaint alleges that Lane Kelman, Esquire and John Greenhall, Esquire breached an implied contract with M. Cohen. This claim for breach of an implied contract is barred by the gist of the action doctrine. While an action for legal malpractice may be brought in either contract or tort, as it pertains to this particular matter, it is clear that the implied contract between M. Cohen and Lane Kelman, Esquire and John Greenhall, Esquire is collateral to the alleged wrongful conduct of Kelman and Greenhall, that is professional negligence and breach of fiduciary duty arising from the conflicting dual representation of M. Cohen and Cumby in the IAS Project and the failure to provide bonding

⁴¹ *Bruno*, supra at 71.

⁴² *Id.*

advice by Lane Kelman, Esquire. Here, the gist of the legal malpractice action lies in tort and not in contract as is clear from the allegations in Count III of the Amended Third Party Complaint and the summary judgment record. Based on the foregoing, summary judgment in favor of John Greenhall, Esquire and Lane Kelman is warranted with respect to Count III of the Amended Third Party Complaint.

As it pertains Roy Cohen, Esquire and Cohen Seglias, the claim for breach of implied contract in Count III of the Amended Third Party Complaint and Count III of the Counterclaim is also dismissed for the same reasons set forth above, that is the claim against Roy Cohen, Esquire and Cohen Seglias lies in tort and not contract. However, the Motion for Summary Judgment is denied as it pertains to the claim for breach of express contract against Roy Cohen, Esquire and Cohen Seglias. M. Cohen alleges that Defendant Roy Cohen, Esquire entered into a modified contingent fee agreement with M. Cohen regarding the Structure Tone Litigation and that Roy Cohen, Esquire and Cohen Seglias breached said agreement. With respect to the Structure Tone Litigation, the contract, that is the modified contingent fee agreement, is not collateral to the action and the alleged breach arises directly from the contract. Consequently, the gist of the action does not bar the contract as it pertains to the Structure Tone Litigation and the Motion for Summary Judgment in this regard is denied.⁴³

II. Count IV of the Amended Third Party Complaint alleging Defamation against Roy Cohen is dismissed as a matter of law.

⁴³ Cohen Seglias and Roy Cohen, Esquire filed a separate motion for summary judgment on liability which included the claim for breach of contract as it related to the alleged modified fee agreement. This motion is denied as there were genuine issues of material facts that preclude the entry of summary judgment.

M. Cohen, in Count IV of the Amended Joinder Complaint, purports to state a claim for defamation/slander *per se* against Roy Cohen, Esquire.⁴⁴ Specifically, M. Cohen alleges that Roy Cohen, Esquire made malicious and defamatory statements and disclosed confidential financial circumstances to Patrick Pasquariello, principal of P. Agnes, Inc. which statements made M. Cohen appear financially unstable.⁴⁵ M. Cohen further alleges that as a result of said statements it suffered and will continue to suffer harm as its good name and reputation has or may incur lost business opportunities.⁴⁶

Defamation, of which libel, slander, and invasion of privacy are methods, is the tort of detracting from a person's reputation, or injuring a person's character, fame, or reputation, by false and malicious statements.⁴⁷ A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure them in their business or profession.⁴⁸ In order to be actionable, the words must be untrue, unjustifiable, and injurious to the reputation of another.⁴⁹ When communications tend to lower a person in the estimation of

⁴⁴ On November 30, 2020, the Court struck any claims against Roy Cohen from the counterclaim and any claims against Cohen Seglias in the Third Party Complaint. As such, the only claim for defamation is against Roy Cohen, Esquire.

⁴⁵ M. Cohen also alleged in the Amended Joinder Complaint that Roy Cohen made similar statements regarding M. Cohen's confidential financial circumstances to other third parties and firm clients including Cumby. (86). Despite this allegation, M. Cohen has not directed this Court to any evidence that Roy Cohen communicated with others including Cumby about M. Cohen's financial status.

⁴⁶ Counterclaim p. 85, 88; Amended Joinder Complaint 84- 88).

⁴⁷ *Joseph v. Scranton Times L.P.*, 959 A.2d 322, 334 (Pa. Super. 2008).

⁴⁸ *Id.* citing *See MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 124–25, 674 A.2d 1050, 1054 (1996).

⁴⁹ *Id.* citing *See* 42 Pa.C.S.A. § 8343(a).

the community, deter third persons from associating with them, or adversely affect their fitness for the proper conduct of their lawful business or profession, they are deemed defamatory.⁵⁰

A cause of action in defamation is now codified by statute, which provides that in a defamation lawsuit, plaintiff has the burden of proving:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion.⁵¹

A defendant may prevail against a plaintiff in a defamation suit by proving: “(1) The truth of the defamatory communication; (2) The privileged character of the occasion on which it was published; [and] (3) The character of the subject matter of defamatory comment as of public concern.”⁵²

M. Cohen’s claim for defamation centers upon statements made by Roy Cohen, Esquire to Patrick Pasquariello, a principal of P. Agnes, Inc., a construction management firm with whom M. Cohen does significant business and has had a long-standing relationship. According to M. Cohen, Roy Cohen told Mr. Pasquariello that M. Cohen failed or refused to pay for legal services Cohen Seglias provided to M. Cohen. Attached as an exhibit to M. Cohen’s Motion for Summary Judgment is a signed statement of Mr. Pasquariello. This Statement is not competent evidence for this Court to consider.

⁵⁰*Joseph v. Scranton Times L.P.*, 959 A.2d 322, 334 (Pa. Super. 2008), citing *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. 1997).

⁵¹ 42 Pa.C.S. § 8343(a)

⁵² *Id.* at § 8343(b).

