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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Rottem, Dr Shagra

- v -

Giovanelli, P

INDEX NO. 601499/08

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion of defendant Lorenzo Vascotto for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiffs Dr. Shagra Rottem and Intellison Corp. as against him is granted solely as to the first, second, and third causes of action for libel, and denied as to the fourth cause of action for tortious interference with a contract, without prejudice; and it is further

ORDERED that counsel for plaintiffs and counsel for Mr. Vascotto appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, October 27, 2009 at 2:15 p.m.; and it is further

ORDERED that Mr. Vascotto serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 9/23/09

J.S.C.
HON. CAROL EDMEAD

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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DR. SHAGRA ROTTEM and INTELLISON, CORP.

Index No. 601499/08

Plaintiffs,

-against-

DECISION/ORDER

PHILIP GIOVANELLI and LORENZO VASCOTTO,

Defendants.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiffs Dr. Shagra Rottem ("Dr. Rottem") and Intellison Corp. ("Intellison") (collectively, "plaintiffs") seek damages against defendants Philip Giovanelli ("Mr. Giovanelli") and Lorenzo Vascotto ("Mr. Vascotto") (collectively "defendants") for libel and tortious interference with a contract.

Mr. Vascotto now moves for an order, pursuant to CPLR §3211(a)(7), dismissing plaintiffs' Complaint as against him.

Background[1]

Dr. Rottem is president of Intellison and chairman of its board of directors. Plaintiffs allege that on May 18, 2007, Mr. Giovanelli sent an e-mail to a group of Intellison investors (see the "Giovanelli E-mail"). Attached to the Giovanelli E-mail is a letter from Mr. Vascotto, one of Intellison's investors, to Dr. Rottem dated May 17, 2007 (the "Vascotto Letter").

Plaintiffs' Complaint alleges four causes of action against defendants. In their first cause of action for libel on behalf of Dr. Rottem, plaintiffs allege that Mr. Vascotto published a

[1]Information is taken from Mr. Vascotto's motion and plaintiffs' opposition.

statement alleging that Dr. Rottem's plans for Intellison included "giving away valuable assets without any consideration at all for the Company, but in a fashion that would enrich [him]" (the Vascotto Letter). In publishing such a statement, Mr. Vascotto portrayed Dr. Rottem as a dishonest businessman who planned to cheat the investors in his company, plaintiffs contend (Complaint, ¶ 15). In their second cause of action for libel on behalf of Intellison, plaintiffs allege that Mr. Vascotto published a statement alleging that Dr. Rottem's "recent communications have made it clear that [Dr. Rottem intends] to sell all of the assets of the Company" (the Vascotto Letter). In publishing such a statement, Mr. Vascotto meant to imply that Intellison was going out of business, plaintiffs contend (Complaint, ¶ 19). In their third cause of action for libel on behalf of Dr. Rottem, plaintiffs allege that by publishing that "[s]everal shareholders have been unsuccessful in obtaining information about the internal financing round offered by Intellison" (the Giovanelli E-mail), Mr. Vascotto meant to and did imply that Dr. Rottem was a dishonest businessman who was denying investors information about Intellison and, thus, was operating Intellison in an unprofessional manner (Complaint, ¶ 23). The fourth cause of action alleges tortious interference with a contract.

Mr. Vascotto's Motion

Mr. Vascotto contends that a claim for defamation, libel or slander must allege that the particular defendant made false statements and published such false statements to a third party without authority or privilege. Mr. Vascotto argues that plaintiffs' Complaint fails to allege that he published any false or defamatory statement; instead, the Complaint alleges that only *Mr.*

Giovanelli published allegedly false statements in the Giovanelli E-mail.[2] There is no allegation in the Complaint that Mr. Vascotto published anything to any third party. Mr. Vascotto further argues that any allegedly false statements made in the Vascotto Letter are privileged. Citing caselaw, Mr. Vascotto contends that communications by and among shareholders are privileged, and, thus, protected from an action for defamation. Therefore, the statements in the Vascotto Letter cannot support a claim for libel or defamation. Finally, Mr. Vascotto contends that plaintiffs failed to plead defamation *per se*, or allege with particularity special damages in order to support their claims for libel.

