

Mees v Buiter

2019 NY Slip Op 32792(U)

September 20, 2019

Supreme Court, New York County

Docket Number: 154905/2018

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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HELEEN MEES,

Index No. 154905/2018

Plaintiff,

Motion Date: 2/27/2019

-against-

Motion Seq. No.: 004

WILLEM H. BUITER,

DECISION/ORDER

Defendant.

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HON. ROBERT D. KALISH, J.S.C.:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 175 to 267, were read on this motion to dismiss, for sanctions and an injunction.

Plaintiff pro se Heleen Mees brings this action seeking damages for negligent infliction of emotional distress and tortious interference with prospective business relations, allegedly resulting from defendant Willem H. Buiter’s conduct during and after the parties’ romantic and sexual relationship. Defendant now moves to dismiss the Verified First Amended Complaint (the Complaint) (Koch Affirm. [Doc. 177], Ex. 1 [Doc. 178])¹ on the grounds of res judicata, collateral estoppel, failure to state a claim, statute of limitations and failure to plead with particularity (CPLR 3211[a][1], [5], and [7]). Defendant also seeks an order enjoining Mees from bringing any further motions, applications, actions or proceedings against anyone concerning any claim having anything to do with him without court permission, and asks for monetary sanctions of up to \$10,000 for each cause of action that the court finds to be frivolous

¹ References to “Doc.” followed by a number refer to documents either filed in this action in the New York State Courts Electronic Filing (NYSCEF) system based on their corresponding NYSCEF Document Number, or, as indicated, in the Southern District of New York Official Court Electronic Document Filing System available through Pacer.

(CPLR § 8303-a).

BACKGROUND

The following facts are taken from the pleadings, the parties' submissions on the motion and prior judicial decisions involving the same subject matter. Because the motion is based in part upon res judicata, the decisions of the Supreme Court, Kings County in *Mees v Buiter*, Index No. 9579/2014 (Edwards, J.) (the Kings County action) are of particular relevance. The judge in that action reviewed much of the same documents and other evidence that has been placed in this record, and for the sake of the efficiency the court will rely on the facts and procedural history as recited in those rulings whenever possible. Reference will thus be made to Justice Edwards' June 1, 2016 decision, order and judgment dismissing the Kings County action (the Dismissal Order) (Koch Affirm., Ex. 2 [Doc. 179]); Justice Edwards' February 23, 2018 decision and order denying plaintiff's motion for renewal (the Renewal Order) (Koch Affirm., Ex. 3 [Doc. 180]); and Justice Edwards' October 1, 2018 decision and order denying reargument of the Renewal Order (the Reargument Order).² Because those decisions have already devoted nearly 70 pages of discussion to this matter, the recitation here will be necessarily abbreviated.

The parties are both prominent economists. In the Kings County action, the court found

² Defendant has not attached the Reargument Order to his motion because the files in the Kings County action were sealed after being deemed a non-public matrimonial action under Domestic Relations Law § 235. Although the two other orders were also issued in that action, defendant has placed them into this record because plaintiff took no steps to insure their confidentiality when including them in the record on appeal in the Second Department. The court has reviewed a copy of the Reargument Order, however, because it was handed up by counsel at the January 15, 2019 oral argument of defendant's since-withdrawn original motion to dismiss (Transcript of oral argument 1/15/2019 [Doc. 170], 10:21-11:5). The court has quoted from it to a limited extent, as have the parties, but it contains no confidential information that is not included in the first two orders.

that beginning in October 2008, plaintiff and defendant engaged in a romantic and sexual relationship which lasted at least until defendant's wife discovered it in November 2009 (Dismissal Order, 3). Plaintiff claims that they resumed it in 2010 and that it continued into 2012, during which time they had frequent sexual interactions using Skype (*id.*, 4). Plaintiff asserts that over the course of that time during these online sessions, defendant surreptitiously recorded and saved 1,251 screen shots of her private parts (*id.*). Defendant, however, claims that it was plaintiff who created and sent him the photographs unsolicited, via email (*id.*).

The court further found that in July 2012, defendant asked plaintiff to stop harassing him and to leave him alone forever (*id.*, 6). However, between July 2012 and July 2013 plaintiff continued to email defendant, with defendant contending that he received over 2,500 messages from plaintiff during that period (*id.*, 5-6). In some of these messages, plaintiff told defendant she loved him and missed him; in others, plaintiff recognized that she was losing control and hurting defendant and his family; and in others plaintiff said she wished defendant was dead and made other veiled threats (*id.*, 6-7). Plaintiff also sent threatening messages to defendant's wife (*id.*, 5-6). In February 2013, plaintiff repeatedly told defendant to report her to the police if he wanted her to stop contacting him (*id.*, 8).

