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

PRESENT: HON. MICHAEL D. STALLMAN Justice

PART 7

Index Number : 109856/2008

RENO, NOELLE

vs

MELLON, MATTHEW

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 4/8/08

MOTION SEQ. NO. _____

MOTION CAL. NO. 12

is motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits (+Memo) 1-9	1-2
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Replying Affidavits _____	_____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the annexed Memorandum Decision and Order.

HON. MICHAEL D. STALLMAN

Dated: 3/27/09

J.S.C.

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

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: IAS PART 7

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NOELLE RENO, individually and on behalf of DOF, LLC,

Plaintiff,

-against-

MATTHEW MELLON,

Defendant.

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Index No. 109856/08

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

This action is based upon alleged contractual breaches by, and tortious conduct of, defendant Matthew Mellon (Mellon), arising from the personal relationship between Mellon and plaintiff Noelle Reno (Reno), Mellon's former fiancé, and the business relationship from their jointly-owned limited liability company, DOF, LLC (DOF). The seven-count complaint asserts two causes of action for breach of contract, one cause of action for specific performance, two causes of action for breach of fiduciary duty, one cause of action for defamation, and one cause of action for intentional infliction of emotional distress.

Mellon now moves to dismiss the complaint based upon CPLR 3211 (a) (1) and (a) (7), and CPLR 3016 (b). Mellon also seeks a stay of discovery pending the determination of this motion.

BACKGROUND

Plaintiff commenced this action after the apparently final breakup of the parties' stormy, on-again, off-again romantic relationship. Plaintiff's claims arise from the parties' volatile personal interaction; the business venture that they organized and that defendant financed, apparently because

of the personal relationship; and several purported agreements between the parties, ostensibly in contract form, apparently intended to promote or patch up the personal relationship. At issue, on this motion to dismiss, is the legal sufficiency of the complaint and whether plaintiff's allegations sufficiently state legally cognizable claims at this early stage of the litigation, when analyzed objectively according to well accepted legal principles, notwithstanding the whiff of a grudge-match.

Mellon is an alleged heir of the famous banking and oil Mellon family, and Reno is allegedly a fashion designer and former model. According to Reno, the two began dating in 2004, while Mellon was then married to non-party Tamara Mellon. Mellon and his former wife were later divorced in 2006.

Reno alleges that, in the second year of their relationship, she and Mellon discussed going into a clothing design business, and that, in 2006, they began discussions with designers in London and searched for source factories in Hong Kong. Mellon allegedly stayed in Hong Kong the month of July 2006, while Reno worked to establish business relationships for DOF,[1] and, at this time, Mellon "went on the first of many crack [cocaine] binges, abusing drugs for the better part of that month," and using DOF cash to pay for his drugs (Complaint, ¶ 12). According to Reno, the couple planned to travel to Los Angeles for further DOF business meetings, but Mellon was unable to do so because he was checked into a drug rehabilitation facility. In August 2006, Reno allegedly returned to her mother's home in Arizona.

Reno claims that Mellon checked out of drug rehabilitation in September 2006, and the couple returned to the United Kingdom. Reno and Mellon allegedly hired non-party Nigel Glasgow

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[1] Although the complaint refers to DOF's business during 2006, DOF, LLC was not officially formed until July 23, 2007 (*see* Complaint, ¶ 36).

(Glasgow), with whom Reno worked on designs over the next two months. According to Reno, Mellon lapsed into drug use in November 2006, "kick[ed] her out of their shared home and cancell[ed] her credit cards and mobile phone account" (Complaint, ¶ 17). Mellon also allegedly sold a false story about Reno's "infidelities" to the Daily Mail in London, although the publication allegedly later acknowledged Reno's insistence that the story was false (Complaint, ¶ 18). Reno claims that she and Glasgow continued with DOF's business, traveling to Hong Kong for 10 days in December 2006 and making arrangements for DOF's initial production line. Reno avers that, by December 2006, Mellon appeared to have quit using drugs and sought to instill stability and security in DOF and his personal relationship with Reno.

The couple was engaged in February 2007. However, according to Reno, Mellon resumed using drugs after his acquittal in a criminal trial in June 2007, in which he was accused of illegally wiretapping his ex-wife's telephone. Reno claims that, at this time, Mellon would come into the DOF office and distract employees with his personal matters (such as requiring them to make hotel or airline reservations, or reorganize his iPod playlist), creating inefficiencies at the office. Mellon also allegedly falsely announced that DOF was moving to Los Angeles, causing employees to make arrangements to uproot their lives, but according to Reno, Mellon subsequently changed his mind, requiring Reno to devote substantial efforts to offset the hard feelings he had created.

Reno claims that Mellon used DOF funds to give gifts to his society friends and celebrities. On another occasion, Mellon allegedly came into the office, high on crack cocaine, and "told everyone to stop their work because he was shutting down DOF, and that everyone was out of a job," telling DOF employees that it was Reno's "fault" because she was not "caring" enough (*id.*, ¶ 31), although Mellon later decided that work could continue as normal. Reno claims that, by July 2007,

Mellon's behavior became so erratic that she was forced to leave the United Kingdom for her own safety, and she again returned to her mother's home in Arizona, although she allegedly continued to work for DOF by phone and e-mail.

Reno maintains that Mellon sought her out in Arizona, and proposed that she work for DOF in New York, offering her a work contract, and also a $1 million contract to secure her "future should [Mellon's] erratic behavior ever happen again" (Complaint, ¶ 33). The contract was allegedly "intended as a safety net in case Mellon wrongfully refused to fund [DOF] and Reno needed money for funding DOF and for her own living expenses" (*id.*). This was allegedly Mellon's attempt to legitimize DOF, and to provide funding and security. According to Reno, the following agreements were to compensate Reno for her efforts in creating and running DOF, and as security because of the difficult work environment created by Mellon (Reno Aff., ¶ 9).

