No. 20-7117

IN THE

Supreme Court of the United States

DERVANNA H.A. TROY-MCKOY,

Petitioner,

v.

MOUNT SINAI BETH ISRAEL,

Respondent.

Petition for a Writ of Certiorari to the New York State Court of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do the issues involved, which pertain solely to New York State law, namely (1) the statute of limitations for property damage; (2) whether New York State recognizes an independent cause of action for civil conspiracy; and (3) whether a party can move to dismiss a complaint prior to submitting an answer, warrant review by this Court, when there are no important federal questions presented and no decisions have been made by any United States court of appeals?
2. Should this Court review an issue of New York State law that was not part of the action giving rise to the Order for which the Petitioner seeks review, but rather was alleged in a subsequent action initiated by the Petitioner that has not been decided by a state court of last resort or any appellate court?

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1. *Dervanna H.A. Troy-McKoy v. Mount Sinai Beth Israel* (Supreme Court of the State of New York, County of New York, Index No. 100835/2018). The judgment of the Appellate Division, First Department was entered on April 20, 2018. The judgment of the Court of Appeals was entered on September 15, 2020.
2. *Dervanna H.A. Troy-McKoy v. Mount Sinai Beth Israel* (Supreme Court of the State of New York, County of New York, Index No. 157291/2020). The judgment of the Supreme Court of the State of New York, County of New York dismissing the action was entered on December 22, 2020. Petitioner is not directly seeking review of this judgment. No appellate court has reviewed the decision of the trial court.

JURISDICTION

This Court does not have jurisdiction under 28 U.S.C. 1257(a) as the issues involved concern purely state law. Furthermore, this Court does not have jurisdiction as the petition was untimely filed more than 90 days after the date the judgment from which review is sought was entered, and no application for an extension of time to file the petition for a writ of certiorari was filed by Petitioner.

INTRODUCTION

It is axiomatic that the Supreme Court of the United States, while having broad jurisdiction over issues of Constitutional or federal law, does not have jurisdiction over state court judgments on questions of purely state law. This principle is set forth in U.S.C § 1257(a) and in the Supreme Court's own Rule 10. Nonetheless, the pro se Petitioner erroneously attempts to bring issues of purely well-settled New York State law before this Court. Petitioner also attempts to muddle the issues that were decided in the orders from which he seeks review with issues concerning fraud that were only formally raised and decided in an action that was filed subsequent to such orders. Indeed, that subsequent action has been dismissed by New York's trial-level court, and no appellate court, let alone the highest New York State court, the Court of Appeals, has reviewed the trial court's decision. Because this Court only has jurisdiction over judgments made by State courts of last resort, and not over trial court decisions subject to state appellate review, the issues related to Petitioner's allegations of fraud, which also constitute questions of purely New York State law, may not be reviewed by this Court. As the issues raised in the petition relate to matters of purely New York State law, some of which have not been decided by a State court of last resort, the petition does not merit review and should be denied.

STATEMENT OF THE CASE

This petition arises out of an action commenced by the pro se Petitioner in or around June 2018 in the Supreme Court of the State of New York, County of New York, entitled: *Dervanna H.A. Troy-McKoy v. Mount Sinai Beth Israel* (Index No. 100835/2018) (the "First Underlying Action"), in which he sought monetary compensation in the amount of over $10,000,000.00 for damages allegedly sustained as a result of Mount Sinai Beth Israel's alleged intentional destruction of his medical file, which was destroyed in a fire at the storage facility housing such file. Petitioner alleges that his medical file was destroyed in a deliberate conspiracy with the FBI and the Supreme Court of the State of New York, County of New York, in an effort to cover up the FBI's alleged poisoning of himself, which, according to Petitioner, was a racially motivated hate crime.

In lieu of an answer, Mount Sinai moved to dismiss the complaint on the grounds that (1) the statute of limitations had expired, (2) Petitioner had failed to state a cause of action, and (3) the Complaint had failed to name necessary parties. Subsequently, Petitioner moved for a default judgment against Mount Sinai on the grounds that Mount Sinai did not respond to the Complaint within thirty days.

By way of an Order dated March 13, 2019 and entered March 14, 2019, Hon. David B. Cohen granted Mount Sinai's motion to dismiss on the grounds that (1) the statute of limitations had expired; and (2) Petitioner had failed to state a cause of

action. Pet. App. 7. By way of another Order dated March 13, 2019 and entered March 14, 2019, Hon. David B. Cohen denied Petitioner's motion for default judgment on the ground that service of process had not been proper. Pet. App. 6. The Petitioner's subsequent motion to reargue the motions was denied. Pet. App. 5.

