

**Harmony Holding Group, LLC v Astoria Fed.
Sav.**

2008 NY Slip Op 32958(U)

October 23, 2008

Supreme Court, Nassau County

Docket Number: 010362/08

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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**HARMONY HOLDING GROUP, LLC and
JULIA MANNERS**

TRIAL PART: 21

NASSAU COUNTY

Plaintiff,

INDEX NO: 010362/08

-against-

MOTION SEQ. NO: 02

ASTORIA FEDERAL SAVINGS

SUBMIT DATE: 9/26/08

Defendant.

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The following papers having been read on this motion:

Notice of Motion..... 1
Opposition 2

Motion by the attorneys for the defendant for an order pursuant to CPLR §3211(a)(5) and (7) dismissing the third and fifth causes of action in plaintiffs' complaint as barred by the statute of limitations and dismissing the remaining causes of action for failure to state a cause of action is granted.

In this action plaintiffs seek to recover damages for invasion of privacy, breach of contract, defamation, negligent infliction of emotional distress and intentional infliction of emotional distress. Plaintiffs allege that Astoria is liable to Harmony for defamation and/or for disclosing certain "financial information" to a third party in violation of Harmony's statutory and contractual privacy rights. Plaintiffs further allege that Astoria's agents engaged in certain "extreme and outrageous" conduct that caused plaintiff Julia Manners to sustain emotional injury. Plaintiffs' action arises out of two incidents involving plaintiff Julia Manners and an Astoria agent that allegedly occurred at Astoria's offices on March 29, 2007 and March 30, 2007. The complaint alleges that Astoria and Harmony were parties to a mortgage agreement wherein Astoria was the mortgagee and Harmony

was the mortgagor. Plaintiffs allege that Julia Manners' husband, Robert M. Manners, is the Secretary of 950 Management Inc., the company that manages Harmony. Plaintiffs admit that between August 2006 and December 2006, Harmony had fallen behind in its mortgage payments to Astoria. By March 2007, Harmony was approximately two thousand dollars (\$2,000.00) in arrears. Plaintiffs further allege that on March 29, 2007 and March 30, 2007 plaintiff Julia Manners was sent to Astoria's offices on Harmony's behalf by her husband, with an envelope containing a check in the sum of \$2,000.00 to satisfy the mortgage deficiency. The complaint contains five causes of action: (i) invasion of privacy as to Harmony pursuant to the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801, et seq. ("GLBA"); (ii) breach of contract as to Harmony; (iii) defamation as to Harmony; (iv) negligent infliction of emotional distress ("NIED") as to Manners; and (v) intentional infliction of emotional distress ("IIED") as to Manners. Plaintiffs seek damages in the amount of one million dollars (\$1,000,000.00) for each cause of action, for a total of five million dollars (\$5,000,000.00).

Plaintiffs first cause of action is for invasion of privacy and alleges Astoria violated the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. § 6801, et seq. by sharing private financial information with plaintiff Julia Manners. Plaintiff Harmony alleges that plaintiff Julia Manners had no knowledge of the prior business dealings between Harmony and Astoria, no knowledge of the contents of the letter she was delivering and no knowledge of the mortgage deficiency dispute. She was merely a messenger with instructions to deliver the envelope to Astoria. When the bank employee opened the envelope and saw that the \$2,000.00 check was not certified, he allegedly spoke to plaintiff Julia Manners in an abusive manner and disclosed to her the underlying dispute between Harmony and Astoria. It was the disclosure of the mortgage deficiency dispute by the employee of Astoria to Julia Manners that plaintiff Harmony contends forms the basis of an invasion of privacy claim. The plaintiffs fail to refute defendant's argument that the Gramm-Leach Bliley Act of 1999 does not provide a private right of action. (See *Farley v Williams*, 2005 U.S. Dist. Lexis 38924 [W.D.N.Y. December 30, 2005]; *Menton v Experian Corp.*, 2003 U.S. Dist. Lexis 12457 [S.D.N.Y. July 17, 2003]). No other grounds exist upon which plaintiffs can maintain their first cause of action since New York State does not recognize a common law right of privacy. (*Thomas v Northeast Theater Corp.*, 51 AD3d 588). Although Civil Rights Law § 51 creates a right of privacy, it is only applicable to situations where a person's name, portrait, picture, or voice is used for advertising purposes or the purpose of trade without that person's consent, none of which are present here. (*Colon v City of*

Rochester, 307 AD2d 742, 762 [4th Dept. 2003]). There is neither statutory nor legal authority to support plaintiffs' cause of action for invasion of privacy. Therefore, plaintiff's first cause of action is dismissed.

