

Xing v Leckel

2012 NY Slip Op 30928(U)

March 23, 2012

Sup Ct, New York County

Docket Number: 104073/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

FENG XING,
Plaintiff,

- against -

INDEX NO. 104073/09

MOTION SEQ. NO. 003

REGINA LECKEL,
Defendant.

The following papers, numbered 1 to 2 were read on this motion by defendant for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo)

FILED

2

Replying Affidavits (Reply Memo)

APR 02 2012

Cross-Motion: Yes No

In this action for, *inter alia*, malicious prosecution, Regina Leckel (defendant) moves for summary judgment, pursuant to CPLR 3212, dismissing Feng Xing's (plaintiff) complaint and for judgment on her counterclaims. Defendant also seeks the imposition of costs, attorneys fees and sanctions pursuant to CPLR 8303-a. Plaintiff is in opposition to the instant motion.

NEW YORK COUNTY CLERK'S OFFICE

BACKGROUND

Both parties live in New Jersey and work in Manhattan. Beginning at least in early 2007, they would ride the same New Jersey Transit bus from Lyndhurst, New Jersey into the Port Authority bus terminal each work day. The complaint states that defendant initiated a conversation with plaintiff in March 2007, and subsequently they would converse regularly while waiting for the bus and during the commute (Notice of Motion, exhibit A, ¶¶ 10-12). Plaintiff stated that he often accompanied defendant to the front door of her office building before continuing to his place of employment (*id.*, ¶¶ 13-14). According to plaintiff, the parties exchanged e-mail addresses and telephone numbers which they used to communicate "on many occasions" (*id.*, ¶¶ 15, 17). Plaintiff allegedly set up an email account for defendant, in September 2007, specifically for their messages, which she used until January 2008 (*id.*, ¶¶ 23-

24). Additionally, plaintiff claims that they exchanged handwritten notes on the bus, which included love poems by plaintiff (*id.*, ¶¶ 23-24).

Plaintiff concedes that defendant asked him to cease communicating with her in January 2008 (*id.*, ¶ 25). However, defendant continued to follow her commuting schedule, "voluntarily continued, in a friendly and flirtatious manner, to correspond with plaintiff while they waited to depart on the aforesaid 9:45 a.m. New Jersey Transit bus," and "voluntarily continued, in a friendly and flirtatious manner, to allow plaintiff to accompany her to the front of her [office] building" (*id.*, ¶¶ 27-28). Defendant complained to the New York City Police Department (NYPD) and on October 15, 2008, plaintiff was handcuffed, arrested and taken to Central Booking where he was kept in jail overnight. Plaintiff was subsequently arraigned and charged with one count of stalking in the third degree and two counts of aggravated harassment in the second degree in New York County Criminal Court (*id.*, ¶¶ 29-33). On his third appearance in court, on January 16, 2009, the charges were dismissed.

On March 24, 2009, plaintiff commenced the instant action, asserting causes of action for malicious prosecution, prima facie tort and intentional infliction of emotional distress. In her verified answer, defendant offered the affirmative defense that she never pursued criminal sanctions against defendant, and asserted counterclaims for intentional infliction of emotional distress and prima facie tort (see Complaint, exhibit A).

STANDARD

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]; see also *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006]). The evidence should be viewed in the "light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]; see also *Kesselman v Lever*

House Restaurant, 29 AD3d 302 [1st Dept 2006]).

Upon the proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact’” (*Grasso*, 50 AD3d at 545, quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Gross v Amalgamated Hous. Corp.*, 298 AD2d 224 [1st Dept 2002]). “[I]ssue finding, rather than issue-determination, is the key to the procedure and the motion should not be granted where there is any doubt as to the existence of a genuine factual issue” (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient [to defeat a well-supported summary judgment motion], as is reliance upon surmise, conjecture or speculation” (*Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002] [internal quotations and citations omitted]).

DISCUSSION

Defendant’s Motion for Summary Judgment Dismissing the Complaint

Defendant’s verified answer offered a factual background contrasting with plaintiff’s version in the complaint. Defendant states that plaintiff briefly introduced himself to her and another commuter at the bus stop in April 2007 (Verified Answer, ¶ 54). Then or shortly thereafter, a group of commuters, including plaintiff, waiting at the bus stop exchanged business cards (*id.*, ¶ 56). Through August 2007, the parties never had “any conversation that went beyond the extent of a casual greeting” (*id.*, ¶ 55). Between September 2007 and December 2008, “plaintiff persistently attempted to engage the defendant in a conversation, . . . to sit in close proximity to the defendant [on the bus,] . . . to unilaterally speak to defendant about his desire to be romantically involved with her [and] . . . drop various papers in the lap or

close proximity to defendant" (*id.*, ¶¶ 57-61). She claims that she ignored or rebuffed all of these advances. Additionally, in spite of defendant's demands to be left alone, plaintiff often followed her to work after the bus ride in the same period (*id.*, ¶ 63).