Petitioner then commenced an appeal to the New York State Appellate Division, First Department. The Appellate Division issued its Decision and Order on April 30, 2020, which affirmed the lower court's holdings. In its Decision and Order, the Appellate Division held that the action was barred by the statute of limitations and on the grounds that New York does not recognize an independent cause of action for conspiracy. The Appellate Division further held that Petitioner's motion for default judgment was properly denied as service of process on Mount Sinai had been improper. Pet. App. 2-4.

Petitioner then moved for leave to appeal to New York's highest court, the Court of Appeals. Mount Sinai filed and served opposition papers to Petitioner's motion, along with an affidavit of service. Thereafter, Petitioner alleged, via letter to the Court of Appeals, that Mount Sinai conspired with the deponent of the affidavit of service to commit criminal fraud and fraudulently present a signature as Petitioner's on such affidavit. Contrary to Petitioner's erroneous contention in his petition's question presented where he states that Mount Sinai admitted that it created a fraudulent signature, Mount Sinai unequivocally denied this allegation by

letter to Petitioner, with a copy to the Court of Appeals, and explained that neither of the signatures on the affidavit of service had been presented as Petitioner's own signature; rather, they were the signatures of the deponent and the notary witnessing the deponent's signature. The Court of Appeals acknowledged receipt and consideration of the aforementioned letters. Nonetheless, on September 15, 2020, the Court of Appeals denied Petitioner's motion for leave to appeal. Pet. App. 1.

Petitioner then commenced a second action against Mount Sinai on or about September 9, 2020 in the Supreme Court of the State of New York, County of New York, entitled: *Dervanna H.A. Troy-McKoy v. Mount Sinai Beth Israel* (Index No. 157291/2020) (the "Second Underlying Action"). The allegations in the Second Underlying Action are similar to the allegations set forth in the instant petition and reiterated many of the same allegations that were alleged in the First Underlying Action. However, the complaint in the Second Underlying Action raised the allegation of fraud in connection with Petitioner's mistaken belief that his forged signature appeared on Mount Sinai's affidavit of service of its opposition papers to Petitioner's motion for leave to appeal to the Court of Appeals. Mount Sinai once again filed a motion to dismiss in lieu of answer, and by way of an Order dated December 18, 2020, Hon. Paul A. Goetz granted Mount Sinai's motion on the grounds that the documentary evidence, namely the affidavit of service, refutes Petitioner's claims. Petitioner does not seek review of the December 18, 2020 Order.

Petitioner filed the instant petition for a writ of certiorari on January 26, 2021 and the matter was docketed on February 11, 2021.

REASONS FOR DENYING THE WRIT

I. The Petition is Untimely.

Petitioner is seeking review of the Order of the New York State Court of Appeals, which was decided and entered on September 15, 2020. Pet. App. 1. Pursuant to Supreme Court Rule 13.1, "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort … is timely when it is filed with the Clerk of this Court *within 90 days* after entry of the judgment." (emphasis added). Therefore, the deadline to file the instant petition was December 14, 2020. The petition was filed over six weeks after such deadline, on January 26, 2021.

Although Petitioner claims on page 8 of his petition that he is "acting on Order dated Thursday, March 19, 2020 that extend [*sic*] the time to appeal to 150 days from September 15, 2020," he provides no copy of such an Order with his papers. Furthermore, a search of the docket in this case indicates that no application for an extension of time was filed by Petitioner. Indeed, Petitioner's citation to an alleged March 19, 2020 Order – approximately six months prior to the date of the September 15, 2020 Order – is most perplexing as the intermediate appellate court had not yet issued its decision and no motion had been pending before the Court of Appeals on

March 19, 2020. Additionally, Petitioner is no stranger to filing applications for extensions of time before this Court. A docket search indicates that the instant case is the third time Petitioner has sought to bring a case before this Court for review. *See* Docket Nos. 19-8316 and 17-8207. Petitioner filed applications for extensions of time in each of his prior cases and both applications were granted. He failed to do so here despite knowing when and how to make such an application. In fact, Petitioner's statement of jurisdiction does not indicate that an application for an extension of time was filed.

Accordingly, the instant petition is untimely and should be denied by this Court.

II. The Questions Presented Do Not Warrant Review, as They Concern Issues of Purely New York State Law.

Pursuant to 28 U.S.C. § 1257(a), which governs this Court's jurisdiction over state court decisions, "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." Here, the validity of a United States

treaty or statute is not being questioned, nor is there a question of any State statute violating the Constitution, treaties or laws of the United States. There are no federal Constitutional or statutory questions at issue. Rather, the issues involve matters of purely New York State law.