A. The Criminal Proceeding (People v Mees)

At that time, defendant's counsel sent plaintiff a cease and desist letter (*id.*). Plaintiff nevertheless continued to send hostile messages to defendant and his wife for the next few months (*id.*, 8-9). On the night of May 6, 2013, defendant called the police upon being informed that plaintiff was in his building and was asking to see him and his wife (*id.*, 9-10). Defendant met with the police in his apartment and, thereafter, defendant provided the assigned

detective, Detective Carl Roadarmel, with most of plaintiff's emails (*id.*). Plaintiff was arrested on July 1, 2013 and charged with five counts of stalking and harassment (*id.*, 11-12). On August 5, 2013 defendant signed a statement recounting plaintiff's behavior, including her additional attempts to contact him through Facebook, by phone and by showing up at hotels in which he was staying in Amsterdam and China (*id.*, 12-13).

Plaintiff claims that defendant made false, misleading or incomplete statements to the police about their communications for the purpose of feigning his role as the victim and accuse her of the crimes (*id.*, 10). Plaintiff claims that defendant failed to disclose that he had secretly taken the naked pictures of her, that they were romantically involved during the entire period of the alleged harassment, and that the meeting in China was an arranged romantic encounter (*id.*, 13-14). Nevertheless, on March 10, 2014 plaintiff agreed to resolve the criminal charges against her by accepting an adjournment in contemplation of dismissal conditioned on a one-year order of protection in favor defendant and his wife, and fourteen court-ordered counseling sessions (*id.*, 14).

B. The Kings County Action

Plaintiff commenced the Kings County action on June 16, 2014 (Koch Affirm., Ex 4 [Kings County Complaint] [Doc.181]). That complaint alleged that in March 2014, defendant called her a stalker on Facebook, denied their romantic relationship and made negative comments about one of her research proposals (Dismissal Order, 14-15). Plaintiff also claimed that in June 2014, defendant falsely accused her of calling him in violation of the order of protection. Based upon this and defendant's other alleged conduct leading up to her arrest, the complaint asserted claims for defamation under New York and Dutch law, false arrest and

imprisonment, malicious prosecution, intentional infliction of emotional distress (IIED) and tortious interference with prospective business relationships (*id.*, 15).

Defendant moved to dismiss in October 2014. On June 15, 2015, several months after defendant initially moved to dismiss, plaintiff served a first amended complaint. That pleading deleted the claims for malicious prosecution and Dutch law defamation, added additional supporting allegations to bolster the remaining claims, and added a claim for intentional infliction of emotional distress based upon defendant's alleged surreptitious recording of the nude images and distribution of them to his attorneys, the police, and the district attorney's office (*id.*, 16). Defendant moved to dismiss the amended complaint in its entirety in August 2015. In that motion defendant also moved to dismiss, with prejudice, the malicious prosecution and Dutch law claims asserted in the initial pleading, and for sanctions for frivolous claims under CPLR 8303-a (*id.*).

(i) *The Dismissal Order*

The June 1, 2016 Dismissal Order dismissed the action in its entirety. As is relevant here, the court found that some of the defamation claims were barred by the one-year statute of limitations (*id.*, 21), that some were absolutely privileged (*id.*, 24) and that others were mere opinion (*id.*, 24-27). The court also found that as to certain alleged oral statements, plaintiff failed to plead the special damages required in slander actions not involving per se defamation, insofar as the harm she claims arose only from negative press publicity over which defendant had no control (*id.*, 21-22).

The court found the claim for IIED based upon defendant's statements to the police to be defective for two reasons. First, the court held that it was duplicative of plaintiff's defamation

claim, and an impermissible attempt to avoid the infirmities of that claim (*id.*, 31). Second, the court concluded that the alleged conduct was not “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency” (*id.*, 31, quoting *Howell v New York Post Co.*, 81 NY3d 115, 122 [1992]).

With respect to the IIED claim based upon the alleged surreptitious recording, the court observed that defendant had “point[ed] to the fact that” plaintiff, in a prior federal proceeding, had admitted to sending the photographs to defendant and claimed there that she no longer had the photographs because of a computer malfunction (*id.*, 34). Furthermore, the court noted that even if it was defendant who created them, plaintiff’s emotional distress resulted from their distribution rather than their creation. In that connection, the court found that her objection to his sharing of the pictures with the police was redundant of her defamation and false arrest claims, and that giving them to his attorneys was absolutely privileged (*id.*, 34-35). And as with the other IIED claim, the court found that the sharing of the photographs with the police, district attorney and lawyers was in any event not extreme and outrageous (*id.*, 35).