Defendant alleged that plaintiff repeatedly sent her e-mails "with increasingly delusional and obsessive letters which focused on his unilateral romantic interest in her," and left her telephone messages at her work (*id.*, ¶¶ 66-67). She claimed that, on or about December 2007, she spoke to the Lyndhurst Town Police, the Port Authority Police and NYPD without receiving assistance from them (*id.*, ¶¶ 70-72). When plaintiff allegedly followed her to the secluded back entrance at her office building, she filed a complaint with her employer's security department. They, in turn, contacted NYPD, which resulted in defendant being interviewed by a detective (*id.*, ¶¶ 76-77).

Defendant's job in Manhattan ended on December 5, 2008 and, with the change in her commuting pattern and place of employment, defendant allegedly believed that plaintiff's conduct would cease. Accordingly, she decided not to sign a witness statement against him offered by the New York County District Attorney's office, which had obtained a temporary restraining order against plaintiff on or about October 17, 2008 (*id.*, ¶¶ 80-88 *passim*).

Defendant submits about 100 pages of e-mail messages dated from May 30, 2007 to October 3, 2008 (Notice of Motion, exhibit F). She states that they represent only about 20% of the e-mail sent by plaintiff (Sediva Affirm., at 2). While the selected messages probably show defendant to best advantage, there is little doubt about their tenor. Her early messages are friendly, but relatively impersonal:

May 30, 2007 – "Yes the bus terminal was busy. Work is very busy today also. I hope you get to enjoy the weather a little....have a nice day."

June 19, 2007 – "Work is busy this week. I am sorry but I wont be able to meet with you tonight I have dinner plans with some friends and tomorrow I have a photo shoot all day. I hope you are having a good day today."

July 3, 2007 – “The photo [you sent] is very cute. The bear is also very cute. Hope you have a good holiday.”

August 8, 2007 – “Hello....I you day (*sic*) is going well. The email below is very nice. I enjoyed my time in Vegas very much. I did not realize that it would be as hot here as it was on the West coast. have a good day and ill (*sic*) talk to you later.”

August 22, 2007 – “Hi there....yes it was an early day today and a cold day. Hope you day (*sic*) is going well.”

By contrast, plaintiff’s messages at the same time have a stronger emotional content:

May 30, 2007 – “I am glad that I have won you back” (when defendant did not answer several prior e-mails).

June 29, 2007 – “I miss you so much and miss the time and the joys we shared when we were together.”

August 8, 2007 – “I am so glad that you liked the moonlight email, and I like it very much too. Yes, it was clever, sensational and emotional, and most importantly, every word in the email was truly from the deep bottom of my heart, and it was only for you, Regina, my Queen.”

August 30, 2007 – “Someday you will find that your Frank is such a serious guy in love with you who would never do anything on you (*sic*) that you don’t feel comfortable with. Your Frank wants you to be in his life and to stay with him life-long.”

As defendant indicated in her verified answer, her demeanor changed in September 2007. In response, plaintiff wrote on September 5, 2007, “Yes, I was so shocked when you were pushing me away yelling ‘just don’t touch me!’ I can’t believe it was my beautiful, sweet and sometimes shy Regina.” Subsequently, plaintiff’s messages, sampled below, rarely evoked a response, friendly or otherwise, from defendant.¹

October 1, 2007 – “Every time I call REGINA in email, voice message, or in person, I see sweet and beautiful Regina in front of me. Do you mind I call your name, the most attractive and beautiful sound in the world, over and over? Love you, and want to kiss you, my dear Regina.”

¹ One message, dated December 10, 2007, seems to be responsive to a communication from defendant: “I am so sorry to hear that the shoot was cancelled. I know you put great efforts on the shoot and it wasn’t an easy call to cancel the trip at the last minute.” However, he may have gathered this information indirectly, because he apparently listened to some of defendant’s mobile telephone calls while on their daily bus ride (see e.g., October 6, 2007 email [“you were talking to your girl friend over cell phone while I was on side of you”]; September 26, 2007 email [“I was recalling your phone conversation with your brother that I overheard yesterday”]).