On July 19, 2007, Reno and Mellon entered into an agreement, whereby they sought to determine Reno's rights, if any, in Mellon's property at Flat 1, 21 Eaton Place, London SW1X 8BP (Eaton Place), where they had lived for the previous three years (Eaton Place Agreement). This agreement, which Mellon submits as documentary evidence, provides that Reno is the beneficial owner of $1 million of the appreciation in value of Eaton Place, and requires Mellon to transfer $1 million to Reno upon the sale of the property. If Eaton Place were not sold by February 28, 2008, Mellon agreed to pay $1 million to Reno. The Eaton Place Agreement provided that it is governed by New York law.

On July 22, 2007, Reno and Mellon entered into an agreement to set forth their respective rights, obligations, positions and ownership interests in the business of DOF (7/22/07 Agreement). Under the 7/22/07 Agreement, Mellon owned 51% of DOF and Reno owned 49%, but neither party

would receive compensation under this agreement. The 7/22/07 Agreement provided that Reno could be terminated "only on ninety days' advance written notice, unless termination is for 'cause', with 'cause' being an intentional act to harm the Company" (Morrison Aff., Ex. 8). The 7/22/07 Agreement also provided that it is governed by New York law.

On July 23, 2007, Reno and Mellon entered into the operating agreement for DOF (DOF Operating Agreement). The DOF Operating Agreement provided that Reno and Mellon were members and that Mellon was the Manager. The DOF Operating Agreement is governed by Delaware law.

Reno claims that, from August through December 2007, Mellon provided capital and participated in several company meetings, and that, during that time, she and Glasgow progressed in developing DOF. Reno avers that, by January 2008, Mellon relapsed into cocaine use, cut off her access to DOF's company accounts and her credit cards, undermined her authority with employees, and refused to pay her any compensation. Reno allegedly told Mellon that she could no longer live with him, and Mellon allegedly notified her that she was "terminated," that he would "destroy" her for leaving him (Complaint, ¶ 38), and told DOF's U.S. public relations firm that Reno was fired (*id*, ¶ 39). Reno claims that she nevertheless continued working on DOF matters, including publicity events that both Reno and Mellon attended.

On February 5, 2008, the parties entered into amendments to the Eaton Place and 7/22/07 Agreements. Reno claims that the amendments constituted Mellon's agreement that DOF needed stability and structure, and was an effort to give her more control over the company. The amendment to the Eaton Place Agreement acknowledged that the sale of Eaton Place had been delayed and extended the Eaton Place sale date (which triggered Mellon's $1 million payment to Reno) from

February 28, 2008 to June 27, 2008.

The 7/22/07 Agreement was amended in recognition of DOF requiring funding in excess of Mellon's prior commitment. The parties agreed that any of Mellon's funding that exceeds "his $200,000 commitment in the July 23, 2007 agreement between the parties shall be attributed to [Reno] in proportion to her ownership percentage in the Company, with the amount so attributed being subtracted from the $1 million payment due to [Reno] under the July 19, 2007 agreement" (Brickell Aff., Ex. A).

On February 9, 2008, the parties entered into a "2nd Amendment to the July 22, 2007 Original Agreement"[2] (2/9/08 Amendment), the so-called "Cocaine Agreement," whereby the parties sought "to make certain assurances to each other in order to enhance the operations of DOF, LLC ..., of which they are both members" (Morrison Aff., Ex. 3). The parties agreed that, "[i]f [Mellon] injests [*sic*] cocaine or other similar drug on or before the six month anniversary of this amendment, which act renders him unable to interact normally with other people for more than two days," then Mellon would "transfer to [Reno] sufficient ownership interests in DOF, LLC ... to give her control of DOF," and Reno would "be entitled to a cash payment of one million dollars, payable within 90 days" (*id.*).

Reno claims that, thereafter, in February 2008, she went to Paris and secured more than $500,000 in sales for DOF. Reno avers that, in April 2008, Mellon went on a three-week crack cocaine binge, while the couple was meeting with a psychiatrist/mediator in an effort to resolve their personal issues. During this time, Mellon allegedly had DOF employees come to his house, where

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[2] The court notes Mellon's argument that this document constitutes a separate contract, not an amendment to the 7/22/07 Agreement. This argument is discussed later in this decision.

he would inform them that Reno "was 'a liar,' a 'whore,' had 'no talent,' was a 'nobody,' and that she was embezzling Company funds" (Complaint, ¶ 50). Reno claims that Mellon also "directly threatened [her], stating that he would 'destroy' her, and then fire her" (*id.*). According to Reno, Mellon instructed employees to "tell Reno to clear out her desk, and that she had just been removed from the DOF bank account" (*id.*, ¶ 51).

Reno claims that, during a crack binge in May 2008, Mellon fired her on at least five separate occasions. On May 27, 2008, Mellon sent an e-mail to Reno, copying Mellon's personal assistant, wherein Mellon purported to accept the resignation of Reno and two other employees, and stated: "You are a whore, a thief, with absolutely no talent in Fashion" (Reno Aff., Ex. F). Mellon also allegedly notified third parties in the industry that Reno no longer worked for DOF, and cancelled DOF events scheduled by Reno, including an in-store event at Saks for 200 guests on June 5th. Mellon allegedly refused to explain his conduct to customers, employees and other public relations personnel. Mellon also allegedly fired DOF's U.S. public relations firm without notice, without informing Reno, and without replacing that firm, "because he believed that they 'sided' with Reno" (*id.*, ¶ 52).

