

Tsatskin v Kordunsky
2018 NY Slip Op 32746(U)
October 19, 2018
Supreme Court, Kings County
Docket Number: 521941/2017
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 19th day of October, 2018.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

PAUL TSATSKIN and IGOR TSATSKIN, as shareholders of Dial Car, Inc., and YAKOV GUZMAN, as shareholder and employee of Dial,

Plaintiffs,

- against -

MICHAEL KORDUNSKY, ALEX SULAVA and ALEX BRUDOLEY, individually and as Presidents and Chairmen of the Board of Directors of Dial Car, Inc., and Current CEO, SERGEY KVVYAT, individually and as Vice President and as Member of the Board of Directors of Dial Car Inc., MICHAEL LEVIN, individually and as Secretary of the Board of Directors of Dial Car, Inc., RICHARD LOWENSTEIN and MANSOOR AHMAD, individually and as Grievance Chairmen and Members of the Board of Directors of Dial Car Inc., ALEX REYF and ISRAEL YAKOBZON, individually and as Ombudsman of Dial Car Inc., and DIAL CAR INC.

Defendants.

Index No.: 521941/2017

Motion Seq. # 1 & 2

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Reply Affirmation, Affidavit and Exhibits	3

Upon the foregoing papers Defendants move this Court for an Order (1) dismissing the amended complaint pursuant to CPLR §215(3); CPLR §3014; CPLR §3016(a); CPLR §3024(b); CPLR §3211 (a)(5)&(7)¹ and (2) staying this matter and directing that the parties appear for arbitration

¹Originally Defendants also sought dismissal based upon lack of jurisdiction pursuant to CPLR §3211(a)(8). That portion of the request for relief was withdrawn in Defendants' reply papers thereby making Plaintiffs' cross-motion moot. Further, Defense Counsel states that the Reply is also submitted on behalf of Defendants Lowenstein and Kvyet. Please see Reply Affirmation by Kenneth R. Tuch, Esq. ¶13.

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pursuant to CPLR §7503. Plaintiffs cross-move for an Order directing that the Affidavits of Service filed in this action be deemed timely.

Background

Defendant, Dial CAR INC.(Dial) is a “Black Car” “radio-dispatched” car service company headquartered in Brooklyn. Dial allegedly was intended to operate as a cooperative that provides fare referral, billing and related services to its member shareholders who are the drivers of the vehicles. Dial distributes assignments using a computer/satellite communication system that is installed in the drivers’ vehicles. Plaintiffs assert that the instant action, commenced on or about December 4, 2017, is a direct shareholder and employee claim that “....stems from and is the outgrowth of the underlying shareholder derivative action involving the same plaintiffs.” In part, Plaintiffs assert that Defendants took actions against them in retaliation for bringing the shareholder derivative action filed in this Court under Index # 512059/2015.

Upon a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), the pleading is to be liberally construed, accepting all of the facts alleged therein to be true, according the allegations the benefit of every possible favorable inference, and the court “determine[s] only whether the facts alleged fit within any cognizable legal theory.” *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *Hurrell-Harring v State of New York*, 15 NY3d 8 (2010). The only issue, therefore, to be decided upon a motion to dismiss is whether or not Plaintiff has a cause of action, not whether the plaintiff has stated a cause of action. *Nunez v Mohammed*, 104 AD3d 921, 922 (2nd Dept 2013). The pleadings must be sufficiently particular to give notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved as well

as the material elements of each cause of action or defense.” *Maldonado v Olympia Mech. Piping & Heating Corp.*, 8 AD3d 348, 350-51 (2d Dept 2004). Each element of a cause of action must be supported by factual allegations in the pleading containing the details constituting the wrong. Conclusory allegations will not suffice. *Cadet-Duval v Gursim Holding, Inc.*, 147 AD3d 718, 719–20 (2d Dept 2017), citing *Stortini v. Pollis*, 138 A.D.3d 977, 978 (2d Dept 2016); *Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595 (2d Dept 2015).

1st Cause of Action: Breach of Contract

A party alleging a breach of contract must “demonstrate the existence of a contract reflecting the terms and conditions of the purported agreement.” *Saul v Cahan*, 153 AD3d 947, 950 (2d Dept 2017). Moreover, to demonstrate the existence of a binding contract, a plaintiff must establish “...mutual assent sufficiently definite to assure that the parties are in full agreement with respect to all material terms.” *Id.* In the instant action, Plaintiffs contend that the Corporate By-Laws that were adopted by Dial’s Board of Directors and ratified by the shareholders on May 18, 2003 incorporates the “Proprietary License Agreement” that was allegedly breached. Further, Plaintiffs allege that Defendants stopped making referrals in breach of the “Proprietary License Agreement.” Plaintiffs have not set forth in the complaint the terms and conditions of the subject contract that were allegedly breached. Rather, Plaintiffs rely upon conclusory allegations without actually pleading the pertinent terms of the purported agreement as required by law. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 (2011). The law requires that a pleading consist of plain and concise statements and that each paragraph be separately numbered and contain “....as far as practicable a single

allegation...". **CPLR § 3014**. The within breach of contract cause of action contains eight paragraphs and is six pages long. Even according the allegations set forth as the 1st cause of action the benefit of every possible favorable inference, Plaintiffs have failed to adequately set forth the material elements of a breach of contract cause of action. ***Maldonado v Olympia Mech. Piping & Heating Corp., supra at 350-51.***

2nd Cause of Action: Intentional Interference with Prospective Economic Advantage

To state a cause of action for tortious interference with prospective economic advantage, a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm upon him/her. ***Posner v Lewis, 18 NY3d 566, 570 (2012), citing Carvel Corp. v. Noonan, 3 N.Y.3d 182, 190 (2004).*** Plaintiffs claim that defendants wrongfully stopped referring fares to them. However, the complaint does not sufficiently set forth allegations to indicate that Defendants either employed wrongful means or acted for the sole purpose of inflicting intentional harm on Plaintiffs. The allegations in the complaint, therefore, are palpably insufficient to support the elements of a cause of action for intentional infliction of prospective economic advantage. ***Soumayah v Minelli, 41 AD3d 390, 391 (1st Dept 2007).***

3rd Cause of Action: Breach of Fiduciary Duty

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages directly caused by the defendant's misconduct." ***Stortini v Pollis, 138 AD3d 977, 978-979 (2d Dept 2016), citing Deblinger v Sani-Pine Prods Co Inc, 107 AD3d 659, 660 (2d Dept 2013); Rut***

v Young Adult Inst Inc, 74 AD3d 776, 777 (2d Dept 2010); Robert I Gluck MD, LLC v Kenneth M Kamler MD, LLC, 74 AD3d 1167 (2d Dept 2010); Kurtzman v Bergstol, 40 AD3d 588, 590 (2d Dept 2007). A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b). *Stortini v Pollis, supra at 978.* CPLR § 3016 (b) is satisfied when the facts suffice to permit a “reasonable inference” of the alleged misconduct. The strength of the requisite inference will vary based on the facts and context of each case. *Eurycleia Partners, LP v Seward & Kissel, LLP supra at 560-61.* However, as recently set forth by the Court of Appeals,

“[C]onclusory allegations or bare legal assertions with no factual specificity are not sufficient, and will not survive a motion to dismiss. Mere speculation cannot support a cause of action for breach of fiduciary duty.”

In re Kenneth Cole Productions, Inc., 27 NY3d 268, 278 (2016), citing Godfrey v. Spano, 13 N.Y.3d 358, 373 (2009).

While Plaintiffs allege that defendant Kordonsky exerted improper influence over Dial’s Board of Directors, absolutely no factual specificity as to how or when this allegedly occurred, was included in the pleading. Mere speculation cannot support a cause of action for breach of fiduciary duty. *Id., citing Kassover v Prism Venture Partners, LLC, 53 AD3d 444, 450 (1st Dept 2008).* This Court finds that the complaint in the instant action fails to allege the requisite factual details of the Defendants’ alleged misconduct and thereby fails to create a reasonable inference of breach of a fiduciary duty. *In re Kenneth Cole Productions, Inc., supra at 278.*

4th Cause of Action: Intentional Infliction of Emotional Distress

A cause of action for intentional infliction of emotional distress requires four elements:

(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. *Howell v New York Post Co., Inc.*, 81 NY2d 115, 121-122 (1993). Plaintiffs must demonstrate that Defendants' conduct was so extreme, reckless and outrageous as to cause severe emotional distress. *Khan v Reade*, 7 AD3d 311, 312 (1st Dept 2004). Even accepting the allegations of the complaint as true, they do not allege conduct so outrageous in character, and so extreme in degree, as to state a cause of action to recover damages for intentional infliction of emotional distress. *Epifani v Johnson*, 65 AD3d 224, 232 (2d Dept 2009). It is unclear when the alleged misconduct took place as Plaintiffs refer generally to misconduct that occurred from October 2015 through September 2017. A cause of action for intentional infliction of emotional distress is governed by a one year statute of limitations pursuant to CPLR § 215 (3). Therefore, any conduct that occurred prior to December 4, 2016, even if properly plead, would be time barred. *Teller v Galak*, 162 AD3d 959,960 (2nd Dept 2018). Moreover, the remaining allegations that are not time barred lack the requisite specificity to support a claim for intentional infliction of emotional distress.