Plaintiffs' Opposition

First, plaintiffs argue that each of the three libel causes of action allege that the libel was published by "defendants" (Complaint, ¶¶ 14, 18, 22). Thus, as a matter of pleading, Mr. Vascotto's argument is mistaken. Mr. Vascotto appears to argue that, since the Giovanelli E-mail was sent by Mr. Giovanelli, this negates publication by Mr. Vascotto. This is incorrect, plaintiffs argue. Since the Giovanelli E-mail itself states that it is being sent to Intellison investors at the specific request of Mr. Vascotto, under caselaw, it is a publication by Mr. Vascotto, plaintiffs argue. If Mr. Vascotto denies that the e-mail was sent at his instigation, he has not done so by affidavit on this motion, and, in any event, that would only create an issue of fact, plaintiffs argue.

Second, plaintiffs argue that while Mr. Vascotto is correct that communications between stockholders are privileged, such a privilege is only qualified, not absolute, plaintiffs argue.

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[2] Mr. Vascotto contends that the Giovanelli E-mail was sent on May 17, 2007 (motion, ¶4). However, the Giovanelli E-mail contains a date of May 18, 2007.

Thus, the assertion of a qualified privilege does not render plaintiffs' Complaint subject to dismissal; it only raises a question of fact, to be decided at trial. In their Complaint, plaintiffs allege that the defamatory statements were made for the improper purpose of coercing plaintiffs into hiring Mr. Giovanelli, or punishing them for their refusal to do so (Complaint, ¶¶ 11-13). Plaintiffs further contend that questions of good faith and lack of malice cannot be decided prior to the submission of any proof on those issues.

Third, regarding Mr. Vascotto's argument that the Complaint fails to allege defamation *per se*, plaintiffs contend that allegations of dishonest or unethical business practices are actionable *per se*, without any allegation of special damages. Similarly, assertions concerning a business that disparage the basic integrity, creditworthiness, and competence of the business are actionable *per se,* and no pleading of special damages is required, plaintiffs contend.

Finally, plaintiffs point out that in his motion, Mr. Vascotto raises no argument that plaintiffs' fourth cause of action fails to state a claim for intentional interference with contractual relations. Thus, the fourth cause of action should be sustained, plaintiffs argue.

Vascotto's Reply

Mr. Vascotto disputes plaintiffs' argument regarding the sufficiency of their libel pleading. The fact that Mr. Giovanelli's e-mail states that it was sent at the request of Mr. Vascotto is insufficient to support a claim for libel, Mr. Vascotto argues.

Mr. Vascotto also reasserts his argument that any alleged false statements in the Vascotto Letter are privileged. While the privilege afforded to communications by and among shareholders is qualified, plaintiffs are incorrect in their assertion that whether the privilege applies is a question of fact, Mr. Vascotto argues. To the contrary, since the communication at

issue is protected by a qualified privilege, plaintiff must allege facts sufficient to establish that the defendant was motivated by ill will or malice; conclusory allegations of ill will or malice will not suffice. Here, plaintiffs fail to allege that Mr. Vascotto acted with the requisite malice required to overcome the qualified privilege afforded to his statements. Indeed, the Complaint is devoid of any allegations of any wrongful conduct by Mr. Vascotto, save for the reference to him in the Giovanelli E-mail. Plaintiffs' bald and conclusory statement that defendants published the Giovanelli E-mail maliciously fails to come anywhere near the pleading required to overcome the privilege.

Mr. Vascotto contends that plaintiffs concede that they have not alleged special damages, but assert that the Complaint alleges defamation *per se* and dishonest or unethical business practices, which is actionable *per se*. However, the allegations in the Complaint, including the Giovanelli E-mail and the Vascotto Letter, do not rise to the level of defamation *per se*, Mr. Vascotto argues.

Finally, Mr. Vascotto argues that plaintiffs' purported tortious interference claim fails because plaintiffs failed to allege facts supporting all of the elements of a *prima facie* case.