Furthermore, pursuant to Supreme Court Rule 10, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further outlines certain considerations governing review on certiorari. The first consideration concerns a decision made by a United States court of appeals that is "in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of the judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." The second consideration concerns when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." The third and final consideration concerns when "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

None of these considerations governing review are present here. The decision from which Petitioner is seeking review was not decided by a United States court of appeals or any other federal court. Furthermore, the New York State Court decisions have not decided any important questions of federal law; the issues presented here are solely issues of New York State law, as set forth below, and such issues are well-settled and were correctly decided under New York State law.

Accordingly, the instant petition should be denied.

1. The Three-Year Statute of Limitations Under New York State Law for Petitioner's Property Damage Claim Had Expired.

The Supreme Court of the State of New York, as affirmed by the Appellate Division, First Department, correctly found that the First Underlying Action was time-barred. It is well settled by the New York State courts that the statute of limitations for property damage is three years from the date of the damage, not the date of discovery of the damage. See *Town of Oyster Bay v. Lizza Indus., Inc.*, 22 N.Y.3d 1024 (2013); *EPK Props., LLC v. PFOHL Bros. Landfill Site Steering Comm.*, 159 A.D.3d 1567 (4th Dep't 2018); *Backus v. Lyme Adirondack Timberlands II, LLC*, 96 A.D.3d 1248 (3d Dep't 2012); *Verizon-New York, Inc. v. Reckson Assocs. Realty Corp.*, 19 A.D.3d 291, 796 N.Y.S.2d 922 (1st Dep't 2005); *Manhattanville College v. James John Romeo Consulting Engineer, P.C.*, 5 A.D.3d 637, 641 (2d Dep't 2004) ("The plaintiff's property damage claims … are governed by the three-year statute of limitations (see C.P.L.R 214 [4]), and such claims

'accrue[] upon the date of injury.'") (internal citation omitted)); see also *N.Y. Civ. Prac. Law 214(4) (McKinney 2015).*

Here, Petitioner's medical records were destroyed in a January 31, 2015 fire at the storage facility containing the records. Therefore, the statute of limitations during which Petitioner could have commenced the Underlying Action expired on January 31, 2018, well before he actually did so in June 2018.

Accordingly, because the statute of limitations for property damage had expired, the Supreme Court of the State of New York, as affirmed by the Appellate Division, First Department, correctly granted Mount Sinai's motion to dismiss. As this issue does not fall within this Court's considerations governing review, the instant petition does not merit review.

2. Petitioner Failed to State a Cause of Action for Civil Conspiracy.

It is well-settled by the Courts in New York that the law in New York does not recognize an independent cause of action for civil conspiracy. See *Alexander & Alexander, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986) ("[A]s we long ago held, 'a mere conspiracy to commit a [tort] is never of itself a cause of action.'") (quoting *Brackett v. Griswold,* 112 N.Y. 454, 467 (1889)); *Rose v. Different Twist Pretzel, Inc.*, 123 A.D.3d 897 (2d Dep't 2014); *Thome v. Alexander & Louisa Calder Found*, 70 A.D.3d 88, 110 (1st Dep't 2009); *Roche v. Claverack Coop. Ins. Co.*, 59 A.D.3d 914 (3d Dep't 2009); *Zachariou v. Manios*, 50 A.D.3d 257, 257 (1st Dep't 2008);

Bronx-Lebanon Hosp. Ctr. v. Andrew Wiznia, M.D., 284 A.D.2d 265, 266 (1st Dep't 2001); *Kjar v. Jordan*, 217 A.D.2d 981 (4th Dep't 1995). Furthermore, if "none of plaintiff's tort claims are viable and timely, those claims cannot form the basis for a civil conspiracy cause of action." *Thome*, 70 A.D.3d at 110; *Linden v Moskowitz*, 294 A.D.2d 114, 115 (1st Dep't 2002).

In the First Underlying Action, Petitioner alleged that Mount Sinai destroyed his medical file in a conspiracy with the FBI to destroy evidence that the FBI inflicted a hate crime and had poisoned him. He further alleged that the Supreme Court of the State of New York, County of New York also conspired with the FBI and Mount Sinai by having his lawsuits disappear. As Petitioner's other alleged tort claim against Mount Sinai, specifically, the destruction of his medical file, was not viable or timely, that claim cannot form the basis for a civil conspiracy cause of action. As noted above, New York does not recognize an independent cause of action for civil conspiracy.