November 2, 2007 – “Did you feel you see your old and best friend, and actually even much much more than just that, this morning? I saw the chemistry and the excitement in your eyes. I know what that mean because I told you I can read your mind. I don't want you to cheat yourself any more. I know you love me just as you know I love you.”

December 8, 2007 – “Having Seen so many people and talked to so many people, at the end of the day like right now - every thing is settled down - my heart tells me that there is one person I am still waiting for, hoping to see her brilliant smiles, hear her soft and sweet voice, and smell the light scent from her fragrant body.”

Nothing in the record indicates that the parties ever saw each other socially on any occasion in spite of plaintiff's frequent requests. Defendant states that “I have never been on a date with the Plaintiff, never seen him in any social setting or even entertained the idea of seeing him in any social setting” (Leckel Aff., ¶ 5). In addition, defendant tried to deter him by words and deeds with no success:

January 8, 2008 (from plaintiff) – “I interpreted your body language wrong - you put your bag on the other seat and didn't remove it when I got on the bus so that it came to my mind in a nano-second that you didn't want me to sit next to you. Now I believe that you simply want me to ask you if I can sit down here so that you have the privilege to give me an instant approval of my request and issue me a permit by saying 'yes', and you love me sitting by you.”

January 10, 2008 (from defendant) – “I think you have interpreted my friendship in the wrong way. I am not your girlfriend. Please do not call my work number because it interrupts my work day when you tie up the line. Also please do not call my cellular as it is a work cellular and when you tie up the line it interrupts my work.”

April 11, 2008 (from defendant) – “I don't think you understand....I am not your girlfriend and I will not be your bride. I am only someone who you met on the bus that is all.”

May 5, 2008 (from plaintiff) – “I didn't realize why you were so angry (I don't like the words 'piss off' though) this morning till this afternoon. I forgot for a moment that you actually are so sensitive to my words, which is good, because it tells me that you so care about every thing Frank tells you.”

May 22, 2008 (from defendant) – “We do not have an anniversary. I am not your girlfriend.”

June 23, 2008 (from defendant) – “Stop emailing me, this is my work email. Stop emailing me.”

June 25, 2008 (from defendant) – “Please stop emailing me. I am not your girlfriend.”

July 2, 2008 (from defendant) – “Please stop calling me. Please stop emailing me. I am

changing my work cell phone again because you do not understand that I am NOT your girlfriend. Also I have gone to the police to let them know that you do not stop calling me so I too have a record on file."

July 15, 2008 (from defendant) – "I AM NOT KIDDING DO NOT EMAIL ME AND DO NOT CALL ME. I HAVE REPORTED YOU TO MY OFFICES AND TO THE POLICE. LEAVE ME ALONE."

Plaintiff ignored defendant's entreaties:

July 24, 2008 – "Love you - and I will call you later, and could you please turn on your cell phone - I do not want to leave messages any more, I want to hear your voice."

August 5, 2008 – "You are assured you are my forever love and I am told by your unspoken language you have fallen for Frank."

August 26, 2008 – "Once we meet [in Heaven], we will stay together, forever, and awaiting our children to join us....

PS, tell me you did not cry while reading this. Kiss you."

October 1, 2008 – "Do you feel sweet? Do you feel loving is so good? Do you want to stay in the hub of sweet loving whole life long with your honest yet passionate Frank?"

October 3, 2008 – Regina, want to tell you that I WILL NOT ABANDON YOU AT THE TIME YOU NEED ME AND NEED MY HELP, AND I WILL NEVER THROW YOU AWAY THOUGH IT IS THE EASIEST THING TO DO IN THE WORLD."

In addition to riding the same commuter bus in the morning, the telephone calls and e-mails, plaintiff would occasionally wait for defendant after work in or near the parking lot where she left her car in the morning:

September 19, 2007 – "Last night I stayed with you car for a while, after I came back from the downtown around 10 pm."

October 4, 2007 – "Please let me know if Solara [the model of her automobile] did a good job last night to pass my note to you."

October 6, 2007 – "I knew you worked very late again last night, though I didn't leave anything on your car."

October 11, 2007 – "What I didn't tell you was that I actually stopped by your car on Tuesday night [October 9, 2007]."