Analysis

Motion to Dismiss

The standard on a motion to dismiss a pleading for failure to state a cause of action, pursuant to CPLR §3211(a)(7), is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]). The

court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002], *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank* at 228). However, where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez* at 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Libel

According to the First Department, the elements of libel are "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], *citing* Restatement [Second] of Torts §558). Further, CPLR 3016 (a) requires that "the particular words complained of shall be set forth in the complaint." In addition, the complaint "must allege the time, place and manner

of the false statement and specify to whom it was made" (*Dillon* at 38, *citing Arsenault v Forquer*, 197 AD2d 554 [2d 1993]; *Vardi v Mutual Life Ins. Co.*, 136 AD2d 453 [1st Dept 1988]). The First Department further explains:

> In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction. "[C]ourts '"will not strain"' to find defamation "where none exists." Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable.
> (*Dillon* at 38) (internal citations omitted)

At issue here are statements contained in the Giovanelli E-mail and the Vascotto Letter, which are attached to plaintiffs' Complaint.

First, Mr. Vascotto's argument that he personally did not publish the statements lacks merit. "It is axiomatic that a defendant cannot be held liable for a libelous statement that it did not write or publish" (*Khan v New York Times Co., Inc.*, 269 AD2d 74, 80 [1st Dept 2000] ["As defendants point out, the allegedly libelous subheading never appeared in the Times and there is *no evidence that Ms. Antilla or anyone else employed by the Times participated in creating this new subheading*]). However, "[a]ll who take part in the procurement, composition, and publication of a libel are equally responsible in law for the resulting damages" (44 NY Jur 2d, Defamation and Privacy, §212 (*see e.g. Karaduman v Newsday, Inc.*, 51 NY2d 531, 540 [1980] ["Additionally, it is well established as a matter of substantive law that the five defendants who actually were responsible for the initial publication of "The Heroin Trail" in serial form cannot be held personally liable for injuries arising from its subsequent republication in book form *absent a showing that they approved or participated in some other manner in the activities of the third-party republisher*" (*emphasis added*)]; *Campo v Paar*, 18 AD2d 364, 368, [1st Dept 1963]

["Anyone giving a statement to a representative of a newspaper *authorizing or intending its publication* is responsible for any damage caused by the publication" [*emphasis added*]).

Here, the Complaint indicates that Mr. Giovanelli forwarded Vascotto's letter to Intellison investors, *i.e.* a third party, *at Mr. Vascotto's request*. The Giovanelli E-mail states: *"At the request of shareholder Lorenzo Vascotto*, a copy [of the Vascotto Letter to Dr. Rottem] has been forwarded to you for your attention" (emphasis added). Further, Mr. Vascotto does not deny that he instructed Mr. Giovanelli to forward the letter to other investors. Therefore, contrary to Mr. Vascotto's contention, plaintiffs have sufficiently alleged that he published the allegedly defamatory statements.

It is also well settled that some statements, even if defamatory, enjoy a "qualified privilege" against libel claims (*see e.g., Mihalakis v Committee of Interns and Residents (CIR)* 162 AD2d 371 [1st Dept 1990]). Such a qualified privilege exists "where the communication is made to persons who have some common interest in the subject matter" (*Silverman v Clark*, 35 AD3d 1 [1st Dept 2006] *citing Foster v Churchill*, 87 NY2d 744, 751 [1996]; *Mihalakis* at 371). New York courts recognize that communications among shareholders of a corporation enjoy such a privilege (*see e.g. Erdberg v Freeman*, 90 Misc 2d 797, 799 [NY City Civ Ct 1977] ["Communications between stockholders of a corporation have enjoyed that protection"] citing *Ashcroft v Hammond*, 197 NY 488, 494-495 [1910] [defendant and Mr. Clemens, the two largest shareholders, were both "vitally interested in the proper management of the company and in the settlement of the controversy that had arisen as to the validity of the election of the new board of directors" and "equally interested in the success of the company, but they were in controversy as to what course would best subserve their common interest. Each had the right to endeavor to

convert the other to his own view and for that purpose to state such facts relative to the subject as he believed to be true."]). And, as explained by the Court of Appeals, unlike communications protected by an absolute privilege, "[c]ommunications that are protected by a qualified privilege are not actionable *unless a plaintiff can demonstrate that the declarant made the statement with malice*. Malice in this context has been interpreted to mean spite or a knowing or reckless disregard of a statement's falsity" (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007]).