Addressing plaintiff’s claims for tortious interference with prospective business relationships as with various universities and corporations, the court held “there is an absence of an alleged act of interference with a contract or business relationship distinct from plaintiff’s general declaration of injury to reputation included in her defamation claim” (*id.*, 33). Finally, the court denied defendant’s motion for sanctions, which relied upon, *inter alia*, a statute of limitations tolling argument that was contradicted by the record, the bolstering of her defamation claim by reference to statements that were made only to her own counsel, and reliance on misstatements and inapposite authorities in support of her arguments regarding the law of

republishing and false arrest. Although the court found that “in certain instances, plaintiff’s positions border on being frivolous, it does not find that plaintiff continued this action in bad faith without any reasonable basis in law or fact or solely to harass or maliciously injure defendant” (*id.*, 39).

(ii) *The Renewal Order*

Plaintiff moved to renew her opposition to the dismissal motion in June 2017 (Renewal Order, 3). The application was based upon three letters sent to the court by plaintiff’s former counsel after her opposition to the prior motion had already been filed: one dated October 26, 2015, one dated January 7, 2016, and one dated May 31, 2016 (*id.*, 4). The October letter argued that entries in a privilege log raised questions regarding defendant’s defamation statute of limitation argument insofar as it indicated that he had been in indirect contact with the police later than he claims (*id.*, 6-7); the January letter argued that new evidence discovered in November 2015 that defendant kept 1,251 naked pictures of plaintiff on his Verizon cloud service showed that he was still enjoying them and undercut his claim that he was alarmed by them, and also supported her argument for IIED because of her fear that the cloud might be hacked (*id.*, 8-9); the May letter summarized a 20-page forensic report (finalized on April 15, 2016 and translated into English on May 2, 2016) that concluded that it was a near certainty that plaintiff neither took nor sent the pictures (*id.*, 10-11). Plaintiff asserted that when she reviewed the record on appeal from the court, the letters were missing from the case file (*id.*, 4).

In denying renewal, the court first noted that the letters could not constitute new evidence because they all predated the Dismissal Order, and that they were omitted from the record on appeal because they were sent directly to the court rather than submitted in the form of

affirmation or affidavits in accordance with CPLR 2012(a) and 22 NYCRR 202.5(b) (*id.*, 5-6).

The court also explained at length why nothing contained in the three letters would affect its determination in the Dismissal Order. With respect to the October letter, the court noted that the defamation claim was also dismissed for lack of particularity and failure to plead special damages, defects which would not be cured even if some issue was raised about the timing of the statements (*id.*, 7-8). With respect to the January letter, the court found that any argument regarding the photographs could have been made in the opposition papers because the amended complaint alleged that defendant was “in possession” of them, and she knew about the cloud backup months before the Dismissal Order. The court also noted that the existence of the cloud backup had no bearing on the reasons for dismissal, as the prior decision had acknowledged plaintiff’s contention that defendant was lying about the pictures being unwelcome, but nevertheless found that other circumstances justified her arrest (9-10). With respect to the May letter, the court identified some authentication and methodological problems with the forensic report, and found that it was in any event irrelevant. Specifically, the court noted that the Dismissal Order recognized the dispute over who created the photographs, but that plaintiff had alleged that her emotional distress was caused by their distribution – which the court held “was not so extreme and outrageous so as to state a cognizable claim for intentional infliction of emotional distress” (*id.*, 11-12).

(iii) *The Reargument Order*

Plaintiff moved for reargument of the Renewal Order in March 2018, limiting her objections to the dismissal of the claim for IIED related to the surreptitious recording. The court rejected plaintiff’s argument that it committed an error with respect to the date by which the

“unavailability” of the facts was measured, holding that the time of availability to the plaintiff, rather than the time at which they became matters of public record, was controlling (Reargument Order, 10). The court reiterated that all of the facts were available to plaintiff prior to the issuance of the Dismissal Order, as they were contained in the three letters that predated the Dismissal Order, and again noted that none of the facts would affect the ultimate legal conclusions (*id.*, 10-11). The court also rejected plaintiff’s contention that she was entitled to damages for emotional distress based on the surreptitious creation of the photographs, and that she had only relied upon the dissemination and threat of publication as aggravating factors. The court held that this was a new argument that was impermissibly raised on reargument, and that in any event plaintiff had not adequately pled the outrageous conduct or the intent to cause emotional harm (*id.*, 13-15).