Accordingly, because Petitioner failed to state a cause of action for civil conspiracy, the Supreme Court of the State of New York, as affirmed by the Appellate Division, First Department, correctly granted Mount Sinai's motion to dismiss. As this issue does not fall within this Court's considerations governing review, the instant petition does not merit review.

3. Not Only Was Service of Process on Mount Sinai Improper, but Mount Sinai Properly Moved to Dismiss Prior to Serving its Answer.

Pursuant to New York statute, a plaintiff must serve a summons and complaint upon a defendant within a certain time frame after it is filed with the Court. See *N.Y. Civ. Prac. Law 306-b (McKinney 2015).* It is well-settled by statute and among the courts of New York State that a party can move to dismiss the complaint prior to submitting an answer. See *N.Y. Civ. Prac. Law 3211(e) (McKinney 2015)*; see also *Goldenberg v. Westchester County Health Care Corp.*, 16 N.Y.3d 323 (2011); *Wan Li Situ v. MTA Bus Co.*, 130 A.D.3d 807 (2d Dep't 2015); *Basis Yield Alpha Fund v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128 (1st Dep't 2014); *Nowacki v. Becker*, 71 A.D.3d 1496 (4th Dep't 2010); *Reed v. State*, 147 A.D.2d 767 (3d Dep't 1989).

Petitioner filed his complaint on June 22, 2018 but never served Mount Sinai. Therefore, the time to answer or appear had not commenced to run. He failed to provide any affidavit of service on Mount Sinai, or documentation that Mount Sinai's prior defense firm, Kennedys CMK, had agreed to accept service on its behalf. Rather, on July 18, 2018 the Sheriff's Department of the City of New York dropped off an envelope at Kennedys CMK when such firm was no longer counsel for Mount Sinai, and in turn, Kennedys CMK provided the undersigned firm with the Summons and Complaint.

Pursuant to N.Y. C.P.L.R. § 3211(f), service of a motion under subdivision (a) before service of a pleading responsive to the cause of action or defense sought

to be dismissed extends the time to serve the pleading until ten days after service of the notice of entry of the order. *N.Y. Civ. Prac. Law 3211(f) (McKinney 2015)*. Therefore, once Mount Sinai moved to dismiss the complaint pursuant to N.Y. C.P.L.R. § 3211(a)(5), (a)(7), and (a)(10), any responsive pleading, including an answer to the complaint, was not due until ten days after Mount Sinai's motion to dismiss was decided and served with notice of entry upon Petitioner.

As such, Mount Sinai did not fail to respond to Petitioner's Summons and Complaint in a timely fashion. Accordingly, the Supreme Court of the State of New York, as affirmed by the Appellate Division, First Department, correctly denied Petitioner's motion for a default judgment. As this issue does not fall within this Court's considerations governing review, the instant petition does not merit review.

III. Petitioner's Muddled Question Concerning the Allegations of Fraud in the Second Underlying Action, Which is an Issue of New York State Law, Has Not Been Decided By a State Court of Last Resort or Any Appellate Court.

Although Petitioner is seeking review of the New York State Court of Appeals' September 15, 2020 Order denying Petitioner's motion for leave to appeal to the Court of Appeals and the preceding April 30, 2020 Order of the Appellate Division, First Department, both of which pertain to the First Underlying Action, his question presented and ensuing Petition muddle the First Underlying Action with his subsequent complaint in the Second Underlying Action against Mount Sinai concerning allegations of conspiracy to commit fraud with respect to the signature

on the affidavit of service. However, while Mount Sinai's motion to dismiss in the Second Underlying Action was granted by Hon. Paul A. Goetz pursuant to a December 18, 2020 Decision and Order, the Order was issued in the Supreme Court of the State of New York, County of New York, which is a trial-level court. Because the Second Underlying Action has not been decided by a state court of last resort or any intermediate appellate court, it does not merit review by this Court.

Without burdening the Court with the details of the specific allegations and arguments made in the Second Underlying action pertaining to the alleged fraud raised by Petitioner, even if those issues had been decided by a state court of last resort and were ripe for review by this Court, those issues would still not merit review as they are purely issues of New York State Law.

Accordingly, that part of the petition concerning the allegations of a fraudulent signature does not merit review by this Court.

CONCLUSION

For the foregoing reasons, and any other reasons that seem just and proper to this Court, the petition for a writ of certiorari should be denied.

Dated: New York, New York
March 12, 2021

Respectfully submitted,

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