

<b>Harman Agency, Inc. v Wilhelmina Licensing, LLC</b>
2020 NY Slip Op 33409(U)
October 16, 2020
Supreme Court, New York County
Docket Number: 655399/2018
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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THE HARMAN AGENCY, INC., KELLI WALTERS,

Plaintiff,

- v -

WILHELMINA LICENSING, LLC, WILHELMINA  
INTERNATIONAL, INC., WILLIAM WACKERMANN, ERIC  
STERN

Defendant.

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INDEX NO. 655399/2018  
MOTION DATE N/A  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for SUMMARY JUDGMENT.

In this action, plaintiffs The Harman Agency, Inc. (The Harman Agency) and Kelli Walters, the President and sole owner of The Harman Agency, allege that defendants Wilhelmina Licensing, LLC (Wilhelmina Licensing), its successor-in-interest Wilhelmina International, Inc. (Wilhelmina International) (collectively, Wilhelmina), and William Wackermann, the Chief Executive Officer of Wilhelmina, wrongfully terminated a license agreement between The Harman Agency and Wilhelmina Licensing.<sup>1</sup> The Harman Agency and Wilhelmina are modeling agencies. Plaintiffs allege eleven causes of action asserting contract and tort claims against all defendants. Defendants Wilhelmina and Wackermann move for summary judgment dismissing all of the causes of action. For the reasons that follow, the motion for summary judgment is granted.

<sup>1</sup> The complaint alleges that defendant Eric Stern was an employee or agent of Wilhelmina. (Compl. ¶9.) It is undisputed that defendant Stern has not been served with the summons and complaint.

### Factual Background

It is undisputed that Wilhelmina Licensing and The Harman Agency entered into a License Agreement, as of April 1, 2009, under which Wilhelmina Licensing granted The Harman Agency the right and license to use the “Wilhelmina” trade name and copyrighted designs or other materials (the Licensed Property) in conjunction with the operation of a Model Agency. (License Agreement, Second Whereas Clause; § 1.) It is further undisputed that Wilhelmina International and The Harman Agency executed a License Termination Agreement on May 2, 2017, terminating the License Agreement, including all of The Harman Agency’s rights to utilize the Licensed Property, effective as of April 11, 2017. (License Termination Agreement, § 1 [a].) The License Termination Agreement contains a mutual general release, which provides, in pertinent part:

“ . . . [T]he Parties hereto shall be deemed to have mutually released and forever discharged each other from any and all claims, causes of action, debts, liabilities or obligations, whether arising from or out of the License Agreement, [The Harman Agency’s] operation of a modeling agency, or any other business relationship or dealings by and between the Parties, except for any claims arising from or out of a breach of this Agreement.”

(License Termination Agreement, § 6.)

The complaint alleges that defendants wrongfully terminated the License Agreement and “conduct[ed] a vicious campaign to slander and disparage plaintiffs and steal clients and models from plaintiffs’ model management business.” (Compl., ¶ 1.) The complaint further alleges that defendants “threatened, bullied, intimidated, and coerced Walters to sign a termination agreement with a full release under extreme duress and against her will while she was suffering from severe stress and major depression and anxiety and taking medication that substantially

impaired her judgment.” (Id.) These claims are the subject of sharp dispute between the parties.<sup>2</sup>

### Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd [b]).” (Zuckerman, 49 NY2d at 562.)

Defendants’ motion is a pre-discovery motion for summary judgment. (Pls.’ Memo. In Opp., at 6 [NYSCEF Doc. No. 79]; Defs.’ Reply Memo., at 2-3 [NYSCEF Doc. No. 83].) Contrary to plaintiffs’ contention, the mere fact that discovery has not been conducted does not render the motion premature. (See Pls.’ Memo. In Opp., at 5.) Rather, the burden is on the opponent of a pre-discovery motion for summary judgment to submit “affidavits [] in opposition to the motion,” showing that “facts essential to justify opposition may exist but cannot then be stated. . . .” (CPLR 3212 [f].)<sup>3</sup> Moreover, as discussed further below, plaintiffs fail to show that

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<sup>2</sup> The parties submitted separate Statements of Material Facts. The court declines to consider these Statements, as they are not only unsworn but violate Rule 7 of the Part 60 Practices and Procedures, which requires a single joint statement of fact.