(iv) *The Second Department Appellate Proceedings*

Plaintiff perfected an appeal of the Dismissal Order in the Appellate Division, Second Department, on January 2, 2018 (Koch Affirm., ¶ 2). By order dated April 26, 2018, that court denied plaintiff’s motion to consolidate the appeal of the Dismissal Order with her appeal of the Renewal Order, but upon its own motion ordered that the two would be calendared together and argued or submitted on the same date (Koch Affirm., Ex. 14). Plaintiff perfected an appeal of the Renewal Order on November 3, 2018 and the briefing on that appeal was completed on February 4, 2019 (Koch Affirm., ¶ 20).

C. *The Federal Court Proceedings*

In March 2014, plaintiff commenced an action in the District Court for the Southern District of New York, the first of five federal proceedings (the Federal Proceedings)

seeking discovery pursuant to U.S.C. § 1782 from defendant, certain of his family members and his employer, as part of her Dutch attorneys' investigation and potential prosecution of a defamation claim against him in the Netherlands (Koch Affirm., ¶ 21). Between 2014 and 2016, three proceedings were filed in the Southern District (No. 14 MC 56, No. 14 MC 88, No. 15 MC 262), one in the Eastern District (No. 16 MC 209), and one in the Middle District of Florida (No. 16 MC 17) (not available on Pacer). All of the proceedings were eventually consolidated in the Southern District (16 MC 56, Doc. 38 [October 7, 2015 order consolidating Nos. 14 MC 56, 14, MC 88 and 15 MC 262] and Doc. 41, ¶ 2 [Stipulated Order and Agreement dated May 20, 2016 providing for consolidation with No. 16 MC 17 from Middle District of Florida]).

The Southern District Court Judge (Preska) initially denied plaintiff's application to compel discovery from the bench in May 2014, but that order was vacated and the matter remanded by the Second Circuit Court of Appeals in July 2015 (*see Mees v. Buitter*, 793 F3d 291 (2d Cir 2015)). However, pursuant to a so-ordered letter stipulation dated June 23, 2016 (the Stay Stipulation) (14 MC 56, Doc.40), the parties agreed to stay discovery pending resolution of the appeal of the Kings County Dismissal Order. The stipulation also provided, *inter alia*, that during the pendency of the appeal, the federal court would make no ruling regarding the preclusive effect of the Dismissal Order, and that any party could move to lift the stay upon resolution of the appeal (*id.*, 2)

D. The Dutch Proceedings

In June 2014, plaintiff commenced a civil action against defendant and his wife in the Netherlands in the District Court of Amsterdam, Private Law Division (*Mees v Buitter et ano*, Case No. C/13/577569 (the Dutch Action) (*see Kortmann Affirm.* [Doc. 206], Ex. 29 [Doc. 207]

[the Dutch Judgment]). As relevant here, plaintiff alleged that defendant filed the police report in New York based on incorrect or misleading statements about their relationship and made similarly inaccurate claims on his Facebook page, knowing or reasonably expecting that they would be publicized by the international press and thereby damage her reputation. She also included her claim that defendant surreptitiously photographed their Skype sessions (Dutch Judgment, 6-7). In its November 2, 2016 judgment, the Dutch court dismissed plaintiff's claims by reason of the res judicata effect of the Kings County Dismissal Order, holding that "the body of facts and the legal relationship which the American judgment has assessed and decided on is identical to the body of fact and the legal relationship at issue in the present proceedings" (*id.*, 11) (as translated from the original Dutch). The court also found that "[c]ontrary to what Mees asserts, the question whether Buiters has taken nude screenshots has also been discussed in the American proceedings," and assessed her €1,412.00 as the unsuccessful party (*id.*, 11-12).

According to one of defendant's Dutch lawyers, plaintiff noticed an appeal from the Dutch Judgment in February 2017 and obtained an extension to file her statement of appeal up until February 2019 (Kortmann Affirm., ¶ 3). Dutch counsel also represents that plaintiff indicated, through counsel, that she intends to assert another claim in the Netherlands based on the photographs, and that she filed a motion seeking discovery in connection with that proposed claim in December 2018 (*id.*).