5th Cause of Action: Defamation

In order to establish a viable cause of action for defamation, a plaintiff must allege that a false statement was made, in this case about each of the three Plaintiffs, was published without privilege or authorization to a third party, with fault as judged by, at a minimum, a negligence standard, and that the false statement caused special harm or constituted defamation per se. *Stolatis v Hernandez*, 51 Misc 3d 1203(A) (Sup Ct, Westchester County,

2016), *affd*, 161 AD3d 1207 (2d Dept 2018), citing *Epifani v. Johnson, supra*. CPLR § 3016(a) requires that the complaint set forth the particular words allegedly constituting defamation, the time, place, manner of the false statement and must specify to whom it was made.

Salvatore v. Kumar, 45 AD3d 560, 563 (2d Dept. 2007), citing *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999). Additionally, a plaintiff alleging defamation must plead that he/she has sustained the loss of something of economic or pecuniary value. *Rufeh v Schwartz*, 50 AD3d 1002, 1003 (2d Dept 2008), quoting *Liberman v Gelstein*, 80 NY2d 429, 434-435 (1992). In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of an average person, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction. *Silsdorf v Levine*, 59 N.Y.2d 8 (1983), cert. denied 464 U.S. 831 (1983). The complaint in the instant action fails entirely to meet any of the requisite criteria for a defamation cause of action.

6th Cause of Action: Intentional Infliction of Harm (Prima Facie Tort)

To state a legally cognizable claim for prima facie tort, a plaintiff must allege (1) the intentional infliction of harm, (2) resulting in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful. *Posner v Lewis, supra at 570*, citing *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143 (1985). Additionally, a plaintiff must plead that the defendant's motive for the act or series of acts was solely malevolent. *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 333 (1983).

Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm for which no traditional tort provides a remedy, and not to provide a catchall alternative for every cause of action which is not independently viable. *Epifani v Johnson, supra at 232-233*. Plaintiffs claim there was on an ongoing scheme to punish, discriminate, defame and retaliate against them after the 2015 shareholder derivative action was commenced. The allegations as set forth in the complaint are conclusory at best and cannot support a prima facie tort claim as they fail to adequately give notice of the actual occurrences or series of occurrences intended to be proved, as required by CPLR § 3013. It is unclear when exactly the alleged misconduct took place as Plaintiffs refer generally to misconduct that occurred from October 2015 through September 2017. Additionally, with regard to prima facie tort, “[a] critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages.” *Id. at 233, citing Freihofer v Hearst Corp., supra at 142-143*. Such damages must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts. *Ginsberg v Ginsberg, 84 AD2d 573, 574 (2d Dept 2009), quoting Luciano v Handcock, 78 AD2d 943, 944 (2d Dept 1980)*. Moreover, a cause of action for a prima facie tort is governed by a one year statute of limitations pursuant to CPLR § 215 (3). Therefore, any conduct that occurred prior to December 4, 2016, even if properly plead, would be time barred. *Teller v Galak, supra at 960*. Any remaining allegations that are not time barred lack the requisite specificity to support a claim for a prima facie tort.

7th Cause of Action: Violation of Labor Law

Labor Law § 215 prohibits discharging an employee in retaliation for making a complaint that the employer has violated any provision of the Labor Law. ***Epifani v Johnson supra at 235.***

In order to state a retaliation claim under New York Labor Law, a plaintiff must adequately plead that while employed by the defendant, he/she made a complaint to the employer regarding a violation of New York Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result. ***Higueros v. New York State Catholic Health Plan, Inc., 2007, 526 F.Supp.2d 342 (EDNY 2007).*** To be properly plead, therefore, a retaliation claim requires that the specific provision of the Labor Law alleged to have been violated by the employer be included in the complaint. ***Grella v St Francis Hosp. 149 AD3d 1046, 1049 (2d Dept 2017).*** Accordingly, Plaintiffs' failure to set forth what provision of the Labor Law Dial allegedly violated is fatal to Plaintiffs' claim for retaliatory discharge. The allegations set forth in Plaintiffs 7th cause of action cannot support recovery pursuant to Labor Law § 215.

Punitive Damages

Punitive damages are available where the conduct constituting, accompanying, or associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available and is sufficiently egregious to warrant the additional imposition of exemplary damages. Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally. ***Rocanova v Equit. Life Assur. Soc. of U.S., 83 NY2d 603, 613 (1994).*** In

contrast to compensatory damages, which are intended to redress the concrete loss that a plaintiff has suffered by reason of the defendant's wrongful conduct, punitive damages are essentially private fines levied by civil juries to punish reprehensible conduct, and deter its future occurrence. *Frankson v Brown & Williamson Tobacco Corp.*, 67 AD3d 213, 218-19 (2d Dept 2009), citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, (2001); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Contrary to the Plaintiffs' contention, there can be no award of punitive damages in the instant action as the conduct alleged does not support the claim nor was the alleged conduct aimed at the public generally. *Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 758-59 (2d Dept 2008).

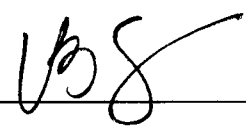
Accordingly, Defendants' motion to dismiss is granted in its entirety.

This is the Decision and Order of the Court.

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