Manna Amsterdam Ave., LLC v Epstein
2021 NY Slip Op 30762(U)
February 24, 2021
Supreme Court, Kings County
Docket Number: 510879/2018
Judge: Reginald A. Boddie

At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 24th day of February 2021.

P R E S E N T:
Honorable Reginald A. Boddie, JSC

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MANNA AMSTERDAM AVENUE, LLC D/B/A GINA LA FORNARINA, MANNA PARC 61, LLC D/B/A GINA LA FORNARINA, MANNA LEXINGTON AVENUE LLC D/B/A GINA LA FORNARINA, MANNA MADISON AVENUE LLC D/B/A GINA LA FORNARINA and MAMEXICANA LLC D/B/A GINA MEXICANA,

Plaintiffs,

Index No. 510879/2018
Cal. No. 17, 18 MS 2, 3

-against-

DECISION AND ORDER

DARREN J. EPSTEIN, ESQ., THE LAW FIRM OF DARREN J. EPSTEIN, ESQ. P.C., RANDY SARF, JZRM CORPORATION, HRI CONSULTING, INC., IMPERIAL BAG & PAPER CO., LLC and ACE ENDICO CORP.,

Defendants.

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Papers	Numbered
MS 2	Docs. # 91-97, 99-102
MS 3	Docs. # 103-119

Upon the foregoing cited papers, the decision and order on plaintiff's motion to dismiss defendants' counterclaims and defendant's motion to dismiss the Amended Complaint, pursuant to CPLR 3211, is as follows:

Plaintiffs (collectively Manna) own and operate a restaurant. Defendants Imperial Bag & Paper Co. (Imperial) and Ace Endico Corp. (Ace) (collectively Suppliers) are restaurant suppliers with whom Manna had contracts and who have pending collection actions against Manna in Supreme Court, Westchester County and the New York City Civil Court, Kings County.

By complaint dated December 4, 2017, Imperial Bag commenced an action against Manna in New York City Civil Court, Kings County to recover $17,926.40 allegedly due and owing for goods sold and delivered. By complaint dated December 15, 2017, JZRM Corporation (JZRM), as agent for Ace, commenced an action against Manna in Supreme Court, Rockland County to recover $85,136.56 allegedly due and owing for goods sold and delivered. The JZRM action was subsequently transferred to Supreme Court, Westchester County. Darren Epstein, Esq. was the attorney of record to the Suppliers in these actions.

Manna commenced the instant action against all the named defendants to recover damages alleging they engaged in a fraudulent collections scheme. The gravamen of Manna's complaint is defendants Darren Epstein, Esq., the Epstein Law Firm, Randy Sarf, JZRM and HRI Consulting (HRI), as authorized agents for Imperial and Ace, engaged in a fraudulent debt collections scheme in which they deliberately, knowingly and fraudulently served information subpoenas and restraining notices based on a nonexistent judgment and caused their Citibank account to be frozen for two days in an attempt to threaten, coerce, intimidate and force them to make payment. Plaintiffs alleged that defendants' fraudulent actions caused them economic harm including decreased sales, lost profits, inability to meet payroll, loss of employees and inventory, and attorney's fees. The complaint alleged Randy Sarf, a debt collector and the President and shareholder of defendants JZMR and HRI, devised a scheme with Epstein to falsely represent that monetary judgments had been entered against Manna in the Kings and Westchester County cases on December 18, 2017. The complaint alleged JZRM and HRI operated debt collection services without the requisite licenses and defendants knowingly and intentionally used an unlicensed process server in the Kings and Westchester County actions.

The Amended Complaint alleged Ace and Imperial conspired with, participated in a scheme, and knowingly engaged with one or more of the defendants, in Manna's cases and numerous others filed against other alleged judgment debtors in the Greater New York area, to obtain debt collection results based on improper conduct and illegal practices that were strikingly and noticeably different from results achieved by other attorneys that perform debt collection services. Plaintiffs alleged that in this and other cases, defendants caused their attorney to enter default judgments prior to defendants' time to answer or appear expired.

The compliant further alleged that on January 3, 2018, after Epstein withdrew the restraining notices, an accountant employed by Manna received a call from "Nicholas" from Epstein's office. Plaintiffs alleged Nicholas threatened to send "his" attorney to the Manna Madison location to forcibly collect and take possession of plaintiffs' inventory and property.