Plaintiff also filed criminal complaints against defendant with the Amsterdam police in December 2016 and January 2017 (Kortmann Affirm., ¶ 4). The Amsterdam Department of Justice informed plaintiff in an August 2017 letter that it would not prosecute defendant because the conduct alleged did not constitute a criminal offense under Dutch Law (Kortmann Affirm.,

Ex.30 [Doc. 208]). Plaintiff sought a review of that determination, which was rejected in a decision of the Amsterdam Court of Appeal in August 2018 (Kortmann Affirm., Ex. 33 [Doc. 211]).

E. The Instant Action

Plaintiff commenced this action on May 25, 2018 (Koch Affirm., Ex. 18 [Doc. 195] [Summons and Complaint]). The Verified Complaint set forth three causes of action for negligent infliction of emotional distress (NIED): one for defendant's dissemination of the photographs to defendant's Dutch counsel in preparation for the hearing in the civil action held in September 2016; another for saving the photographs in the Verizon cloud service; and the third for saving them in his handheld devices. Defendant moved to dismiss in August 2018 (Motion sequence number 03, Doc. 59-150, 152-57), and after the matter was fully briefed, oral argument was held before this court on January 15, 2019 (Doc. 17).

That day, however, plaintiff signed the amended Complaint now before this court, which was filed on January 22, 2019. The new pleading omitted the NIED claim based on dissemination of the photographs, and added two claims for tortious interference with prospective business relations. The first claim for tortious interference alleges that defendant made derogatory comments about plaintiff, including comments about her mental state, to a Bloomberg News anchorperson, Joe Weisenthal, who subsequently rescinded an invitation to plaintiff to appear on his show. The second claim for tortious interference alleges that defendant made similar comments to the Dutch Consulate General, which then rescinded all of its invitations to her with the result that she no longer receives consulting jobs through the Dutch network meetings organized by the Consulate.

On January 31, 2019, based upon a letter received from defendant's counsel, this Court marked the prior motion to dismiss (Seq. 003) withdrawn and allowed defendant to make a new motion to dismiss plaintiff's first amended complaint (Doc. 174).

F. Plaintiff's Actions against Defendant's Attorneys

On or about January 29, 2019, plaintiff commenced by summons with notice an action against the two New York attorneys representing defendant in this action and their law firms, as well as the New York office of Buiters' Dutch counsel (*Mees v Stribbe New York B.V. et al*, Index No. 150975/2019) (the Stribbe Action) (Koch Affirm., Ex. 20 [Doc 197]). On February 4, 2019, she commenced an action by filing a summons with notice against the attorney who represented defendant during the criminal proceedings against plaintiff (*Mees v Clayman et al*, Index No. 151204/2019) (Koch Affirm., Ex. 21 [Doc. 198]). Both notices assert claims for negligent infliction of emotional distress based upon dissemination of the photographs.³

DISCUSSION

I. The Claims for Negligent Infliction of Emotional Distress are Barred by Res Judicata

The first claim (cloud) and the second claim (handheld device) for NIED are barred by the res judicata effect of the Kings County Dismissal order. "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause

³ Plaintiff served the complaint in the Stribbe action on June 29, 2019 (Stribbe action, Doc. 33). Defendants have moved to dismiss and plaintiff has moved to amend the caption and lift the stay of discovery (Stribbe action, motion sequence numbers 02, 03 and 04, Doc. 39-159) and the papers on those motions have been recently submitted. Defendant's counsel represents that plaintiff has not served the summons with notice in the Clayman action and has indicated that she does not intend to, but the action has not been withdrawn (Koch Affirm. [Stribbe action] [Doc. 40], ¶ 37).

of action” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). Accordingly, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Furthermore, “[t]he rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again” (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). The applicability of the doctrine is not affected by the pendency of an appeal of the judgment (*see Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 A.D.3d 89, 98 [1st Dept 2012]; *People ex rel. McGoldrick v Baldwin Gardens, Inc.*, 283 AD 897, 898 [2d Dept 1954]).⁴ Here, the NIED claims arise out of the same transactions as the dismissed IIED claims, so the change in the underlying legal theory is of no consequence.

Plaintiff argues that the conduct alleged in the Complaint is not the same as that litigated in the Kings County action because her NIED claims are now premised on the saving and retention of the images in defendant’s cloud service and handheld devices, rather than upon their surreptitious creation (Memo. in Opp. at 4). However, regardless of whether or not she

⁴ The Complaint itself recognizes that “some of the previous litigation between the parties took place in Kings County” (Compl. ¶ 6), but dismisses this history with the objection that “the Supreme Court and Second Department are so overflown [sic] with cases that it results in unacceptable waiting times.” It also avers that plaintiff once fainted in the Supreme Court because the courtrooms were so crowded. These observations, however, are irrelevant to whether that litigation, already reduced to a judgment, involved the same transactions that are the subject of the Complaint. Calendar congestion, at best, is a partial and non-controlling justification for a timely interposed motion for change of venue (*see Finn v Kanter*, 172 A.D.2d 416, 417 [1st Dept 1991]; *Stratton v Dueppengiesser*, 281 AD2d 991 [4th Dept 2001], and even in such cases must be supported by more than hearsay (*id.*) or “vague assertions” (*Ament v Church of Annunciation of Elma*, 247 AD2d 843, 843 [4th Dept 1998]).

identified that conduct as the precise source of her distress in the Kings County action, this Court finds that it was part of the same series of transactions and, as such, she could have raised such a claim in the Kings County action. Furthermore, the pleadings in Kings County *did* allege that defendant saved and retained the pictures (*see* Kings County Complaint, ¶¶ 42-43, 155, 156, 159). Furthermore, plaintiff specifically raised her concern about the retention of the photographs in the cloud service in her motion to renew, and the court rejected it in view of her failure to make that argument in her original opposition papers despite having the knowledge and opportunity to do so. Indeed, in the Renewal Order, dated February 26, 2017, Justice Edwards noted that “Plaintiff knew that defendant had these photographs since she alleged, in her amended complaint, that defendant was ‘in possession of’ them, and plaintiff knew about the cloud backup since November 17, 2015, well before the June 1, 2016 decision [dismissing the complaint]” (Renewal Order, 9-10; *see also* Koch Affirm., Ex. 4 [January 7, 2016 Letter from Mees Counsel to Hon. Edwards]). Therefore, the fact that plaintiff did not specifically set forth the instant causes of action for NIED in the Kings County complaint is of no moment. The issue was raised before that court.

Justice Edwards further found that the existence of the cloud backup had “no bearing on the reasons for the dismissal of plaintiff’s claims, and does not constitute any reason to disturb the June 1, 2016 decision.” As such, by bringing the first and second causes of action for NIED in the instant action, plaintiff is in sum and substance asking this Court to sit in appellate review of the determinations by Justice Edwards. This Court lacks such authority.

Plaintiff additionally argues that her current claims are not a part of the same “transaction” as the surreptitious creation of the photographs because unlawful surveillance is

criminalized under a different section of New York's Penal Law (section 250.45) than the dissemination of the resulting images (section 250.55). However, the only question here is whether for the purpose of res judicata, plaintiff's claims arise from the same series of transactions -- not whether the Legislature has happened to categorize any two particular acts as a single criminal offence or transaction in its statutory scheme. All of plaintiff's NIED claims as stated in this action arise from the creation and retention of the photographs, which were among the transactions under consideration in the Kings County action.

The court also rejects plaintiff's argument that it was not possible for her to raise her new claims in the prior litigation. On this point, she contends that she only learned the relevant facts about the cloud photographs after the motion before Justice Edwards had been argued and fully submitted, and that Justice Edwards erroneously held that it was sufficient that she learned about them before the time that motion was decided. However, again, Justice Edwards squarely addressed these arguments in the Renewal and Reargument Orders, and found that the alleged new evidence, whenever it was discovered, had no bearing on her determination. The determinations by Justice Edwards as to the relevant time for the discovery of new facts (compare *Elder v Elder*, 21 AD3d 1055 [2d Dept 2005] with *Luna v Port Auth. of New York & New Jersey*, 21 AD3d 324 [1st Dept 2005]) are not reviewable by this court, but rather must be resolved by the Second Department in the pending appeal.

Lastly on this issue, plaintiff contends that defendant is judicially estopped from raising the defense of res judicata, because defendant argued on plaintiff's motion to renew that plaintiff "should assert a new claim" if she was distressed by the existence of the cloud backup (Memo. in Opp. at 7). The doctrine of judicial estoppel "prevents a party who assumed a certain position in

a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed” (*Herman v 36 Gramercy Park Realty Assocs., LLC*, 165 AD3d 405, 406 [1st Dept 2018] [quotation marks and citation omitted], *leave denied*, 33 NY3d 1045 [2019]). Contrary to plaintiff’s argument, defendant has not taken an inconsistent position on this motion, as he did not previously concede that plaintiff had a valid claim or invite or consent to her making one. Rather, defendant merely pointed out that plaintiff had not made one despite knowing of the cloud backup and argued that it would not have made a difference if plaintiff had (Mees Aff. [Doc. 224], Ex. D [excerpt of defendant’s brief in Kings County action]).

Defendant also challenges the NIED claims for failure to state a claim, pursuant to CPLR 3211 (a) (7). Because of the res judicata bar it is unnecessary to address the parties’ arguments at great length. Nonetheless, contrary to plaintiff’s argument, this court finds that, under First Department precedent, plaintiff is required to assert factual allegations of extreme and outrageous conduct (*see Melendez v City of New York*, 171 A.D.3d 566, 567 [1st Dept 2019], following *Lau v S & M Enterprises*, 72 AD3d 497, 498 [1st Dept 2010] [“[t]he existence of extreme and outrageous conduct is also a necessary element for a claim of negligent infliction of emotional distress”]; *compare Taggart v Costabile*, 131 AD3d 243, 255 [2d Dept 2015] [holding that extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress]). Clearly, defendant’s mere storage of the photographs on his cloud and handheld device does not constitute extreme and outrageous conduct. Furthermore, plaintiff has not alleged either a duty of care running to her from defendant, or a guarantee of genuineness regarding her claim of mental distress from the mere

existence of the photographs (*see Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6 [2008]; *Offor v Mercy Med. Ctr.*, 171 AD3d 502, 503 [1st Dept 2019]; *see also Sawitsky v State*, 146 AD3d 914, 915–16 [2d Dept 2017], *leave denied*, 29 NY3d 908 [2017] [emotional distress resulting from negligent storage of intimate photographs non-actionable where defendant was not responsible for their ultimate dissemination]). Moreover, plaintiff fails to state a claim for NIED because her emotional distress is merely based on the fear, and arguably speculation, of a criminal actor potentially hacking into defendant’s cloud or handheld device at some point in the future.

II. The Claims for Tortious Interference Must Be Dismissed

Each of plaintiff’s tortious interference with prospective business relations claims alleges that defendant made “false, misleading, and defamatory statements about [her] and destroying [her] good name, reputation and earning capacity” (Complaint, ¶¶ 51, 59). As such, they are merely defamation claims “in the guise of an economic tort” (*Entertainment Partners Group, Inc. v Davis*, 198 A.D.2d 63, 64 [1st Dept 1993]; *see Demas v Levitsky*, 291 A.D.2d 653, 658 [3d Dept 2002] [dismissing tortious interference claim because “[i]n view of the fact that the claimed damage is measured by harm to plaintiff’s reputation, the cause of action sounds in defamation”]; Dismissal Order, 33 [“Here, however, there is an absence of an alleged act of interference with a contract or business relationship distinct from plaintiff’s general declaration of injury to reputation included in her defamation claim . . . [p]laintiff bases her claim for relief on precisely the same substantive facts pleaded in her defamation claim which, as discussed above, cannot be sustained, and she seeks no distinct damages from her defamation claim”]). Consequently, they fail for at least two reasons. First, they are not pled with particularity as required by CPLR

3016(a), failing to set forth the “exact words complained of and the time, place and manner of the purported defamation” (*Offor*, 171 AD3d 502, 503 [internal quotations and citations omitted]; *see Rubin v Napoli Bern Ripka Shkolnik, LLP*, 151 AD3d 603, 604 [1st Dept 2017]). Second, the claims would be barred by the one-year statute of limitations (*Entertainment Partners*, 198 AD2d 63, 64 [“it is well settled that a plaintiff may not circumvent the one-year statute of limitations applicable to defamation actions (CPLR § 215[3]) by denominating the action as one for intentional interference with economic relations”]).

Moreover, the claims would not survive even if construed as tortious interference. Plaintiff has failed to identify to a specific contract she would have obtained or the names of the parties thereto (*see RSSM CPA LLP v Bell*, 162 AD3d 554, 555 [1st Dept 2018]; *Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 267 [1st Dept 2002]). Additionally, to the extent that defamation may in some instances form the predicate for a tortious interference claim (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]), as discussed above, plaintiff has failed to allege with particularity the derogatory words that caused her alleged injury.

III. The Motion for Injunctive Relief and Sanctions is Denied

In support of his motion for injunctive relief and sanctions, defendant points to the number of legal proceedings commenced by plaintiff, her allegedly vexatious litigation strategy, her attempted communications with plaintiff, and some of the statements appearing in her papers on this motion. For the following reasons, the court declines, in its discretion, to grant the relief requested at this juncture.