Defendant submits in support of her motion, affidavits from Lauren Leb, Matthew Parillo and Joel Solomon, defendant's co-workers, which attest to the volume and frequency of

unsolicited telephone calls she may have received from plaintiff (Notice of Motion, exhibits I-K). Sometimes they claim that they answered defendant's telephone calls in an attempt to curb plaintiff's conduct.

It appears from the record before the Court that it was reasonable for defendant to report her situation to her firm's security. C. Jahmel Daise, Director of Security & Investigation for Viacom International, formerly with NYPD for 20 years, requisitioned all e-mails between the parties from the firm's information technology department, reviewed them all and "[b]ased upon my review, experience, and expertise in law enforcement and security I deemed Plaintiff's actions consistent with that of a stalker, and became concerned that Plaintiff may one day cause physical harm to Ms. Leckel" (Daise Aff., ¶ 16). He then contacted NYPD to report plaintiff's conduct. The ensuing police investigation resulted in plaintiff's arrest. This action follows the dismissal of the charges against him.

To prevail on a claim for malicious prosecution, a party is "required to prove four elements: (1) plaintiff's initiation of a criminal proceeding against him, (2) termination of the proceeding in his favor, (3) lack of probable cause, and (4) malice" (*Maskantz v Hayes*, 39 AD3d 211, 213 [1st Dept 2007]). Of these necessary elements, the only one that weighs in plaintiff's favor is the termination of the proceeding. Even putting aside Daise's and NYPD's response to her situation, defendant's probable cause is self-evident from plaintiff's words and deeds. Probable cause was long ago "defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offence with which he is charged" (*Carl v Ayers*, 53 NY 14, 17 [1873]).

Plaintiff's affidavit offers a prosaic version of the parties' relationship, describing himself "as the romantic poet I am who uses imagery and flowery language [to] demonstrate my thoughts and emotions as to how I held Defendant in high regard and esteem" (Xing Aff., ¶ 11).

[*9]

This offered by plaintiff ignores defendant's reaction to plaintiff's words and deeds, vividly expressed in her own words and deeds and his description of her words and deeds. Plaintiff seemed to engage in fantasy rather than poetry when he wrote, on January 8, 2008, in reaction to defendant's blocking the seat on the bus next to hers, "I do know you often say or do something in opposite to what you want to tell me."

While plaintiff accuses defendant of enveloping "her friends, family, colleagues, employer and acquaintances . . . [in] her campaign to destroy my reputation and to portray me as a sick, demented individual," he never questions the validity of the e-mails submitted by defendant, his and hers. Plaintiff speaks of a "relationship between the parties [that] grew from casual acquaintance to that of emotionally intimate friends," how they "enjoy[ed] each other's companionship on a regular basis," and how they "had an ongoing relationship and communicated often with each other over time by telephone, e-mail and through traveling together to and from work on the bus from New Jersey to New York City" (*id.*, ¶¶ 16, 17, 41). However, plaintiff fails to submit or proffer any allegation, suggestion or evidence that these purported emotionally intimate friends spent any time in each other's company off the commuting path.

In opposition to the herein motion plaintiff requests discovery "to be able to gather sufficient proof to demonstrate the improper motives of Defendant in making baseless allegations regarding stalking and harassment by Plaintiff against her" (Opposition, ¶ 28). However, plaintiff fails to offer any evidence of defendant's malice or improper motives. While the complaint speaks of her "friendly and flirtatious manner," it frankly admits that she issued "instructions to plaintiff to cease sending her emails or calling her" (Complaint ¶¶ 26-29). Upon a review of the record, there are no demonstrations of flirtatiousness on defendant's part, and after September 5, 2007, there is very little friendliness. Under these circumstances the Court finds that discovery would be a fishing expedition. With ample evidence of probable cause, and

no evidence of defendant's malice, dismissal of plaintiff's cause of action for malicious prosecution is fully warranted.

The complaint charges that "Defendant's acts and continuous course of conduct as aforesaid constitute a prima facie tort injuring plaintiff" (Complaint, ¶ 44). However, the Court has found above that defendant's conduct in reporting plaintiff's behavior to her firm's security office was reasonable. Additionally, plaintiff's conduct was the real source of emotional distress to defendant and he has no claim when it redounded to his disadvantage. The Court finds that plaintiff's causes of action for intentional infliction of emotional distress and prima facie tort asserted in his complaint are redundant of the cause of action for malicious prosecution, and as a result are dismissed (*see Fischer v Maloney*, 43 NY2d 553, 557-558 [1978] ["it may be questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability, here malicious prosecution and abuse of process"]; *see also Leonard v Reinhardt*, 20 AD3d 510 [2d Dept 2005] ["Here, the cause of action alleging intentional infliction of emotional distress should have been dismissed as duplicative of the causes of action alleging malicious prosecution and assault and battery"]).