Plaintiffs alleged 1) abuse of process, 2) prima facie tort, 3) civil conspiracy, 4) mail fraud (predicate 1), 5) wire fraud (predicate 2), 6) financial institution fraud (predicate 3), 7) interference with commerce by robbery or extortion (predicate 4), 8) RICO violations, 9) conversion, 10) commercial disparagement, 11) defamation, 12) intentional infliction of emotional distress, 13) negligent infliction of emotional distress, 14) violations of New York Judiciary Law § 487, 15) negligence, and 16) gross negligence including willful, wanton and reckless conduct.

Defendants asserted counterclaims alleging they are entitled to recover against plaintiffs, including Paola Pedrignani (Pedrignani), as guarantor, for debts in the amount of $18,000 and $70,000, plus fees and costs, for goods sold and delivered, and seeking damages incurred in defending a frivolous lawsuit.

In considering a motion to dismiss pursuant to CPLR 3211, the compliant is given liberal construction and "the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*see* CPLR 3211 [a] [7]; *Simos v Vic-Armen*

Realty, LLC, 92 AD3d 760, 761 [2d Dept 2012] [internal quotation marks and citation omitted]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Plaintiffs moved to dismiss the Suppliers' first, second and third counterclaims as duplicative of the claims alleged in the Kings County and Rockland/Westchester County cases. On the grounds that the Suppliers' claims against Manna for monetary damages in the amounts of $18,000 and $70,000 for goods allegedly sold and delivered are pending in the above cited actions, the Suppliers' first, second and third counterclaims are dismissed as duplicative.

Manna also moved to dismiss Suppliers' fourth counterclaim which alleged frivolous litigation in violation of NYCRR 130-1 b. The Suppliers alleged Manna's Amended Complaint asserts material factual statements that are false, without merit in law, cannot be supported by reasonable argument, and was filed to delay or prolong the resolution of litigation, harass or maliciously injure the Suppliers. For the reasons stated herein, this counterclaim is also dismissed. Accordingly, plaintiffs' motion to dismiss defendants' counterclaims is granted.

Imperial and Ace (the Suppliers) moved to dismiss all causes of action alleged in the Amended Complaint on the grounds that plaintiff failed to state a cause of action, or plaintiffs' causes of action should be addressed in the prior pending collection actions and the cases should be consolidated. Movants averred Manna failed to allege viable causes of action or damages against them. They further argued that to the extent Manna seeks damages against Darren Epstein, they should do so in the actions pending in Kings and Westchester Counties.

Suppliers averred the first cause of action, abuse of process, was only alleged against Epstein, The Epstein Law Firm, Sarf, JZRM and HRI, and therefore should be dismissed against them. The Court rejects defendants' argument on the ground that the Amended Complaint alleged the Suppliers conspired with Epstein, The Epstein Law Firm, Sarf, JZRM and HRI in their collection activities against Manna and numerous others.

"[C]ausing process to issue lawfully but to accomplish some unjustified purpose" is abuse of process (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 400 [1975]). The tortious action is the "[use of] legal process to attain some collateral objective," such as the "employment of process to extort property," or for blackmail or retribution (*id.*, at 402, 404 [citations omitted]). "Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of process in a perverted manner to obtain a collateral objective" (*Ettienne v Hochman*, 83 AD3d 888, 888 [2d Dept 2011] [citations omitted]). The process complained of "must involve an injury to or an interference with one's person or property" (*Varela v Investors Ins. Holding Corp.*, 185 AD3d 309, 311 [2d Dept 1992], quoting *Siegel v Smith, Panish & Shapiro*, 136 AD2d 620, 621 [2d Dept 1988]; *Williams v Williams*, 23 NY2d 592, 596 n 1 [1969] [describing types of writs which can create a cause of action including cases as the use of a subpoena for the collection of a debt]). The Court of Appeals in *Board of Educ. of Farmingdale Union Free School Dist.*, 38 NY2d at 403, explained:

> Despite the paucity of New York authority, three essential elements of the tort of abuse of process can be distilled from the preceding history and case law. First, there must be regularly issued process, civil or criminal, compelling the performance or forebearance [*sic*] of some prescribed act. Next, the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification (*cf. James v. Board of Educ. of Cent. School Dist. No. 1 of Towns of Orangetown & Clarkstown*, 37 NY2d 891, 378 NYS2d 371, 340 NE2d 735). Lastly, defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process.

Here, plaintiffs pleaded defendants participated with each other in a fraudulent debt collections scheme in order to obtain extraordinary results. To that end, plaintiffs alleged that following commencement of the collections actions, but prior to the expiration of plaintiffs' time to answer, Epstein, a co-conspirator, issued information subpoenas and restraining notices, absent a judgment, resulting in the freezing of plaintiffs' bank account, and with the intent to threaten and coerce them into paying an alleged debt. Assuming these allegations are true and affording plaintiffs every favorable inference, the Amended Complaint nevertheless failed to state a cause of action for abuse of process as there is no allegation that the information subpoenas and restraining notices were issued to achieve a collateral advantage beyond the accelerated collection of the debt allegedly owed. Therefore, the branch of defendants' motion to dismiss the first cause of action for abuse of process is granted.

Suppliers argued the second cause of action, prima facie tort, was insufficiently pleaded. They argued the Amended Complaint was patently devoid of any allegation that Ace or Imperial took any of the complained of action or had any intent relating to it, and failed to set forth specific and measurable special damages.

The elements of a cause of action for prima facie tort are: (1) intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (*Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768, 772 [2d Dept 2017]). To adequately plead prima facie tort, the complaint must plead the defendant's malicious intent or disinterested malevolence as the sole motive for the challenged conduct (*Elkoulily*, 153 AD3d at 772, citing *see Simaee v Levi*, 22 AD3d 559 [2d Dept 2005] [holding plaintiff's cause of action for prima facie tort was properly dismissed because plaintiff's conclusory allegation that the defendants' conduct was motivated solely by malice and disinterested malevolence was contrary to its allegations concerning the defendants' economic motives for terminating the contract and plaintiff failed to set forth special damages]). Here, plaintiffs alleged defendants participated in a fraudulent collections scheme with the intent to intimidate and coerce payment of an alleged debt and to that end issued unlawful information subpoenas and restraining notices. Even affording plaintiffs every favorable inference, the allegations state that defendants were motivated, at least in part, by their economic interests in collecting debts allegedly owed to them. Accordingly, defendants' motion to dismiss the second cause of action, prima facie tort, is granted.

Suppliers sought to dismiss the third cause of action, civil conspiracy, on the grounds that this claim is not recognized in New York. "Although an independent cause of action for civil conspiracy is not recognized in this State, a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme" (*Faulkner v City of Yonkers*, 105 AD3d 899, 900 [2d Dept 2013], quoting *Litras v Litras*, 254 AD2d 395, 396 [2d Dept 1998] [citation omitted]). Therefore, under New York law, "[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement" (*Faulkner*, 105 AD3d at 900, quoting *Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2012]; [citations omitted]). "A bare conclusory allegation of conspiracy is usually held insufficient" (*Faulkner*, 105 AD3d at 901, quoting *Goldstein v Siegel*, 19 AD2d 489, 493 [1st Dept 1963] [citations omitted]).

Here, Manna pleaded that "[t]he resulting actions of Defendants' conspiracy includes negligence, negligent and intentional infliction of emotional distress, abuse of process, defamation and prima facie tort against Plaintiffs" and sought consequential, incidental and punitive damages. In opposition to defendants' motion, plaintiffs argued ". . . [their] civil conspiracy claims are actionable because sufficient evidence exists in the record to establish Ace and Imperial's abuse of process and prima facie tort." However, the pleadings and this argument are insufficient to establish a cause of action for civil conspiracy. Accordingly, the branch of defendants' motion to dismiss the third cause of action for civil conspiracy is granted.

Suppliers sought to dismiss the fourth (mail fraud), fifth (wire fraud), sixth (bank fraud) and seventh (extortion) causes of action on the ground that no private right of action exists pursuant to the federal statutes that govern these claims. The Amended Complaint pleaded these four causes of action as predicates to the eighth cause of action alleging RICO violations. Suppliers also sought to dismiss the eighth cause of action on the grounds that New York's RICO statute is a criminal statute and does not confer civil liability, and plaintiff failed to state a cause of action under federal law. As an initial matter, the Amended Complaint did not plead the fourth through eighth causes of action as either State or Federal claims. Plaintiffs' opposition to this branch of Suppliers' motion argued the Amended Complaint sufficiently alleged violations of 18 USC §§ 1962 (c) and 1962 (d) of the RICO statute.

The federal statute provides civil liability for racketeering (*see* 18 USC §§ 1962, 1964 [c]; *see e.g. House of Spices (India), Inc. v SMJ Servs., Inc.*, 103 AD3d 848 [2d Dept 2013]; *see Besicorp Ltd. v Kahn*, 290 AD2d 147, 151 [3d Dept 2002]; *see Ritchie v Carvel Corp.*, 180 AD2d 786, 787 [2d Dept 1992]). RICO claims, as alleged here, require plaintiff to allege defendant has either (1) collected an unlawful debt; or (2) engaged in a pattern of racketeering activity (*see* 18 USC § 1962 [a] ["It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . ."]). Here, there is no allegation that defendants collected an unlawful debt.

Therefore, a claim for RICO violations requires plaintiff to plead that specific defendants engaged in a pattern of racketeering activity which affect "interstate or foreign commerce" (*see* 18 USC 1962; *see Besicorp*, 290 AD2d at 151-152; *see Ritchie*, 180 AD2d at 787, ["if an act of wire fraud is alleged, it must be predicated on interstate communications"], citing *see Creed Taylor v CBS, Inc.*, 718 F Supp 1171, 1179 [SDNY 1989]; *see also Eisenberger v Spectex Industries, Inc.*, 644 F Supp 48, 51 [EDNY 1986]). Here, there is no allegation of interstate communications to sustain plaintiffs' wire fraud claim. Accordingly, the fifth cause of action for wire fraud is dismissed.

When, as here, allegedly fraudulent communications by mail is alleged as a predicate RICO act, the pleading must conform to rule 9 (b) of the Federal Rules of Civil Procedure (*see Grafstein v Schwartz*, 78 AD3d 772, 773 [2d Dept 2010]; *see Ritchie v Carvel Corp.*, 180 AD2d 786, 787 [2d Dept 1992]). Rule 9 (b) will be satisfied if the complaint specifies the following:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) the same, (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants "obtained as a consequence of the fraud" (*Ritchie*, 180 AD2d at 787, citing *Conan Properties v Mattel, Inc.*, 619 F Supp 1167, 1172 [SDNY 1985]).

The allegedly fraudulent communications must be specifically described (*Ritchie*, 180 AD2d at 787). The time, place, and speaker of the alleged misrepresentations, or the documents in which they appear, must be identified with specificity (*id.*). Here, while the Amended Complaint alleged fraudulent filing and service of legal documents, it lacks specificity as to defendants' use of the mail and failed to allege facts implicating interstate or foreign commerce (*see* 18 USC § 1341; *see Besicorp*, 290 AD3d at 152). Accordingly, the fourth cause of action for mail fraud is dismissed.

To survive a motion to dismiss, the complaint must plead "conduct of an enterprise through a pattern of racketeering activity, meaning that the racketeering predicates are related and amount to or constitute a threat of continued racketeering activity" (*Becher v Feller*, 64 AD3d 672, 677 [2d Dept 2009] [citation omitted]; *Greenstone/Fontana Corp. v Feldstein*, 72 AD3d 890, 894 [2d Dept 2010] [to survive a motion to dismiss, plaintiff must allege facts to support an inference of a threat of continuing criminal activity]; *Besicorp*, 290 AD2d at 152 [to sustain a RICO action, plaintiff must "sufficiently plead two or more predicate acts under RICO"]).

Here, plaintiff alleged predicate activities also included bank fraud (sixth cause of action) and extortion (seventh cause of action). "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right" (18 USCA § 1951 [b] [2]). It is well-settled that an essential element of extortion is consent (*People v Hagen*, 212 AD 879 [2d Dept 1925]). Here, even assuming the Amended Complaint sufficiently pleaded defendants obtained the property from another, by . . . fear, or under color of official right, it failed to plead facts to establish the consent element. Accordingly, the branch of defendants' motion to dismiss the seventh cause of action for extortion is granted.

Finally, plaintiffs alleged defendants made false statements to their bank and interfered with their business by illegally freezing their bank accounts to coerce them into paying debts allegedly owed. The Amended Complaint also alleged court filings show, beginning in 2016, and on February 9, 2018, that Ace and Imperial, through their attorney Epstein and one or more of the other defendants entered numerous money judgments against various other alleged judgment debtors in courts in the Greater New York area on the basis of misrepresentations made to the courts' judgment clerks. Even assuming the Amended Complaint sufficiently pleaded bank fraud, to sustain their civil RICO claim, plaintiffs were required to allege that multiple predicates constituted a pattern of racketeering activity (*Besicorp*, 290 AD2d at 152; *New York Mtge. Servicing Corp. v Dake*, 179 AD2d 1007, 1008 [4th Dept 1992], citing *see H.J. Inc. v Northwestern Bell Telephone Co.*, 492 US 229, 229-230 [1989]). Having failed to allege facts sufficient to maintain their causes of action for wire fraud, mail fraud and extortion, plaintiffs' RICO claim fails as plaintiffs have not pleaded the requisite pattern of racketeering activity. Accordingly, the branch of defendants' motion to dismiss the fourth through eighth causes of action is granted.

Suppliers sought to dismiss the ninth cause of action, conversion, on the grounds that the Amended Complaint alleged only The Epstein and Sarf defendants took action which led to the two-day restraint on the plaintiffs' bank account. The Suppliers further argued that plaintiff did not allege they intentionally interfered with, or were ever obliged to return, the funds in the restrained accounts and therefore plaintiffs have failed to plead the ninth cause of action against them. " 'Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights' " (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012, quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [citations omitted]). It is well settled that "[i]nterference with the right of possession is essence of a conversion" (*General Elec. Co. v American Export Isbrandtsen Lines, Inc.*, 37 AD2d 959 [2d Dept 1971] [citation omitted]). Actual physical possession of the property is not required, rather any wrongful exercise of dominion by one other than the owner is a conversion (*General Elec. Co.*, 37 AD2d at 959-960). Here, plaintiffs alleged Epstein, acting as attorney for defendants, issued false and fraudulent legal documents which caused plaintiffs' Citibank account to be frozen for two days. Having alleged a wrongful exercise of dominion over and interference with plaintiffs' property, defendants' motion to dismiss plaintiffs' ninth cause of action for conversion is denied.

Suppliers sought to dismiss the tenth cause of action, commercial disparagement, on the ground plaintiffs failed to allege disparagement of goods or services and special damages. Suppliers also sought to dismiss the eleventh cause of action, defamation, on the grounds that plaintiff failed to plead this cause of action or, in the alternative, the statement was privileged. In the commercial litigation context, these causes of action are founded on false statements that cause harm to the reputation or credit of a business (*see Harwood Pharmacal Co v National Broadcasting Co.*, 9 NY2d 460, 464 [1961]). ". . . such statements that constitute a prima facie attack on a corporation's reputation by impugning its "integrity or creditworthiness," are deemed defamatory per se and do not require a showing of special damages. For example, statements allegedly made to banks and customers with which a corporation was doing business that the corporation "had acted illegally and had chosen an official whose reputation warranted care in future dealings" were deemed sufficiently defamatory not to require special damages" (NYPRAC-COMM § 138:12, citing *Isaacs v Pan Am. Trading Co.*, 7 AD2d 757, 758 [2d Dept 1958]; *see also BDCM Fund Adviser, L.L.C. v Zenni*, 103 AD3d 475, 478 [1st Dept 2013]). Here, plaintiffs alleged defendants published false statements to their bank which identified them as judgment debtors even though no judgment had been obtained. They alleged the fraudulent restraining notices tarnished their reputation with their bank and interfered with their customer-based relationships. They further alleged they incurred legal fees and were delayed in satisfying payroll and other business obligations, and thus delayed in realizing financial gains.

Defendants' argument that the statements were privileged is insufficient to defeat plaintiffs' allegations that the restraining notices were fraudulently issued with purpose of coercing payment of the alleged debts (*see Lacher v Engel*, 33 AD3d 10, 13 [1st Dept 2006]; *see also Diorio v Ossining Union Free School Dist.*, 96 AD3d 710, 712 [2d Dept 2012]). Accordingly, defendants' motion to dismiss plaintiffs' tenth and eleventh causes of action is denied.

Suppliers sought to dismiss twelfth cause of action, intentional infliction of emotional distress, on the ground that Epstein's conduct, even if attributable to the Suppliers, was not sufficiently extreme or outrageous. As a matter of law, allegations of unprofessional and inappropriate conduct, such as the threatening phone call allegedly made by "Nicholas" here, do not satisfy the element of extreme or outrageous conduct in a cause of action for intentional infliction of emotional distress (*see American Credit Card Processing Corp. v Fairchild*, 11 Misc

3d 972, 977-979 [Sup Ct, Suffolk County 2006]; *cf. Matter of Leff v Our Lady of Mercy Academy*, 150 AD3d 1239, 1241-1242 [2d Dept 2017]).

Moreover, the tort claims of intentional and/or negligent infliction of emotional distress alleged in the twelfth and thirteenth causes of action of the Amended Complaint lack merit because they seek to recover damages for emotional distress caused by alleged intentional or negligent harm to personal property, including Manna's bank accounts, inventory and property (*see Probst v Cacoulidis*, 295 AD2d 331, 332 [2d Dept 2002] [citations omitted]). "Damages are not recoverable for mental distress caused by malicious or negligent destruction of personal property" (*Probst*, 295 AD2d at 332 [citations omitted]). Accordingly, the thirteenth and fourteenth causes of action for intentional and negligent infliction of emotional distress are dismissed.

Suppliers sought to dismiss the fourteenth cause of action pursuant to New York Judiciary Law § 487 on the grounds that this section provides a remedy against attorneys and counselors who are guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party, and Suppliers are not attorneys. On the grounds that Suppliers are not attorneys and the imposition of damages for violation of the statute is ". . . designed to punish attorneys who violate the statute and to deter them from betraying their 'special' obligation to protect the integrity of the courts and foster their truth-seeking function,' " Suppliers' motion to dismiss the fourteenth cause of action against them is granted (*see Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 177-178 [2020]; *see Specialized Indus. Servs. Corp. v Carter*, 99 AD3d 692, 693 [2d Dept 2012], citing *Amalfitano v Rosenberg*, 12 NY3d 8 [2009]).

Suppliers sought to dismiss the fifteenth and sixteenth causes of action for negligence and gross negligence on several grounds, including plaintiffs' failure to plead the Suppliers owed them a duty. Defendants relied on *Benzemann v Citibank N.A.*, 149 AD3d 586, 586 (1st Dept 2017), in support of their argument that they owed no duty to plaintiffs. The case in *Benzemann* arose from the restraining notices issued by defendants and the resulting restraints placed on plaintiff's bank accounts (*id.* at 586). The Court held plaintiff's negligence claims were properly dismissed because "there [were] no allegations of privity or near-privity between the [attorney and his law firm] defendants and plaintiffs, nor [were] there any non-conclusory allegations of their "fraud, collusion, malice or bad faith" (*id.*, citing *Pecile v Titan Capital Group, LLC*, 96 AD3d 543, 544, 947 NYS2d 66 [1st Dept 2012], lv. denied 20 NY3d 856, 959 NYS2d 691, 983 NE2d 770 [2013]). The Court also held that plaintiff's negligence claims against the attorney's clients, who were identified on the restraining notices as the creditors, also failed on the grounds that they were conclusory since they, too, were premised on the attorney conduct (*id.* at 586-587).

Plaintiffs' argument in opposition relied on *Colorado Capital v Owens*, 227 FRD 181, 188-189 (EDNY 2005). In determining whether a credit card issuer owes a duty of care to its debtors, the Court held

> There is nothing contrary to public policy that precludes the Court from holding credit card issuers to a duty of care in the collection of their debts. It is also entirely reasonable to expect credit card issuers to exercise care in the selection of the debt collection firms they hire to collect their debts. For example, surely credit card issuers should not be able to escape liability if they hired a debt collection firm that used hit-men or torturous means to collect debt from their customers. Creditors should reasonably foresee that a debt collection firm they hire could possibly resort to impermissible or illegal conduct to collect debt. Thus, the imposition of a duty of care in this context furthers the legislative and societal judgment that unfair and harmful debt collection practices in this country are unacceptable (*Colorado Capital*, 227 FRD at 189).

New York law does not ordinarily recognize any liability on the part of an attorney to a nonclient third party for injuries sustained as a result of an attorney's actions in representing his client (*see New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 153 AD3d 1351, 1355 [2d Dept 2017], citing *see Benzemann v Citibank N.A.*, 149 AD3d 586, 586 [1st Dept 2017]; *Doo v Berger*, 227 AD2d 435, 436 [2d Dept 1996]; *see also DeMartino v Golden*, 150 AD3d 1200, 1201 [2d Dept 2017]). However, there is a narrow exception when there is fraud, collusion, a malicious or tortious act, or other special circumstances (*id.*; *Ginsburg Dev. Cos., LLC v Carbone*, 85 AD3d 1110, 1111 [2d Dept 2011]).

Here, the pleadings did not allege privity or near-privity between Epstein and Manna, and alleged liability for negligence against the Suppliers is premised on the conduct of attorney Epstein. Specifically, the negligence cause of action pleaded in the Amended Complaint alleged "Epstein told one or more persons, including a Court Clerk, that serving the Restraining Notices on Plaintiffs based on non-existent judgments was 'an honest mistake.' " It also pleaded that defendants were "negligent, reckless and careless by not following the laws, procedures and rules set out by the City and State of New York and improperly and illegally causing Plaintiffs' bank accounts to be frozen." However, the complaint alleged the defendants acted in concert to coerce plaintiffs and expedite collection of debts allegedly owed. Accordingly, this branch of defendants' motion is denied.

As to plaintiffs' allegations of gross negligence, plaintiffs alleged "[d]efendants were grossly negligent engaged in willful, wanton and reckless misconduct in the performance of their duties as attorneys, debt collectors, agents and principals and/or Defendants acted with reckless indifference or conscious disregard to the known or obvious risk of harm to Plaintiffs when Defendants unlawfully froze Plaintiffs' bank accounts." Plaintiffs further alleged "Defendants' extreme departure from the ordinary standard of conduct and/or failing to exercise even slight care or diligence to Plaintiffs by deviating from Defendants' duty owed to Plaintiffs and/or by acting with thoughtless disregard of the consequences that may and did follow from their fraudulent act(s) and/or omission(s) constituted gross negligence."

To constitute gross negligence, a party's conduct must " 'smack[ ] of intentional wrongdoing' " or "evince[ ] a reckless indifference to the rights of others" (*Ryan v IM Kapco*, Inc., 88 AD3d 682, 683 [2d Dept 2011], citing *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554

[1992], quoting *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]). Here, based on the allegations asserted in the complaint, this branch of defendants' motion to dismiss is denied.

Suppliers also sought to dismiss Pedrignani as a named plaintiff on the grounds that no factual basis is given for any claims that she may purport to assert, and to the extent that the "emotional distress claim" is attributable to her, it is improperly pleaded. In opposition, Manna argued, "The individual Plaintiff Paola, the owner/operator of Manna restaurant, suffered physical trauma and emotional distress due to Defendants' wrongful placement of the Restraining Notices." The pleading of the twelfth cause of action for intent, at paragraph 181, alleged "Defendants' unlawful freezing of Plaintiffs' bank accounts caused Plaintiffs to suffer mental and physical anguish, which required medical and other healthcare." To the extent Pedrignani was identified as an owner of the plaintiff corporations, this branch of defendants' motion to dismiss is denied.

Accordingly, plaintiffs' motion to dismiss defendants' counterclaims (MS 2) is granted. Defendant Suppliers' motion to dismiss the Amended Complaint (MS 3) is granted to the extent plaintiffs' first, second, third, fourth, fifth, sixth, seventh, eighth, twelfth and thirteenth causes of action are dismissed on the ground that plaintiffs failed to state a cause of action (*see* CPLR 3211 [a] [7]). The fourteenth cause of action, pursuant to Judiciary Law § 487, is dismissed only as to the Suppliers.

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Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.