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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON J.S.C. PART 55

— 0103769/2003

BURSTIN, BRIAN
vs
SPODEK, IRA

INDEX NO. _____

MOTION DATE 3/26/04

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

— DISMISS ACTION

The following papers, numbered 1 *to* 8 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-7
Replying Affidavits	8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
MAY 20 2004
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/17/04

JANE S. SOLOMON
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STAI'E OF NEW YORK
COUNTY OF NEW YORK: PART 55
----------X
BRIAN J. BURSTIN,

DECISION AND ORDER

Plaintiff,

-against-

lndcx No. 103769/03

IRA SPODER, YESHAYAHU GREENFELD, ALAN BLUMENTHAL, MICHAEL DAVID SPIEGEL, Individually and in their capacity as Officers of the CONGREGATION TALMUD 'I'ORAII of FLATBUSH,

Defendants.
. . . . . -X

SOLOMON, J.

In this action for defamation, intentional and negligcnt infliction of emotional distrcss, abuse of process, breach of contract and breach of fiduciary duty, defendants Ira Spodek, Yeshayahu Greenfeld, Alan Blumcnthal and Michael David Spiegel, officers of thc Congregation Talmud 'I'orahof Flatbush (the Congrcgation), move for **an** order, pursuant to CPLR 3211 **(a)** (1), (5) and (7), dismissing the complaint brought by plaintiff Brian J. Burstin, a disgruntled former member of the Congregation. For the reasons set forth below, defendants' motion to dismiss the coniplaint is granted.

FACTS

Acccpting the allegations of the complaint as truc (Rovello v. Orofino Realty Co., 40 NY2d 633 [1976]), thc following facts emerge: The Congregation is an Orthodox Jewish congregation located in Brooklyn, New York. In 2001, plaintiff commcnccd a lawsuit against Isaac Tuchman, the former President of the Congregation, entitled Congregation Talmud Torah of Flatbush v Isaac Tuchman (Index No. 12503/01 [Supremc Court, Kings County]), seeking

disclosure of the Congregation's financial records in connection with the renovation and expansion of the Congregation's Social Hall (the Tuchman action). The Tuchman action was dismissed on April 19,2002, on the ground that plaintiff had failed to establish standing to bring a derivative action on behalf of the Congregation. A subsequent motion, which sought renewal and reargument of the order granting dismissal, was denied on August 9,2002.

During a November 12, 2001 meeting of the Congregation's Board of Trustees, a resolution was issued, stating that plaintiff had initiated the Tuchman action without having been authorized or retained by the Congregation to do so, and that "the Congregation believes that his initiation, maintenance and conduct of this proceeding and the issuance of subpoenas to the officers of the Congregation is unethical, immoral and against Jewish Halachic law" (Affidavit of Monte Sokol, Esq., Exh D). The Board of Trustees further resolved that plaintiff be sent a letter demanding that he cease representing the Congregation in any legal capacity, and that he discontinue the proceeding.

The Congregation then sought to have plaintiffs dispute resolved by the Vaad Harabbanim of Flatbush, the Rabbinic authority for Central and Southern Brooklyn (the Vaad), by filing a complaint alleging that plaintiff had violated Torah Law by bringing a case in a secular court against a fellow Jew. In a November 1,2001 letter to plaintiff, the Chairman of the Vaad's Beth Din stated:

> It has come to our attention that you are pursuing a case in court in the name of the Talmud Torah of Flatbush. As the Rabbinical authority within the community, we at the Vaad Harabbanim of Flatbush, feel we must inform you that pursuing a case in court against a fellow Jew is prohibited by Torah law and constitutes a Chilul Hashem, a desecration of G-d's name. The proper venue to adjudicate such matters is in a rabbinic court or Beis Din. We

> invite you to avail yourself of the Vaad's Beis Din and to bring your grievances before it. In your role as To'ein or plaintiff, you may request we summon the other party(ies) to a Din Torah.
>
> We ask that you stop and desist from your current suit and any iuture contemplated suits. Aside from Chilul Hashem, you may G-d forbid fall within the category of "Mosier," a Jew who causes a fellow Jew to be harmed financially or physically by non-Jews. We ask that you follow the path of Torah and come under the guidance of the Vaad Harabhanim to assist you in resolving your dispute.