<sup>3</sup> The cases cited by plaintiff are not to the contrary. They held pre-discovery summary judgment motions premature “in the circumstances presented.” (E.g., Yun-Shou Gao v City of New York, 29 AD3d 449, 449 [1st Dept 2006]; Bradley v Ibex Constr. LLC, 22 AD3d 380, 380-81 [1st Dept 2005].)

information necessary to support their causes of action is within defendants' possession as opposed to plaintiffs' possession. (See generally Zuckerman, 49 NY2d at 562-63.)

#### Contract Causes of Action

Plaintiffs plead a first cause of action for breach of the License Agreement, a second cause of action for breach of the implied covenant of good faith and fair dealing, a third cause of action for economic duress in compelling plaintiffs to enter into the License Termination Agreement, and a fourth cause of action for rescission of the License Termination Agreement.

The first cause of action alleges that Wilhelmina's termination of the License Agreement was wrongful and without basis. (Compl., ¶¶ 54-58.) The second cause of action alleges that defendants acted in bad faith in failing to comply with the terms of the License Agreement. (Id., ¶¶ 59-64.) In claiming that Wilhelmina wrongfully terminated the License Agreement, plaintiffs allege, among other things, that Wilhelmina terminated the License Agreement on the ground that plaintiffs had not paid the required minimum royalty payments for 2014, 2015, and 2016. (Id., ¶ 25.) Plaintiffs further claim that they had in fact made such payments for 2014 and 2015, and that the time to make the full 2016 payment had not yet expired. (Id., ¶ 29.) Defendants argue that the claims for breach of contract and breach of the implied covenant of good faith and fair dealing are barred by the License Termination Agreement. (Defs.' Memo. In Supp., at 6, 7.) Plaintiffs counter that the License Termination Agreement is unenforceable on the grounds that the License Termination Agreement was procured by economic duress and is, in any event, unconscionable; that defendants breached the License Termination Agreement "by disparaging and undermining Walters, her new business endeavor, and poaching her clients"; and/or that the License Termination Agreement was procured by fraud because the License Agreement created a franchisor/franchisee relationship between The Harman Agency and Wilhelmina. (Pls.' Memo.

In Opp., at 8.) Plaintiffs also argue that Walters lacked the capacity to contract at the time she signed the License Termination Agreement. (Id., at 21.)

Defendants make a threshold showing, based on the release provision of the License Termination Agreement (§ 6, quoted above) that plaintiffs' breach of contract and implied covenant claims are barred. In opposition, plaintiffs fail to demonstrate that the License Termination Agreement is unenforceable on the grounds stated or to raise a triable issue of fact as to the enforceability of that Agreement.

Plaintiffs' claim that the License Termination Agreement was procured by economic duress is based on the assertions that defendants threatened to take legal action against plaintiffs unless plaintiffs signed the License Termination Agreement, and that defendants would not agree to plaintiffs' proposed modifications of that Agreement. (Pls.' Memo. In Opp., at 9, 12.) These acts are patently insufficient to support a claim of economic duress.

“Economic duress exists where a party is compelled to agree to terms set by another party because of a wrongful threat by the other party that prevents it from exercising its free will.” (Beltway 7 & Properties, Ltd. v Blackrock Realty Advisers, Inc., 167 AD3d 100, 105 [1st Dept 2018], lv denied 32 NY3d 916 [2019].) The fear of litigation is insufficient to establish duress. (Id., at 107.) Moreover, “a party cannot be guilty of economic duress for refusing to do that which it is not legally required to do.” (Edison Stone Corp. v 42nd Street Development Corp., 145 AD2d 249, 255 [1st Dept 1989], quoting 805 Third Ave. Co. v M.W. Realty Associates, 58 NY2d 447, 453 [1983].) Not only were defendants under no obligation to accept plaintiffs' terms, but plaintiffs were represented by counsel at the time of the execution of the License Termination Agreement. (Pls.' Memo. In Opp., at 20.) While plaintiff Walters now asserts that

her counsel did not adequately represent her interests (Walters Aff. In Opp., ¶¶ 115-143), the fact that she was represented further undermines her claim of duress.