Reno claims that, at one point, while she was on a pre-approved vacation in Arizona, Mellon notified Reno's immigration lawyers in the United Kingdom that she was no longer employed by DOF, and that DOF would no longer pay for the attorney's services in assisting her with necessary work visas. Mellon also allegedly falsely planted stories that Reno had resigned from DOF, that she had stolen from him and DOF, that she had refused to return his engagement ring, and that she had begun a personal relationship with billionaire Ronald Burkle, all of which Mellon knew were demonstrably false. Mellon also allegedly placed ads in industry publications seeking to replace

Reno as DOF Creative Director, even though he did not have the right to terminate her employment, and informed Reno that he would cease his threats to terminate her and agree to fund DOF on the condition that Reno "continued to sleep and co-habit with him" (*id.*, ¶¶ 101-102).

DISCUSSION

It is well settled that, "[o]n a motion to dismiss, a complaint must be accorded every favorable inference" (*Williams v Reiss Eisenpress L.L.P.*, 49 AD3d 423, 424 [1st Dept 2008]), and that "affidavits may be used to remedy defects in the complaint and supplement its allegations" (*Mulder v Donaldson, Lufkin & Jenrette*, 208 AD2d 301, 307 [1st Dept 1995]). "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Second and Third Causes of Action
(Breach of the 7/22/07 Agreement and 2/9/08 Amendment)

Mellon seeks dismissal of Reno's second and third causes of action, arguing that the 2/9/08 Amendment is void for lack of consideration and as against public policy. In support of his argument that the 2/9/07 Amendment was a "new contract, not a modification or amendment" (Mellon Mem. of Law, at 9 n 4), Mellon cites *Clark v Fey* (121 NY 470, 476 [1890]). Reno counters that the 2/9/08 Amendment did not require new consideration because it merely modified the parties' underlying agreement, and that the amendment does not violate public policy.

The second cause of action for breach of contract is based upon Mellon's wrongful termination of Reno, and Mellon's drug use, in violation of the 7/22/07 Agreement and the 2/9/08 Amendment, respectively. The third cause of action seeks specific performance in the form of an order directing Mellon to transfer a controlling interest in DOF to Reno for violating the 2/9/08 Amendment.

To state a cause of action for breach of contract, Reno must allege "the existence of a valid contract," the "performance of [her] obligations thereunder, [Mellon's] breach ..., and resulting damages" (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). To have a valid contract, there must be consideration (*Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 264 [1st Dept 1995] ["[i]n essence, a contract is a promise supported by consideration"]).

Here, section 8 (subsections a through g) of the original 7/22/07 Agreement identified the parties' ownership interests in DOF. As discussed above, the first amendment to the 7/22/07 Agreement, dated February 5, 2007, added "Section 8h" (Brickell Aff., Ex. A). The 2/9/08 Amendment expressly stated that it was the "2nd Amendment to the July 22, 2007 Original Agreement" and that Reno and Mellon, "intending to be legally bound hereby, agree to amend the Original Agreement by adding the following Section 8i" (Morrison Aff., Ex. 3). In addition, the 2/9/08 Amendment stated that the parties entered into it seeking "to enhance the operations of DOF, LLC," and it specifically refers to circumstances that would trigger a change in the parties' ownership interests in DOF that were memorialized under the original 7/22/07 Agreement (Morrison Aff., Ex. 3). Thus, the 2/9/08 Amendment reaffirmed the parties' original agreement, then modified its ownership provision; accordingly, the 2/9/08 Amendment is merely a modification of the 7/22/07 Agreement, and, as such, no new consideration was required (General Obligations Law § 5-1103). While "'[a] promise to perform an existing legal obligation is not valid consideration to provide a basis for a contract" (*Nam Tai Elecs., Inc. v UBS PaineWebber Inc.*, 46 AD3d 486, 487 [1st Dept 2007] [citation omitted]), "[a] written, signed agreement to discharge or modify an existing obligation is not rendered invalid because of the absence of consideration" (*GG Mgrs. v Fidata Trust Co. N.Y.*, 215 AD2d 241, 242 [1st Dept 1995], citing General Obligations Law § 5-1103; *see also*

Nappy v Nappy, 2003 WL 22462409, 2003 NY Misc LEXIS 1287, NY Slip Op 51332[U] [App Term, 2d Dept 2003] [oral modification to stipulation of settlement "not invalid because of a lack of consideration").

Mellon's reliance upon *Clark v Fey* is misplaced, because *Clark* was decided prior to the enactment of General Obligations Law § 5-1103, and, in any event, that case is distinguishable on its facts. Mellon also argues that the 2/9/08 Amendment violates public policy, because it would constitute enforcing "an agreement that allows, and in fact facilitates, the consumption of controlled substances so long as the individual ingesting the substance maintains some loosely defined degree of composure" (Mellon Mem. of Law, at 12). However, here, the 2/9/08 Amendment, if anything, seeks to prevent Mellon from using controlled substances, not to promote such activities. Thus, Mellon fails to explain how the 2/9/08 Amendment violates New York's public policy "of eradicating the illicit possession of controlled substances" (*People v Figueroa*, 173 AD2d 156, 159 [1st Dept 1991]).

In his reply brief, Mellon argues that the 7/22/07 Agreement, did not exist at the time of the 2/9/08 Amendment, because the 7/22/07 Agreement was superseded by the DOF Operating Agreement, which states that it "constitutes the entire company agreement of [DOF], and the entire agreement of the Members regarding [DOF's] governance, and supersedes any prior company agreement of [DOF], whether oral or written" (Morrison Aff., Ex. 5). Mellon also argues in his reply papers that the 2/9/08 Amendment is unenforceable because it is a penalty provision. However, these arguments are raised for the first time in Mellon's reply papers, and, as a result, Reno has not had an opportunity to respond to them. Therefore, these arguments are not considered by the Court (*Leeds v Lenox Hill Hosp.*, 6 AD3d 232 [1st Dept 2004]; *see also Schultz v 400 Coop. Corp.*, 292

AD2d 16, 21 [1st Dept 2002] ["[t]he consideration of arguments advanced at a time when the opposing party has no opportunity to respond is a procedure that this Court condemned"]).