Aff. of Ira Spodek, Esq., Exh 1.

On February 20,2002, plaintiff wrote to the Vaad, informing it that he wished to convene the Beth Din under the auspices of Machon L'Horaah of Brooklyn under the Chairmanship of Rabbi Rosenberg, instead of using the Vaad of Flatbush. The Vaad responded in a letter dated February 25,2002, acknowledging plaintiffs desire to have another Beth Din handle the dispute. The letter further advised plaintiff that the Vaad would not relinquish jurisdiction until it heard from the alternate Beth Din, and that, therefore, he was still under its "jurisdiction." The letter also indicated that until the Vaad heard from the new Beth Din, "we expect you to come to the din Torah, and we will set a date" for a hearing at which he would be required to appear (Aff. of Camille M. Abate, Esq., Exh 5).

On February 28,2002, a "Scruv," or a contempt citation, was issued by the Vaad's Beth Din against plaintiff for allegedly failing to submit the dispute he had with defendants to a Beth Din, after three summons by the Vaad directing him to do so. The Seruv provided that:

> You have ignored three Hazmanot and thus have willfully declined to appear before the Beth Din of the Vaad Harabbanim of Flatbush in the above-mentioned dispute. You are hereby declared to be in contempt of the Heth Din as prescribed by Halacha. We therefore wish to inform you that according to the Shulchan Aruch, Chosen

> Mislipat, one who refuses to come to a Din Torah, a Mesarev L'Din, should not be counted to a minyan or a mezuman or to any other religious function. ***And*** *it is also permitted for the claimant to publicize this fact in uny manner* ***he*** *sees fit*. Since you are in contempt of the Beth Din, the claimant, therefore, is authorized by the Beth Din to enforce its rights in the Civil Courts.

Spodck Aff., Exh 2 (emphasis added).

The effect of a Seruv is to a make a person a persona non-grata in the Jewish community. Among other things, a person may not be counted for the purposes of a minyan, may not be given honors at the synagogue, and may not even be spoken to by other people in the Orthodox community,

On March 4,2002, a meeting of the Board of Trustees was held, at which the Seruv was publicly read to tlic Trustees by Rabbi Yaakov Shulman, the spiritual leader of the Congregation. **At** the same meeting, plaintiff was summarily expcllcd from membership of the Congregation.

On March 7,2002, Rabbi Aryeh M. Rabinowitz faxed a letter to the Vaad, informing it that plaintiff had signed an agreement to proceed to a Beth Din with him. Plaintiff alleges that "[a]s a inattcr of Jewish Law, the plaintiffs signing of the Shtar Berurim to proceed to a Beth Din nullified the Seruv issued by the Vaad on February 28th" (Complaint, ¶ 52).

On March 8,2002, the Board of Trustees sent a lctter to every niembcr of the Congrcgation, informing them that the Seruv had been issued against plaintiff, and containing instructions as to how the Congregation was to treat plaintiff in light of his failure to submit his dispute to a Jewish court. The letter also informed the Congregation of Board of Trustees' decision to remove Burstin, and two other individuals that had also received Seruvs, from

membership of the Congregation. Accompanying the letter was a "Seruv: **A** Primer," prepared by Rabbi Shulman.

On the same day, defendants had the actual Seruv displayed in the locked display case in the lobby of the Synagogue, where it remained until June 19,2002.

On March 12,2002, plaintiff sent another letter to the Vaad, expressing his dismay at their action, and requesting that the Seruv be publicly retracted.

On March 15, 2003, Spodek sent the Seruv to the rabbis of two additional congregations with which plaintiff was affiliated.