Pa. R. Civ. P. 1035.4 titled Affidavits provides that “supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the signer is competent to testify to the matters stated therein.” “Affidavits” are defined by the Pennsylvania Rules of Civil Procedure as a statement in writing of a fact or facts, signed by the person making it, that either

(1) is sworn to or affirmed before an officer authorized by law to administer oaths, or before a particularized officer or individual designated by law as one before whom it may be taken, and officially certified in the case of an officer under seal of office, or 2) is unsworn and contains a statement that it is made subject to the penalties of 18 Pa. C. S. § 4904 relating to unsworn falsification to authorities.⁵³

Mr. Pasquariello’s Statement does not satisfy the definition of an Affidavit as it is not sworn to or affirmed before an officer authorized by law to administer oaths or before a particularized officer or individual designated by law as one before whom it may be taken. Additionally, the Statement does not contain a statement that it is made subject to the penalties of 18 Pa. C. S. § 4904. Based on the foregoing Mr. Pasquariello’s Statement is not competent evidence for this Court to consider at summary judgment to create a genuine issue of fact.

Notwithstanding the foregoing, M. Cohen’s claim for defamation also fails for other reasons. First, the statement Roy Cohen, Esquire made to Mr. Pasquariello that M. Cohen was not paying his bills, was true.⁵⁴ Defamatory words, even if defamatory per se, will not provide a basis for recovery where the words are true; truth is a complete and absolute defense to a civil

⁵³ Pa. R. Civ. P. 76 Definitions.

⁵⁴ See, M. Cohen’s Response in Opposition, Exhibit A- deposition of Allen Cohen dated May 19, 2021 pg. 173 L. 8-12.

action for defamation.⁵⁵ Allen Cohen testified that he was not paying his bills. Consequently, the claim for defamation fails.

Lastly, M. Cohen has not produced any evidence that it suffered any damages as a result of Roy Cohen's Statement. When a communication constitutes slander *per se*, a plaintiff is not required to prove special harm, *i.e.*, pecuniary loss. Rather, "a defendant who publishes a statement which can be considered slander *per se* is liable for the proven, actual harm the publication causes."⁵⁶ Actual harm includes "impairment of reputation and standing in the community, ... personal humiliation, and mental anguish and suffering."⁵⁷

M. Cohen has not presented any evidence demonstrating injury to its reputation or standing in the community. Allen Cohen testified that he still has a relationship with Mr. Pasquariello and that they are very good friends.⁵⁸ Allen Cohen further testified that Pasquariello has not told him that he thinks differently of him or less of him because of the statements. Also, Mr. Pasquariello never told Allen Cohen that he would not do business with him because of Roy Cohen, Esquire's statements.⁵⁹ Based on the foregoing the claim for defamation fails as a matter of law and the Motion for Summary Judgment is granted.⁶⁰

⁵⁵ *Pelagatti v. Cohen*, 370 Pa. Super. 422, 439, 536 A.2d 1337, 1345–46 (Pa. Super.1987).

⁵⁶ *Brinich v. Jencka*, 757 A.2d 388, 397 (Pa. Super. 2000) citing *Walker v. Grand Central Sanitation, Inc.*, 430 Pa.Super. 236, 634 A.2d 237, 244 (1993), *appeal denied*, 539 Pa. 652, 651 A.2d 539 (1994) (adopting Restatement (Second) of Torts § 621).

⁵⁷ *Id.*, quoting Restatement (Second) of Torts § 621, Comment at b. (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974)).

⁵⁸ M. Cohen Exhibits to Response in Opposition to Motion for Summary Judgment Exhibit "A" Allen Cohen Exhibit p. 166-168.

⁵⁹ *Id.*

⁶⁰ In addition to the statement made by Roy Cohen, Esquire to Mr. Pasquarello regarding M. Cohen's failure to pay its bills, M. Cohen also alleges that Roy Cohen, Esquire made other

III. The motion for summary pertaining to statute of limitations is denied as questions of fact exist.

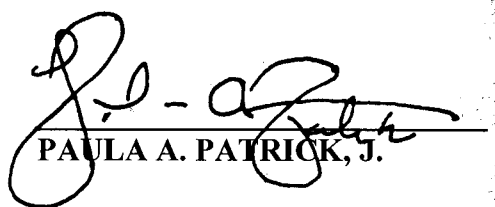
The Motion for Summary Judgment based on Statute of Limitations as it pertains to Defendants Lane Kelman, Esquire and John Greenhall, Esquire, specifically the claims for professional negligence (Count I) and breach of fiduciary duty (Count II), is denied. Questions of fact exist as to when M. Cohen discovered that Defendants Lane Kelman, Esquire and John Greenhall, Esquire breached any duty owed to M. Cohen & Sons, Inc.

Additionally, the Motion for Summary Judgment seeking to dismiss allegedly different and new theories pled in the Amended Third Party Complaint as Time-Barred is denied. Any amendments to the Third Party Complaint are not new theories of liability but amplify the causes of action already pled which is permitted by Pa. R. Civ. P. 1033.

CONCLUSION

Based on the foregoing, the Motion for Summary Judgment is Granted in part and Denied in part as set forth in the attached Order.

BY THE COURT:


PAULA A. PATRICK, J.

statements regarding privileged and confidential matters concerning M. Cohen to other Firm Clients who maintain business relationships with M. Cohen. See, Answer with New Matter Counterclaim ¶¶ 59, 61 and Amended Third Party Complaint ¶¶ 75, 77. However, the record fails to evidence any defamatory statement made by Roy Cohen, Esquire regarding M. Cohen's financial stability and circumstance including to whom the statements were made, when the statements were made, and damages suffered as a result of said statement (s). Based on the foregoing, the Court finds that M. Cohen has failed to state a claim for defamation for statements Roy Cohen allegedly made to other firm clients.