Defendant's Motion for Summary Judgment on its Counterclaims

Defendant moves for summary judgment on her counterclaims for intentional infliction of emotional distress and prima facie tort, and the imposition of sanctions on plaintiff for bringing the instant action, regarding it as an extension of his harassment against her.

"The tort [of intentional infliction of emotional distress] has four elements: (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]). The Court has no hesitancy about finding the latter three elements present in the instant circumstances.

However, the first element of extreme and outrageous conduct is a "strict standard" (see *Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 303 [1983]). "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" (Restatement (Second) of Torts § 46, Comment d). These words are cited and repeated often (see e.g. *Howell*, 81 NY2d at 121; *Murphy*, 58 NY2d at 303; *Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [1st Dept 2005]). While little can be said in defense of plaintiff's conduct, the Court finds that it did not go beyond all possible bounds of decency, and cannot be held to be atrocious and utterly intolerable in a civilized community (see *Marmelstein v Kehillat New Hempstead: Rav Aron Jofen Community Synagogue*, 11 NY3d 15 [2008] [Where a rabbi initiated a three-and-a-half year sexual relationship with a congregant who sought him out for counseling on a variety of personal, legal and financial problems, the dismissal of her cause of action for intentional infliction of emotional distress was affirmed]; *Suarez v Bakalchuk*, 66 AD3d 419 [1st Dept 2009] [Where a physician used vulgar language on an emergency room discharge form submitted to plaintiff's employer, the conduct was "extremely offensive and bizarre, [it] does not satisfy the requirement of outrageous conduct"]; *Kaye v Trump*, 58 AD3d 579, 579 [1st Dept 2009] [Where allegedly "defendants variously made rude remarks to and about her, commenced two baseless lawsuits and filed a criminal complaint against her, and frightened her and her daughter by attempting to instigate her arrest," this was not sufficiently outrageous to constitute intentional infliction of emotional distress]; *Wolkstein v Morgenstern*, 275 AD2d 635, 636 [1st Dept 2000] [Where plaintiff was evicted in the middle of winter more than one year after her attorney falsely advised her that the landlord-tenant proceeding had been settled in her favor, "as drastic and as alarming as the effects of the attorney's alleged malpractice may have been," it did not qualify as intentional infliction of emotional distress]). Therefore, the portion of defendant's motion seeking summary

judgment on her counterclaim for intentional infliction of emotional distress is denied, and this counterclaim is dismissed.

“Prima facie tort requires a showing of intentional infliction of harm, without excuse or justification, by an act or series of acts that would otherwise be lawful, resulting in special damages” (*Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]). While the harm to defendant cannot be ignored, plaintiff’s thoroughly misguided conduct never seems to have been intended to harm defendant. As seen in the e-mail exchanges, he took No for Yes and continued his outpourings of affection regardless of the responses they evoked. Nowhere does plaintiff seem to realize how defendant felt about him; he rationalized her words and deeds at every turn. As unpleasant as plaintiff’s behavior was, it lacked the requisite intent to inflict harm and thus the Court finds that defendant’s motion for summary judgment on her counterclaim for prima facie tort is denied and this counterclaim is dismissed.

Defendant’s Request for Costs, Fees and Sanctions Against Plaintiff

The Court now turns to the portion of defendant’s motion seeking the imposition of sanctions, costs, and attorneys fees against plaintiff² for instituting and maintaining this allegedly frivolous action, pursuant to CPLR 8303-a, which provides in part,

[a] If in an action to recover damages for personal injury . . . or an action brought by the individual who committed a crime against the victim of the crime, and such action or claim is commenced or continued by a plaintiff or a counterclaim, defense or cross claim is commenced or continued by a defendant and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney’s fees

“CPLR 8303-a (a) calls for the award of costs and reasonable attorney’s fees not exceeding ten thousand dollars against a party, his attorney, or both; who are found to have brought a

² The Court notes that CPLR 8303-a(b) allows for the award of costs and fees against a party bringing the action or his attorney, or both. However defendant seeks only to impose sanctions against the plaintiff himself, and did not request the imposition of sanctions against plaintiff’s attorney.

frivolous action in bad faith or as a means of harass[ing] (CPLR 8303-a [c] [i]) the successful adversary" (*Nyitray v New York Athletic Club in City of N.Y.*, 274 AD2d 326, 327 [1st Dept 2010] [internal quotations and citations omitted]). Frivolity can be found on the basis that a claim was "commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another" and/or said claim was "commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification, or reversal of existing law" (CPLR 8303-a[c][i], [ii]).