By letter dated March 19, 2002, the Vaad acknowledged the receipt of plaintiff's March 12 letter, as well as the letter from Rabbi Rabinowitz. The Vaad stated that, as soon as they received "confirmation" of plaintiffs commitment with Rabbi Rabinowitz to proceed to a Beth Din, they would "he glad to officially nullify and void the Seruv issued against you" (Abate Aff., Exh 8).

On May 12,2002, Spodek, the then-President of the Congregation, filed a complaint with the disciplinary committee of the First Department, accusing plaintiff of unethical behavior in connection with the Tuchman action.

By letter dated June 19,2002, the Seruv was removed by the Vaad's Beth Din, because plaintiff was purportedly willing to have a different Beth Din resolve the entire controversy. To date, plaintiff has still not adjudicated the issues of Jewish law before a Beth Din.

Plaintiff then brought this action. In the first through fifth causes of action, plaintiff alleges defamation in connection with defendants' publication of the Seruv issued

against him. In the sixth through eighth causes of action, plaintiff alleges defamation in connection with a letter sent by Spodek to the First Department Grievance Committee; an e-mail sent by Spodek to Eric Greenberg, a journalist with Jewish Weekly, a weekly periodical which publishes matter of interest to the Jewish community; and a fax sent to Greenberg by Rabbi Shulman in anticipation of the article Greenberg was writing. In the ninth cause of action, plaintiff alleges abuse of process in connection with the First Department grievance proceeding. Plaintiff also alleges intentional and negligent infliction of emotional distress (ten and eleventh causes of action), prima facie tort (twelfth cause of action), breach of contract (thirteenth cause of action) and breach of fiduciary duty (fourteenth cause of action).

DISCUSSION

A. First Through Fifth Causes of Action – Defamation in Connection with the Scruv

In the first through fifth causes of action, plaintiff alleges that defendants' conduct in publishing the Seruv to tlic Board of Trustees, and later republishing the Seruv to others, was defamatory, because the Seniv contained several false statements. Specifically, in the first cause of action, plaintiff alleges that Rabbi Shulman, acting as an agent and employee of defendants, read thc Seruv issued by the Board of Trustees on March 4,2002, and that the Seruv letter was defainatory because it contained several false statements. Plaintiff alleges that the statements in the letter that plaintiff ignored three Hazmots, and that plaintiff willfully declined to appear before tlic Beth Din of the Vaad, were false on thcir face, because dcfendants knew that hc was negotiating with another Beth Din to resolve the dispute.

In thc second cause of action, plaintiff alleges that, on March 7, 2002, a written communication was made to defendants informing them that plaintiff had agreed to arbitrate the

matters involved in the Seruv in an alternate Beth Din, which, "[a]s a matter of Jewish Law," rendered the Seruv ineffective and a nullity (Complaint, ¶ 110). Plaintiff further alleges that, despite the fact that the Seruv had been nullified, defendants published the Seruv by displaying it in the Synagogue's locked display case from March 8,2002 to June 19,2002.

Th the third cause of action, plaintiff alleges that, notwithstanding the fact that Scruv had been nullificd, the Seruv was republished on March 8,2002, by the mailing, to every member of the Congregation, of the letter which falsely accused plaintiff of being under the Seruv, and which contained additional defamatory statements.

In the fourth arid fifth causes of action, plaintiff alleges that Spodek sent a copy of tlic Seruv lettcr to two other congregations with which plaintiff was affiliated, falsely informing them that plaintiff *was* under a Seruv for refusing to submit his dispute to a Beth Din.

Plaintiff allegcs that defendants knew tlicse statements were false, and published them with the aim of destroying plaintiffs reputation and his livelihood. Plaintiff further alleges that, from the period of March 7, 2002 to the present, Rabbi Shulman, acting as defendants' agent, publicly encouraged members of the Congregation to isolate plaintiff, sometimes in the middle of services, because he was still under the Scruv, thereby giving the false impression that the Seruv was still in effect, and that plaintiff had still not submitted to a Beth Din.

