Winklevoss v Steinberg
2018 NY Slip Op 32304(U)
September 18, 2018
Supreme Court, New York County
Docket Number: 159079/2017
Judge: David B. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

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CAMERON WINKLEVOSS, an individual, TYLER WINKLEVOSS, an individual, WINKLEVOSS CAPITAL FUND, LLC, a Delaware limited liability company,

Plaintiffs,

- against -

TODD STEINBERG, an individual,

Defendant.

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DECISION AND ORDER

Index No. 159079/2017

DAVID B. COHEN, J.:

In this action sounding in defamation and malicious prosecution, defendant Todd Steinberg moves, pursuant to CPLR 3211 (a) (1) and (a) (7), CPLR 3013 and CPLR 3016, for dismissal of the complaint, or, in the alternative, for summary judgment pursuant to CPLR 3212.

BACKGROUND

Plaintiffs Cameron Winklevoss and Tyler Winklevoss (together, the Winklevosses), through their firm, plaintiff Winklevoss Capital Fund, LLC (WCF), are investors in numerous technology startup companies (complaint, ¶ 20). On November 23, 2016, WCF and defendant executed a Notice of Intent to Transfer Shares (the Term Sheet) whereby WCF agreed to purchase 64,343 shares of Series A Preferred Stock owned by defendant in nonparty Eaze Solutions, Inc. (Eaze) (*id.*, ¶¶ 22 and 25). Plaintiffs allege that the sale was subject to the following conditions: an extension of a "side letter" previously negotiated between WCF and Eaze and Eaze's formal approval of the transfer (*id.*, ¶ 2). Plaintiffs claim that Eaze never approved the extension or the sale (*id.*, ¶¶ 27 and 32). When WCF refused to complete the sale by tendering the purchase price for defendant's shares, Steinberg commenced an action against it in Delaware Chancery Court for a declaratory judgment and specific performance (the Delaware Action) (*id.*, ¶ 34). Plaintiffs allege that, in connection with that lawsuit, defendant made numerous false and defamatory

statements about them to various news outlets with the knowledge that the statements would be republished in "many other news outlets, websites, blogs, and social media" (*id.*, ¶ 40). The complaint, though, references just a single publication of the allegedly defamatory statements. Defendant's remarks appeared in the New York Post in an article, written by Mara Siegler, entitled "Winklevoss pot deal goes up in smoke" (*id.*, ¶ 37). The article, published on Page Six on June 19, 2017, included the following quote attributed to defendant:

> "Just because you are rich and famous doesn't mean you can default. It's the difference between right and wrong . . . . I believe in honoring my commitments. Unfortunately, I have had the opposite experience with Cameron and Tyler Winklevoss . . . I believe it is time that somebody stands up to them"

(*id.*). Less than six weeks after the New York Post article was published, defendant voluntarily dismissed the Delaware Action (*id.*, ¶ 43).

Plaintiffs commenced this action on October 11, 2017, by filing a summons and complaint. The complaint asserts three causes of action: (1) defamation; (2) malicious prosecution; and (3) a judgment declaring that plaintiffs owe no money and have no legal obligations to defendant.

DISCUSSION

A. The Parties' Contentions

Defendant presents four arguments in support of dismissal of the defamation claim. First, he contends that his remarks are absolutely privileged under the fair reporting privilege found in Civil Rights Law § 74. Second, defendant argues that the Winklevosses are public figures because of the publicity stemming from their well-known dispute with Facebook's founder, Mark Zuckerberg, as evidenced in the numerous newspaper and magazine interviews and articles published about the plaintiffs and their interviews and appearances on various radio and television networks (defendant's aff, exhibit K). Additionally, the Winklevosses maintain "verified" and publicly accessible accounts on Facebook, Twitter and Instagram, and a "verified" account on those social media platforms is an account of "public interest" or one that belongs to a "public

figure" (defendant aff, exhibit L at 1, 4 and 7). Defendant maintains that plaintiffs, as public figures, must plead and prove actual malice. The complaint, though, fails to contain specific factual allegations that defendant was aware that his statements were false or that he published them with reckless disregard for the truth. Next, defendant argues that his statements in the New York Post constitute nonactionable opinion or hyperbole. Finally, defendant argues that plaintiffs failed to plead defamation with particularity, as required by CPLR 3013 and 3016 (a).

