Liberty v Coursey
2016 NY Slip Op 31940(U)
October 7, 2016
Supreme Court, New York County
Docket Number: 653815/2015
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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MICHAEL A. LIBERTY and MOZIDO, INC.,

Plaintiffs,

-against-

GARY BRUCE COURSEY, DEREK RUNDELL, DAVID G. TRACHTENBERG, TRACHTENBERG RODES FRIEDBERG LLP and PHILIP H. GEIER, JR.,

Defendants.

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Index No. 653815/2015
Motion Seq. No. 001, 003, 004, & 005
Motion Date: 5/12/2016

BRANSTEN, J.:

Motion sequence numbers 001, 003, 004, and 005 are consolidated herein for disposition.

In this action, Plaintiffs Michael Liberty and Mozido, Inc. ("Mozido") allege that Defendants Gary Bruce Coursey, Derek Rundell, and Philip Geier, Jr., as well as Attorney-Defendants David Trachtenberg and Trachtenberg Rodes & Friedberg LLP (together "Trachtenberg Defendants"), attempted to extort millions of dollars from Mozido by "launching an unconscionable and egregious smear campaign." *See* Compl. ¶ 1. Each Defendant now has filed a motion to dismiss. For the reasons that follow, each of the motions is granted.

I. Background[1]

In 2007, Plaintiff Mozido became the first company in the United States to launch a mobile wallet – a means of payment allowing people to access financial services through their phones instead of bank accounts. *See* Compl. ¶¶ 13-14. Plaintiff Michael A. Liberty is the founder of Mozido, as well as its largest shareholder. *Id.* ¶¶ 3, 13.

A. *TomorrowVentures' Investment in Mozido and the Hiring of Braddock and Geier*

While Liberty personally funded Mozido during its startup phase, in 2010, Liberty began seeking outside financing for the company from institutional investors, as well as an experienced management team and board of directors. *See* Compl. ¶ 17. As part of that effort, non-party Richard Braddock was named chairman in December 2011, and Defendant Philip H. Geier, Jr. joined the board as a director in March 2012. *Id.*

In addition, Mozido secured funding from non-party TomorrowVentures, for which Defendants Gary Bruce Coursey and Derek Rundell allegedly worked. *Id.* ¶ 18. Coursey and Randall purportedly told Plaintiffs that they could facilitate joint ventures between Mozido and partners in Africa, India, and the Middle East. *Id.*

Plaintiffs' relationships with each of these individuals – Braddock, Geier, Coursey, and Rundell – quickly deterioriated.

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[1] The facts cited in this section are drawn from the Complaint, unless otherwise noted.

B. *The Braddock Complaint*

For reasons not described in the Complaint, Braddock retained counsel to "threaten Liberty, Mozido, and its board members with a lawsuit for breach of contract and alleged misrepresentations." (Compl. ¶ 20.) "In or around September 2013," Braddock's counsel, Defendant David G. Trachtenberg, prepared and disseminated a draft complaint to Plaintiffs "and their business associates." *Id.* The draft complaint ("Braddock Complaint") purportedly contained defamatory statements regarding an action instituted by the Securities and Exchange Commission against Liberty. According to Liberty, Trachtenberg circulated the Braddock Complaint to drive off investors at a critical time for Mozido and to induce Liberty to pay off Braddock and Trachtenberg. *See* Compl. ¶¶ 21-23. Plaintiffs settled with Braddock in November 2013. *See id.* ¶ 23.

C. *The Geier Actions*

Defendant Geier resigned from the Mozido board in May 2013. Nearly two years later, Geier commenced separate lawsuits against Plaintiffs in Florida and Delaware. In the Florida action, non-party Geier Holdings, LLC – of which Defendant Geier is a manager – alleged that Liberty fraudulently induced Geier to invest $1 million in non-party Family Mobile LLC by falsely representing that the money would be used to purchase membership interests in Mozido. Ultimately, Plaintiffs allegedly diverted Geier's investment through a scheme involving promissory notes. *See* Compl. ¶ 32. The

Delaware complaint asserted breach of contract and unjust enrichment claims against Mozido for failing to honor a proposed stock option. *Id.*

Against the backdrop of the Delaware and Florida actions, Plaintiffs contend that Geier made disparaging remarks about Liberty and Mozido "to the manager of a prominent, New York city based, hedge fund, the principals of which were investors in Mozido." (Compl. ¶ 33.) In "mid-2015," Geier purportedly spoke with this unnamed hedge fund manager and called Liberty a "crook" and stated that Liberty had "cheated" him. *Id.* In addition, Geier allegedly stated that Mozido was formed by fraud and was going out of business. *Id.* Due to these statements, this unnamed hedge fund manager allegedly refused to fund investments that had been promised to Plaintiffs. *Id.* ¶ 34.

D. *Litigation by Coursey and Rundell*

Finally, Plaintiffs' relationship with Coursey and Rundell allegedly soured after the Mozido board failed to approve the payment of certain consulting fees to them. *See* Compl. ¶¶ 27-29. While Coursey, Rundell, and Liberty entered into a February 5, 2014 Memorandum of Understanding providing that Liberty would recommend to the board that such payments be made, the board failed to approve a final compensation agreement for Coursey and Rundell. *Id.* ¶ 30.

According to Plaintiffs, Coursey and Rundell then launched a "smear campaign" against Plaintiffs, making disparaging remarks to the following unnamed persons: two investment bankers, an unnamed Mozido investor, at least two Mozido executives

and board members, and Liberty's other business associates. *Id.* ¶ 38. Coursey and Randall allegedly called Liberty a criminal who lied to the SEC and said that Liberty started Mozido with stolen money. *Id.* ¶ 38.

In May 2015, Coursey and Rundell, through their attorney, Trachtenberg, threatened legal action against Plaintiffs. Later, in September 2015, Trachtenberg drafted complaints, which allegedly contained the allegations in the Braddock Complaint repeated "verbatim." *See* Compl. ¶¶ 39-41. The draft Coursey and Rundell Complaint was sent to Plaintiffs' lawyers, who Plaintiffs contend were "duty bound" to share the draft with the Mozido board. *Id.* ¶ 42.

E. *The Instant Action*

On November 19, 2015, Plaintiffs commenced the instant action, asserting: (1) defamation and defamation *per se* against Trachtenberg, Trachtenberg LLP, Coursey and Rundell; (2) defamation and defamation *per se* against Geier; (3) tortious interference with advantageous business relations against Geier; and, (4) *prima facie* tort against all Defendants.

II. Discussion

Defendants now seek dismissal of Plaintiffs' Complaint in its entirety. Their motions will be considered in turn.

A. *Defendant Geier's Motion to Dismiss*

Defendant Geier seeks dismissal of the claims asserted against him – defamation, defamation *per se*, tortious interference with business relations, and *prima facie* tort – for failure to state a claim. In addition, Geier maintains that dismissal of the action is warranted under the doctrine of *forum non conveniens*.

1. Defamation

Plaintiffs' defamation claim asserts two categories of defamatory statements: (1) statements made in Florida and Delaware Complaints and (2) statements made to unnamed individuals calling Liberty a "crook" and alleging that he "cheated."

a. **Privilege**

Geier first seeks dismissal of the Florida and Delaware-related defamation allegations on the grounds that the statements at issue are privileged under Section 74 of the New York Civil Rights Law. Section 74 provides, in relevant part, "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding..." "To be fair and true, the account need only be substantially accurate." *McRedmond v. Sutton Place Rest. & Bar, Inc.*, 48 A.D.3d 258, 259 (1st Dep't 2008) (internal citations omitted). Indeed, in the First Department, it is firmly established that allegations made during litigation are "made in the course of judicial proceedings" and so are "privileged and thus nonactionable." *1711 LLC v. 231*

W. 54th Corp., 7 A.D.3d 261, 262 (1st Dep't 2004) (affirming lower court's dismissal of a defamation claim). "[S]tatements that essentially summarize or restate the allegations of a complaint" fall within the ambit of the privilege. *McRedmond*, 48 A.D.3d at 259 (applying Section 74 in affirming the dismissal of defamation claim where statements were published in news articles and websites relating to the litigation).

Accordingly, Defendant Geier argues that statements from, or summaries of, the Florida and Delaware Complaints cannot form the basis for a defamation claim. Specifically, the Florida Complaint alleges that Liberty and Mozido: (1) fraudulently induced Geier into investing into Family Mobile and Mozido, LLC; (2) caused Mozido, LCC to fraudulently transfer assets into Mozido, Inc.; and, (3) misappropriated corporate funds. *See* Affirmation of Philip I. Frankel Ex. B. The Delaware Complaint echoes the above, stating, for example, "[f]ollowing Plaintiff's service on…the board…Mozido, LLC caused all or substantially all of its valuable assets to be transferred from Mozido, LLC to Mozido, Inc. The purpose of that transfer was to divert value from Mozido LLC and its stakeholders, including Plaintiff, and create a new investment entity for future investors..." *See* Frankel Affirm. Ex. C ¶ 1.

In opposition, Plaintiffs argue that the issue of privilege should not be considered on a pre-answer motion to dismiss, since the statements alleged in the instant Complaint, on their face, do not refer to a court proceeding. The Court disagrees. The Complaint specifically refers to the nature of those actions, alleging "[t]he claims in the Florida Action related to, among other things, Liberty's alleged mismanagement of Family

Mobile, including in connection with its investments in a Mozido Affiliate. In the Delaware Action, Geier seeks to judicially backtrack on his decision not to buy into Mozido, alleging that he was somehow cheated of a 1% equity stake in Mozido that had been promised to him." (Compl. ¶ 32).

Thus, the Court concludes that there is more than "some perceptible connection between the challenged report and the proceeding," since Plaintiffs unambiguously say so. *Fine v. ESPN*, 11 F.Supp.3d 209, 216 (N.D.N.Y. 2014). In fact, the "smear campaign" allegedly undertaken by Geier is almost wholly premised on the Florida and Delaware actions. Accordingly, these allegations are covered by the privilege and therefore do not state a claim for defamation.

b. **Particularity**

Plaintiffs allege additional defamatory statements, aside from those listed in the Florida and Delaware Complaints. Plaintiffs also assert that Defendant Geier told a hedge fund manager that Liberty was a "crook" and "cheated" him. Defendant correctly argues that these allegations are not pleaded with the particularity required by CPLR 3016(a).

CPLR 3016(a) requires that in an action for libel or slander "the particular words complained of shall be set forth in the complaint." Moreover, the complaint must identify to whom the statements were made, when, and where. *See, e.g., Bell v. Alden Owners Inc.*, 299 A.D.2d 207, 208 (1st Dep't 2002) (affirming dismissal of defamation

claim where "[t]he claimed defamatory remarks were alleged to have been made by unknown persons to certain unspecified individuals, at dates, times and places left unspecified.").

Plaintiffs allege two specific words spoken by Geier – "cheated" and "crook" – and claim the statements were made to an unidentified hedge fund manager some point in mid-2015. (Compl. ¶ 33). Plaintiffs further allege that Geier told the unnamed hedge fund manager that Mozido was formed by fraud, was going out of business, was being pursued by the SEC, and he otherwise "impugned the basic integrity, creditworthiness and competence of plaintiffs." *Id.* By failing to provide any of the specifics regarding to whom, when, and where Geier's statements were made, Plaintiffs' allegations fall far short of the particularity standard of CPLR 3016(a) and must be dismissed.

c. **Injury**

The necessary elements for a cause of action of defamation are: (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and (4) results in injury to the plaintiff. *See, e.g., Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 379 (1977).

Defendant Geier next maintains that the defamation claim should be dismissed with prejudice, since Plaintiffs cannot allege the requisite injury element. Specifically, Defendant argues that Plaintiffs have not and cannot plead injury, since they cannot

demonstrate that the unidentified hedge fund manager had any obligation to invest, or otherwise would have invested, but for Defendant's alleged defamation.