In support of their motion to dismiss the complaint, defendants argue that plaintiffs defamation claims should be dismisscd on the ground that they involve issues of Jewish law, taken by the Congregation to the Vaad for resolution. **As** such, defendants argue, the Establishment Clausc of the First Amendment of the United States Constitution prohibits this Court from adjudicating this matter.

Conversely, plaintiff argues that this case does not involve Jewish law but, rather, is a classic defamation case – the publication by defcndants of false statements about plaintiff to a broad cross section of his acquaintanccs, colleagues and friends. Plaintiff contends that, while he does not believe that the Seruv was properly issued under Jewish law, his claim docs not dcpend upon any finding that the Seruv was erroneously issued under Jewish law bccause, as a matter ol'fact, the Seruv was vacated as soon as plaintiff responded to the summons, and announced a choice of a Beth Din.

It is axiomatic that the Establishment Clause of the First Amendment prohibits courts from "interfering in or determining religious disputes" (First Presbyterian Church of Schenectady v United Presbyterian Church, 62 NY2d 110, 116, cert denied 469 US 1037 [1984]; ~~see also~~ Mandel v Silbcr, 304 AD2d 538 [2d Dcpt], lv denied 1 NY3d 503 [2003]). On the other hand, civil controversies involving religious partics or institutions may be adjudicated without offending the First Amendment, as long as neutral laws of general applicability are utilized in their resolution (Presbyterian Church v Mary Elizabeth Blue Hull Mcmarial Presbyterian Church, 393 US 440 [1969]). Thus, the issuc in this case is whcther plaintiff's defamation claims are ecclesiastical in nature concerning "discipline, faith, internal organization or ecclesiastical rule, custom or law" (Serbian Eastern Orthodox Diocese for U.S. of America and Canada v Milivoievich, 426 US 696, 713 [1976]), or involve a "purely secular dispute[] between third parties and a particular defendant, albcit a religiously affiliated organization" (General Council on Finance and Administration of United Methodist Church v California Superior Court, 439 US 1355, **1373** [1978]).

Contrary to plaintiff's contention, this matter cannot be decided by application of

neutral principles of law, as "[r]esolution of the parties' dispute would necessarily involve an impermissible inquiry into religious doctrine and a determination of whether the plaintiff violated religious law" (Mandel v Silber, 304 AD2d at 538 [dismissing causc of action alleging defamation]).

To establish a claim of defamation, a plaintiff must prove that the defendant (i) published a false statement of fact about tlic plaintiff (ii) to a third party (iii) that caused injury to the plaintiff (see e.g. Christopher Lisa Matthew Policano, Inc. v North American Precis Syndicate, Inc., 129 AD2d 488 [1st Dept 1987]). Thus, to make out his defamation claims, plaintiff must prove that the statements made by defendants were false, However, to determine whether thc statements were false, this Court would be required to inquirc into areas of clear ecclcsiastical concern.

The underlying controversy here involves the fairness and propriety of the Vaad's actions in issuing the Scruv, without giving plaintiffthe opportunity to appcar before it, as well as whcther, under Jewish Law, the Seruv was automatically nullified once plaintiff selected an alternative Bcth Din. Any determination of these issues is inextricably linked to the review and interpretation of ecclcsiastical doctrine, law, practice, procedures and rulings, which is proscribed by the First Amendmcnt.

Sieger v Union of Orthodox Rabbis of United States and Canada (1 AD3d 180 [1st Dept 2003], appeal dismissed ___ NY2d [2004]), is instructive. In that case, plaintiff wife brought an action against several rabbis and rabbinical courts, alleging defamation based upon a decision in a religious divorce proceeding. The Court dismissed plaintiffs claims for defamation, finding that "[t]he allegedly defamatory statements which would require an

examination of religious doctrine or practice, or an inquiry into the methodology of how the rabbinical tribunal arrived at its conclusions concerning questions of religious doctrine, such as whether plaintiff failed to respond to the summons of the rabbinical tribunal, are not actionable by virtue of the Establishment Clause of the First Amendment" (id. at 182; see also Mandel v Silber, 304 AD2d 538, supra).