For the foregoing reasons, Mellon's motion to dismiss Reno's second and third causes of action is denied.

First Cause of Action
(Breach of the Eaton Place Agreement)

Mellon moves to dismiss Reno's first cause of action for breach of contract, which is based upon Mellon's failure to pay Reno $1 million under the Eaton Place Agreement. Here, the Eaton Place Agreement states, in pertinent part:

> WHEREAS, the parties have been residing together in Matthew's property in Flat 1, 21 Eaton Place, London SW1X 8P, England ..., for a period of approximately three years preceding the date of this Agreement; and
>
> WHEREAS, the parties wish to fix and determine Noelle's rights, if any, in the Eaton Place Property by reason of their living together, and to accept and comply with the provisions of this Agreement in full discharge, settlement and satisfaction of all legal rights, if any, accruing to Noelle in the Eaton Place Property under the law
>
> * * *
>
> 2. **Undertaking and settlement**
> a. Noelle is the beneficial owner of $1 million of the appreciation in value of the Eaton Place Property.
>
> * * *
>
> 3. **Further claims.** Noelle understands and acknowledges that she has no further claims or ownership rights in Matthew's assets nor any right to make any future claims against Matthew's assets up to and including the date the parties are married, if and when they are married.
>
> * * *
>
> 10. **Enforcement/legal fees.** Matthew [Mellon] agrees that there are no preconditions to his undertakings hereunder" and "not to challenge any legal action by Noelle to enforce this Agreement"

(Morrison Aff., Ex. 2, at 1 [emphasis in original]). By amendment made as of February 5, 2008, the parties amended the Eaton Place Agreement, to delay payment of the $1 million set forth in Section 2 of the original agreement (Brickell Affirm., Ex B). The recitals to the amendment state, in pertinent part, "WHEREAS, each party understands that modification of the date for payment of the $1 million set forth in Section 2 of the Original Agreement may facilitate the financing of the parties' mutual business interest in DOF, LLC" (*ibid.*). By an amendment also made on February 5, 2008, which amended the 7/22/07 agreement, Mellon agreed that

> Funding by Matthew of DOF, LLC in excess of his $200,000 commitment in the July 23, 2007 agreement between the parties shall be attributed to Noelle in proportion to her ownership percentage of the Company, with the amount so attributed being subtracted from the $1 million payment due to Noelle under the July 19, 2007 agreement between the parties, including any amendments thereto

(Brickell Affirm., Ex A). Thus, under both amendments, the more that Mellon contributed to DOF, LLC, the less Reno would receive in proceeds from the sale of Eaton Place, the payment of which would be delayed until June 30, 2008.

> New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together, provided only that illicit sexual relations were not 'part of the consideration of the contract'. The theory of these cases is that while cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law

(*Morone v Morone*, 50 NY2d 481, 486 [1980][citations omitted]). "'[Where an agreement consists in part of an unlawful objective and in part of lawful objectives, the court may sever the illegal aspects and enforce the legal ones, so long as the illegal aspects are incidental to the legal aspects and are not the main objective of the agreement'" (*Donnell v Stogel*, 161 AD2d 93, 97-98 [2d Dept

1990][citation omitted]). The issue presented is whether sexual relations were the only consideration that plaintiff provided for the Eaton Place Agreement.

Mellon argues that the Eaton Place Agreement is unenforceable because Reno's promise not to sue based upon her English rights was illusory. Citing *Lloyds Bank PLC v Rosset* ([1991] 1 AC 107), a decision from the British House of Lords, Mellon argues that, under English law, Reno had no rights arising from her past cohabitation with Mellon, because cohabitation alone does not grant an individual an interest in cohabited property. Mellon concludes that, because Reno's alleged waiver of her English rights was not valid consideration for the Eaton Place Agreement, "her only possible consideration for that alleged Agreement was her cohabitation with Mr. Mellon from mid-2004 to July 2007," which is illegal consideration under New York law, because Mellon was married to another woman for the bulk of the parties' cohabitation (Mellon Mem. of Law, at 15). In support of his argument, Mellon relies upon *Pfeiff v Kelly* (213 AD2d 916 [3d Dept 1995]).

Reno submits an affidavit in opposition to Mellon's motion, supplementing her pleading, stating that her belief that she had rights in the property was reinforced by the fact that Mellon's real estate agent asked her to sign a document relinquishing her rights to any interest in the property (Reno Aff., ¶ 10). Reno allegedly signed this document, and claims that she was informed that the house could not be legally sold until she waived any claims to the property (*id.*). Reno's affidavit claims that the Eaton Place Agreement was also based upon Mellon's desire to compensate her for her efforts in creating and running DOF (Reno Aff., ¶ 9). Reno allegedly "agreed to continue working for DOF without compensation" based upon Mellon's agreement to give her a share of the value of the Eaton Place property once it was sold (*id.*, ¶ 10). The parties allegedly entered into the 7/22/07 Agreement three days later, and Reno claims that she agreed to receive no compensation

from DOF because the Eaton Place Agreement provided her with compensation in the form of proceeds from the sale of Eaton Place. In sum, Reno counters that the parties entered into the Eaton Place Agreement based upon Reno giving up her rights, and, at least in part, upon her continuing work for DOF without compensation.