As for the malicious prosecution claim, defendant contends the factual allegations in the complaint are legally insufficient to maintain the claim. Defendant's voluntary withdrawal of the Delaware Action does not constitute a disposition favorable to plaintiffs. Additionally, defendant maintains that he had probable cause to bring that suit because plaintiffs failed to abide by the terms of the Term Sheet. The terms of the First Refusal and Co-Sale Agreement between Eaze and its shareholders, dated May 5, 2015 (the ROFR), imposed restrictions on the sale of Eaze's common stock but not a sale of preferred stock (Steinberg aff, ¶ 8). Nonetheless, plaintiffs refused to complete the sale. Lastly, defendant alleges that plaintiffs failed to plead a special injury.

Plaintiffs, in response, argue that defendant's remarks are not protected by Civil Rights Law § 74 because his statements did not pertain to or summarize the complaint in the Delaware Action. In addition, plaintiffs contend that defendant publicly defamed them for the sole purpose of coercing WCF into completing the stock transfer.

Plaintiffs refute defendant's contention that they are public figures. They are not general purpose public figures because they are not known on a "national scale" nor are they limited purpose public figures who have injected themselves into a matter of public controversy. Furthermore, even if plaintiffs were public figures, they adequately pleaded actual malice.

Plaintiffs also reject defendant's argument that his statements are protected opinion because his statements implied that certain facts about the viability of the Delaware Action were

omitted. Moreover, defendant's statements impugn plaintiffs' professional competence, and therefore, they are defamatory per se.

As for the malicious prosecution claim, plaintiffs assert that they have met each element necessary to maintain the claim. First, the voluntary dismissal of the Delaware Action is a termination favorable to plaintiffs. Defendant also lacked probable cause to bring that action. Communications between a WCF employee and defendant's broker reveal that the stock transfer was contingent upon Eaze's approval (Sterling Witzke [Witzke] aff, exhibit A at 1-2). Yet, despite defendant's awareness of this condition and of Eaze's refusal to grant its consent, he chose to sue WCF. Plaintiffs maintain that the absence of probable cause is sufficient to infer that defendant acted with malice. Finally, plaintiffs assert that their diminished reputations within the business community qualify as special injuries.

In reply, defendant largely repeats his original arguments. Whether plaintiffs are general or limited purpose public figures is immaterial because, under either category, the complaint fails to plead actual malice. Defendant also maintains that, even if Eaze's approval of the stock transfer was required, defendant had been informed by Eaze's outside counsel that such approval was not necessary (defendant reply aff, ¶ 2).

The court notes that the motion does not address the third cause of action for a declaratory judgment.

B. Legal Standards

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord [the plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Allegations that are ambiguous must be resolved in plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). A motion to dismiss the complaint will be denied "if from its 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] [citations omitted]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). "When documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff stated a cause of action to whether it has one" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [internal quotation marks and citation omitted]).

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

C. The First Cause of Action (Defamation)

Defamation is the "[m]aking [of] a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace" (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]). To prove a cause of action for defamation, a plaintiff must show: "(1) a false statement that is (2)

published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). The contested statement also must be "'of and concerning'" the plaintiff (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016], quoting *Julian v American Bus. Consultants*, 2 NY2d 1, 17 [1956]).

On a motion to dismiss a defamation claim, the court must determine "whether the contested statements are reasonably susceptible of a defamatory connotation" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks and citation omitted]), by construing the words "in the context of the entire statement or publication as a whole, tested against the understanding of the average reader" (*Aronson v Wiersma*, 65 NY2d 592, 594 [1985]; *Immuno AG v Moor-Jankowski*, 77 NY2d 235, 250 [1991], *cert denied*, 500 US 954 [1991] [stating that the court must look at the effect of the allegedly defamatory words upon the average reader]; *Silsdorf v Levine*, 59 NY2d 8, 13 [1983], *cert denied* 464 US 831 [1983] [same]). If the challenged words, taken in their "ordinary meaning and in context," are reasonably susceptible of a defamatory connotation, then the motion to dismiss must be denied (*Davis*, 24 NY3d at 272).