Likewise, in Klagsbrun v Va'ad Harabonim of Greater Monsey (53 F Supp 2d 732 [D NJ 19991, affd 263 F3d 158 [3d Cir 2001]), the plaintiff was an Orthodox Jew accused by religious leaders of bigamy and failing to obtain a religious divorce from his wife prior to remarrying. The plaintiff brought an action against the rabbinical board who sanctioned him, the board's individual members, and his wife, alleging slander and libel. The defendants moved to dismiss, arguing that to determine tlic truth or falsity of the alleged statements, the Court would have to "delve dangerously into questions of doctrine and faith" (id. at 739) and therefore, the court lacked jurisdiction over this ecclesiastical dispute under the First Amendment.

The District Court considered the elements of slander and libel under New Jersey law, and agreed that it would have to determine whether the plaintiff had engaged in bigamy in violation of the Orthodox Jewish faith. The Court concluded that because "an inquiry into the truth or falsity of the defendants' statement concerning Seymour Klagsbrun's alleged bigamy would entail judicial intrusion into ecclesiastical doctrine and practice" (id. at 741), dismissal was required, based on the First Amendment Establishment Clause.

Likewise, here, in order to adjudicate plaintiffs claims, this Court would have to determine the truth or falsity of defendants' statements concerning plaintiffs allegedly willful failure to appear before the Vaad, resulting in the creation of the Seruv, and defendants'

statements to the Congregation and others that plaintiff was under a Seruv. In order to do so, the Court would have to examine and weigh ecclesiastical doctrine, including whether the Seruv was properly issued against plaintiff under Jewish law, and whether, under Jewish law, the Seruv was nullified once plaintiff selected an alternate Beth Din, thereby violating the Establishment Clause.

Plaintiff argues that this Court would not be required to resolve any questions of Jewish Law, but rather, only the factual question of whether the Seruv was nullified when he entered into an agreement to utilize an alternate Beth Din. This line of reasoning, however, is unpersuasive. Resolution of these factual disputes would clearly require this Court to inquire into religious doctrine and practice. Indeed, plaintiff himself alleges in the complaint that "*[a]s a matter of Jewish law*, the signing of the Shtar Berurim by the plaintiff rendered the Seruv ineffective and a nullity" (Complaint, ¶ 110 [emphasis added]).

Plaintiff's defamation claims would thus necessarily implicate ecclesiastical questions concerning the faith, discipline, rule, custom or law of their religion. Accordingly, any inquiry into the truth or falsity of the allegations contained in the Seruv, or in the letters republishing the Seruv, is barred by the First Amendment, and thus, the first through fifth causes of action for defamation must be dismissed (see Klagsbrun v Va'ad Harabonim of Greater Monsey, 53 F Supp 2d 732, supra; Sieger v Union of Orthodox Rabbis of United States and Canada, 1 AD3d 180, supra; Mandel v Silber, 304 AD2d 538, supra; *see* also Jackson v Presbytery of Susquehanna Valley, 265 AD2d 253 [1st Dept 1999]).

C. Seventh and Eighth Causes of Action – Other Allegations of Defamation

In his seventh cause of action, plaintiff alleges that, in September 2002, Spodek

sent a defamatory e-mail to Eric Greenberg, a journalist at Jewish Weekly, which contained scvcral false statements, including a suggestion that plaintiff was under investigation for unethical behavior, other than his dispute with Spodek and the Congregation, and a statement that he submitted his dispute with the Congregation to a civil court, rather than a Din Torah, as required by Jcwish Law. In the eighth cause of action, plaintiff alleges that Kabbi Shulman, acting as an agent and employee of defendants, faxed a letter about plaintiff to Greenberg, which also contained false and defamatory statements about plaintiffs behavior in connection with the Tuchman action. Plaintiff further alleges that the publication of the false allegations in the e-mail and the fax "was a wilful, intentional, knowing and malicious act of an outrageous nature" (Coniplaint, ¶¶ 175, 184).

It is clear that these allcgcd defamatory statements can be evaluated solely by the application of neutral principles of law, and do not implicate matters of religious doctrine and practice. Nevertheless, these statements are subject to a qualified privilege, since they were made by Spodek, the former President of the Congregation, and Rabbi Shulman, the spiritual leader of the Congregation, in furtherance of a common interest of a religious organization (see Mihlovan v Grozavu, 72 NY2d 506 [1988]; Sieger v Union of Orthodox Rabbis of United States and Canada, 1 AD3d 180, supra; Kantor v Pavelchak, 134 AD2d 352 [2d Dept 19871).

To overcome a del'ense of qualified privilcge, plaintiff has the burden of cstablishing that the statements were made with actual malice (Park Knoll Assocs. v Schmidt, 59 NY2d 205 [1983]; Clark v Somers, 162 AD2d 982 (4th Dept 1990]). Plaintiff must plcad facts showing that the statements were made with a high dcgrce of awareness of their probable falsity, or that defendants entertained serious doubts as to the truth of the publication (Liberman v

Gelstein, 80 NY2d 429 [1992]). Conjecture, surmise or suspicion are insufficient to meet that burden (Clark **v** Somers, 162 AD2d **982,** supra). The conclusory pleading of the word "malice" is insufficient (Doherty v New York Tel. Co., 202 AD2d 627 [2d Dept 1994]).

Plaintiff fails to overcome this defense of qualified privilege. Plaintiff has pleaded the word "malice" only in a conclusory fashion in his complaint, and has made no attempt to plead allegations which might show that defendants either made the alleged statements with a high degree of awareness of their probable falsity, or with serious doubts as to the truth of the matter contained in the alleged statements. Thus, plaintiff has failed to overcome his burden of showing a genuine issue of actual malice.

Accordingly, both the seventh and eighth causes of action for defamation must be dismissed.

C. Sixth and Ninth Causes of Action – Grievance Committee Proceedings

In his sixth and ninth causes of action, plaintiff seeks damages for libel and abuse of process in connection with the complaint filed on behalf of the Congregation with the First Department Grievance Committee.

In his sixth cause of action, plaintiff alleges that Spodek made false and defamatory statements about him in the disciplinary complaint made to the Grievance Committee. However, a proceeding before the Grievance Committee is considered to be a "judicial proceeding" and, as such, is cloaked by absolute privilege (Weiner v Weintraub, 22 NY2d 330, 332 [1968] ["defendants' letter to the Grievance Committee was absolutely privileged"]; see also Jonas v Faith Properties, Inc., 221 AD2d 959, 961 [4th Dept 19951 [publication of letter to Bar Association Grievance Committee "has an absolute privilege"];

Sullivan v Crisona, 54 Misc 2d 478 [Sup Ct, NY County 19671 [action for libel arising out of the commencement of a Grievance Committee proceeding against an attorney was subject to the defense of absolute privilcge]). Accordingly, plaintiffs sixth causc of action must be dismissed (see id.).

In his ninth cause of action, plaintiff allcges that thc purpose of the complaint to the Grievance Committee was to prevent him from appealing the dismissal of thc Tuchman action, to force him to abandon his attempt to review thc Congregation's financial records, and to cause him cmotional pain and humiliation, all of which was without excuse and justification.

Under New York law, abuse of process is defined as "themisuse or perversion of regularly issued legal proccss for a purpose not justificd by the nature of the process" (Hoard of Education v Farmingdale Classroom Teachers Assoc., 38 NY2d 397,400 [1975]). There arc three essential elements lo a cause of action for abuse of process: (1) regularly issued process compelling the performance or forbearance of some prescribed act; (2) the person activating the process inust have been motivated to do some harm without economic or social excuse or justification; and (3) the person activating thc process must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the lcgitimate ends of process (Curiano v Suozzi, 63 NY2d 113 [1984]).

Plaintiff's ninth cause of action for abuse of process must also bc dismissed, as plaintiff fails to inect the second requirement of an abuse of process claim. Plaintiff alleges that "the abuse of process of the First Department Disciplinary Committee was wilful, intentional, knowing and malicious, and of an outrageous nature," as well as "without excuse or justification" (Complaint, ¶¶ 186, 188). These allegations, however, fail to state a cause of action, as plaintiff

does not allege that defendants' intent to harm plaintiff was their sole motive (see American Prcferrcd Prescription, Inc. v Health Mgt., Inc., *252* AD2d 414 [1st Dept 19981).

Plaintiff has also failed to make out thc third clement o f a cause of action for abuse of process. **A** party improperly seeks to obtain a "collateral advantage" when it uses a court's process to achieve an ulterior goal unrelated to the proper purpose of that process, seeking to achieve its ends through "extortion, blackmail or retribution" (Board of Education v Farmingdale Classroom Teachers Assoc., supra, 38 NY2d at **404).** The allegations set forth in the complaint do not establish that defendants in some way wrongfully used process to gain an advantage collateral to their legitimate ends (sec Curiano v Suozzi, 63 NY2d 113, supra: Perez **v** Mount Sinai Medical Center, 297 AD2d 615 [1st Dept 2002]; Bonarco Ltd. v. Cossington Overseas, Ltd., 269 AD2d 158 [1st Dept 20001).

D. Tenth and Eleventh Causes of Action – Negligent and Intentional Infliction of Emotional Distress

In his tenth cause of action, plaintiff allcgcs that defendants engaged in a pattern of acts, including the publication of the Seruv after it ceased to be operative in a way that suggested that it still was, as well as the various libelous letters and statements, that were "extreme and outrageous in nature" (Coniplaint, ¶ 190), and that were intended to and did cause plaintiff severe emotional distrcss. In the eleventh cause of action, plaintiff alleges that defendants negligently allow the Scruv lctter to be displayed in the lobby case of the Synagogue after the Seruv had been liftcd, which caused him to suffer severe emotional distress.

In order to plead a cause of action for intentional infliction of emotional distress, plaintiff must allege that defcndants' conduct was "so outrageous in character, and so extreme in

degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community" (Murphy v Am. Home Prods. Corp., 58 NY2d 293, 303 [1983] [citations omitted]; see also Howell v New York Post Co., Xnc, 81 NY2d 115 [19931). The same legal standard is generally applicable to negligcnt infliction of emotional distrcss (see Longo v Armor Elevator Co., Inc., 307 AD2d 848, 850 [1st Dept 20031 [plaintiffs must "establish the element of extreme and outrageous conduct for a negligent infliction of emotional distress claim [by] *** evidence that thc *** defendants' conduct was *so* outrageous in character and extreme in degree as to go beyond all possible bounds of decency"]).

Here, the facts allcged in the complaint, even if true, are insufficient to state a cause of action for either intentional or negligent infliction of emotional distress, falling far short of "extreme and outrageous conduct [so transcending] tlic bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (Freihofcr v Hearst Corp., 65 NY2d 135, 143 [1985]; Demas v Levitsky, 291 AD2d 653 [3d Dept], lv dismissed **98** NY2d 728 [2002]). Indeed, courts have repcatcdly held that allegations alleging far more serious conduct than that alleged here do not constitute the type of conduct needed to sustain a causc of action for negligent or intentional infliction of emotional distress (see e.g. Foley v Mobil Chem. Co., 214 AD2d 1003 [4th Dcpt 1995] [sexual harassment and discrimination]; Shea v Cornell Univ., 192 AD2d 857 [3d Dcpt 19931 [crude and offensive statements of a sexually derisive nature]; Ruggiero v Contemporary Shells, Inc., 160 AD2d 986 [2d Dept 1990] [harassment and discharge of plaintiff due to her pregnancy]; Leibowitz v Bank Leumi Trust Co. of New York, 152 AD2d 169 [2d Dept 1989] [religious and ethnic slurs]).

Accordingly, plaintiffs causes of action for negligent and intentional infliction of

emotional distress must be dismissed (see Longo v Armor Elevator Co., Inc., 307 AD2d 848, supra; J.C. Klein, Inc. v Forzley, 289 AD2d 79 [1st Dept 2001]).

E. Twelfth Cause of Action – Prima Facie Tort

Plaintiffs twelfth cause of action is for prima facie tort. Plaintiff alleges that defendants' pattern of conduct harmed him, by, inter alia, causing him to be ostracized in the Congregation, causing him to be denied honors in the Congregation, and causing damage to his reputation and business.

Under New York law, the elements of a prima facie tort are the: "(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse of justification, and (4) by an act or series of acts that would otherwise be lawful" (WBF Telecoms., Inc. v NYNEX Corp., 188 AD2d 257, 258 [1st Dept 1992], lv denied 81 NY2d 709 [1993]). It is central to the cause of action for prima facie tort that the defendant's intent was to solely injure the plaintiff, i.e., that the defendant acted from "disinterested malevolence" (id.).

Here, plaintiff merely alleges, in a conclusory manner, that defendants' conduct was "wilful, intentional, knowing and malicious, and of an outrageous nature" (Complaint, ¶ 204). Plaintiff fails, however, to allege that malevolence was defendants' sole motivation for the conduct he claims constitutes a prima facie tort. Accordingly, plaintiff's cause of action for prima facie tort must be dismissed (see Spinale v 10 W. 66th St. Corp., 291 AD2d 234 [1st Dept 2002] [cause of action for prima facie tort dismissed as plaintiff failed to allege that defendant's sole motivation was disinterested malevolence]; Bainton v Raran, 287 AD2d 317 [1st Dept 2001] [same]).

Plaintiff also fails to allege special damages. Rather, plaintiff merely alleges that

defendants' conduct caused "damage to his reputation and business" (Complaint, ¶ 203). In the absence of special damages, plaintiffs cause of action for prima facie tort must be dismissed (Havell v Islam, 292 AD2d 210 [1st Dept 20021; Spinale v 10 W. 66th St. Corp., 291 AD2d **234,** supra).

F. Breach of Contract

Plaintiffs thirteenth cause of action for breach of contract must also be dismissed. Plaintiff alleges that the method by which his membership in the Congregation was terminated violates the rules and by-laws of the Congregation. However, "it is well settled that membership requirements are strictly an ecclesiastical matter and decisions of the church or synagogue are binding on the courts" (Park Slope Jewish Center v Stern, 128 AD2d 847, 848 [2d Dept 19871, appeal dismissed 72 NY2d 873 [1988] [citations omitted]). Thus, judicial resolution of this cause of action would violate the Establishment Clause of the First Amendment, and must be dismissed (see id.).

G. Fourteenth Cause of Action – Breach of Fiduciary Duty

In his fourteenth cause of action, defendant alleges that, as officers of the Congregation, "defendants had a fiduciary duty to the members of the Coiigregatioii to act towards them fairly and in a manner consistent with Jewish law" (Complaint, ¶ 213), and that by virtue of defendants' conduct, defendants breached the obligations of their fiduciary relationship to plaintiff, However, as stated by plaintiff in the complaint, in order to ascertain whether defendants breached a fiduciary duty to plaintiff as a member of the Congregation, this Court would be required to determine whether, under Jewish law, defendants owed any fiduciary duty to plaintiff. To make such a determination would violate the Establishment Clause of the First

Amendment (see Langford v Roman Catholic Diocese of Brooklyn, 271 AD2d 494 [2d Dept 2000]). As such, this cause of action must be dismissed as well.

The Court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 5/17/04

ENTER:

J.S.C.

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