Mellon and his former wife's divorce was finalized on February 6, 2006, more than 17 months before the parties entered into the Eaton Place Agreement, and more than six months before they agreed that Reno was to become "the beneficial owner of $1 million of the appreciation in value of the Eaton Place Property" (Eaton Place Agreement, §§ 2 [a] and [b] [stating that Reno's ownership interest accrued on August 31, 2006]). Thus, the parties' "agreement was not one to promote divorce or to facilitate adultery, as it was entered into long after the divorce was final and the adultery had ceased" (*Donnell*, 161 AD2d at 97).

"Under New York law, forbearance to assert a colorable legal claim constitutes sufficient consideration to support a contract so long as the promise of forbearance is absolute and for a definite time" (*Sharon Steel Corp. v Chase Manhattan Bank, N.A.*, 521 F Supp 104, 111 [SD NY 1981], *affd in part, revd in part* 691 F2d 1039 [2d Cir 1982], *cert denied* 460 US 1012 [1983]).

> [T]he law does not erect insuperable barriers to the creation of binding agreements. To constitute sufficient consideration, for example, a party need only have a good-faith belief in the merit of its position. That the party's view of the law might ultimately prove meritless does not undermine the validity of the agreement

(*Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993] [citations omitted]). The Court is not persuaded that Reno possessed a good-faith belief that she had any interest in Eaton Place, which would give rise to colorable right, the forebearance of which could have constituted consideration for the Eaton Place agreement.

Reno alleges that her efforts in creating and running DOF also constituted consideration (Reno Aff., ¶¶ 9-14). However, to the extent DOF was created and running before the Eaton Place Agreement (and prior to its formal creation as a limited liability company), "the general rule is that past consideration is no consideration" (*Kastil v Carro*, 145 AD2d 388, 388 [1st Dept 1988]).

Because the Court finds that plaintiff's purported consideration for the Eaton Place Agreement is not valid consideration, the Court concludes that the Eaton Place Agreement is unenforceable as an agreement between unmarried persons, "because the main consideration therefor . . . was plaintiff's provision of companionship (both platonic and sexual)" (*Pizzo v Goor*, 50 AD3d 586 [1st Dept 2008]). Thus, Mellon's motion to dismiss Reno's first cause of action is granted.

Sixth Cause of Action (Defamation)

Mellon seeks dismissal of Reno's sixth cause of action for defamation, arguing that the alleged defamatory statements were merely opinions, hyperbole and name-calling, and that the claim is not pleaded with sufficient particularity under CPLR 3016 (a).

Reno also argues that English law, which is more favorable to her claim,[3] "may" apply to her defamation cause of action (Reno Opp. Mem. of Law, at 17 n 15), because where the parties "are domiciled in different states, the applicable law in an action where civil remedies are sought for tortious conduct is that of the situs of the injury" (*Locke v Aston*, 31 AD3d 33, 38 [1st Dept 2006]). Reno argues that the context of the alleged defamatory statements is relevant, and that the statements

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[3] "Under English law, any published statement which adversely affects a person's reputation, or the respect in which that person is held, is prima facie defamatory. Plaintiffs' only burden is to establish that the words complained of refer to them, were published by the defendant, and bear a defamatory meaning" (*Bachchan v India Abroad Publ. Inc.*, 154 Misc 2d 228, 231 [Sup Ct, NY County 1992]).

are objectively verifiable, not opinions or name-calling; and that, if the allegations of the complaint are insufficient, she be permitted to amend the pleading. Mellon counters that the complaint "put[s] both parties in the United States at the time of the allegedly defamatory May 27, 2008 email," and cites paragraphs 50-53 of the complaint in support of this argument (Mellon Reply Mem. of Law, at 11).

Pleading requirements are a matter of procedure governed by the law of the forum (*Westdeutsche Landesbank Girozentrale v Learsy*, 284 AD2d 251, 252 [1st Dept 2001]). Under CPLR 3016 (a), "the particular words complained of shall be set forth in the complaint." Reno must also "allege the time, place and manner of the false statement and specify to whom it was made" (*Dillon*, 261 AD2d at 38). Here, the sixth cause of action alleges that, "[t]hroughout May 2008, Mellon disseminated false statements to all of the employees of DOF about Reno, telling them on a number of occasions that she was 'a liar,' a 'whore,' had 'no talent,' was a 'nobody,' and that she was embezzling company funds" (Complaint, ¶ 92). The complaint avers that, on May 27, 2008, Mellon sent an e-mail to Reno, copying Mellon's personal assistant, wherein Mellon purported to accept the resignation of Reno and two other employees, and stated: "You are a whore, a thief, with absolutely no talent in Fashion" (Complaint, ¶ 93; Reno submits a copy of this e-mail as Exhibit F to her affidavit). Mellon also allegedly falsely advertised to third parties that Reno had refused to return his engagement ring upon the end of their engagement, or that she had returned a "fake," and that she had taken jewelry that did not belong to her (Complaint, ¶ 95).

Reno also alleges that Mellon sold a false story to the Daily Mail in London, claiming that she had left him for billionaire Ronald Burkle (Reno Aff., ¶ 27), and in support of this allegation submits a "Mail Online" article (*id.*, Ex. G). However, this article does not attribute any statements

to Mellon.

Reno also alleges that Mellon accused her of embezzling funds from DOF, and in support of this argument she cites *Rabushka v Marks* (229 AD2d 899, 902 [3d Dept 1996] [defamation claim upheld "since the specific language in issue--plaintiffs embezzled funds--has a precise meaning that is capable of being proven true or false"]). However, the plaintiff in that case satisfied CPLR 3016 (a) by including specific allegations of embezzlement in her complaint, whereas Reno has failed to do so.