This action falls under the ambit of CPLR 8303-a, as it was brought by plaintiff, who committed a crime against defendant, the victim of the crime (see CPLR 8303-a[a]). The Court concludes that the instant action is frivolous as it was commenced in bad faith and brought solely to further harass the defendant (see CPLR 8303-a[c][i]). It is also apparent that this action has been continued in bad faith because based upon the differing accounts of what occurred between the plaintiff and defendant and the fact that defendant's account was corroborated, among other things, by affidavits from her co-workers and the Director of Security and Investigation from her former employer, plaintiff and his counsel should have known upon receipt of defendant's notice of motion and supporting papers that plaintiff's action lacks merit such that it should have been discontinued (see *McGill v Parker*, 179 AD2d 98, 99 [1st Dept 1992] ["[w]hat is required, in effect, is a showing that the plaintiff and counsel knew or should have known that the action lacks merit"]; see also CPLR 8303-a[c][ii]). Moreover, plaintiff's intent to prolong the resolution of the matter as a means of harassment is evident from plaintiff's failure to take deposition testimony of defendant's witnesses, despite his possession of said witness list since 2009. Furthermore, the Court gave plaintiff an opportunity to withdraw his claims against defendant during oral argument on the instant motion, however he flatly refused to do so and chose to continue with the motion.

After finding that plaintiff's complaint is frivolous, the imposition of sanctions in the instant matter is mandatory (*see Entertainment Partners Group v Davis*, 155 Misc2d 894 [Sup Ct, New York County 1992, Lebedeff, J.]; *see Nyitray v New York Athletic Club in City of N.Y.*, 274 AD2d 326, 327 [1st Dept 2000]; *see also* 24C Carmondy-Wait 2d § 148:31["[s]anctions under the CPLR are mandatory after a finding of frivolousness"]; *see also Fritze v Versailles*, 158 AD2d 669 [2d Dept 1990]). The imposition of sanctions is also supported by the legislative policy that "frivolous and baseless actions will not be tolerated and will result in a strict application of the provisions of CPLR 8303-a" (*Rittenhouse v St. Regis Hotel Joint Venture*, 180 AD2d 523, 525 [1st Dept 1992]). Accordingly, the portion of defendant's motion seeking sanctions, costs and attorneys fees against plaintiff, pursuant to CPLR 8303-a is granted. Plaintiff is hereby sanctioned in the amount of \$5,000, and is also responsible for compensating the defendant for her reasonable attorneys fees and costs incurred in the herein matter.

Accordingly, it is

ORDERED that defendant Regina Leckel's motion for summary judgment, pursuant to CPLR 3212, is granted and the complaint is dismissed in its entirety, with costs and disbursements to Regina Leckel as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that the portion of defendant Regina Leckel's motion for summary judgment on her counterclaims is denied and defendant's counterclaims for intentional infliction of emotional distress and prima facie tort are hereby dismissed; and it is further,

ORDERED that the portion of defendant Regina Leckel's motion for the imposition of sanctions, costs and attorneys fees on plaintiff is granted, and plaintiff is hereby sanctioned in the amount of \$5,000 and defendant's reasonable attorneys fees are imposed as well; and it is further,

ORDERED that the issue of defendant Regina Leckel's reasonable attorneys fees

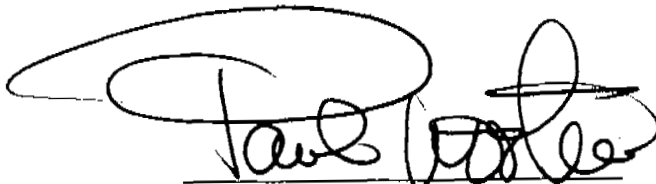
incurred in the herein action is referred to a Special Referee to hear and determine; and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry on the Special Referee Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a special referee, and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and the Clerk of the Court, who is directed to enter judgment accordingly, within 30 days of entry.

This constitutes the Decision and Order of the Court.

Dated: 3-23-12


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE

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APR 02 2012

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