SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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ARSEN UVAYDOV, RUHOLDING, CORP. d/b/a RUCONCERT and ARSENAL CONSULTING, INC. d/b/a ARSENAL GROUP,

Plaintiffs,

-against-

LEV PAUKMAN and JOSEPH PAUKMAN,

Defendants.

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Index No. 156787/16
Motion Sequence 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Defendants Lev Paukman and Joseph Paukman ("Defendants") move to dismiss the complaint pursuant to CPLR 3211(a)(5) on the ground that the complaint is time-barred and pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Plaintiffs Arsen Uvaydov ("Uvaydov"), RuHolding, Corp. d/b/a RuConcert, and Arsenal Consulting, Inc. d/b/a Arsenal Group (collectively, "Plaintiffs") oppose the motion and cross-move pursuant to CPLR 3025 for leave to file and serve a supplemental summons and amended complaint.[1]

Plaintiffs' verified complaint was E-filed on August 23, 2016 ("Complaint"). According thereto, Plaintiff Uvaydov was the principal of Arsenal Group ("Arsenal"), a concert promotion and artist management business. Defendant Lev Paukman was the owner of the NYC Millennium Theatre ("Millennium Theatre") located in Brooklyn, New York. Defendant Joseph Paukman is his son. Between 2008 and 2013 Lev Paukman operated the Millennium Theatre using Arsenal for marketing, promotion, and venue booking. In 2013 Lev Paukman surrendered the lease for the Millenium Theatre (Complaint ¶¶7-11). Thereafter disputes arose between the Paukmans and Uvaydov. Lev Paukman accused Uvaydov of stealing $75,000,000 in theatre money and filed suit in Kings County Supreme

[1] CPLR 3025(b) provides that a "party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

Court for the return thereof (*id.* at 14). Since then Defendants allegedly have embarked on a campaign to harm Uvaydov by contacting his business contacts and accusing him of "forgery, fraud, bad business practices, theft and money laundering" (*id.* at 15). The Complaint alleges four causes of action against the Defendants. The first three sound in tortious interference, defamation, and negligent misrepresentation, and allege damages in indeterminate amounts. The fourth cause of action seeks punitive damages.

Defendants have moved to dismiss all causes of action, arguing, among other things, that Plaintiffs' defamation and tortious interference claims are barred by the one year statute of limitations and that Plaintiffs have not met their particularity pleading requirements. On October 7, 2016 Plaintiffs E-filed their opposition to the motion and filed a cross-motion for leave to serve a supplemental summons and amended verified complaint ("Amended Complaint").[2] The proposed Amended Complaint, which amplifies the allegations and claims set forth in the original Complaint, contains six causes of action which seek damages in indeterminate amounts. The first two causes of action sound in tortious interference and defamation.[3] The third cause of action sounds in negligent misrepresentation. The fourth cause of action seeks punitive damages. The fifth cause of action is a separate cause of action for tortious interference. The sixth cause of action is for prima facie tort.

The Amended Complaint alleges that "within the past year, both defendants conducted a recruitment of parties through the internet to sue the plaintiffs and have coordinated with business associates to file suits. During the defendants' global internet campaign, which continues today, the defendants accused the plaintiffs of the following: forgery, fraud, bad business practice, theft and

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[2] Copies of the proposed supplemental summons and amended verified complaint are annexed to Plaintiffs' papers as exhibit B. ("Amended Complaint").

[3] The second cause of action alleges that "Defendants committed acts of libel, slander, and defamation" but seeks damages "on the theory of fraud" (Amended Complaint ¶39-40). To the extent Plaintiffs' intent was to pursue a fraud claim, the pleadings are not detailed enough in this regard to sustain such a fraud claim. See CPLR 3016(b).

money laundering" (Amended Complaint, ¶15). The Amended Complaint describes in detail numerous examples of Defendants' alleged conduct, including the following (¶¶19-21, 24):

> 19. The plaintiffs had produced and funded a documentary called Century Soldiers in or about 2014. Plaintiffs contracted for minimum returns of $300,000 to $400,000 with a major distributor named Irv Hollander of Multicom. Thereafter, a website was created called CenturySoldiers.com in order to promote the documentary. That site had a comments section about the documentary. Starting about September, 2015, and continuing towards the end of 2015, defendant JOSEPH PAUKMAN entered comments into the website stating that he hoped that investments would not be made with the plaintiffs who has [sic] been accused of stealing millions of dollars, depositing checks into his private account that do not belong to him. . . .
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> 20. On or around September 20th, 2015, LEV PAUKMAN called an Aron Bronstein with whom the defendants did theatre management business. LEV PAUKMAN advised Mr. Bronstein in sum and substance that ARSEN UVAYDOV was a "thief" and stole millions of dollars from LEV PAUKMAN . . . . LEV PAUKMAN advised Mr. Bronstein that Mr. Bronstein would be crazy if he ever let the plaintiff promote a show with him [] as the plaintiff would steal money. . . . LEV PAUKMAN advised Mr. Bronstein that if he ever did business with the plaintiff, LEV PAUKMAN would direct his son JOSEPH PAUKMAN, an attorney, to sue Mr. Bronstein. As a result of the above, Mr. Bronstein banned plaintiff from the Millenium Theatre building where the plaintiffs would host shows.
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> 21. In or about October, 2015, LEV PAUKMAN called Oleg Bakerini, Vice President to Roman Grachov, President at the Crocus Center in Moscow multiple times advising that the plaintiff was a thief, liar, and had stolen millions of dollars from him. . . . LEV PAUKMAN advised that he and his son JOSEPH PAUKMAN were cooperating with the Kings County District Attorney's office to put the plaintiff in jail and that the plaintiff would soon be in jail. As a direct result of the foregoing, the plaintiff's events at the Crocus center were cancelled. . . .
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> 24. On or about September 15, 2015, the defendants collectively started to and continued to attack the character of ARSEN UVAYDOV with a constant stream of libelous, defamatory and disparaging comments on social media to the effect that the plaintiff is a thief, should be punished . . . . False statements included the defendants claiming that ARSEN UVAYDOV was a former manager of the Millenium Theatre and in that capacity stole money.

In addition to the foregoing, the Amended Complaint sets forth approximately a dozen instances in which Defendants allegedly interfered with Plaintiffs' business contacts, defamed Plaintiffs to their former business contacts, and posted defamatory comments about Plaintiffs on social media platforms (¶¶22-23, 25-28, 30-35).

Defendants' November 11, 2015 E-filed reply responds to the causes of action in the Amended Complaint and seeks its dismissal. Notably, Defendants do not assert a CPLR 3211(a)(5) statute of limitations argument, presumably since the Amended Complaint alleges that Defendants' tortious

activities occurred within one year of its filing.[4] However, Defendants continue to argue that Plaintiffs' defamation claim has not been properly pled under CPLR 3016(a).[5] The Amended Complaint describes a number of conversations between Defendants and Plaintiffs' business contacts, but the only place where actual quotation marks are used is in ¶ 20 where Lev Paukman allegedly called Mr. Uvaydov a "thief". All of the other allegations summarize what was allegedly communicated, which, according to Defendants, does not satisfy CPLR 3016(a)'s strict pleading requirements. With regard to the other causes of action, Defendants argue that Plaintiffs' tortious interference claim and prima facie tort claim are duplicative of their non-actionable defamation claim, that Plaintiffs' negligent misrepresentation cause of action fails to plead the essential elements thereof, and that New York law does not recognize a separate cause of action for punitive damages.

Pursuant to CPLR 3211(a)(7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action." On a CPLR 3211 motion to dismiss the court must afford the pleadings a liberal construction, must accept the facts as alleged in the complaint as true, and must accord the Plaintiff the benefit of every favorable inference. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011); *see also Leon v Martinez*, 84 NY2d 83, 88 (1994) ("We . . . determine only whether the facts as alleged fit within any cognizable legal theory"). A motion to dismiss will fail if "from [the Complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . ." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976). On the other hand, while factual allegations contained in a Complaint should be accorded

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[4] CPLR 215(3) provides that actions to recover for intentional torts such as "libel, slander, [and] false words causing special damages" are bound by a one-year statute of limitations.

[5] CPLR 3016 provides that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally."

a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Beattie v Brown & Wood*, 243 AD2d 395, 395 (1st Dept 1997).

I. Defamation

CPLR 3016(a) requires in an action for libel or slander that the complaint set forth the particular words complained of. "Compliance with CPLR 3016(a) is strictly enforced." *Horbul v Mercury Ins. Group*, 64 AD3d 682, 683 (2d Dept 2009). "[M]erely paraphrasing the statements" made by the defendant is not sufficient (*American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 420 [1st Dept 1998]), and the defamatory words must be set forth in "*haec verba*" (*Glazier v Harris*, 99 AD3d 403, 404 [1st Dept 2012]; *see also Gardner v Alexander Rent-A-Car, Inc.*, 28 AD2d 667, 667 [1st Dept 1967]). Thus, "[a] cause of action sounding in defamation which fails to comply with these special pleading requirements must be dismissed." *Fusco v Fusco*, 36 AD3d 589, 590 (2d Dept 2007).

In this case, the Amended Complaint meticulously details Defendants' alleged activities but does not satisfy the pleading requirements of CPLR 3016(a) since the exact words complained of are not contained therein. Rather, the Amended Complaint contains the sum and substance of Defendants' alleged conversations with Plaintiffs' business contacts and only generally describes the content of the purportedly hundreds of posts made by Defendants about the Plaintiffs on the internet via social media platforms. This is not sufficient under the CPLR and the defamation causes of action must be dismissed accordingly.

However, Defendants have not shown that their alleged conversations with Plaintiff's business contacts and alleged internet comments were merely non-actionable statements of opinion (*see Steinhilber v Alphonse*, 68 NY2d 283, 290 [1986] ["A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based"]), and the cases upon which Defendants rely to show otherwise are inapposite. For example, *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130 (1992) involved statements made during a public hearing and "reasonable listeners come

to a public hearing with expectations that the speaker is airing a layperson's opinion." *Id.* at 144. The case *Galasso v Saltzman*, 42 AD3d 310 (1st Dept 2007) involved a distinguishable dispute between neighbors. After plaintiff allegedly committed criminal trespass by removing trees and a fence on defendant's property, defendant allegedly stated that he was intent on "getting" plaintiff who was "no good" and "a criminal". Such statements were found to be non-actionable opinions. *Id.* at 311. In this case, given the full context of Defendants' alleged statements and activities, in particular their alleged purpose and the surrounding circumstances, the conclusion could be reached by a reasonable listener that what was being said were statements of fact. Accordingly, Defendants' motion to dismiss Plaintiffs' defamation causes of action is granted and such causes of action are dismissed without prejudice. Plaintiffs' motion to file and serve an amended complaint is denied without prejudice.

II. Tortious Interference

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 AD3d 319, 323 (1st Dept 2007). Plaintiffs describe no less than ten distinct occasions in their Amended Complaint that are sufficient at this point to sustain their tortious interference claims.

Relying upon *Morrison v National Broadcasting Co.*, 19 NY2d 453, 459 (1967) (courts "look for the reality, and the essence of the action and not its mere name"), Defendants argue that Plaintiff's tortious interference claims are in fact defamation claims in disguise. *See Goldberg v Sitomer, Sitomer & Porges*, 97 AD2d 114, 116 (1st Dept 1983) (New York law considers claims sounding in tort to be defamation claims where the "entire injury complained of by plaintiff flows from the effect on his

reputation"); *Lesesne v Brimecome,* 918 F. Supp.2d 221, 224 (SDNY Jan. 11, 2013) ("courts in New York have also kept a watchful eye for claims sounding in defamation that have been disguised as other causes of action"). However, the *Morrison* essence of the claim test concerned the choice of statute of limitations which is not at issue here, and unlike *Goldberg*, the Complaint in this case alleges discrete and significant business losses and describes interference with advantageous business relationships that go beyond mere reputational harm. As such Plaintiffs' fifth cause of action for tortious interference claim may proceed. *See Zetes v Stephens*, 108 AD3d 1014 (4th Dept 2013).

III. Negligent Misrepresentation

A cause of action for negligent misrepresentation "requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information . . ." *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007). The Amended Complaint fails to plead the first and third elements since it contains no allegation that Defendants communicated anything to Plaintiffs upon which Plaintiffs relied to their detriment. Accordingly, the third cause of action for negligent misrepresentation is hereby dismissed.

IV. Punitive Damages

While plaintiffs are entitled to include in their prayer for relief a request that they be awarded punitive damages in the event they prove the requisite degree of culpability, a claim for punitive damages may not be maintained as a separate cause of action. *La Porta v Alacra, Inc.*, 142 AD3d 851, 853 (1st Dept 2016); *Ehrlich v Incorporated Vil. of Sea Cliff*, 95 AD3d 1068, 1070 (2d Dept 2012). Accordingly, Plaintiffs' fourth cause of action for punitive damages is hereby dismissed without prejudice to replead.

V. Prima Facie Tort

"Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful." *Freihofer v Hearst Corp.*, 65 NY2d 135, 142 (1985). "The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Id.*

The court rejects Defendants' contention that Plaintiffs' prima facie tort claim must be dismissed because it is duplicative of their defamation and tortious interference claims. While it is true that "prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort. . . .where a traditional tort remedy exists, a party will not be foreclosed from pleading, as alternative relief, a cause of action for prima facie tort." *Id*; *see also Fleischer v NYP Holdings, Inc.*, 104 AD3d 536, 538-39 (1st Dept 2013); *Butler v Delaware Otsego Corp.*, 203 AD2d 783, 784 (3d Dept 1994). As set forth above Plaintiff's current defamation claim is not actionable but their tortious interference claim is in fact actionable. Thus, Plaintiffs may pursue their prima facie tort claim as an alternative to their tortious interference claim, and the sixth cause of action may proceed.

CONCLUSION

In light of all of the foregoing, it is hereby

ORDERED that Defendants' motion to dismiss is granted in part and denied in part; and it is further

ORDERED that Plaintiffs' first and second causes action are dismissed without prejudice to the extent they sound in defamation; and it is further

ORDERED that Plaintiffs' third cause of action for negligent misrepresentation is dismissed, with prejudice; and it is further

ORDERED that Plaintiffs' fourth cause of action for punitive damages is dismissed without prejudice to replead; and it is further

ORDERED that Defendants' motion to dismiss is otherwise denied; and it is further

ORDERED that Plaintiffs' cross-motion to file and serve an amended complaint is denied without prejudice; and it is further

ORDERED that all parties shall appear for a status conference in Part 30 on March 6, 2016 at 9:30AM; and it is further

ORDERED that the Clerk of the Court shall mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: January 12, 2017

SHERRY KLEIN HEITLER, J.S.C.