The falsity of a published statement is key to a defamation claim because only a statement that purports to convey facts about the plaintiff are actionable (*see Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]). Therefore, "[o]pinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 380 [1977], *rearg denied*, 42 NY2d 1015 [1977], *cert denied*, 434 US 969 [1977]). A statement of "pure opinion," which is supported by the facts upon which the statement is based, is protected, "no matter how vituperative or unreasonable it may be" (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]). Similarly, "rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression . . . imprecise language and [an] unusual setting . . . [which] signal [to] the reasonable observer that

no actual facts were being conveyed about an individual" are not actionable (*Immuno AG*, 77 NY2d at 244; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [stating that "[l]oose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable"]). However, where a statement "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is 'mixed opinion' and is actionable" (*Steinhilber,* 68 NY2d at 289). Factors to consider in determining whether a statement constitutes fact or nonactionable opinion are:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal … readers or listeners that what is being read or heard is likely to be opinion, not fact'"

(*Brian v Richardson*, 87 NY2d 46, 51 [1995], quoting *Gross*, 82 NY2d at 153, quoting *Steinhilber*, at 292 [internal quotation marks omitted]). The context of the communication, including "the immediate context in which the disputed words appear . . . [and] the larger context in which the statements were published," may be the most significant factor (*Brian*, 87 NY2d at 51). "Whether a particular statement constitutes fact or opinion is a question of law" (*Rinaldi*, 42 NY2d at 381).

"Truth provides a complete defense to defamation claims" (*Dillon*, 261 AD2d at 39). In addition, statements alleged to be defamatory may be protected by an absolute or qualified privilege (*see Rosenberg v Metlife, Inc.*, 8 NY3d 359, 365 [2007]). As is relevant here, Civil Rights Law § 74 provides an absolute privilege for a fair and true report of a judicial proceeding and legal pleadings (*Martin v Daily News L.P.*, 121 AD3d 90, 100 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]). The fair reporting privilege is an affirmative defense (*see Greenberg v Spitzer*, 155 AD3d 27, 42 [2d Dept 2017]), and may be invoked by "all persons," not just "newspapers and radio broadcasters" (*Williams v Williams*, 23 NY2d 592, 597 [1969]). "Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that

fall within section 74's privilege" (*Lacher v Engel*, 33 AD3d 10, 17 [1st Dept 2006]; *accord Crucey v Jackall*, 275 AD2d 258, 262 [1st Dept 2000] [Saxe, J, concurring]), provided that the report is fair and true. It is also settled that "'newspaper accounts of . . . official proceedings must be accorded some degree of liberality'" (*Alf v Buffalo News, Inc.*, 21 NY3d 988, 990 [2013], quoting *Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 68 [1979]). Therefore, "[f]or a report to be characterized as 'fair and true' within the meaning of the statute . . . it is enough that the substance of the article be substantially accurate" (*Holy Spirit Assoc. for Unification of World Christianity*, 49 NY2d at 67). Furthermore, the report must comment on a judicial proceeding, otherwise the statute is inapplicable (*see Cholowsky v Civiletti*, 69 AD3d 110, 114 [2d Dept 2009]).

As an initial matter, the court finds that the complaint meets the pleading requirements set forth in CPLR 3013 and CPLR 3016 (a). A complaint in an action for libel or slander must set forth the particular words alleged to be defamatory (*see* CPLR 3016 [a]), as well as the "time, place and manner of the false statement and specify to whom it was made" (*Dillon*, 261 AD2d at 38). The complaint identified the particular words complained of and the time, place and manner of publication. Consequently, the branch of the motion seeking dismissal of the first cause of action, pursuant to CPLR 3013 and CPLR 3016 [a], is denied.

As for the challenged statements, the court finds they are protected under Civil Rights Law § 74. In the complaint filed in the Delaware Action, defendant had alleged that he and WCF had entered into a binding commitment (the Term Sheet) whereby WCF agreed to purchase defendant's shares in Eaze (defendant aff, exhibit B at 4-5). WCF, though, refused to honor its obligations under the Term Sheet (*id.* at 6]). The New York Post article discusses defendant's "suit filed in Delaware court" concerning a "contract to buy shares from investor [defendant]" (affirmation of plaintiff's counsel, exhibit A at 1). According to the article, plaintiffs "agreed to purchase about $465,00 worth [of shares] . . . and even had a term sheet in place . . . [b]ut the

[plaintiffs] called off the deal . . . even though the company gave the stock sale its blessing" (*id.*). Although the complaint included only excerpts of defendant's quote, which appears near the end of the New York Post article, the full quote reads:

> "'Just because you are rich and famous doesn't mean you can default,' Steinberg commented. 'It's the difference between right and wrong.' He added, 'I have never been sued, and, until now, I have never been forced to sue anyone . . . I believe in honoring my commitments. Unfortunately, I have had the opposite experience with Cameron and Tyler Winklevoss . . . I believe it is time that somebody stands up to them'"

(*id.*, exhibit A at 2).