Plaintiffs' argument that the License Termination Agreement is unconscionable is also unavailing. (Pls.' Memo. in Opp., 14.) A claim of unconscionability "generally requires a showing that the contract was both procedurally and substantively unconscionable when made – i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (Gillman v Chase Manhattan Bank, N.A., 73 NY2d 1, 10 [1988] [internal quotation marks and citations omitted].) Plaintiffs argue that procedural unconscionability is established by Wilhelmina's "deceptive" and "high pressure tactics," while substantive unconscionability is established because the agreement was "unreasonably favorable to defendants." (Pls.' Memo. In Opp., at 14.)

The claim of procedural unconscionability is without merit under these circumstances in which plaintiff was represented by counsel. Indeed, plaintiffs do not dispute the evidence submitted by Marilee Holmes, Wilhelmina's Vice President of Operations and General Counsel, that plaintiffs' attorney requested various modifications to the License Termination Agreement, some of which were agreed to by Wilhelmina. (Holmes Aff. In Supp., ¶¶ 29-30.) The claim of substantive unconscionability is unsupported by any showing that the terms of the License Termination Agreement were unreasonably favorable to either party. As noted above, the parties dispute whether The Harman Agency owed Wilhelmina royalty payments and whether the License Agreement was properly terminated on that ground. In the License Termination Agreement, Wilhelmina expressly waived its claim to the royalties and the parties exchanged mutual general releases. (License Termination Agreement, §§ 3, 6.) Plaintiffs' claim that they

received no benefit from the Agreement (Pls.' Memo. In Opp., at 14) is accordingly unsupported by its terms.

To the extent that plaintiffs claim that Ms. Walters lacked capacity to consent to the License Termination Agreement, they fail to establish that she lacked the capacity to contract or to raise a triable issue of fact in this regard. “A party’s competence to enter into a contract is presumed, and the party asserting incapacity bears the burden of proof.” (Er-Loom Realty, LLC v Prelosh Realty, LLC, 77 AD3d 546, 548 [1st Dept 2010], lv denied 16 NY3d 710 [2011]; see also Sears v First Pioneer Farm Credit, ACA, 46 AD3d 1282, 1284 [3d Dept 2007].) The party asserting incapacity must show that its mind ““was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction and that such incompetence or incapacity existed when [it] executed the document.”” (Genger v Genger, 123 AD3d 445, 446-47 [1st Dept 2014], lv denied 24 NY3d 917 [2015], quoting Lansco Corp. v N.Y. Brauser Realty Corp., 63 AD3d 513, 514-15 [1st Dept 2009].) Other authority in this department holds that the party asserting incapacity must show that the agreement “was the result of impulsive or irrational behavior beyond [its] control and that defendants knew, or should have known, that [it] did not possess the proper capacity to enter into contracts.” (Blatt v Manhattan Med. Group, 131 AD2d 48, 52 [1st Dept 1987].)

In her affidavit in opposition to this motion, Ms. Walters asserts that from December 2016, when Wilhelmina terminated the License Agreement, and throughout the discussions that led to the execution of the License Termination Agreement in May 2017, “I became extremely depressed and anxious, as I was fearful of Wilhelmina taking legal action that could devastate my company and me financially and put us out of business.” (Walters Aff. In Opp., ¶ 67.) She also states that she was taking prescription medicine at the time (id., ¶ 68), and “was suffering

from severe stress, depression, and anxiety. I was taking Xanax at the time to help me cope with the situation. Such medication substantially impaired my judgment.” (Id., ¶ 88.) Notably, Ms. Walters does not state that she did not understand that she was agreeing to a termination of the License Agreement or that she did not understand the terms of the License Termination Agreement. Nor does she point to any evidence that would have alerted defendants to her lack of capacity to contract.

While plaintiffs submit the affidavit of Dr. Lawrence Von Rago, a psychiatrist, Dr. Von Rago states that he did not know Ms. Walters until October 17, 2018, when he “conducted a psychiatric evaluation on her.” (Von Rago Aff. In Opp., ¶ 2.) His opinion is based on Ms. Walters’ report to him of her condition prior to “signing an extremely important document” in 2017. (Id., ¶¶ 4-6.) He opines that she was experiencing “withdrawal symptoms” based on discontinuance of “psychotropic medication.” (Id., ¶ 8.)<sup>4</sup> He further states: “These withdrawal symptoms, coupled with the sleep deprivation Kelli experienced, at the very least, played a prominent etiological role in her compromised cognition.” (Id., ¶ 10.) The doctor’s opinion is thus not based on personal knowledge. This opinion also does not provide any facts relevant to the court’s determination of whether Ms. Walters’ alleged “compromised cognition” rose to the level of lack of capacity to contract under the governing legal standard.

Plaintiffs further claim that defendants “cannot rely on” the License Termination Agreement because defendants breached the License Termination Agreement by continuing to “disparage[] and defame[] Walters and her new agency” and by continued “poaching” of plaintiffs’ models after the License Termination Agreement was signed. (Pls.’ Memo. In Opp.,

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<sup>4</sup> Doctor Von Rago’s statement that Ms. Walters stopped taking medication appears to contradict her own statement, discussed above, that she was taking medication before she signed the License Termination Agreement. Ms. Walters also attaches as Exhibit B to her affidavit a list of prescriptions filled at CVS which shows that she continued to fill her prescription for alprazolam (Xanax) from January to May 2017. (Walters Aff. In Opp., Ex. B.)

at 14-15.) In particular, plaintiffs claim that defendants breached License Termination Agreement section 1 (e), which provides: “The parties will not disparage, nor undermine, each other or their respective employees and agents, in their business and social endeavors. Each will demonstrate mutual respect and not attempt to undermine or interfere with each other’s business and social pursuits.”

The sole allegations in the complaint regarding Wilhelmina’s alleged defamation of plaintiffs are the following:

“48. Wilhelmina’s employees in New York openly disparaged and defamed plaintiffs and their new agency to clients and modeling talent, creating a windstorm of bad publicity and negative social media frenzy.

49. The receptionist at Wilhelmina’s New York office was instructed to tell the hundreds of models, parents, and clients who called to inquire about Wilhelmina Philadelphia that there were ‘problems’ with that agency and that it was therefore no longer affiliated [with] Wilhelmina.

50. Many models who had worked with Walters informed her that Wilhelmina New York made many disparaging remarks about her and her agency.

51. These actions prompted numerous clients and models to leave plaintiffs’ new agency and discouraged new talent from coming to plaintiffs’ twice-monthly open calls, which resulted in an immediate loss of revenue.”

CPLR 3016 (a) requires that “[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint. . . .” Moreover, “[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation.” (Mann v Abel, 10 NY3d 271, 276 [2008], cert denied 555 U.S. 1170 [2009].) “Whether a particular statement constitutes an opinion or an objective fact is a question of law.” (Id.)

Here, the complaint fails to plead allegations sufficient to support a claim of defamation. The only specific disparaging statement cited – that there were “problems” with plaintiff agency

– is clearly a statement of opinion. Plaintiffs also do not submit any evidence on this motion to support a defamation claim. In particular, they do not submit a single affidavit from any model to whom the disparaging statements were allegedly made or any evidence of social media posts supporting their claim of a “negative social media frenzy.”

The complaint also alleges that after the parties entered into the License Termination Agreement, “Stern continued poaching models under contract with plaintiffs at will.” (Compl., ¶ 52.) In support of this allegation, plaintiff names two models, Terrell Pigeon and Daniel Nelson, whom Stern allegedly induced to breach their contracts with plaintiffs. (Compl., ¶ 78.) On this motion, however, plaintiffs produce no evidence of the contracts these two models allegedly had with plaintiffs. Specifically, plaintiffs produce no written contracts with the two models, and Walters does not state in her affidavit that their contracts were oral. In addition, although the complaint pleads that “numerous clients and models” left plaintiffs’ agency (*id.*, ¶ 51), and information as to the identity of such clients and models is within plaintiffs’ possession, plaintiffs do not identify any but the two models named above. In her affidavit, Ms. Walters repeats the assertions that numerous clients and models left her agency as a result of defendants’ disparaging remarks about her and her agency. (Walters Aff. In Opp., ¶¶ 94-97.) She annexes a document entitled “Models & Actors who attended Open Calls from May 2017 – May 2018 who declined representation with W Talent Mgmt. [her new agency] after calling Wilhelmina NY’s office and speaking with the receptionist.” This document lists 149 names. In her affidavit, Ms. Walters does not set forth the conversations she had with such persons and does not even state that she had conversations with any of these persons. Nor does she provide any information as to whether discussions or negotiations were had with any of these persons regarding entry into contracts and, if so, the status of such negotiations when these persons allegedly declined to enter

into contracts with her new agency. All of this information would be expected to be within plaintiffs' knowledge.

A party's request to rescind a settlement agreement, and to excuse its obligation to perform under such agreement, will be granted only where the party shows that the opposing party's breach of the settlement agreement was "a material and willful breach, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." (Bisk v Cooper Sq. Realty, Inc., 115 AD3d 419, 419 [1st Dept 2014]; see Smolev v Carole Hochman Design Group, Inc., 79 AD3d 540, 541 [1st Dept 2010].) On this record, for the reasons stated above, plaintiffs fail to demonstrate that, or raise a triable issue of fact as to whether, defendants' alleged breaches of the License Termination Agreement render the Agreement unenforceable.

Finally, plaintiffs argue that the License Termination Agreement was procured by fraud because the relationship of the parties was that of franchisor/franchisee, not licensor/licensee. (Pls.' Memo. in Opp., at 15; General Business Law § 680 et seq.) This conclusory assertion is unsupported by any showing that the relationship was mischaracterized or that the provisions of the General Business Law governing franchises were violated in any respect.

In sum, as discussed above, plaintiffs fail to demonstrate, or raise a triable issue of fact as to, the unenforceability of the License Termination Agreement. Plaintiffs are therefore precluded from maintaining their first and second causes of action for breach of the License Agreement and breach of the implied covenant of good faith and fair dealing, respectively.<sup>5</sup> As also discussed above, plaintiffs third cause of action for economic duress in the procurement of the License Termination Agreement is not maintainable.

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<sup>5</sup> The cause of action for breach of the covenant of good faith and fair dealing must also be dismissed as duplicative of the breach of contract claim. (Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423, 426 [1st Dept 2010], lv denied 15 NY3d 704; accord Polaris Venture Partners VI L.P. v AD-Venture Capital Partners L.P., 179 AD3d 548, 548 [1st Dept 2020].)

In the above discussion, the court also rejected plaintiffs' contention that the License Termination Agreement is subject to rescission based on defendants' material breaches of that Agreement, after the Agreement was signed, by defaming plaintiffs' agency and poaching plaintiffs' clients. Plaintiffs' fourth cause of action for rescission of the License Termination Agreement is, however, pleaded not on the basis of alleged defamation and poaching but, rather, "on the basis that plaintiffs were compelled to enter into the License Termination Agreement by Wilhelmina's wrongful threats "to commence legal action against plaintiffs for not signing the Termination Agreement" (compl., ¶ 71), and that "[a]t the time, Walters was suffering from severe stress and major depression and anxiety and taking Xanax to help her cope with the situation, all of which in combination substantially impaired her judgment." (*Id.*, ¶ 72.) For the reasons discussed above, plaintiffs also fail to demonstrate, or raise a triable issue of fact, as to these bases for rescission.

#### Tort Claims

Plaintiffs plead a fifth cause of action for "tortious interference with contractual relationship," a sixth cause of action for tortious interference with prospective business relationships, a seventh cause of action for prima facie tort, an eighth cause of action for intentional infliction of emotional distress, a ninth cause of action for negligent infliction of emotional distress, and a tenth cause of action for negligent hiring and supervision. (*Id.*, ¶¶ 75–104.)

The fifth cause of action alleges that "Plaintiffs had valid contracts with models under their management" and that Stern induced them to breach their contracts." (*Id.*, ¶¶ 75-79.) The sixth cause of action alleges that "[a]s a result of defendants' actions in disparaging and defaming plaintiffs and their new agency, plaintiffs were prevented from entering into business

relationships with potential clients and modeling talent.” (Id., ¶ 81.) This cause of action further alleges that defendants were “motivated solely by malice or to inflict injury by unlawful means to harm and damage plaintiffs. . . .” (Id., ¶ 82.)

To plead a claim for tortious interference with a contract, a plaintiff must allege “the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.” (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424 [1996]; accord Oddo Asset Mgt. v Barclays Bank PLC, 19 NY3d 584, 594 [2012], rearg denied 19 NY3d 1065.) “Specifically, a plaintiff must allege that the contract would not have been breached ‘but for’ the defendant's conduct.” (Burrowes v Combs, 25 AD3d 370, 373 [1st Dept 2006], lv denied 7 NY3d 704; accord Carlyle, LLC v Quik Park 1633 Garage LLC, 160 AD3d 476, 477 [1st Dept 2018].)

“A claim for tortious interference with a prospective business relationship (i.e., an economic advantage) must allege: (1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship.” (534 E.11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 542 [1st Dept 2011], citing NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc., 87 NY2d 614 [1996].) While defamation can suffice as a wrongful means of interference, the claim for defamation must be pleaded with sufficient specificity. (Wolberg v IAI N. Am., Inc., 161 AD3d 468, 470 [1st Dept 2018].)

These causes of action for tortious interference with contract and tortious interference with prospective business relations are not maintainable for the reasons discussed above. In

brief, plaintiffs fail to come forward with any evidence of existing contracts with models that were allegedly breached, including evidence of contracts with the only two named models. In her affidavit, Ms. Walters also states that as a result of defendants' disparaging remarks about her and her agency, numerous models left her agency or were discouraged from coming to her open calls. (Walters Aff. In Opp., ¶ 97.) As discussed above, she provides no factual detail in support of these claims, although the information would be expected to be within her possession.

The eighth cause of action alleges that “[d]efendants intentionally and recklessly engaged in a malicious campaign of extreme and outrageous harassment and intimidation against Walters with the intention of causing or reckless disregard of the probability of causing emotional distress to Walters.” (Compl., ¶ 89.) This cause of action is, by its terms, based on the acts on which the preceding causes of action are based. (*Id.*, ¶ 90.) Plaintiffs contend that the events at issue stemmed from a harassing phone call by Mr. Stern to Ms. Walters that led to a malicious campaign to cause plaintiffs to sign the License Termination Agreement, and then continued after that Agreement was signed. (Pls.’ Memo. In Opp., at 19-20.) As alleged in the complaint, and repeated in Ms. Walters’ affidavit, on December 9, 2016, Mr. Stern called Ms. Walters and, in a profanity-laced tirade, told her her agency was “done.” (Compl., ¶ 23; Walters Aff. In Opp., ¶ 26.) Ms. Walters explains that, as she understood it, Mr. Stern was outraged by her use on the agency’s website of an image of a model working under Mr. Stern, which she believed she was authorized by the License Agreement to use. (Walters Aff. In Opp., ¶¶ 22-24.) Ms. Walters further states that Wilhelmina advised plaintiffs just three days later that it invoked its right to terminate the License Agreement for failure to pay royalties, which, according to Ms. Walters, were in fact paid or not yet due. (*Id.*, ¶¶ 31-34, 37.) She appears to assert that the harassment to procure her agreement to sign the License Termination Agreement included threatening of

lawsuits, disparagement of her business, and poaching of her models and clients. (Id., ¶¶ 56, 66, 74-81, 94-98.) Ms. Walters also claims that this harassment continued after she signed the License Termination Agreement (id., ¶¶ 94-98) and resulted in emotional distress, including “severe stress, depression and anxiety.” (Id., ¶¶ 88.)

The tort of intentional infliction of emotional distress “has 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 [1993].) Such conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” (Id., at 122 [internal quotations marks and citations omitted].) “[A] deliberate and malicious campaign of harassment or intimidation” may constitute extreme and outrageous conduct. (Paulino v Paulino, 170 AD3d 629, 629-30 [1st Dept 2019], quoting Scollar v City of New York, 160 AD3d 140, 146 [1st Dept 2018].)

Here, however, plaintiffs’ allegation that defendants engaged in a malicious campaign is wholly conclusory, and the acts relied upon to support this allegation do not, individually or taken together, rise to the level of outrageousness required to support a cause of action for intentional infliction of emotional distress. The abusive phone call to which Ms. Walters claims to have been subjected, while deplorably crass and vulgar, was not repeated. The subsequent threats of litigation also do not support the cause of action, as “[c]ommencement of litigation, even if alleged to be for the purpose of harassment and intimidation, is insufficient” to support a claim for intentional infliction of emotional distress. (Walentas v Johnes, 257 AD2d 352, 353 [1st Dept 1999], lv dismissed 93 NY2d 958.) As discussed above, plaintiffs do not plead or

come forward with evidence to show that defendants disparaged plaintiffs' business. Even given the benefit of every favorable inference, the complaint alleges nothing more than an unfortunate end to a once apparently successful business relationship, but not one redressable in tort.

The ninth cause of action for negligent infliction of emotional distress alleges that defendants owed a duty of care to Walters, which they breached by engaging in the above acts. (Compl., ¶¶ 95–99.) “[A] cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff’s physical safety, or causes the plaintiff to fear for his or her own safety.” (Bern v East 51st St. Dev. Co., LLC, 78 AD3d 590, 591 [1st Dept 2010] [internal quotation marks and brackets omitted].) “A breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness.” (Ornstein v New York City Health & Hosps. Corp., 10 NY3d 1, 6 [2008] [internal quotation marks omitted].) Plaintiffs do not allege a breach of any duty that would support this tort.

Plaintiffs’ tenth cause of action for negligent hiring and supervision is based on the allegation that “Wilhelmina intentionally, carelessly, recklessly, and/or negligently failed to adequately hire, train, supervise, and discipline its agents, servants, and/or employees with regard to their duties” (compl., ¶ 101), and that Wilhelmina had actual or constructive notice of improper actions” of their employees, including Mr. Stern. (Compl., ¶ 102.) This cause of action is not maintainable, as the acts alleged do not establish wrongful conduct for the reasons discussed above.

In holding that plaintiffs' causes of action are not maintainable, the court rejects plaintiffs' contention that discovery is required to oppose defendants' summary judgment motion. Plaintiffs' seek extensive discovery from defendants regarding their alleged interference with models' existing or prospective contracts with plaintiffs, including all contracts, memos, and correspondence with the models defendants allegedly poached from plaintiffs. (Request for Documents [NYSCEF Doc. No. 67].) As discussed above, plaintiffs have not met their threshold burden of producing evidence that models terminated their contracts with plaintiffs or declined to enter into contracts with plaintiffs. Plaintiffs also request depositions of Mr. Stern and Mr. Wackermann but make no showing that those depositions would lead to evidence sustaining their causes of action.

#### Remaining Causes of Action

The complaint also pleads a seventh cause of action for prima facie tort on the ground that "defendants' actions were done with malice and for the sole purpose of causing plaintiffs damage and harm." (Compl., ¶ 86.) This cause of action is based on the same acts as the other tort causes of action and is duplicative of those causes of action. Moreover, for the reasons discussed above, the acts are insufficient to support the prima facie tort cause of action.


The complaint also pleads an eleventh cause of action for a declaratory judgment that Wilhelmina "had no right or authority to terminate the License Agreement." (Compl., ¶¶ 105-109.) This cause of action must be dismissed as duplicative of the breach of contract cause of action. (Apple Records v Capitol Records, 137 AD2d 50, 54 [1st Dept 1988]; Urban Soccer Inc. v Royal Wine Corp., 53 Misc.3d 448, 463 [Sup Ct, NY County 2016] affd 148 AD3d 576 [1st Dept 2017].)

ORDER

It is accordingly hereby ORDERED that the motion of defendants Wilhelmina Licensing, LLC, Wilhelmina International, Inc., and William Wackermann for summary judgment is granted to the extent of dismissing the complaint in its entirety; and it is further

ORDERED, on the court's own motion, that, as this decision contains confidential, personal information about plaintiff Walters' medical contention, the decision shall be filed under seal, pursuant to 22 NYCRR 216.1; and a copy redacted as to such information shall subsequently be publicly filed.

This constitutes the decision and order of the court.

<u>10/16/2020</u> DATE	 MARCY S. FRIEDMAN, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE