

<b>Kaisman v Hernandez</b>
2008 NY Slip Op 30723(U)
March 12, 2008
Supreme Court, New York County
Docket Number: 0114829/2007
Judge: Jane S. Solomon
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PRESENT: Hon. JANE S. SOLOMON

PART 55

Index Number : 114829/2007  
**KAISMAN, ARDEN**  
 VS.  
**HERNANDEZ, YAHAIRA**  
 SEQUENCE NUMBER : 001  
 CONSOLIDATION/JOINT TRIAL

INDEX NO. 114829/2007  
 MOTION DATE 1-11-2008  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-3  
4-5  
6-7

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.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
 MAR 14 2008  
 NEW YORK  
 COUNTY CLERK'S OFFICE

Dated: 3/12/08

  
**JANE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: TAS PART 55

-----X  
ARDEN KAISMAN and RINA KAISMAN,

INDEX NO. 114829/2007

Plaintiffs,

-against-

YAHAIRA HERNANDEZ, ESTHER HERARTE,  
JENNIFER V. STERN, PAUL BRISSON MD  
and EMILY DEEBS,

DECISION and ORDER

Defendants.

-----X  
JANE S. SOLOMON, J.

Defendants Yahaira Hernandez, Esther Herarte and

Jennifer V. Stern (collectively, the "Moving Defendants") move under CPLR § 3211(a)(7) to dismiss the Complaint for failure to state a claim, or in the alternative, to consolidate this matter with the related case pending before this court under New York County Index No. 104989/2007 (the "Related Action"). Defendant Dr. Paul Brisson ("Brisson") does not appear on this motion, and counsel for the Moving Defendants argues that Emily Deebs ("Deebs") was never properly added as a defendant. Plaintiffs Dr. Arden Kaisman ("Kaisman") and his wife Rina Kaisman oppose the motion, which is granted as follows.

Kaisman previously operated a joint medical practice with Brisson, and the three Moving Defendants worked in that

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MAR 14 2008  
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[\* 3 ] .

office. It is undisputed that Kaisman sent the Moving Defendants sexually suggestive email attachments, and that he engaged in other office behavior that his own counsel describes as "stupid." When Brisson left his practice with Kaisman, the Moving Defendants allege that they left with him solely because of the work environment Kaisman had created. They then sued Kaisman in the Related Action for sex discrimination, assault, battery and intentional infliction of emotional distress. On February 1, 2008, I granted Kaisman's motion to dismiss the intentional infliction of emotional distress claim and the assault claim as to two of the women, but allowed the remainder of the action to continue.

While that motion was subjudice, on October 12, 2007, Kaisman entered his name into the internet search engines Google, Yahoo! and MSN, and discovered that the links to several pornographic websites included his name (the "Internet Search Results"). Kaisman alleges that prior to that date, his name did not appear linked to such websites and that defendants caused his name to be so associated. On October 16, 2007, Kaisman's attorney sent a letter to the moving defendants' counsel, stating, in part:

Assuming for present purposes, that plaintiffs' [defendants in this matter] suit is without any merit whatsoever, it may well be that, nevertheless, Part 130 Sanctions are

unavailable to Dr Kaisman, and it may well be that he has no viable claim for libel, abuse or process, malicious litigation, intentional infliction of emotional distress or prima facie tort. However, what the enclosed Google search represents is a vile, vicious, ruthless, malicious and maybe criminal series of acts having as their objective complete economic destruction of Dr Kaisman's livelihood.

The letter also threatens actions against the Moving Defendants pursuant to federal law.

On or around November 7, 2007, Kaisman and his wife commenced the instant action alleging three somewhat unclear causes of action: the first alleges intentional infliction of emotional distress based on defendants allegedly causing Kaisman's name to appear in the Internet Search Results; the second alleges damages for the intentional "professional and occupational assassination" based on such actions; and the third is a derivative claim from Kaisman's wife for loss of consortium. Plaintiffs' opposition papers clarify that these causes of action are for intentional infliction of emotions distress premised exclusively on defendants having caused Kaisman's name to be linked to pornography in the Internet Search Results; *prima facie* tort; and loss of consortium. On December 3, 2007, an Amended Complaint added Brisson as a defendant, and a Second Amended Complaint dated December 21, 2007, purports to name Deeks as an

additional defendant, both acting in concert with the Moving Defendants on the previously pleaded causes of action.

#### Discussion

Taking the facts alleged in the Complaint as true and giving plaintiffs the benefit of every favorable inference, Kaisman has still failed to plead a claim for intentional infliction of emotional distress. The claim requires a showing of "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993). Even assuming that defendants somehow caused Kaisman's name to appear in the Internet Search Results, the fact that he admits to sending pornographic images, sound and video files as email attachments contradicts a finding that he suffered severe emotional distress from learning his name was linked to pornography.

Kaisman also has failed to state a claim for *prima facie* tort, which requires a showing of four elements: "(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful." Curiano v. Suozzi, 63 N.Y.2d 113, 117 (1984) (internal citations omitted). Assuming, as plaintiffs claim, that this action was not brought in retaliation for the Related Action, Kaisman will not be able to prove the

\$50,000,000 in special damages blindly asserted in the Complaint. As with his first cause of action, the fact that Kaisman sent his employees sexually explicit images by email prevents a finding that his business practice would somehow be damaged by having his name associated with pornographic websites. Moreover, to the extent that this action was commenced in response to the Related Action, "New York courts have consistently refused to allow retaliatory lawsuits based on *prima facie* tort predicated on the malicious institution of a prior civil action." Curiano, 63 N.Y.2d at 118.

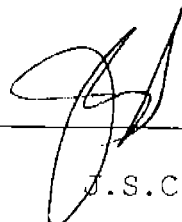
The third cause of action must be dismissed because the other two claims are dismissed, and "it is well established that a spouse's action for loss of consortium is derivative, and not independent of the injured spouse's claim." Young v. Robertshaw Controls., 104 A.D.2d 84, 88 (3<sup>rd</sup> Dep't 1984).

Finally, the court need not address the issue of whether Deeks was properly added as a defendant, and, upon searching the record, the Complaint also is dismissed as to her and Brisson. Accordingly, it hereby is

ORDERED that the motion to dismiss is granted, and upon searching the record, the Complaint is dismissed as to all defendants, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements to the Moving Defendants as taxed.

Dated: March 12, 2008

ENTER:

  
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J.S.C.  
JANE G. SOLOMON

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