In the second cause of action the plaintiffs allege provisions of the note and mortgage between plaintiff Harmony and the defendant contained an express or implied right to privacy. Plaintiffs allege that the defendant violated these provisions of the note and mortgage by disseminating financial information to a third party, to wit: to plaintiff Julia Manners, thereby breaching the contract with respect to the mortgage instrument. At the outset the Court notes that paragraph 4 of the complaint states "the mortgage note and the mortgage are not the subject of this complaint." It would follow that since the note and mortgage "are not the subject of the complaint" there is no contract that is the subject matter of the underlying cause of action for which a breach of contract action can lie. Nevertheless, assuming *arguendo* the mortgage and note did create a contractual right to privacy, Harmony cannot prevail on a breach of contract theory unless it sustained actual damages as a natural and probable consequence of the alleged breach. Any perceived damages as alleged by Harmony are too speculative to sustain a cause of action based on a breach of contract. *Rakylar v Washington Mutual*, 51 AD3d 995. Plaintiff Harmony does not even attempt to suggest the manner in which it was damaged when Astoria's agent disclosed to plaintiff Julia Manners the mortgage dispute between Harmony and Astoria.

The plaintiffs' third cause of action for defamation is barred by the statute of limitations. CPLR §215(3) provides that an action to recover damages for libel and slander must be commenced within one (1) year. Plaintiffs do not deny that the action was commenced in June 2008, more than one year after the alleged statements were made in March 2007.

Plaintiff Julia Manners' fourth cause of action is for negligent infliction of emotional distress. The complaint alleges that when plaintiff Julia Manners, who was "several months pregnant," brought the check to the bank, a clerk opened the envelope and when he saw that the check was not certified, spoke to her in a loud, abusive, insulting and terrifying manner stating that "your husband does not know how to follow directions. . . your husband is in default on his mortgage. . . your husband is losing his building because he does not follow directions." According to the plaintiff Julian Manners, the abusive and insulting conduct occurred on March 29, 2007 and March 30, 2007. Plaintiff Julia Manners allegedly "went into shock and began weeping . . . became fearful of a miscarriage." In

paragraph 26, the plaintiff alleges “Defendant’s attempt to terrify Plaintiff Manners were successful. Plaintiff Manners was so upset that she almost miscarried. She began to cramp and went to her doctors, who were unable to find the heartbeat of the fetus for three (3) days. Plaintiff Manners had to go to specialists, and she had to remain in bed for three (3) days as a result of the stress of the incident. For the rest of her pregnancy, Plaintiff Manners was classified as ‘high risk’ and terrified at the prospect of losing her baby due to the actions of the Defendant.” In their fourth cause of action, plaintiffs allege that Astoria, “through its extreme and outrageous conduct, caused malicious and deliberate intimidation and harassment” to plaintiff Julia Manners, and further, through its disclosure of the financial information “contributed to the anxiety, nervousness and sleeplessness of Plaintiff Manners.” (Complaint ¶¶ 39-40). In order to state a cause of action alleging negligent infliction of emotional distress, the conduct must be “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.” *Benyo v Sikorjak*, 50 AD3d 1074 citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303, quoting Restatement [Second] of Torts § 46, comment d; *see Howell v New York Post Co.*, 81 NY2d 115, 122, *aff’d*, 82 NY2d 690; *Freihofer v Hearst Corp.*, 65 NY2d 135; *Hering v Lighthouse 2001, LLC*, 21 AD3d 449. Even assuming the allegations of the complaint are true, and the employee of Astoria spoke to Julia Manners in such a harsh manner, the conduct cannot be considered 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 American Home Products Corp.*, *supra* at p. 303. The fourth cause of action is dismissed.

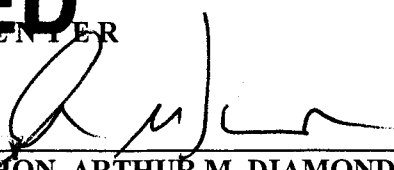
The fifth cause of action for intentional emotional distress is governed by the one-year statute of limitations in CPLR 215(3). *Campbell v Chabot*, 189 AD2d 746; *see also Jemison on Behalf of Jemison v Crichlow*, 139 AD2d 332. Plaintiffs do not deny that the action was commenced in June 2008, more than one year after the alleged statements were made in March 2007. The fifth cause of action is dismissed.

The complaint is dismissed in its entirety.

This decision constitutes the decision and order of the Court and terminates all proceedings under Index No. 01362/08.

DATED: October 23, 2008

ENTERED
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 OCT 29 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE
 ARTHUR M. DIAMOND
 J. S.C.



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