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

PRESENT: Hon. Arthur F. Engoron PART 37
Justice

JONATHAN I. KLEIN,

Plaintiff,

- v -

CLINTON PARK DEVELOPMENT, LLC, et al.,

Defendants.

INDEX NO. 152224/14
MOTION DATE 5/9/14
MOTION SEQ. NO. 001

DECISION AND ORDER

The following papers, numbered 1 to 4, were read on this motion for a mandatory preliminary injunction reinstating plaintiff's gym membership and cross-motion to dismiss the instant action.

	PAPERS NUMBERED
Moving Papers	1
Cross-Moving Papers	2
Opposition Papers	3
Reply Papers	4

Some lawsuits should be brought; some lawsuits should not be brought; and some lawsuits just make you scratch your head and wonder, "What were they thinking?"

Jonathan I. Klein brought the instant lawsuit essentially because defendants suspended, on November 8, 2013, then terminated, on November 26 or 28 (the documentation is barely legible), his health club membership. He had received a one-year membership, commencing March 2, 2013, free-of-charge, as a courtesy to make up for construction delays in the building. Thus, the membership would have expired by its terms on March 2, 2014 (some time ago). Paragraph 13 of the Membership Agreement (Cross-Moving Exh. B) provides that the health club "has the right to suspend and/or terminate any membership for … behavior conflicting with the best interests of The Mercedes Club [or] for inappropriate behavior incidental to the enjoyment of the club by other members."

His complaint purports to assert causes of action for breach of contract; specific performance; defamation; breach of the implied covenant of good faith and fair dealing; tortious interference with prospective economic advantage; and prima facie tort.

Right off the bat, the specific performance claim and the good faith claim are subject to dismissal. The former is a possible form of relief in breach of contract actions, not a separate cause of action. The latter is a doctrine of contract performance, and also is not a separate cause of action. Thus, plaintiff's complaint is reduced to breach of contract and, probably for their *in terrorem* effect, defamation and two "economic harm" causes of action.

In a brief handwritten "interim" decision dated April 2, 2014, this Court denied plaintiff's motion for a mandatory preliminary injunction reinstating his membership, on the grounds of unclean hands, a lack of likelihood of success on the merits, and a balancing of the equities.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED: J.S.C.

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

Defendants, who own, operate, and/or work for the health club, cross-moved, pursuant to CPLR 3211(a)(1) and (7), to dismiss. The cross-motion was held in abeyance in the April 2 decision and is now granted, as plaintiff's own uncontested writings, and the contract at issue, demonstrate that defendants were well within their rights to terminate plaintiff's health club membership and are not otherwise liable to him.

Plaintiff thinks the world of himself ("a very busy professional with a lot of projects to handle"), and not much of anybody else. He "develop[s] ... software ... in the field of patient-medical-data-collection" for a living. For health reasons (although, despite his professed profession, he has not provided the proverbial "doctor's note"), he moved into the subject building, which has an on-premises health club, including an indoor swimming pool. Plaintiff claims that defendants knew that in order to prevent strokes like the one he suffered in 1998, he "is on a strict regimen of swimming and a workout routine."

In plaintiff's disingenuous telling, defendants revoked "the professor's" (as he likes to be called) right to use the health club for "reasons [that] are at this juncture unclear." Really? To this Court, just based on the e-mails that plaintiff does not dispute he sent, the reasons are perfectly clear: the abusive, harassing, threatening, devious, and just plain "creepy," to use the vernacular, messages he sent and the behavior in which he engaged. The "animosity" he claims defendants harbor towards him (Moving Affirmation ¶ 11) (which has become "deep animosity" by plaintiff's reply affirmation, ¶ 10) is more than understandable, it is inevitable under the circumstances. Plaintiff has provided no basis for any pre-existing animosity, but plenty of basis for ongoing animosity.

Plaintiff's first foray into impermissible conduct occurred shortly after his membership commenced. A concierge named Kimberly Pihls (or "Phils" or "Pihs," the papers contain inconsistent spellings; this Court will use "Pihls") asked him to photograph her, to which he replied that he "only took photos of nude women." He then apparently boasted around the club, falsely, that Ms. Pihls wanted him to take nude photos of her. One or more individual defendants then told him, allegedly within earshot of third parties, that he "should stop telling people that [Pihls] wanted plaintiff to take nude shots of her." Thus, the statements apparently at issue (see immediately infra) were made by plaintiff himself, were true, and/or were matters of opinion, any one of which makes them non-actionable.

The parties argue whether plaintiff has complied with the CPLR 3016(a) requirement that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint." The complaint is long and rambling, and somewhere therein "the particular words complained of" might, possibly, be found. However, as they are not set forth in the "Third Cause of Action," the one for defamation, defendants and this Court have no way of knowing which particular words are "complained of." Complaints are to be liberally construed; but courts are not in the business of cherry-picking or mind-reading. Thus, the defamation claim is subject to dismissal for this reason as well.

The parties also argue whether plaintiff has adequately alleged slander per se or special damages. He has not. There is no allegation with any factual specificity that he was harmed in his business; and nothing alleged fits within the traditional categories of slander per se. "The test as to whether words are libelous or slanderous per se is whether the tenor of the language used would naturally import a criminal or disgraceful charge to the mind of an intelligent person." 43A, NY Jur 2d, Defamation and Privacy § 6, at 204-05 (1994) (citations omitted). In this day and age, wanting to take nude photographs, without more, is neither criminal nor disgraceful.

Plaintiff's counsel's initial statement (Moving Affirmation ¶ 14) that "Dr. Klein has not engaged in inappropriate behavior and he has not harassed the employees and/or club members" demonstrates that plaintiff had not been forthcoming with counsel, counsel has not been forthcoming with this Court, or that counsel has a shockingly broad view of "appropriate" behavior and a shockingly narrow view of what constitutes "harassment." Plaintiff himself says (Moving Affidavit ¶ 15) that he has "never engaged in any rule[-]breaking or inappropriate behavior." Hm?