The New York Post article clearly refers to the Delaware Action and to the plaintiffs. When defendant's quote is read in the context of that article, his statements that plaintiffs were in "default" with regard to honoring commitments constitute a substantially fair and accurate report on the Delaware Action at that time, and, therefore, defendant's statements are protected (*see Highland Capital Mgt., L.P. v Stern*, 157 AD3d 501, 501 [1st Dept 2018], *lv denied* 31 NY3d 906 [2018]; *Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011], *lv denied* 17 NY3d 707 [2011]; *Lacher*, 33 AD3d at 17]).

Plaintiffs' contention that Civil Rights Law § 74 is inapplicable lacks merit. A defense under the statute is "absolute and applies even in the face of allegations of malice or bad faith" (*Panghat v New York State Div. of Human Rights*, 89 AD3d 597, 597 [1st Dept 2011], *lv denied* 19 NY3d 839 [2012], *cert denied* 568 US 943 [2012]). However, there is a limited judicial exception to application of the statute where "it appears that the public policy goals of the statute are being thwarted by the commencement of litigation intended as a device to protect a report thereof and thereby disseminate defamatory information" (*Halcyon Jets, Inc. v Jet One Group, Inc.*, 69 AD3d 534, 534 [1st Dept 2010], citing *Williams*, 23 NY2d at 599). Thus, where a complaint includes an allegation that a defendant brought a lawsuit "maliciously and solely for the purpose of later defaming the plaintiff," then the defense found in Civil Rights Law §74 is

inapplicable (*Branca v Mayesh*, 101 AD2d 872, 873 [2d Dept 1984], *affd* 63 NY2d 994 [1984]). The complaint alleges that defendant claimed the Delaware Action "would get to the press, and the news coverage would be 'worse for you [plaintiffs]" unless he was paid (complaint, ¶ 7). The complaint also characterizes defendant's remarks in the New York Post article as an attempt to bully plaintiffs into acceding to his demand (*id.*, ¶¶ 3 and 9). These allegations, though, fail to show that defendant brought the Delaware Action maliciously and solely for the purpose of defaming the plaintiffs (*see Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 920 [1st Dept 2010], citing *Branca*, 101 AD2d at 873; *Divet v Reinisch*, 169 AD2d 416, 417 [1st Dept 1991] [plaintiff failed to plead that defendant brought an action "in bad faith as a vehicle for disseminating defamatory matter"]).

In addition, the balance of defendant's quote merely expresses his opinion because his remarks "could not have been understood by a reasonable reader as assertions of fact that were proffered for their accuracy," particularly given the context in which his words appear (*Brian*, 87 NY2d at 53; *Farber v Jefferys*, 103 AD3d 514, 516 [1st Dept 2013], *lv denied* 21 NY3d 858 [2013] [stating that "[t]he full content of the statement, including its tone and apparent purpose, and the broader context of the statement and surrounding circumstances leads to the conclusion that what was being read was 'likely to be opinion, not fact'"]; *Mercado v Shustek*, 309 AD2d 646, 647 [1st Dept 2003] [finding that "[d]efendant's remarks, as quoted, contain no 'implications of additional undisclosed facts'"]; *Dillon*, 261 AD2d at 41 [finding that defendant's statement "conveyed only nonactionable opinion based on facts known to both the declarant and the listener"]). Further, defendant's words qualify as hyperbole, which cannot form the basis of a defamation claim (*see Sabharwal & Finkel, LLC v Sorrell*, 117 AD3d 437, 437-438 [1st Dept 2014] [concluding that defendant's statements about an ongoing lawsuit "constitute hyperbole and convey non-actionable opinions about the merits of the lawsuit and the motivation of [a client's] attorneys, rather than statements of fact"]; *Phillips v Carter*, 58 AD3d 528, 528 [1st Dept 2009] [dismissing a defamation

claim, premised on defendant's statements that "plaintiff had breached his contract and 'could not be trusted as a contract partner'" as nonactionable opinion]).