At the pleading stage, the plaintiff does not have to show evidentiary facts to support allegations of malice (*Pezhman v City of New York*, 29 AD3d 164, 169 [1st Dept 2006]; *Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [1st Dept 2004]). Instead, malice "*may be inferred* from a defendant's use of expressions beyond those necessary for the purpose of the privileged communication . . . or from a statement that is 'so extravagant in its denunciations or so vituperative in its character' . . . as to warrant an inference of malice" (*Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 259-260 [1st Dept 1995] (emphasis added), citing *Mellen v Athens Hotel Co.*, 153 AD 891, 891 [1st Dept 1912] and *Ashcroft v Hammond*, 197 NY 488 [1910]). For example, in *Hanlin v Sternlicht* (6 AD3d 334 [1st Dept 2004]), the plaintiff alleged in her complaint that her contract as a bridge instructor with the 92nd Street YMHA/YWHA ("the Y") was not renewed because the defendant slandered the plaintiff "by telling the Y that plaintiff is 'incompetent' and that students had told him that 'they had not even learned [from plaintiff] the fundamentals' of bridge" (*id.* at 334). The First Department held that the plaintiff's allegations of malice were not sufficient to overcome the qualified common interest privilege because "allegations that defendant made the offending statements in order to get her job rest only on surmise and conjecture, not evidentiary facts. Certainly, the statements themselves do

not go beyond the Y's interest in plaintiff's competence as an instructor and her students' attitude toward her, and are not 'otherwise 'so vituperative' as to warrant an inference of malice" (*id.*, citing *Sborgi v Green*, 281 AD2d 230 [1st Dept 2001]).

In *Sborgi*, the plaintiff alleged "that she was defamed by defendant, a bishop of her Church and ecclesiastical leader of her congregation, when, in connection with her employment application with a university run by the Church, he told a university official whose duties included evaluations of job applicants that plaintiff is an 'unstable person' and that 'her children are disturbed'" (*id.* at 230). The Court held:

> While the statements were frank, the expressions used were not beyond what was necessary for the purposes of the communication, both speaker and listener having a common interest in plaintiff's character and fitness as a prospective teacher and promoter of their faith, or otherwise "so vituperative" as to warrant an inference of malice. As the IAS court concluded, suspicion, surmise and accusation are not enough to infer malice. (*Id.* at 230) (internal citations omitted)

Here, the alleged defamatory statements in the Complaint are protected by the qualified common interest privilege: They were published by an Intellison shareholder, Mr. Vascotto, to other Intellison shareholders – a group that, together with Mr. Vascotto, had a common interest in the subject matter of the communications. The Giovanelli E-mail begins "Attention Shareholders of Intellison" and states in full:

> *Several shareholders have been unsuccessful in obtaining information about the internal financing round offered by Intellison.* In order to obtain information necessary to reach a qualified decision, and to obtain financial information on the company, the law firm representing Mr. Lorenzo Vascotto has drafted the attached letter and sent a copy to Dr. Rottem at Intellison. At the request of shareholder Lorenzo Vascotto, a copy has been forwarded to you for your attention.

Therefore, the Court must evaluate whether the allegations in the Complaint raise an inference of malice.

Here, plaintiffs only allege facts that support a motive of malice on the part *of Mr. Giovanelli*. For example, plaintiffs allege that Mr. Giovanelli demanded that plaintiffs hire him as Chief Operating Officer of Intellison (Complaint, ¶ 9). Plaintiffs further allege that "[a]t various times, defendant Giovanelli stated to plaintiff Rottem that if Rottem did not acquiesce in Giovanelli's demand for the COO position, GiovanellI would harm the relationship between plaintiffs and the investors in Intellison" (Complaint, ¶ 10). In or about December 17, 2006, Mr. Giovanelli allegedly "sent an e-mail to plaintiff Rottem threatening that unless Rottem did what Giovanelli wanted with respect to fund raising Giovanelli will be forced to show investors that certain requested information was not forthcoming and all hell will break loose" (Complaint, ¶ 11).

However, the Complaint does not allege that *Mr. Vascotto* threatened to harm plaintiffs' relationship with investors; nor does it allege that Mr. Vascotto requested, demanded or even encouraged plaintiffs to hire Mr. Giovanelli. In fact, plaintiffs allege no facts supporting a nexus between Mr. Vascotto and Mr. Giovanelli except that Mr. Vascotto asked that Mr. Giovanelli forward the Vascotto Letter to other Intellison shareholders (see the Giovanelli E-mail).

Further, neither the Giovanelli E-mail nor the Vascotto Letter demonstrates a malicious motive on Mr. Vascotto's part. The Giovanelli E-mail merely states that Mr. Vascotto asked Mr. Giovanelli to circulate the Vascotto Letter "[i]n order [for the shareholders] to obtain information necessary to reach a qualified decision, and to obtain financial information on the company." In their third cause of action for libel on behalf of Dr. Rottem, plaintiffs allege that by publishing that "[s]everal shareholders have been unsuccessful in obtaining information about the internal financing round offered by Intellison" (the Giovanelli E-mail), Mr. Vascotto meant to and did

imply that Dr. Rottem was a dishonest businessman who was denying investors information about Intellison and, thus, was operating Intellison in an unprofessional manner (Complaint, ¶ 23). However, contrary to plaintiffs' arguments, Mr. Giovanelli's statements, without more, fail to support an inference that Mr. Vascotto's motive was malicious, as alleged. Plaintiffs' allegations rest solely on "surmise and conjecture," which cannot support actual malice (*Dillon* at 40).

Indeed, the Vascotto Letter fails to indicate any malice on Mr. Vascotto's part, which states in relevant part:

> I [Mr. Vascotto] am the holder of record of approximately 175 shares of Intelllson, Inc. (the "Company"). I hereby demand that you provide me with the following materials regarding the Company.[3]
>
> * * *
>
> *Please be further advised that your recent communications have made clear that you intend to sell all of the assets of the Company.* Any sale, whether done in one transaction or a series of transactions, cannot be commenced without shareholder approval. I hereby demand that you provide the shareholders with complete notice of your business plan and schedule a meeting so that shareholders may vote on the plan. *Aspects of the proposed plan appear to include giving away valuable assets without any consideration at all for the Company, but in a fashion that would enrich you.* Please be advised that to the extent that you engage in transactions with the Company, the burden is upon you to demonstrate the fairness of each such transaction. In the event you engage in the transactions that enrich yourself at the expense of the Company, I am reserving my right to seek all appropriate remedies.
> (*Emphasis added*)

In their first cause of action for libel on behalf of Dr. Rottem, plaintiffs allege that Mr. Vascotto published a statement alleging that Dr. Rottem's plans for Intellison included "giving away valuable assets without any consideration at all for the Company, but in a fashion that would enrich [him]" (the Vascotto Letter). In publishing such a statement, Mr. Vascotto portrayed Dr.

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[3] The list of documents sought is omitted.

Rottem as a dishonest businessman who planned to cheat the investors in his company, plaintiffs contend (Complaint, ¶ 15). In their second cause of action for libel on behalf of Intellison, plaintiffs allege that Mr. Vascotto published a statement alleging that Dr. Rottem's "recent communications have made it clear that [Dr. Rottem intends] to sell all of the assets of the Company" (the Vascotto Letter). In publishing such a statement, Mr. Vascotto meant to imply that Intellison was going out of business, plaintiffs contend (Complaint, ¶ 19).

However, contrary to plaintiffs' arguments, all of Mr. Vascotto's statements in the Vascotto Letter appear to further the purpose of the qualified privilege – namely, to encourage Dr. Rottem to disclose certain information to shareholders that could affect their common interest as shareholders in Intellison (*see Present v Avon Prods.*, 253 AD2d 183, 188-89 [1st Dept], *lv dismissed* 93 NY2d 1032 [1999] [holding that the statements at issue in that case "clearly furthered the purpose of the privilege, namely, to allow companies to investigate employees' criminal misconduct and to share this information with law enforcement authorities"]). Further, Mr. Vascotto does not use "expressions beyond those necessary for the purpose of the privileged communication"; nor are his statements "so extravagant in its denunciations or so vituperative in its character" as to warrant an inference of malice (*see Herlihy* at 260). Therefore, dismissal based on Mr. Vascotto's contention that the alleged statements in the Giovanelli E-mail and the Vascotto Letter are protected by the qualified privilege is warranted.

Defamation Per Se, or Special Damages

In order to support a claim for libel, the plaintiff must also allege that the statements either cause special damages, or constitute libel *per se*, in which injury is presumed (*Dillon* at 38). "Special damages contemplate 'the loss of something having economic or pecuniary value'"

(*Liberman v Gelstein*, 80 NY2d 429, 434 -435 [1992], quoting Restatement [Second] of Torts § 575, comment b). Further, it is "well settled that no allegation of special damages is required when the statement complained of is libelous per se," *i.e.* wherein injury is presumed *(Public Relations Soc. of America, Inc. v Road Runner High Speed Online*, 8 Misc 3d 820, 824, 799 NYS2d 847, 851 [NY Sup 2005]). The four categories of libel *per se* comprise allegations (1) that the plaintiff committed a crime, (2) *that tend to injure the plaintiff in his trade, business or profession*, (3) that plaintiff has contracted a "loathsome disease," and (4) that imputes that a woman is unchaste (*Penn Warranty Corp. v DiGiovanni*, 10 Misc 3d 998, 810 NYS2d 807 [Sup Ct New York County 2005] *citing Liberman v Gelstein*; *Matherson v Marchello*, 100 AD2d 233, 236 [2d Dept 1984]; *see also Rail v Hellman*, 284 AD2d 113 [1st Dept 2001] [holding that where an act of literary impersonation "imputes facts to the person . . . that damage him in his trade or profession, a cause of action for libel per se is adequately pleaded"]; *John Langenbacher Co., Inc. v Tolksdorf*, 199 AD2d 64, 65 [1st Dept 1993] [holding as proper the trial court's finding that "as the disparagement impugned the basic integrity, creditworthiness and competence of the business, injury was presumed and no proof of special damages was required"]; *Ruder & Finn Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981] ["Where a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies and injury is conclusively presumed"]).

Here, contrary to plaintiffs' arguments, plaintiffs failed to plead libel *per se*. Mr. Vascotto's statements are not of such character that they may be said to impugn the basic integrity, creditworthiness and competence of plaintiffs' business. Therefore, dismissal based on Mr. Vascotto's contention that plaintiffs failed to plead special damages or libel *per se* is also

warranted.

As plaintiffs failed to allege that Mr. Vascotto acted with the requisite malice to overcome the qualified common interest privilege afforded to his statements, and failed to plead libel *per se* or special damages, defendants' motion to dismiss the three libel causes of action as against Mr. Vascotto is granted.

Tortious Interference with a Contract

Although Mr. Vascotto's motion seeks dismissal of the Complaint, his motion fails to address or set forth any arguments regarding plaintiffs' fourth cause of action for tortious interference with a contract. Instead, he raises arguments concerning plaintiffs' fourth cause of action the first time in his reply papers. As the First Department explained in *Dannasch v Bifulco* (184 AD2d 415, 417 [1st Dept 1992]), "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." Consequently, courts have often refused to consider arguments asserted for the first time in a movant's reply papers *(Apartment Recycle Co. Of Manhattan Inc. v AIU Ins. Co.*, 10 Misc 3d 1066, 814 NYS2d 559 [Sup Ct New York County 2005] *citing Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625 [1st Dept 1995]). "The First Department, however, has carved out a narrow exception to the maxim excluding arguments advanced in a movant's reply papers: where the opposing party 'availed themselves of an opportunity to oppose the claims in their surreply,' the movant's arguments may be considered on their merits" (*Apartment Recycle Co. Of Manhattan Inc. citing Fiore v Oakwood Plaza Shopping Center, Inc.*, 164 AD2d 737, 739 [1st Dept], *affd*, 78 NY2d 572 [1991], *cert denied*, 506 US 823 [1992]). Since Mr. Vascotto raises arguments

challenging plaintiffs' tortious interference claim for the first time in reply, and plaintiffs have not been given an opportunity to address his argument in any sur-reply, this Court does not reach the issue of whether the Complaint fails to state a cause of action for tortious interference with a contract. Therefore, dismissal of the tortious interference claim is denied, without prejudice.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of defendant Lorenzo Vascotto for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiffs Dr. Shagra Rottem and Intellison Corp. as against him is granted solely as to the first, second, and third causes of action for libel, and denied as to the fourth cause of action for tortious interference with a contract, without prejudice; and it is further

ORDERED that counsel for plaintiffs and counsel for Mr. Vascotto appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, October 27, 2009 at 2:15 p.m.; and it is further

ORDERED that Mr. Vascotto serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 23, 2009

Hon. Carol R. Edmead, J.S.C.