Why is this Court in high dudgeon? Because of the documents constituting Cross-Moving Exh. D!

In a June 19, 2013 e-mail a colleague of Ms. Pihls writes that plaintiff

> has been inappropriate on numerous occasions. He uses profanity all the time and makes sexually suggestive comments. * * * He mentioned that he'd like to take a picture of [Ms. Pihls] naked.
>
> She's clearly upset. I'm very annoyed. Please help.

In an August 3, 2013 "incident report" one tenant alleged as follows:

> [Plaintiff has] been following me around the facilities, asking me for my name. When I declined to give it to him, he pursued me and singled me out on the [bocci] courts, demanding I tell him my name. Things culminated into [sic] a bizarre incident where he figured out what floor I lived on and rang my doorbell.
> * * *
> Obviously since things have escalated to a point where he is looking for my apartment, I feel extremely uncomfortable and would like the situation addressed – somewhat delicately as I am concerned about his mental state and how he may react if he feels pushed to do so.

In a November 7, 2013, incident report Ms. Pihls states as follows:

> Jonathan Klein went into a new employees [sic] office and told him that I was asking Jonathan Klein to take my pictures and that he told me no because he only takes naked pictures and he can only offer me that. Then I told him I'm sick of him talking about me to the residents, members and employees here when he shouldnt [sic] be using my name at all and he said he will continue to talk about me and do whatever he wants to do.

In his opposition, plaintiff fails to refute or dispute these reports. Indeed, plaintiff himself submits nothing in opposition (there is only an affirmation by counsel). However, we have plaintiff's own e-mails, which are consistent with the allegations against him.

In a December 1, 2013 e-mail plaintiff wrote to one individual defendant that "after your prison time for criminal libel – you're going straight to Hell, you Antichrist son-of-a-bitch."

A December 3, 2013 e-mail from a Mercedes House resident concludes on the following note:

> I told him … to please not call my house again. Hours after our discussion, he called again at 9:02 p.m. He again called my house at 10:09 a.m. I checked my phone id, he has called my phone numerous times.
>
> What am I do [sic]? I do not feel safe in my own home!

A December 13, 2013 e-mail from plaintiff, with the usual bizarre beginning and middle, ends on the following note:

> All you have to do from this point forward is to suffer, and to regret ever having made me the target of your brainless assault.
>
> When the smoke clears, and you see the shambles of what's left-of-your-lives, you will finally consider that it was ***only*** because of you, your stupidity, and your crimes that I became …
>
> … Your Worst Nightmare

In an e-mail of the same date, plaintiff writes "Andrea" as follows:

> it's only due to my unending barrage of vicious e-mails that [an individual defendant] constantly wets himself.
>
> Now, as always, ***delete this email:*** and by all means, whenever [said defendant] waddles by, try to avoid mooning him – he's really sensitive about things like that.

Andrea forwarded the e-mail to defendants with the understandable comment, "I have NO idea what he is talking about." Three days later she received the following:

> As a Christmas present, why not chip in with other Mercedes House employees to buy [said defendant] his very own bail-bondsman? * * * I sincerely hope that … he'll get released from prison WELL before he's too senile to enjoy it.
>
> [F]eel free to spend time close enough to [said defendant] so that he'll REALLY appreciate it when you fart in his face.

On January 14, 2014, Andrea received the following:

> The fact that these two ass-wipes [i.e., two of the individual defendants] are so freaked out about this post that I sent to them … says everything that you need to know about who it is that's guilty as shit.
>
> For you, the prime lesson is to stand clear of [said individual defendant], since you never know when he'll start urinating uncontrollably.

Notwithstanding the foregoing, plaintiff claims (Moving Affirmation ¶ 11) that he "has been nothing but generous and friendly with the staff." There is no evidence of his generosity, although perhaps he tipped well at holiday time. His acts of "friendship" were anything but.

Even after becoming aware of the totality of his client's malevolent rants, plaintiff's counsel has the gall to claim:

> Plaintiff has not engaged in any inappropriate behavior that would have provided an adequate basis to terminate the membership. Plaintiff has been a model patron of the Mercedes Club and a model tenant at the Mercedes House.

This Court fully understands that attorneys are advocates, not neutrals. But a statement such as the foregoing debases language, if not thought, in Orwellian dimension.

Plaintiff's purported causes of action for tortious interference with prospective economic advantage and prima facie tort are risible. The documentary and other evidence demonstrates that defendants were well within their rights to take the actions they took, which defeats both claims. See Cross-Moving Affirmation ¶¶ 45-56. Defendants are probably correct that these two causes of action also suffer from various pleading defects.

Most importantly of all, plaintiff clearly engaged in "behavior conflicting with the best interests of The Mercedes Club [and/or] inappropriate behavior incidental to the enjoyment of the club by other members." Plaintiff correctly point out that he sent his egregious e-mails after the

November 2013 suspension and termination of his health club membership. However, the pre-November incident reports were more than enough to justify defendants' prophylactic actions, and the post-termination grotesque behavior in which plaintiff engaged provided the proof of the pudding, albeit in retrospect. Thus, defendants were entitled to terminate the contract, and they did not breach it.

To sum it all up, the only thing as outrageous as plaintiff's e-mails and actions is that lawyers were willing to bring this misbegotten case.

Thus, the instant cross-motion is granted pursuant to CPLR 3211(a)(1), plaintiff's six causes of action are dismissed with prejudice, and the clerk is hereby directed to enter judgment accordingly.

Dated: May 19, 2014

Arthur F. Engoron, *J.S.C.*