As to the prior litigation, plaintiff was represented by counsel for most of it, and did not

incur sanctions. While Justice Edwards found some of plaintiff's arguments on the motion to dismiss close to frivolous, she did not find that they actually crossed that threshold, or that plaintiff had acted in bad faith. Nor were sanctions awarded on the renewal or reargument motions. An appeal is pending, and the Second Department will have the opportunity to take whatever action it deems appropriate.

The existence of the federal court proceedings also does not present a sufficient predicate for sanctions. Most notably, plaintiff prevailed in her argument before the Second Circuit, and thereafter the parties voluntarily stayed the consolidated proceedings upon the issuance of the Dismissal Order in 2016. Of additional significance is that the parties' stipulation specifically prohibited the court from ruling on the res judicata effect of the Dismissal Order during the pendency of the appeal, with the anticipation of at least the possibility of a reversal and ongoing discovery.

The Dutch civil proceeding is likewise pending on appeal. The courts there are competent to judge plaintiff's conduct according to their own rules and customs, into which this court has less insight than it does the workings of this country's state and federal courts. While the Amsterdam District Court did assess plaintiff costs upon dismissing on res judicata grounds, it does not appear they were imposed as a penalty, but rather as a routine mandatory award to the successful party.

Regarding plaintiff's alleged attempts to contact defendant through social media and messaging services, most of them predated this action with the majority occurring prior to 2013. Defendant indicates that there have been no attempts since around the time the first motion to dismiss this action was filed in August 2018. Accordingly, the court finds them to be of limited

relevance.

The court has reviewed all 18 of the statements from plaintiff's opposition papers that defendant's counsel has identified as particularly objectionable. While some of them do contain inaccuracies and mischaracterizations of the record, others are hyperbolic and some are merely arguable. And although the court has rejected plaintiff's res judicata arguments as being without merit, her criticism of the First Department's continued imposition of an outrageous conduct requirement in NIED claims had some basis in law.

The Court is of the opinion that the plaintiff has engaged in some procedural maneuvers which have unnecessarily, and perhaps deliberately, prolonged her litigation with defendant. For example, in both this action and the Kings County action, she amended her complaint only after her initial motions to dismiss had been fully briefed (and in this case, argued). Moreover, this action was commenced the day after oral argument on the reargument motion in the Kings County action. However, each amendment was as of right under the CPLR, so the court does not view the conduct as particularly egregious.

Nonetheless, this Court is very concerned by plaintiff's litigation tactics. Given that plaintiff has a present action pending in Kings County, albeit on appeal, it appears to the Court that plaintiff has inappropriately split her claims between two counties by bringing the present action here, perhaps in the hope of finding a judge that will be more sympathetic to her arguments. Given the considerable time and work expended by the court in Kings County, any attempt to amend the complaint and bring new causes of action should have been litigated there. The Court notes that, according to Defendants, plaintiff had commenced ten separate proceedings prior to the instant action, and following the instant action, she has commenced two

more—now assigned to this Court. It has also come to the Court’s attention that plaintiff has recently filed a motion to amend the operative complaint for the purpose of “clarify[ing]” that Buiters’ retention of the 1,259 images “violated statutory obligations including but not limited to Article 8 of the European Convention on Human Rights” and that the complaint seeks punitive damages for all causes of action (Doc. 271 at ¶¶ 4-6).⁵

Plaintiff’s argument that the judge in the Kings County action took too long to decide certain motions is, as mentioned before, not an appropriate reason to forum shop in a new county. Moreover, this Court expects to receive similar criticism from plaintiff. This Court would note that plaintiff amended her complaint immediately after oral argument was heard on a prior motion to dismiss and, prior to that, plaintiff submitted opposition to her own motion to seal. It is this very behavior by plaintiff that tends to slow the wheels of justice for which she complains.

Similar to Justice Edwards, this Court finds that plaintiff’s litigation tactics border on being frivolous. However, rather than sanction or enjoin plaintiff, this Court finds that the better course is for plaintiff to reconsider the course she has taken in litigating the series of transactions stemming from the end of her romantic relationship with defendant.

⁵ The return date for this motion is September 24, 2019.

CONCLUSION

Accordingly, it is

ORDERED, that the motion to dismiss is granted, and Verified First Amended Complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED, that the motion for injunctive relief and sanctions is denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for Defendant shall serve plaintiff with the instant decision and order with notice of entry within twenty (20) days.

The foregoing constitutes the decision and order of this Court.

Dated: Sept 20, 2019

ENTER:

Robert D. Kalish
HON. ROBERT D. KALISH
JSC