However, giving Plaintiffs the benefit of all reasonable inferences, the allegation that "as a result of Geier's statements, the hedge fund manager to whom the defamatory statements were made refused to fund millions of dollars in other investments which had been promised to plaintiffs," sufficiently pleads injury. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

d. **Conclusion**

For the foregoing reasons, Plaintiffs' defamation claim is dismissed with prejudice insofar as it pertains to the statements in the Florida and Delaware Complaints. Plaintiffs' claim is likewise dismissed as to the statements allegedly made to unnamed individuals "in mid-2015," *see* Compl. ¶ 33; however, this dismissal is without prejudice to re-pleading with the requisite specificity.

2. Defamation *Per Se*

Plaintiffs use the same allegations to assert a defamation *per se* claim. "A false statement constitutes defamation *per se* when it charges another with a serious crime or tends to injure another in his or her trade, business or profession." *Geraci v. Probst*, 61 A.D.3d 717, 718 (2d Dep't 2009). In opposition to Defendant's motion, Plaintiffs argue that the "statements are defamatory *per se* because they undermine investor confidence in

plaintiffs, impugn plaintiffs' business reputation, and are likely to cause those persons to whom the false statements were targeted to avoid doing business with plaintiffs." (Plaintiff Mem. in Opp. at 7).

Just as with the defamation claim, the defamation *per se* allegations are dismissed with prejudice as privileged insofar as they are based on the Florida and Delaware Complaints. In addition, the claim likewise merits dismissal without prejudice since the allegations fall far short of the particularity mandated by CPLR 3016(a).

3. *Prima Facie* Tort

Plaintiffs' *prima facie* tort claim is grounded in the same allegations as their defamation claim. Plaintiffs allege that Geier harmed Liberty and Mozido through the "widespread dissemination of disparaging and offensive false statements to [Mozido's] investors and business associates, including allegations that Liberty was a criminal and a fraud." (Compl. ¶ 67.) Accordingly, this claim is duplicative of the defamation claim and must be dismissed with prejudice. *See Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 538-39 (1st Dep't 2013) (dismissing prima facie tort claim as duplicative where the underlying allegations "fall within the ambit of other traditional tort liability, namely, plaintiffs cause of action sounding in defamation").

4. Tortious Interference with Prospective Business Relationships

Plaintiffs also contend that Geier's alleged statements harmed Mozido's relationships with its investors and caused it to lose potential investments. To state a claim for tortious interference with prospective business relations, Plaintiffs must allege: "(1) the existence of a business relationship between the plaintiff and a third party; (2) the defendants' interference with that business relationship; (3) that the defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, improper, or illegal means that amounted to a crime or independent tort; and (4) that such acts resulted in injury to the plaintiff's relationship with the third party." *Schorr v. Guardian Life Ins. Co. of Am.*, 44 A.D.3d 319, 323 (1st Dep't 2007).

Plaintiffs fail to satisfy the first element, as they do not allege any specific person, or investor, who as a result of Defendants' "interference," decided not to invest in Mozido. In *Parekh v. Cain*, the Second Department affirmed a dismissal of a tortious interference claim where complaint did not "identify the third party with whom the plaintiff was engaging in business relations." *Parekh v. Cain*, 96 A.D.3d 812, 816 (2d Dep't 20012). Plaintiffs argue Defendants reliance on the above case is misplaced because their allegations were sufficient, *i.e.*, "investors with whom plaintiffs had been negotiation…declined to commit to the latest round of Mozido financing." (Compl. ¶¶ 33-34). This bare allegation will not suffice on a motion to dismiss.

Plaintiffs also fail to allege the third tortious interference element by failing to plead wrongful means or malice. "'Wrongful means' include physical violence, fraud or

misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 191 (2004). "[A]s a general rule, the defendant's conduct must amount to a crime or an independent tort." *Id.* at 190. While Plaintiffs argue that their defamation and *prima facie* tort allegations suffice to allege the requisite tortious conduct, these claims are dismissed and therefore fail to support Plaintiffs' tortious interference claim. Likewise, Plaintiffs conclusory pleading that Geier "intentionally, maliciously and improperly interfered with Mozido's relationship with its investors," *see* Compl. ¶ 61, fails to plead "specific facts that could support an inference that [Geier] was motivated solely by a desire to harm" Plaintiffs. *Jacobs v. Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313 (1st Dep't 2004).

Since Plaintiffs fail to plead the first and third elements, their claim for tortious interference likewise is dismissed without prejudice.

5. *Forum Non Conveniens*

Finally, Geier argues that the claims against him should be dismissed on the ground of *forum non conveniens*. Under CPLR 327, codifying the common law doctrine of *forum non conveniens*, a court may dismiss an action where "in the interest of substantial justice the action should be heard in another forum." "The doctrine is based upon justice, fairness and convenience...and the burden is on the party challenging the

forum to demonstrate that the action would be best adjudicated elsewhere." *Grizzle v. Hertz Corp.*, 305 A.D.2d 311, 312 (1st Dep't 2003).

Geier's most compelling argument for dismissal based on *forum non conveniens* grounds is that the Florida court, before which the Florida Complaint is pending, will "necessarily determine the veracity of Geier's supposedly defamatory statements" relating to the "litany of fraudulent business practices asserted against Plaintiffs in the Florida Action." (Def. Reply Mem. in Supp. at 1). Accordingly, Geier argues that the there is an "attendant risk that conflicting rulings might be issued by courts of two jurisdictions." *World Point Trading PTE v. Credito Italiano*, 225 A.D.2d 153, 161 (1st Dep't 1996) (concluding the motion court improvidently retained the action while an action was pending on the same claims in Italy). However, in light of the Court's striking of the privileged allegations from the Complaint—those based on statements in the Florida Complaint—the risk of conflicting judgments is eliminated.

Thus, the Court concludes that Geier failed to overcome the "heavy burden" of demonstrating that it is in the interest of substantial justice adjudicate these claims elsewhere. *Am. BankNote Corp. v. Daniele*, 45 A.D.3d 338, 339 (1st Dep't 2007).

B. *The Trachtenberg Defendants' Motion to Dismiss*

Next, the Trachtenberg Defendants seek dismissal of the two claims asserted against them – defamation and *prima facie* tort – for failure to state a claim.

1. Defamation and Defamation *Per Se*

Plaintiffs' defamation claim against the Trachtenberg Defendants centers on the Draft Coursey and Rundell Complaint, which was sent by Trachtenberg to Plaintiffs' attorneys. This draft complaint, to be filed in Texas state court, named Plaintiff Mozido and its directors as defendants and listed claims for breach of contract, fraudulent inducement, negligent misrepresentation, quantum meruit, and civil conspiracy. *See* Affirmation of Cristina R. Yannucci Ex. E (attaching draft complaint). In particular, the draft contains allegations that Mozido and its directors failed to inform Coursey and Rundell that Liberty entered into a consent judgment with the Securities and Exchange Commission ("SEC"). This judgment followed the SEC's filing of a complaint alleging that Liberty misappropriated certain investor funds. *Id.* ¶¶ 32-41. Coursey and Rundell therefore alleged that this information was withheld in order to induce Plaintiffs "to provide valuable services to Mozido upon false pretenses." *Id.* ¶ 190.

Plaintiffs now assert that the allegations contained in the Draft Coursey and Rundell Complaint are defamatory and that Trachtenberg "intentionally and maliciously published the false and defamatory statements" to impugn Mozido's "basic business integrity and creditworthiness." (Compl. ¶ 46). Like Geier, the Trachtenberg Defendants contend that these defamation allegations must be dismissed based on privilege.

Defendants first argue that the statements in the Draft Coursey and Rundell Complaint are protected by New York Civil Rights Law § 74. As stated above, Section

74 provides, in relevant part, "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding..." The Court of Appeals has extended this privilege to statements made in anticipation of litigation, explaining that "statements made by attorneys prior to the commencement of litigation...are protected by a qualified privilege," and "if the statements are pertinent to a good faith anticipated litigation, no cause of action can be based on those statements." *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 715 (2015).

The Trachtenberg Defendants argue that these statements were made in a concerted effort to reach settlement, citing emails exchanged between the parties, and were thus in good faith. *See* Yannucci Affirm. Exs. I-K (emails to confirm settlement conferences). In opposition, Plaintiffs argue that the statements made in the Draft Complaint were not "pertinent," rendering the privilege inapplicable.

After review of the Draft Coursey and Rundell Complaint, the allegations regarding Liberty and Mozido's dealings with the SEC appear pertinent to the proposed claim for civil conspiracy. The draft complaint alleges that this information was withheld from Coursey and Rundell in order to induce them to solicit investors and provide other valuable services to Mozido. *See* Yannucci Affirm. Ex. E at ¶¶ 185, 190. Accordingly, the Draft Complaint's statements regarding the SEC investigation and the consent judgment fall within the qualified privilege and therefore are non-actionable.

In addition, for the same reasons set forth above with regard to Defendant Geier's motion, Plaintiffs fail to plead this defamation claim with particularity. Plaintiff assert

that the statements at issue were made to Plaintiffs' unnamed "business associates" at an unspecified time. *See* Compl. ¶ 46. This pleading falls far short of the specificity required by CPLR 3016(a). *See, e.g., Dillon v. City of N.Y.*, 261 A.D.2d 24, 38 (1st Dep't 1999) (finding a plaintiff must state "time, place and manner of publication").

2. *Prima Facie* Tort

Plaintiffs' *prima facie* tort claim likewise merits dismissal, as it is duplicative of the defamation claim. Once again, Plaintiffs premise this *prima facie* tort claim on the same allegations as their defamation claim, asserting that the Trachtenberg Defendants harmed them through the "widespread dissemination of disparaging and offensive false statements to [Mozido's] investors and business associates, including allegations that Liberty was a criminal and a fraud." (Compl. ¶ 67.) This claim therefore is duplicative of the defamation claim and must be dismissed with prejudice. *See Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 538-39 (1st Dep't 2013) (dismissing prima facie tort claim as duplicative where the underlying allegations "fall within the ambit of other traditional tort liability, namely, plaintiffs cause of action sounding in defamation").

C. *Defendants Coursey and Rundell's Motion to Dismiss*

Plaintiffs' complaint asserts two claims against Defendants Coursey and Rundell: (1) defamation and defamation *per se* and (2) *prima facie* tort. Coursey and Rundell now

seek dismissal of these claims for lack of personal jurisdiction and failure to state a claim. These two bases for dismissal will be addressed in turn.

1. Lack of Personal Jurisdiction

Coursey and Rundell maintain that this Court lacks personal jurisdiction over them since they are each Colorado residents who are not alleged to have had any contact with New York related to the purported defamatory statements at issue, i.e. the SEC-related allegations in the Draft Coursey and Rundell Complaint.

As a threshold inquiry, defendants who are not New York residents "cannot be subject to personal jurisdiction in New York unless plaintiffs prove that New York's long-arm statute confers jurisdiction over them by reason of their contacts within the state." *Copp v. Ramirez*, 62 A.D.3d 23, 26 (1st Dep't 2009). The CPLR provides three statutory bases for long-arm jurisdiction: (1) the transaction of any business within the state or contracts anywhere to supply goods or services in the state; (2) the commission of a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or (3) the commission of a tortious act without the state causing injury to person or property within the state, again except as to a cause of action for defamation of character arising from the act. *See* CPLR § 302(a)(1), (2), & (3). Since

both of Plaintiffs' claims against Coursey and Rundell sound in defamation,[2] the second and third long-arm jurisdiction grounds are clearly unavailing.

The only remaining potential basis for long-arm jurisdiction is CPLR § 302(a)(1). In order to demonstrate that an individual is transacting business within the meaning of Section 302(a)(1), "there must have been some 'purposeful activities' within the State that would justify bringing the nondomiciliary defendant before the New York courts." *SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass'n*, 18 N.Y.3d 400, 404 (2012). Moreover, "there must be a 'substantial relationship' between [the purposeful] activities and the transaction out of which the cause of action arose." *Id.*

This instant dispute is between a Florida resident, a Delaware corporation, and two Colorado residents. The alleged defamatory statement at issue pertains to an SEC action filed in Pennsylvania and was contained in a draft complaint sent to Plaintiffs' counsel in Maine and Texas. The only New York contact alleged is Coursey and Rundell's retention of New York counsel who sent the draft complaint to Plaintiffs' Maine and Texas attorneys.

While Plaintiffs attempt to cast Coursey and Rundell's "periodic" phone and email communications with New York attorney Trachtenberg as sufficient "purposeful activities" within the state, these limited circumscribed contacts are not of the quality to establish a transaction of business in New York. Even considering Rundell's single lunch

[2] As addressed, *infra*, Plaintiffs' *prima facie* tort claim against Coursey and Rundell is merely a restated defamation claim.

visit with Trachtenberg in June 2015, Plaintiffs have not demonstrated "purposeful activities related to the [defamation] cause of action that would justify bringing [Coursey and Rundell] before the New York courts." *Id.* at 405.

Accordingly, Plaintiffs have failed to demonstrate that this Court has personal jurisdiction over Coursey and Rundell, requiring dismissal of the complaint as brought against them.[3]

2. Failure to State a Claim

Even if not dismissed on personal jurisdiction grounds, Plaintiffs' defamation and *prima facie* tort claims would merit dismissal for failure to state a claim.

As a threshold matter, Coursey and Rundell argue that Texas law should apply to the defamation and *prima facie* tort claims. Nevertheless, Coursey and Rundell fail to assert a conflict between Texas and New York law. *See* Coursey and Rundell Moving Br. at 19-20.[4] To raise a choice of law issue, the burden is on the party asserting the conflict, if any, to assert that a conflict actually exists. *See, e.g., Portanova v. Trump Taj Mahal Assoc.*, 270 A.D.2d 757, 759-60 (3d Dep't 2000) ("[P]laintiffs have failed to

[3] Since the action is dismissed as to Defendants Coursey and Rundell, their separate motion to dismiss or, in the alternative, stay the claims asserted against them in favor of arbitration (motion sequence 004) is denied as moot.

[4] Coursey and Rundell belatedly attempt to raise a conflict for the first time in their reply brief. This is impermissible. *See Ambac Assurance Corp. v. DLJ Mortg. Capital, Inc.*, 92 A.D.3d 451, 452 (1st Dep't 2012) ("[T]he function of a reply affidavit 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 the motion.").

establish the existence of any conflict between the legal principles herein and the applicable law of New Jersey ... As a consequence, we need not engage in any choice of law analysis."). Accordingly, Defendants have not raised a choice of law issue, and the Court will apply New York law as the law of the forum. *See SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354 (1st Dep't 2004) ("The first step in any choice-of-law analysis is to determine if there is actually a conflict between the laws of the competing jurisdictions. If there is none, then the law of the forum state where the action is being tried should apply.").

Once again, for the same reasons addressed with regard to the Trachtenberg Defendants, the draft complaint underlying the defamation claim against Coursey and Rundell falls within the qualified privilege and therefore is non-actionable. *See supra* at Section II.B.1. Likewise, the *prima facie* tort claim is dismissed as duplicative of the defamation cause of action. *See supra* at Section II.B.2.

III. Conclusion

For the foregoing reasons, it is

ORDERED that Defendant Geier's motion to dismiss (motion sequence 001) is granted with prejudice as to the *prima facie* tort claim and the defamation and defamation *per se* claim insofar as it pertains to the statements in the Florida and Delaware Complaints; and it is further

ORDERED that Defendant Geier's motion to dismiss is otherwise granted without prejudice; and it is further

ORDERED that Plaintiffs are granted leave to serve an amended complaint so as to replead the non-privileged defamation, defamation *per se*, and tortious interference with contract causes of action against Defendant Geier within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that Plaintiffs fail to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by Defendant Geier's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action against Defendant Geier, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk; and it is further

ORDERED that the Trachtenberg Defendants' motion to dismiss (motion sequence 003) is granted with prejudice, the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.; and it is further

ORDERED that Defendants Coursey and Rundell's motion to dismiss (motion sequence 005) is granted with prejudice, the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendants Coursey and Rundell's motion to dismiss or, in the alternative, stay the action in favor of arbitration (motion sequence 004) is denied as moot.

Dated: New York, New York
~~September~~ October 7, 2016

ENTER

Hon. Eileen Bransten, J.S.C.