Plaintiffs' arguments that defendant omitted certain facts and that his remarks constituted mixed opinion are not supported. Defendant's words do not imply that he withheld or concealed additional facts, and, in any event, the facts supporting his remarks appear in the body of the article (*see Mercado*, 309 AD2d at 647). The phrases "rich and famous" and "right and wrong" may also mean "different things to different people, and cannot be proved true or false because of their subjective, relative meanings" (*Jacobus v Trump*, 55 Misc 3d 470, 477 [Sup Ct, NY County 2017], *affd* 156 AD3d 452 [1st Dept 2017], *lv denied* 31 NY3d 903 [2018] [internal quotation marks and citation omitted]). Moreover, defendant's comments were elicited for the purpose of obtaining his opinion on the Delaware Action, and the quote appears at the end of the New York Post article discussing the lawsuit. As a result, given the immediate and larger context in which defendant's words appear, the remarks are not statements of mixed opinion.

In light the foregoing, the court need not reach defendant's other grounds for dismissal or plaintiffs' arguments in response. Accordingly, defendant's motion for dismissal of the first cause of action for defamation is granted, and the first cause of action is dismissed.

D. Second Cause of Action (Malicious Prosecution)

To state a claim for malicious prosecution of a civil suit, a plaintiff must plead and prove" "(1) the commencement or continuation of a . . . proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) the absence of probable cause for the . . . proceeding and (4) actual malice" (*Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 613 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016], quoting *Broughton v State*, 37 NY2d 451, 457 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975]). With respect to the second element, the termination must have been on the merits (*Witcher v Children's Tel. Workshop*, 187 AD2d 292, 293 [1st Dept 1992]), and in the plaintiff's favor (*Facebook, Inc.*, 134

AD3d at 613). In addition, the termination cannot have been the result of a settlement or compromise (*see Lowande v Eisenberg Farms, Inc.*, 260 App Div 48, 49 [1st Dept 1940], *affd* 286 NY 634 [1941]). As to the third element, plaintiff bears the burden of proving the lack of probable cause, or "'knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of'" (*Facebook*, 134 AD3d at 614, quoting *Burt v Smith* 181 NY 1, 5-6 [1905]). The fourth element requires a showing that the defendant was "inspired by malice" in bringing the prior suit (*Schultz v Greenwood Cemetery*, 190 NY 276, 278 [1907]). Malice refers to "actual malice," which is "malice in fact" (*Nardelli v Stamberg*, 44 NY2d 500, 502 [1978] [internal quotation marks and citation omitted]), or "conscious falsity" (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 270 [1st Dept 2005] [internal quotation marks and citation omitted]). A plaintiff satisfies the malice element by showing that the defendant "commenced the prior . . . proceeding due to a wrong or improper motive, or something other than a desire to see the ends of justice served" (*Nardelli*, 44 NY2d at 503; *Engel v CBS, Inc.*, 93 NY2d 195, 204 [1999] [stating that the defendant must have brought the underlying action for "a purpose other than the adjudication of a claim"]). Additionally, a plaintiff must plead and prove that he or she sustained a special injury (*Facebook, Inc.*, 134 AD3d at 613). A special injury is "a highly substantial and identifiable interference with person, property, or business" and a "concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" (*Engel*, 93 NY2d at 205). The failure to prove any one of these elements warrants dismissal of the claim (*see Moorhouse v Standard, N.Y.*, 124 AD3d 1, 7 [1st Dept 2014]; *Maskantz v Hayes*, 39 AD3d 211, 213 [1st Dept 2007]).

"Only a party to the proceeding complained of as a malicious prosecution is entitled to maintain an action for malicious prosecution" (*Crown Wisteria v F.G.F. Enters. Corp.*, 168 AD2d 238, 241 [1st Dept 1990]). Here, the Winklevosses were not named parties in the Delaware Action.

Thus, the branch of the motion seeking dismissal of the Winklevosses' second cause of action is granted, and the Winklevosses' second cause of action is dismissed.

As for WCF, the allegations in the complaint fail to meet at least two of the elements for malicious prosecution.

First, WCF failed to plead that the Delaware Action had terminated in its favor. According to the stipulation executed August 31, 2017, the Delaware Action was dismissed without prejudice (Steinberg aff, exhibit J at 2). A voluntary discontinuance of a prior action is considered a termination favorable to a plaintiff seeking to assert a malicious prosecution claim if the discontinuance was not the result of "a compromise or inducement offered by the defendant in the primary action" (*Aquilina v O'Connor*, 59 AD2d 454, 457 [3d Dept 1977], quoting *Marion Steel Co., Inc. v Alderton Dock Yards, Ltd.*, 223 AD 741, 741 [1st Dept 1928]; *Mobile Training & Educ., Inc. v Aviation Ground Schools of Am.*, 28 Misc 3d 1226(A), 2010 NY Slip Op 51501(U), *10 [Sup Ct, NY County 2010] [stating that "[i]t is settled that if the case was voluntarily dismissed as a result of a settlement or compromise, it would not support a claim for malicious prosecution"]). The stipulation reads that "[defendant] now seeks to dismiss this Action, and [WCF] does not oppose a dismissal" (Steinberg aff, exhibit J at 1). This language suggests that the parties did not reach an agreement or compromise for dismissal. However, the Delaware Action was not disposed of in WCF's favor because the action was dismissed without prejudice (*see Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700, 703 [2d Dept 2008] [finding that the discontinuance without prejudice of a prior action by agreement between the parties was not a termination favorable to the plaintiff]). Moreover, there was no termination on the merits because the Delaware Action was voluntarily discontinued (*see Kaye v Trump*, 2008 NY Slip Op 31329(U), *5 [Sup Ct, NY County 2008], *affd* 58 AD3d 579 [1st Dept 2009], *lv denied* 13 NY3d 704 [2009]). The cases cited by WCF are distinguishable because the stipulations at issue in those actions "precluded the institution of another suit on the same claim" (*Aquilina*, 59 AD2d at 457; *Liberty Synergistics, Inc. v Microflo*

Ltd., 50 F Supp 3d 267, 287 [ED NY 2014], *appeal dismissed* 637 Fed Appx 33 [2d Cir 2016] [involving a stipulation of dismissal with prejudice]).

Nor has WCF pleaded a special injury with specificity. WCF claims that it sustained damage to its "business interests and prospective economic opportunities" (complaint, ¶ 57). However, the complaint fails to allege a "specific, verifiable loss of business" (*Engel*, 93 NY2d at 207); *Dermigny v Siebert*, 79 AD3d 460, 460 [1st Dept 2010] [dismissing the malicious prosecution claim where plaintiff failed to identify the employers that refused to hire him]; *Wilhemina Models, Inc.*, 19 AD3d at 269 [dismissing the malicious prosecution claim where plaintiff could not identify any individuals who terminated their business relationships because of the prior action]). Indeed, WCF has not asserted that the alleged loss of business harmed them in a "specific and meaningful way" (*Engel*, 93 NY2d at 207). Furthermore, an "[i]njury to reputation . . . fails to satisfy the injury to or interference with person or property requirement" for a malicious prosecution claim (*Campion Funeral Home v State of New York*, 166 AD2d 32, 37 [3d Dept 1991], *lv denied* 78 NY2d 859 [1991], *rearg denied* 79 NY2d 823 [1991]; *Donohue v Buell*, 2017 NY Slip Op 30108(U), *4 [Sup Ct, NY County 2017] [finding that "[t]he loss of a business opportunity during the litigation or reputational loss . . . is not the type of special injury contemplated"]).

Given the foregoing, the court need not determine whether WCF adequately pleaded the remaining elements for malicious prosecution (*see Facebook, Inc.*, 134 AD3d at 614). Consequently, the motion for dismissal of WCF's second cause of action is granted, and WCF's second cause of action is dismissed.

E. Leave to Replead

The court denies plaintiffs' request for leave to replead their first and second causes of action (*see Genger v Genger*, 135 AD3d 454, 455 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]; *Automobile Coverage, Inc. v American Intl. Group, Inc.*, 42 AD3d 405, 407 [1st Dept 2007]). The standard governing a request for leave to replead is the same standard applied to a motion for leave

to amend a complaint (*see Chaikin v Karipas*, 162 AD3d 842, 844 [2d Dept 2018]). Plaintiffs' request was not accompanied by a proposed pleading. Furthermore, they failed to set forth any new factual allegations in support of the malicious prosecution claim or demonstrate the potential merit of the new allegations on the defamation claim.

Accordingly, it is

ORDERED that the branch of defendant's motion to dismiss the first and second causes of action of the complaint is granted, and the first and second causes of action are dismissed against said defendant; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 58, Room 574, 111 Centre Street, New York, New York, on November 14, 2018 at 9:30 a.m.

Dated: September 18, 2018

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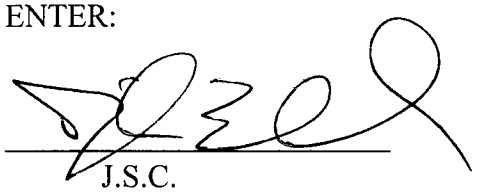

J.S.C.

HON. DAVID B. COHEN
J.S.C.