With the exception of the May 27, 2008 e-mail, which copied only Mellon's personal assistant, Reno fails to allege the time, place and manner of the alleged false statements, and refers generally to third parties and DOF employees. Nothing contained in paragraphs 50-53 of the complaint places the parties in the United States at the time of the May 27, 2008 e-mail. Based upon the papers before the Court, it appears that the parties traveled extensively, and the situs of the alleged injury remains unclear at this juncture. This serves to underscore Reno's failure to allege her claim with the required particularity, including the "time, place and manner of the false statement[s]" (*Dillon*, 261 AD2d at 38). Therefore, Reno's claims fail for lack of specificity.

Although Reno believes that English law may apply to this cause of action, she also argues that Mellon's statements are defamatory under New York law. Reno contends that the statements are actionable as slander per se, because they "imput[e] unchastity to a woman" (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]). In support of this argument, Reno cites *Walia v Vivek Purmasir & Assoc., Inc.* (160 F Supp 2d 380, 394 [ED NY 2000]), where the court found that statements "to various members of the Indian community that [the plaintiff] was a 'whore,' 'slut,' and 'things like that'" constituted slander per se.

To state a cause of action for defamation under New York law, Reno must allege "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). In determining whether statements are defamatory, the Court must consider "the context ... in which they were made" (*Hobbs v Imus*, 266 AD2d 36, 37 [1st Dept 1999]). However, "[l]oose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable" (*id.*). Nonfactual statements of opinion are also not actionable (*Hobbs*, 266 AD2d at 37).

> A "pure opinion" is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may nevertheless be pure opinion if it does not imply that it is based upon undisclosed facts. The issue of whether the words complained of are "pure opinion" is for the court to decide based upon what the average person reading the words would take them to mean

(*D'Agostino v Gould*, 158 AD2d 577, 578 [2d Dept 1990] [internal quotation marks and citations omitted]).

Assuming for the sake of argument, as Reno does, that New York law applies, Reno's claims that Mellon called her a "nobody" who had "no talent" are not actionable, because they are mere opinion. Moreover, while arguably verifiable empirically, Mellon calling her a "whore" and a "liar" amount to mere hyperbole and name-calling, particularly in the context of the parties' turbulent personal relationship. Similarly, calling Reno a "thief" must be considered hyperbole and name-calling, and, in any event, this alleged statement "does not explicitly charge criminality, and is susceptible of an interpretation that even if improper, no actual law was broken" (*Polish Am. Immigration Relief Comm. v Relax*, 189 AD2d 370, 374 [1st Dept 1993]). In short, given Mellon's

alleged erratic behavior and the context of the parties' personal relationship, "nothing about the words uttered ... would lead reasonable persons to conclude that they were witnessing a presentation of fact" (*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 144, *cert denied* 508 US 91 [1992]).

Walia v Vivek Purmasir & Assoc., Inc. (160 F Supp 2d 380, *supra*) is inapposite. That case involved a report and recommendation on damages after defendants' default. The evidence showed that the defendant made statements to various individuals in a close-knit Indian community for the purpose of imputing unchastity to the plaintiff in retaliation for her refusal of his sexual advances and her pursuit of her sexual harassment claims against him. Conversely, here, even if "use of 'bitch,' 'slut' and 'whore' can be normally understood to impute unchastity to plaintiff[,] in this day and age when such terms are used generically," as epithets as discussed above, the context of Mellon's statements "negates any implication of factuality and renders those statements hyperbole or epithets which are exempt from action as slander" (*Saunders v Taylor*, 6 Misc 3d 1015[A], *5, NY Slip Op 51743[U] [Sup Ct, NY County 2003]). Therefore, Reno's reliance upon *Walia* is unpersuasive.

Reno also requests leave to amend the complaint in the event that the Court finds her allegations insufficient to support the defamation claim. Under CPLR 3025 (b), leave to amend a pleading will be freely granted "in the absence of prejudice or unfair surprise" (*Aetna Cas. and Sur. Co. v LFO Constr. Corp.*, 207 AD2d 274, 277 [1st Dept 1994]). However, "leave to amend a complaint is not granted upon mere request without a proper showing. Rather, in determining whether to grant leave to amend, a court must examine the underlying merit of the causes of action asserted therein, since, to do otherwise would be wasteful of judiciary resources" (*Wieder v Skala*, 168 AD2d 355, 355 [1st Dept 1990]). Here, Reno neither submits a proposed amended pleading nor

explains how she would amend the complaint if her request were granted. Therefore, that request is denied. For the foregoing reasons, Mellon's motion to dismiss Reno's sixth cause of action for defamation is granted.

Seventh Cause of Action (Intentional Infliction of Emotional Distress)

Mellon next moves to dismiss Reno's claim for intentional infliction of emotional distress, arguing that it is based upon the same allegations as her defamation claim, and because Reno fails to allege extreme or outrageous conduct by Mellon.

To state a claim for intentional infliction of emotional distress, Reno must allege: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). However, a cause of action for Intentional infliction of emotional distress "is a theory of recovery that is to be invoked only as a last resort" that should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability (*McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 256 AD2d 269, 270 [1st Dept 1998]). Moreover, "the requirements of the rule are rigorous, and difficult to satisfy" (*Howell*, 81 NY2d at 122 [internal quotation marks and citations omitted]). "Liability has been found only where the conduct has been 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" (*id.*).

Here, although some of the allegations supporting Reno's Intentional infliction of emotional distress claim are based upon the same conduct that comprised her defamation claim, which is dismissed; "it follows that dismissal of the intentional infliction of emotional distress claims is not

required" (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 58 [1st Dept 2004]). The intentional infliction of emotional distress claim is also based upon Reno's allegations that: Mellon kicked her out of their home and canceled her credit cards, her mobile telephone account, and her access to company accounts; Mellon came to DOF's office high and told everyone that he was shutting down DOF, that everyone was out of a job, and that it was all Reno's fault; when Reno informed Mellon that she could no longer co-habit with him because of his behavior, Mellon notified Reno that she was "terminated" and that he would "destroy" her for leaving him (Complaint, ¶ 38); because it was essential to Mellon that no one know that he and Reno were no longer co-habiting, he "made it clear daily that if Reno did not 'behave' per his instructions, she would lose her job and her shares in DOF" (*id.*, ¶ 40); Mellon instructed DOF employees to tell Reno to clear out her desk, and that she had just been removed from the DOF bank account; during the weeks following Mellon's May 2008 crack binge, he fired Reno on at least five separate occasions, notified third parties in their industry that she no longer worked for DOF, and cancelled DOF events scheduled by Reno; when Reno was on a pre-approved vacation in Arizona, Mellon notified her immigration lawyers in the United Kingdom that she was no longer employed by DOF and that DOF would no longer pay for their services assisting her with necessary work visas; Mellon falsely planted stories that Reno had resigned from DOF, had stolen from him and DOF, and had refused to return his engagement ring; Mellon placed advertisements in industry publications seeking to replace Reno as DOF's creative director, when he knew that he did not have the right to terminate her; and Mellon informed Reno on at least three occasions that he would rescind all of his threats to terminate her, and that he would fund DOF, "on the single express condition that she continue to wear her 'Mrs. Mellon' hat" and "continued to sleep and co-habit with him" (Complaint, ¶ 102).

The Court notes that, had Reno and Mellon been married, Reno would not be able assert a claim for intentional infliction of emotional distress, because "New York does not recognize a cause of action to recover damages for intentional infliction of emotional distress between spouses." *Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 n 2 (2005). The Court agrees with Mellon's argument that "[m]ere threats, annoyance or other petty oppressions, no matter how upsetting, are insufficient to constitute the tort of intentional infliction of emotional distress" (*Owen v Leventritt*, 174 AD2d 471, 472 [1st Dept 1991]).

The Court of Appeals's decision in *Marmelstein v Kehillat New Hempstead* (11 NY3d 15 [2008]) is instructive. There, the plaintiff brought suit against her rabbi and his congregation, alleging that she and the rabbi had a sexual relationship for five years. The plaintiff alleged that, during the relationship, the rabbi intimidated her by declaring that, "if she disclosed their sexual arrangement to anyone, he would 'have her placed in a straight jacket,' 'have her banned from the shul (synagogue)' and 'turn the community against her'" (*Marmelstein*, 11 NY3d at 18). The plaintiff alleged that, after the affair ended, the rabbi "'engaged in a concerted scheme to embarrass, humiliate and diminish' her such that she was ostracized from the community" (*id.* at 19). The Court of Appeals affirmed dismissal of the plaintiff's cause of action for intentional infliction of emotional distress, reasoning, "The complaint does not establish that Tendler's conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ... and [was] utterly intolerable in a civilized community" (*id.* at 22-23 [international quotation marks and citations omitted]).

Here, the alleged conduct was nasty, obnoxious, and spiteful, but not extreme as to constitute intentional infliction of emotion distress. Although unfortunately characteristic of the vitriol

frequently present in breakups of personal relationships, the conduct alleged does not amount to the objectively extreme and outrageous conduct required to give rise to this cause of action for damages in tort. To hold otherwise would expand this cause of action to cover non-marital relationship breakups and encourage the use of tort litigation for retributive ends, rather than for legitimately sought compensation.

For the foregoing reasons, Mellon's motion to dismiss Reno's seventh cause of action for intentional infliction of emotional distress is granted.

Fourth and Fifth Causes of Action (Breach of Fiduciary Duty)

Mellon seeks dismissal of Reno's claims for breach of fiduciary duty, arguing that he is insulated from liability under the DOF Operating Agreement because Reno fails to allege Mellon's bad faith. Mellon also argues that Reno failed to comply with Delaware's demand futility requirements, that her claims are derivative (as asserted in the fifth cause of action), not direct (as asserted in the fourth cause of action), and that Reno fails to plead any damages.

As it is undisputed that DOF is a Delaware limited liability company, Delaware law therefore applies to Reno's claims for breach of fiduciary duties. Addressing first Mellon's argument concerning Reno's purported failure to comply with demand requirements under Delaware law, "[i]n order to maintain a derivative suit on behalf of an LLC, a member must either (1) make a demand on the managers of the company to bring the suit or (2) show that 'an effort to cause those managers or members to bring the action is not likely to succeed'" (*Kahn v Portnoy*, 2008 WL 5197164, *9 [Del Ch 2008], citing 6 Del. C. § 18-1001). "[I]n order to establish demand futility, the allegations in the complaint must allege particularized facts that establish a reasonable doubt that '(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the

product of a valid exercise of business judgment'" (*id.* [citation omitted]).

Here, the complaint alleges that Reno did not make a pre-suit demand because such a demand would be futile (Complaint ¶ 84). Indeed, Mellon, as the majority owner, manager, and only other member of DOF, could not be expected to initiate an action against himself (*Beneville v York*, 769 A2d 80, 87 [Del Ch 2000] ["it is enough for a plaintiff to show that there is an absence of impartial board members necessary to cause the corporation to accept demand"]). Therefore, demand is excused.

"The elements of a breach of fiduciary duty claim are (1) that a fiduciary duty exists and (2) that the fiduciary breached that duty" (*York Linings v Roach*, 1999 WL 608850, *2 [Del Ch 1999]). Section 18-1101 (e) of the Delaware Limited Liability Company Act allows a limited liability company to "provide for the limitation or elimination of any and all liabilities ... for breach of duties (including fiduciary duties) of a [director]," except that the company "may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing." "The good faith required of a corporate fiduciary includes not simply the duties of care and loyalty ..., but all actions required by a true faithfulness and devotion to the interests of the corporation and its shareholders" (*In re Walt Disney Co. Derivative Litigation*, 906 A2d 27, 67 [Del 2006]).

Here, section 3.3 of the DOF Operating Agreement provides that "the Member and the Manager shall not be liable for any action or refusal to act taken in good faith reliance on the terms of this Agreement" (Morrison Aff., Ex. 6, at 5). Section 6.3 provides that DOF members and its manager "shall not be liable to [DOF] for any act or omission" taken "in their respective capacities as Members, [DOF] employees, or as Manager of [DOF], even if the action or omission furthers the

person's own interest, unless said person acts in bad faith or is guilty of willful misconduct" (*id.* at 10).

Reno alleges that Mellon failed to manage properly DOF's business operations and interfered with business opportunities; that he failed and refused to write a budget or business plan for DOF or manage its finances; that he repeatedly fired Reno and company vendors, such as its public relations firm, without cause or explanation; that he harassed employees by demanding that they declare their loyalty to him and against Reno, thereby interfering with their ability to carry out their work obligations; that he refused to fund DOF events and also cancelled events; and that he damaged relationships with buyers and vendors by attending meetings in an inebriated state. Reno avers that Mellon agreed to stop all of this conduct if she started sleeping with him again.[4]

The pleadings allege that Mellon deliberately took these steps to harm Reno and DOF. Taken together, if proved, these allegations exceed assertions of gross negligence; rather, they show that Mellon engaged in "intentional[] acts with a purpose other than that of advancing the best interests of the corporation," and that he "intentionally fail[ed] to act in the face of a known duty to act, demonstrating a conscious disregard for his duties" (*In re Walt Disney Co. Derivative Litigation*, 906 A2d at 67). Such conduct, if proved, constitutes bad faith sufficient to support Reno's claims for breach of fiduciary duty (*id.*).

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[4] While Reno does not mention the following allegations in her opposition brief, she alleges in the complaint and her affidavit that: Mellon used DOF petty cash to fund his drug use; he sold a false story to a London publication, intending to harass and humiliate her; he used DOF to fund gifts for him to give away to his society friends and celebrities; he came into DOF high and told everyone to stop their work because he was shutting down DOF, and that everyone was out of a job, informing the employees that it was Reno's fault because she was not caring enough. Mellon also allegedly cut off Reno's access to company accounts and her credit cards, and all of this conduct allegedly undermined her authority with DOF employees and her ability to conduct company business. Mellon also allegedly told DOF's public relations firm that Reno was fired and not to speak with her.

In support of his argument that Reno fails to plead damages with sufficient particularity, in accordance with CPLR 3016 (b), Mellon cites a DOF public statement made by Reno, stating her regret that she had been relieved of her duties as creative director of DOF, that it had been "an absolute joy building this DOF brand," and that she was "very proud and grateful to see [DOF] grow to such success in a very short amount of time" (Morrison Aff., Ex. 7). According to Mellon, this demonstrates that Reno fails to plead any damages arising from Mellon's purported breach of fiduciary duties.

However, Reno stated in her opposition affidavit that she "worked hard to build DOF and it was an 'absolute joy' to build the brand because being the creative force behind a clothing line and arranging for it to be created and sold in high-end stores was very fulfilling" (Reno Aff., ¶ 23). She stated in the press release that DOF was a success "because, as a 49% owner in the company and as a member of the LLC, [she] would not take any actions to harm the company" (*id.*). Reno admits that DOF was successful at the time that she left the company. Her claim for breach of fiduciary duty is based upon her assertion that, without Mellon's "constant distractions, including the actions he took in bad faith, ... the company would have been far more successful" (*id.*).

Moreover, for the reasons discussed above, Reno alleges more than "conclusory allegations of emotional distress, harassment, or humiliation" (*DeRaffele v 210-220-230 Owners Corp.*, 33 AD3d 752, 753 [2d Dept 2006]), and, in any event, she need not allege damages at this juncture. As stated by the Court of Appeals:

> It is true that the complaint before us does not contain any allegation of damages to the corporation but this has never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty. This is because the function of such an action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but, as this court

> declared many years ago, "to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates"

(*Diamond v Oreamuno*, 24 NY2d 494, 498 [1969] [internal citations omitted]). Therefore, Mellon's motion to dismiss Reno's claim for breach of fiduciary duties, based upon her failure to plead damages, is denied.

Under Delaware law, in order to determine whether plaintiffs' claims are derivative or individual, the

> court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation

(*Tooley v Donaldson, Lufkin, & Jenrette, Inc.*, 845 A2d 1031, 1039 [Del Supr 2004]). Under *Tooley*, "[t]he analysis must be based solely on ... : Who suffered the alleged harm – the corporation or the suing stockholder individually – and who would receive the benefit of the recovery or other remedy[.]" *Id.* at 1035.

Here, Reno has alleged facts showing injury vis-á-vis her ownership interest in DOF. However, Reno's individual claim fails to allege any harm independent from the alleged injury suffered by DOF. Nor can she prevail without showing an injury to DOF. Therefore, Mellon's motion to dismiss Reno's fourth cause of action for breach of fiduciary duty is granted, and, for the foregoing reasons, Mellon's motion to dismiss Reno's fifth cause of action is denied.

With respect to Mellon's request for a stay of discovery pending the determination of this motion, CPLR 3214 (b) provides that a motion served under CPLR 3211 "stays disclosure until

determination of the motion unless the court orders otherwise." Therefore, Mellon's request is denied as academic.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the first fourth, sixth, and seventh causes of action of the complaint are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the defendant is directed to serve an answer to the complaint within 30 days after service of a copy of this order with notice of entry.

Dated: March 27, 2009
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK