

Tawil v Tawil
2021 NY Slip Op 32771(U)
December 13, 2021
Supreme Court, Kings County
Docket Number: Index No. 525349/20
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of December, 2021.

P R E S E N T:

HON. CAROLYN E. WADE,

Justice.

-----X
CHARLES C. TAWIL,

Plaintiff,

-against-

Index No. 525349/20

HABIB TAWIL, RICHARD S. FINKELSTEIN, ALBERT ROSENHAUS, MICHAEL BERNSTEIN, ALBERT DWECK, EDWARD WIPPER, DARREN OVED, OVED & OVED LLP, AND BERKOWITZ, LICHTSTEIN, KURITSKY, GIASULIO & GROSS LLC,

Defendants.

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The following e-filed papers read herein:

NYSEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) _____	<u>11-21 24-25 27-33</u>
Opposing Affidavits (Affirmations) _____	<u>35 37-39</u>
Reply Affidavits (Affirmations) _____	<u>49-51</u>
Sur Reply _____	<u>43-45</u>

Upon the foregoing papers, plaintiff Charles C. Tawil (Charles) moves (in motion sequence [mot. seq.] two) for an order, pursuant to CPLR 3215, granting him a default judgment against defendant Habib Tawil (Habib), and ordering an inquest on damages.

Defendant Habib moves (in mot. seq. three) for an order, pursuant to CPLR 3211 (a) (4) and (a) (7),¹ dismissing the claims asserted against him in the amended complaint (the first through fourth causes of action).

Defendants Richard S. Finkelstein (Finkelstein) and Berkowitz, Lichtstein, Kuritsky, Giasullo & Gross LLC (incorrectly sued herein as Berkowitz, Lichtstein, Kuritsky, Giasulio & Gross LLC) (collectively, the BLKGG Defendants) move (in mot. seq. four) for an order, pursuant to CPLR 3211 (a) (7), dismissing the claims asserted against them in the amended complaint (the fourth through the seventh causes of action).

Background

Plaintiff Charles and defendant Habib are brothers and each is a fifty percent (50%) beneficiary of a trust under the will of the Alphonse Tawil Family Trust (Family Trust) and the Irrevocable Joint Life Insurance Trust (Insurance Trust). Habib was appointed executor of Charles and Habib's parents' wills and co-trustee of the testamentary Family and Insurance Trusts created thereunder. The management of the estate assets has been a source of conflict between the brothers, and defendants contend that there is pending litigation in Monmouth County Chancery Court in New Jersey in which Habib, as executor on behalf of his father's estate, seeks accountings of the assets of the Insurance and the Family Trusts. The BLKGG Defendants were former counsel to the Insurance and Family Trusts.

¹ Although there is no reference to CPLR 3211 (a) (4) in Habib's notice of motion, his memorandum of law in support of his dismissal motion argues that the amended complaint must be dismissed pursuant to CPLR 3211 (a) (4) based on two litigations pending in the Monmouth County Chancery Court in New Jersey (*see* NYSCEF Doc No. 26 at 11-12).

On December 17, 2020, Charles commenced this action by filing a summons and a verified complaint. On January 28, 2021, the BLKGG Defendants moved to dismiss the original complaint, which motion was subsequently withdrawn.

Meanwhile, on February 17, 2021, Charles filed the first amended verified complaint alleging that defendants engaged in “a deliberate and relentless campaign to financially and emotionally cripple [him] and cause [him] severe suffering and hardship” and “a longstanding campaign of deliberate, systematic, and malicious harassment . . . to withhold and deprive [him of] monies, real property, personal property, financial information and insurance proceeds bequeathed to [him] pursuant to the Insurance Trust and the Family Trust” (amended complaint at ¶¶ 15-23).

Allegedly, in March 2020, Charles, who was living with his elderly aunt, was forced to move out due to health concerns brought on by the COVID-19 pandemic. After living inside his vehicle for four days, Charles allegedly accepted an invitation from Habib to stay at his house. Hours into Charles’ stay, however, Habib revealed that his wife may have COVID-19. Charles allegedly took shelter in their parents’ former residence in Deal, New Jersey (Deal House), which was vacant and an asset of the Family Trust to which Charles was a beneficiary. Habib allegedly contacted the Deal water department, advised them that Charles was a squatter at the Deal House and had the water shut off. Additionally, Habib allegedly called the Deal Police Department and accused Charles of trespassing and burglary at the Deal House, for which Charles was criminally charged.

The amended complaint alleges that the foregoing incidents are the most recent in a long history of events causing Charles extreme emotional stress, which started more than a decade ago when the parties' mother, Marcelle (Marcy), was still alive. The amended complaint alleges that the parties' mother had dementia and was therefore, unable to execute binding paperwork, but Habib fraudulently obtained a power of attorney. The amended complaint also claims that Habib recklessly managed and gambled away their mother's assets, failed to provide her with basic care and allowed her to die in her own filth and blood covered in bedsores. Annexed as Exhibit A to the amended complaint is a June 25, 2009 Deal Police Report of a "welfare check on elderly female[,]” Marcy Tawil, the "victim" at 63 Roosevelt Avenue in Deal, New Jersey (the Deal House), based on a report of neglect by Charles. The Deal Police Report described that:

“FURTHER INVESTIGATIONS REVEALED NO GAS FOR COOKING, NO TELEPHONE & NO WATERSERVICE FOR THE BATH, OR DRINKING WATER. THERE WERE FECES & URINE STILL SITTING IN THE OTHER TOILETS. . . I ADVISED MR. TAWIL [OF] HIS MOTHER'S CONDITION & THE DEPLORABLE CONDITIONS WITHIN THE HOME. . . .”

The amended complaint alleges that, although Habib had a duty to coordinate care for their mother, he refused to pay for proper services and their mother suffered as a result. Charles allegedly suffered emotionally because he was not allowed access to estate assets and was unable to rescue his mother and pay for her care.

The amended complaint also alleges that Habib and the estate attorneys executed false real estate transfers and banking transactions to divert and diminish the value of the

estate assets, including a transfer of the Deal Home from the estate attorneys to Habib in 2011 for \$1.00 and the sale of another property whose sale proceeds are unaccounted for. In addition, the amended complaint provides that Habib terminated Charles' family's medical insurance by stopping the payments that were being made by the estate and, consequently, Charles' wife was unable to consult a doctor after she was involved in a car accident in 2021 and she lost sight in one eye.

The amended complaint asserts the following ten causes of action: (1) the first cause of action against Habib for prima facie tort; (2) the second cause of action against Habib for intentional infliction of emotional distress; (3) the third cause of action against Habib for negligent infliction of emotional distress; (4) the fourth cause of action against Habib, Finkelstein, Edward Wipper, Darren Oved, Oved & Oved LLP and the BLKGG Defendants for fraud; (5) the fifth cause of action against defendants Edward Wipper, Darren Oved, Oved & Oved LLP and the BLKGG Defendants for aiding and abetting Habib's prima facie tort; (6) the sixth cause of action against defendants Edward Wipper, Darren Oved, Oved & Oved LLP and the BLKGG Defendants for aiding and abetting intentional infliction of emotional distress; (7) the seventh cause of action against defendants Edward Wipper, Darren Oved, Oved & Oved LLP and the BLKGG Defendants for aiding and abetting negligent infliction of emotional distress; (8) the eighth cause of action against defendants Albert Rosenhaus, Michael Bernstein and Albert Dweck for aiding and abetting prima facie tort; (9) the ninth cause of action for against defendants Albert Rosenhaus, Michael Bernstein and Albert Dweck for aiding and abetting intentional infliction of emotional distress; and (10) the tenth cause of action

against defendants Albert Rosenhaus, Michael Bernstein and Albert Dweck for aiding and abetting negligent infliction of emotional distress.

Charles' Motion for a Default Judgment

On February 10, 2021, Habib's attorney appeared in New York County Supreme Court on another related matter,² at which time he agreed, in open court, that he would accept service of process on behalf of Habib in this action. It is undisputed that defense counsel received an email from Charles' counsel with the amended complaint on February 18, 2021, one day after Charles electronically filed the amended complaint.

On March 22, 2021, Charles moved for a default judgment against Habib for his alleged failure to timely answer the amended complaint or otherwise appear in this action. Charles' counsel argues that March 20, 2021 was the deadline for Habib to answer the amended complaint or otherwise appear under the CPLR.

Habib, in opposition, submits an attorney affirmation asserting that a hard copy of the amended complaint was never mailed to his office. Defense counsel argues that because the 30-day deadline within which to respond to the amended complaint technically fell on *Saturday*, March 20, 2021, the deadline was extended to the next business day by operation of law, which was *Monday*, March 22, 2021, the date on which Habib timely moved to dismiss the amended complaint.

² Charles filed a prior action in New York County Supreme Court against Habib under New York County index No. 157535/20.

Habib's Dismissal Motion

On Monday March 22, 2021, Habib electronically filed a motion to dismiss the amended complaint, pursuant to CPLR 3211 (a) (4) and (a) (7), on the ground that it fails to state a cause of action and other actions are pending regarding the Insurance and Family Trusts in New Jersey.

Habib's dismissal motion is based on a two-page affirmation from his counsel asserting that "[d]isputes over the [testamentary] trusts' management have led to significant litigation between the parties in New Jersey." Defense counsel affirms that there are two litigations pending in the Chancery Division of the Monmouth County Superior Court in New Jersey regarding the Insurance Trust and the Family Trust, which are docketed as MON-P-383-19/Surrogate's No. 258662 and MON-P-360-20-20/Surrogate's No. 213003, respectively (the New Jersey Surrogate Litigations).

According to defense counsel:

"[b]oth litigations are seeking an accounting of the assets of the trusts, a distribution to Charles Tawil of his proportionate share of the assets, and compensation for any diminution in the trust asset value due to any alleged fraud, waste, or abuse of his brother, Habib Tawil or the co-trustees."

Notably, *there are no exhibits* to defense counsel's moving affirmation, including the pleadings in this case or the pleadings or any other documents that were purportedly filed in the New Jersey Surrogate Litigations.³

³ Although Habib's dismissal motion also fails to annex the amended complaint in this action, the amended complaint has been electronically filed at NYSCEF Doc No. 6, and is thus available to the court for consideration.

Habib also submits a moving memorandum of law arguing that the amended complaint, which “seeks remuneration for actions taken with respect to two New Jersey trusts established pursuant to the wills of Al Halfoun and Marcelle” must be dismissed, pursuant to CPLR 3211 (a) (4), because “[t]hose two trusts are the subject of litigation presently under way in the Monmouth County Chancery Court in New Jersey . . .” The memorandum of law asserts – without any evidentiary proof – that the New Jersey Surrogate Litigations “have sought accountings for the trusts to be provided by the trustees, and a distribution of Charles’ interest to him.” Habib argues that the amended complaint should be dismissed pursuant to CPLR 3211 (a) (4) because “the relief sought by Charles, particularly in the fraud count, seeks relief already actively being sought in the New Jersey actions.”

The remainder of Habib’s memorandum of law seeks dismissal of the amended complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. Habib asserts that Charles’ first cause for prima facie tort must be dismissed because the amended complaint fails to allege special damages or that the allegedly tortious acts were done without excuse or justification. Habib argues that special damages require allegations of specific and measurable losses beyond physical, psychological or nebulous financial damages stemming from his alleged actions. Habib notes that the complaint generally alleges damages of \$100 million but does not identify or particularize any special damages to Charles resulting from his conduct. Habib also argues that the amended complaint does not allege that he acted with the sole purpose of hurting Charles and that Charles did not have the unfettered right to access the Deal House. Habib claims

that he had a valid excuse and justification for excluding his brother from the Deal House to protect estate assets as a beneficiary, and it was his legal duty as a fiduciary to preserve the Deal House and ensure that it was not misused or damaged.

Habib argues that the second cause of action for intentional infliction of emotional distress is subject to dismissal because the amended complaint fails to allege extreme and outrageous conduct. Habib asserts that his alleged conduct does not go beyond all possible bounds of decency, and that he acted toward Charles within the normal scope of his legal rights and obligations to the estate. Habib claims that he delayed delivery of money from the estate and excluded Charles from the Deal House in order to fulfill his duties as a trustee of the estate. Habib argues that there is no case law holding that a delay in the distribution of estate assets or the failure to provide shelter to a sibling is extreme or outrageous conduct.

Habib argues that the third cause of action for negligent infliction of emotional distress should be dismissed because the amended complaint does not allege that Charles was exposed to an unreasonable risk of bodily injury or death, an essential element of a claim for negligent infliction of emotional distress.

Habib contends that the fourth cause of action for fraud is subject to dismissal because the amended complaint fails to allege fraud with sufficient particularity, as required by CPLR 3016, and does not plead the essential elements of a fraud claim. Habib argues that the amended complaint does not specifically allege any misrepresentations by him, knowledge of falsity or any damages. Habib claims that the

general allegations in the amended complaint that he lied about the Insurance and Family Trusts and improperly obtained a power of attorney from his mother are inadequate.

Charles' Opposition to Habib's Dismissal Motion

Charles, in opposition, submits an attorney affirmation arguing that Habib's dismissal motion is premature because certain alleged facts require discovery, including Habib's intentions and state of mind, which are in Habib's exclusive possession. Charles' counsel also asserts that "[t]his instant case alleged causes of action[] that are wholly distinct from those being addressed in the [New Jersey Surrogate Litigations] and seek damages wholly separate from the two Trusts' values in th[os]e cases involving different additional parties." Charles also asserts that "this lawsuit includes defendants who are not and could not be parties to the New Jersey [Surrogate Litigations] while intentional torts are outside the scope of the New Jersey Chancery Matters." Notably, the only exhibit to Charles' opposition papers is the first amended complaint in this action, and thus, none of the parties submitted the pleadings or any other papers filed in the New Jersey Surrogate Litigations for this court's consideration.

Charles also submits an affidavit reiterating some of the allegations in the amended complaint, including that he is a 50% beneficiary under the Family and Insurance Trusts. Charles attests that "Habib was formerly the Insurance Trust's co-trustee until he and his other co-trustees were removed as trustees of the Insurance Trust [by a] March 5, 2020 [court order]." Charles also attests that "Habib retaliated and stopped providing me with any financial support, or the small distributions that he had previously, despite knowing that I was destitute." Charles further attests that Habib

caused the dissolution of his marriage, alienated him from his daughter when she was forced to live with her aunt and that he was banished to live in his cousin's basement. Charles asserts that he was later forced into homelessness when Habib reported him as a squatter in the Deal House and left him without the resources to stay safe during the COVID-19 pandemic, which caused him to be in constant fear for his health.

Charles argues that his first cause of action against Habib for prima facie tort is not subject to dismissal because Habib's actions were motivated by a desire to harm him and his family in a scheme that went beyond Habib's mere desire for financial gain. Charles argues that Habib's cancellation of his family's health insurance, which prevented his wife from seeing a doctor after she was injured in a car accident, was not done for Habib's financial gain. Charles also argues that Habib's mistreatment of his mother and her horrific living conditions when Habib was her caretaker is another example of Habib's disinterested malevolence. Charles attests that Habib mismanaged their mother's money and relied on false power of attorney forms to convey estate property to himself. Charles further attests that Habib misappropriated estate assets by trading insurance proceeds on the stock market and losing approximately \$6 million. Charles argues that the amended complaint sufficiently pleads special damages, including hotel costs, the cost of defending criminal charges for allegedly trespassing at the Deal House, the cost of his psychiatric therapy and COVID-19 testing.

Charles submits a memorandum of law arguing that the second cause of action in the amended complaint sufficiently states a claim against Habib for intentional infliction of emotional distress because Habib's alleged conduct is sufficiently outrageous. Charles

asserts that Habib exposed him to COVID-19 and then, instead of informing Charles that he objected to him staying at the Deal House, Habib had the water shut off and contacted the police. Charles claims that Habib orchestrated a scheme to leave him penniless, tore his family apart and forced him to watch the unnecessarily painful and humiliating death of their mother. Charles also claims that Habib stole the family fortune twice; once when his father passed away and then again when his mother passed away by forging his mother's name on the power of attorney to transfer estate assets. Charles asserts that Habib cancelled his family's health insurance without warning during the COVID-19 pandemic, which left his wife without insurance coverage when she was injured in a car accident. Charles asserts that intentional infliction of emotional distress is sufficiently plead where a taunting is at play, as it was here, and that New York courts have upheld claims involving less controversial conduct.

Charles argues that allegations of actual physical injury are not necessary to support the third cause of action against Habib for negligent infliction of emotion distress. Charles contends that the emotional trauma and mental anguish caused by Habib's alleged actions, which rendered him homeless during the COVID-19 pandemic and unreasonably endangered his safety, are sufficient damages to support a claim for negligent infliction of emotional distress.

Charles argues that the fourth cause of action asserted against Habib for fraud is not subject to dismissal because Habib's misrepresentations will be uncovered during discovery and they are within Habib's exclusive knowledge. Charles notes that the amended complaint includes allegations that Habib made falsehoods with the intent of

depriving Charles. Specifically, Charles claims that Habib continuously made false assertions to obtain the power of attorney over his mother's estate and Habib continually lied to others to carry out fraudulent transfers of the estate's assets. According to Charles, Habib also lied to the police officers who performed his mother's welfare check in 2009 and to the police officers that arrested Charles at the Deal House in 2020.

Habib's Reply

Habib, in reply, reiterates that dismissal of the amended complaint against him is warranted. Regarding the prima facie tort claim, Habib argues that Charles is not allowed to support claims of special damages by only listing costs of defending an action. Further, Habib argues that it is not clear whether any of Charles' costs were increased because of his allegedly "malicious" actions above and beyond what Charles' usual living expenses would have been. Habib argues that Charles was not sufficiently "looking over his shoulder" in anticipatory fear as required for intentional infliction of emotional distress, and that none of his alleged conduct was sufficiently outrageous or extreme. Habib asserts that his conduct was "normal" for a family dispute and cannot support a claim of intentional infliction of emotional distress.

BLKGG Defendants' Dismissal Motion

On March 25, 2021 the BLKGG Defendants moved to dismiss the causes of action asserted against them (the fourth through the seventh causes of action) in the amended complaint for failure to state a cause of action based on an attorney affirmation. Defense counsel asserts that this lawsuit "is clearly an attempt to put the BLKGG Defendants in the middle of a familial dispute between Plaintiff and his brother . . . as

they battle over their parents' estates." Defense counsel explains that the BLKGG Defendants were formerly counsel to the Insurance and Family Trusts, but never represented Charles in any capacity. Defense counsel asserts that "[w]hile Plaintiff asserts a myriad of histrionic claims and allegations against his brother Habib, he neglects to provide any substance to his alleged grievances against the BLKGG Defendants, attorneys who never represented Plaintiff."

Defense counsel asserts that the "fourth cause of action for fraud warrants dismissal as it is untimely, improperly based on group pleading, fails to plead a misrepresentation by the BLKGG Defendants, justifiable reliance by Plaintiff or proximately caused damages." Defense counsel notes that the amended complaint's allegations regarding the BLKGG Defendants broadly assert that they witnessed Charles' and Habib's mother sign a deed in 2009 at a time when she had dementia and was unable to execute any binding transaction, and that an employee of the BLKGG Defendants notarized falsely executed documents. Defense counsel further notes that the amended complaint merely alleges that the BLKGG Defendants assisted Habib in fraudulent transfers by preparing a deed in 2011 to transfer the Deal House, an asset of the estate. Defense counsel asserts that the amended complaint contains conclusory allegations that "all defendants" made material misrepresentations about the status of Habib's power of attorney, the estate's assets as well as Charles' rights.

Regarding the fifth cause of action against the BLKGG Defendants for aiding and abetting prima facie tort, defense counsel argues that the claim is deficient because New York does not recognize such a cause of action. Alternatively, defense counsel argues

that the amended complaint fails to adequately plead a claim for aiding and abetting prima facie tort for the same reasons that the fourth cause of action is subject to dismissal. Defense counsel argues that there are no allegations in the amended complaint that the BLKGG Defendants actually assisted Habib in carrying out his allegedly tortious conduct and that the amended complaint only provides a basic recitation of the legal elements for aiding and abetting tortious conduct.

Defense counsel also argues that the sixth cause of action for aiding and abetting intentional infliction of emotional distress and the seventh cause of action for aiding and abetting negligent infliction of emotional distress are also subject to dismissal because those claims are not recognized under New York Law. Defense counsel contends that New York law does not permit recovery of non-pecuniary damages against attorneys.

Charles' Opposition

Charles, in opposition, argues that dismissal would be premature given that significant discovery needs to be completed to uncover essential facts to support his claims. Charles further argues that discovery will provide further evidence of the actions that the BKGG Defendants took in furtherance of Habib's fraud, which are within their exclusive knowledge. Charles claims that the BLKGG Defendants had duties to assist with the estate assets and that he established a relationship of trust with the BLKGG Defendants since they had superior knowledge. With regards to his claim for prima facie tort, Charles contends that the BLKGG Defendants assisted Habib in fraudulently executing the power of attorney, and requests time to conduct discovery to unearth further details of their role in the alleged fraud. Charles argues that the claims for aiding

and abetting intentional and negligent infliction of emotional distress are recognized in New York and they are supported because the amended complaint asserts extreme and outrageous behavior on Habib's behalf, which caused him to fear that he would be physically injured. Charles also argues that non-pecuniary damages are available even though the BKLG Defendants are attorneys.

Discussion

(1)

Charles' Motion For a Default Judgment

Charles seeks a default judgment against Habib, pursuant to CPLR 3215, because Habib did not answer or otherwise respond to the amended complaint on or before Saturday March 20, 2021. However, New York General Construction Law (GCL) § 25-a provides, in relevant part, that “[w]hen any period of time computed from a certain day, within which or after which or before which an act is . . . required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day” (emphasis added).

Given that the deadline for defendant Habib to answer the amended complaint fell on a Saturday, the time period within which Habib had to answer or respond to the amended complaint was automatically extended, by operation of law, to the following Monday March 22, 2021, the date on which Habib timely filed his dismissal motion (*see Giglio v NTIMP, Inc.*, 86 AD3d 301, 308 [2d Dept 2011]; GCL § 25-a [1]). Therefore, defendant Habib's dismissal motion was a timely response to the amended complaint and Charles is not entitled to a default judgment against Habib.

(2)

Habib's Dismissal Motion

Habib seeks dismissal of the amended complaint under CPLR 3211 (a) (4), which provides, in relevant part, that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state . . .” Under CPLR 3211 (a) (4), “a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same” (*Clark v Clark*, 93 AD3d 812, 815 [2d Dept 2012] [internal quotations omitted]). While it is not necessary that the precise legal theories are presented in the first action also be presented in the second action, “it is necessary only that *the pleadings* be based upon the same actionable wrong” (*Wells Fargo Bank, N.A. v Pena*, 51 Misc. 3d 241, 251 [Sup Ct Kings County 2016] [emphasis added]; *see also JC Mfg., Inc. v NPI Elec., Inc.*, 178 AD2d 505, 506 [1991] [dismissing action under CPLR 3211 (a) (4) because “*(t)he pleadings* in both actions show that both are based on the same contractual agreements and arise out of the same actionable wrongs”] [emphasis added]).

Without producing the pleadings or any other documents filed in the New Jersey Surrogate Litigations, Habib argues that the amended complaint should be dismissed pursuant to CPLR 3211 (a) (4) because “the relief sought by Charles, particularly in the fraud count, seeks relief already actively being sought in the New Jersey [Surrogate]

actions.” Charles, in opposition argues this lawsuit includes defendants who are not and could not be parties to the New Jersey Surrogate Litigations and that intentional torts, like those asserted in this action, are outside the scope of the New Jersey Chancery court. Because the pleadings filed in the New Jersey Surrogate Litigations are not in the record, there is no way for this court to assess whether the amended complaint in this action is based upon the same actionable wrongs as the pleadings filed in the New Jersey Surrogate Litigations. Consequently, that branch of Habib’s dismissal motion based on CPLR 3211 (a) (4) is denied.

In considering a motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action “the pleadings must be liberally construed” and “[t]he sole criterion is whether from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Gershon v Goldberg*, 30 AD3d 372, 373 [2d Dept 2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “The facts as alleged in the complaint are accepted as true, with the plaintiff accorded the benefit of every favorable inference (*Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 [2d Dept 2011]; see also *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*ECB I, Inc., v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Prima Facie Tort (First Cause of Action)

Prima facie tort consists of the following four essential elements: (1) intentional infliction of harm; (2) causing special damages; (3) without excuse or justification; and (4) by an act or series of acts that would otherwise be lawful (*see Curiano v Suozzi*, 63 NY2d 113 [1984]). A cause of action for prima facie tort must allege special damages and that the defendant's actions were motivated by disinterested malevolence (*id.* at 117). Furthermore, "[s]uch damages must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts" (*Ginsberg v Ginsberg*, 84 AD 2d 573 [2d Dept 1981] [internal quotations omitted]) and the damages must go beyond the physical, psychological, or financial demands of defending a lawsuit (*Del Vecchio v Nelson*, 300 AD2d 277 [2d Dept 2002]). Retaliatory lawsuits based in prima facie tort predicted on the malicious institution of a civil action are generally not allowed (*Curiano v Suozzi*, 63 NY2d at 113).

Here, Charles explicitly alleges that Habib acted "with a disinterested malevolence to injure the plaintiff for the sole reasons of causing him injury" (amended complaint at ¶ 73; *c.f. Lancaster v Town of East Hampton*, 54 AD3d 906 [2d Dept 2008]). Although the complaint admits that Habib was a beneficiary, helped manage the estate, and thus, had an interest in the estate properties, the amended complaint also alleges that Habib's conduct went further than benefitting the estate, and that Habib acted without excuse or justification, including when he allegedly called the water department and police to the Deal House and cancelled Charles' family's health insurance. Therefore, the amended

complaint sufficiently pleads that Habib's actions were motivated by disinterested malevolence.

Further, the amended complaint alleges damages of no less than \$100 million. Charles elaborates regarding the nature of his alleged damages, including his hotel costs when he was homeless, his criminal defense costs resulting from Habib's alleged call to the Deal police to evict Charles from the Deal House as a squatter, psychiatric therapy and COVID-19 testing. Although the \$100 million in damages sought in the amended complaint are staggering and Charles' alleged expenses seem minimal in comparison, this court will not dismiss the first cause of action for prima facie tort where some special, pecuniary damages are alleged other than emotional distress and the costs of this action. Therefore, accepting the allegations in the amended complaint as true and giving Charles the benefit of every favorable inference, the first cause of action in the amended complaint for prima facie tort against Habib is sufficiently pled to survive dismissal (*see Berland v Chi*, 142 AD3d 1121, 1122 [2d Dept 2016]).

Intentional Infliction of Emotional Distress (Second Cause of Action)

The essential elements of a cause of action for intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The conduct complained of must be so outrageous that it "transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]).

“Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action” (*Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000] [citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 (1983)]). Notably, according to the First Department, providing false information to the police is not necessarily conduct that would be considered so outrageous or extreme as to go beyond all possible bounds of decency (*see Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421, 422 [1st Dept 2006]; *see also Brown v Sears Rowbuck & Co.*, 297 AD2d 205, 212 [1st Dept 2002]).

Accepting the allegations in the amended complaint as true, and affording Charles the benefit of every favorable inference, this court does not find that the occurrences surrounding Habib’s invitation to Charles to stay in his home, Charles’ subsequent arrest at the Deal House and Habib’s allegedly negligent management of estate assets to constitute sufficiently extreme and outrageous conduct so transcending bounds of decency as to be regarded as atrocious and intolerable in civilized society (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]; *Rohrlich v Consolidated Bus Tr.*, 15 AD3d 561, 562 [2d Dept 2005]). Accordingly, Charles’ second cause of action against Habib in the amended complaint for intentional infliction of emotional distress is dismissed.

Negligent Infliction of Emotional Distress (Third Cause of Action)

While a cause of action to recover damages for negligent infliction of emotional distress does not require physical injury as a necessary element, there must generally be some breach of a duty owed to plaintiff which unreasonably endangered the plaintiff’s

physical safety or caused the plaintiff to fear for his safety (*see Santana v Leith*, 117 AD3d 711, 712 [2d Dept 2014]).

Here, the amended complaint alleges that Habib negligently exposed Charles to COVID-19 and caused Charles to become homeless during the COVID-19 pandemic, which contributed to Charles' fear for his physical safety. Those allegations, however, do not allege how Habib breached a duty of care to Charles, either as fiduciary to their parent's estate or in some other capacity. The court also notes that there are no allegations that Charles ever confirmed that Habib's wife had contracted COVID-19 and was indeed infected with the virus when Habib invited Charles to his home. The allegations in the amended complaint are notably scant regarding Charles' alleged fear of his physical safety above those of the general public that navigated life during the COVID-19 pandemic (*see Brown v New York City Health and Hospitals Corp.*, 225 AD2d 36 [2d Dept 1996]). Further, the amended complaint simply alleges *intentional* conduct by Habib when Charles went to stay in the Deal House, which cannot support a cause of action sounding in negligence (*see Scifo v Taibi*, 198 AD3d 704 [2d Dept 2021]). For the foregoing reasons, the amended complaint does not support a cause of action of negligent infliction of emotional distress against defendant Habib, and thus, the third cause of action against Habib is dismissed for failure to state a cause of action.

Fraud (Fourth Cause of Action)

The amended complaint alleges that Habib fraudulently gained control over the estate under false pretenses and then subsequently mismanaged estate assets. The amended complaint sufficiently alleges that misrepresentations were made by Habib, and

more specifically, that a signature was forged in order for Habib to obtain a power of attorney which was used to effectuate multiple deals that negatively affected estate assets. Considering these facts as true giving, and giving Charles the benefit of every inference, fraud is sufficiently alleged in the amended complaint.

(3)

The BLKGG Defendants' Dismissal Motion

The amended complaint alleges that the BLKGG Defendants aided Habib in improperly obtaining a power of attorney from his mother although the BLKGG Defendants knew that she suffered from dementia. The amended complaint also alleges that the BLKGG Defendants forged her name on documents or were aware that Habib had done so. Further, the amended complaint alleges that the BLKGG Defendants' staff acted as official witnesses and notaries on fraudulent transfers of estate assets. The amended complaint alleges that the BLKGG Defendants' assistance in these matters helped empower Habib to mismanage estate assets and detrimentally affect Charles.

Fraud (Fourth Cause of Action)

A cause of action for fraud must be pleaded with the requisite particularity under CPLR 3016 (b) and allege "a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance on the misrepresentation or material omission, and injury" (*De Martino v. Abrams*, 189 AD3d 774 [2d Dept 2020] [quoting *Deutsche Bank Natl. Trust Co. v. Sinclair*, 68 A.D.3d 914, 916 (2d Dept 2009)]).

Here, the amended complaint sufficiently alleges that the BLKGG Defendants knew about Charles' mother's dementia and her inability to execute binding agreements but facilitated Habib's execution of the power of attorney and other estate-related transactions. Further, the amended complaint alleges that Charles was negatively impacted by BLKGG's alleged fraud when Charles relied on misrepresentations regarding his mother's wishes and failed to challenge the fraudulent power of attorney. The amended complaint adequately states a cause of action against the BLKGG Defendants for fraud.

Aiding and Abetting Prima Facie Tort (Fifth Cause of Action)

The fifth cause of action asserted against the BLKGG Defendants in the amended complaint for aiding and abetting prima facie tort requires allegations that the BLKGG Defendants had actual knowledge and substantially assisted Habib in committing the alleged torts (*see Markowits v Friedman*, 144 AD3d 993, 996 [2d Dept 2016]; *see also Monaghan v Ford Motor Co.*, 71 AD3d 848 [2d Dept 2010]). The amended complaint merely alleges that the BLKGG Defendants contributed to Habib's fraudulent scheme by allowing the fraudulent deed and power of attorney transfers. However, the amended complaint contains no allegations that the BLKGG Defendants provided any substantial assistance to Habib when he allegedly unleashed his harsh treatment of Charles during the COVID-19 pandemic.

While Charles asserts that the BLKGG Defendants were Habib's attorneys during the time his life fell into disrepair and distress at the hands of his brother, the amended complaint does not allege actual knowledge by the BLKGG Defendants of Habib's other

alleged tortious conduct, including Habib's discontinuance of medical insurance to Charles' family and Charles' expulsion from the Deal House. The BLKGG Defendants' alleged assistance with the execution of estate paperwork for estate transactions and transfers does not support a claim for aiding and abetting Habib's prima facie tort, since the BLKGG Defendants did not aid and/or support Habib's actions allegedly performed with disinterested malevolence. Consequently, the fifth cause of action for aiding and abetting prima facie tort asserted against the BLKGG Defendants is subject to dismissal for failure to state a cause of action.

Aiding and Abetting Intentional and Negligent Infliction of Emotional Distress (Sixth and Seventh Causes of Action)

The sixth and seventh causes of action asserted against the BLKGG Defendants for aiding and abetting intentional infliction of emotional distress and aiding and abetting negligent infliction of emotional distress, respectively, are subject to dismissal for the same reasons that the underlying emotional distress claims fail to state a cognizable claim. Accepting the allegations in the amended complaint as true, and affording Charles the benefit of every favorable inference, the court does not find that the allegations asserted against the BLKGG Defendants in the amended complaint regarding their alleged provision of assistance to Habib in managing estate assets to constitute extreme and outrageous conduct necessary to support a claim of intentional infliction of emotional distress (*see Freihofer v Hearst Corp.*, 65 NY2d at 143) and do not sufficiently support a breach of a duty owed to Charles which unreasonably endangered his physical safety or

caused him to fear for his safety (*see Santana v Leith*, 117 AD3d at 712). Accordingly, it is hereby

ORDERED that Charles' motion (mot. seq. two) for a default judgment against Habib is **denied**; and it is further

ORDERED that Habib's motion (mot. seq. three) to dismiss the amended complaint is only **granted to the extent** that the second (intentional infliction of emotional distress) and third (negligent infliction of emotional distress) causes of action asserted against Habib are dismissed; Habib's dismissal motion is **otherwise denied**; and it is further

ORDERED that the BLKGG Defendant's motion (mot. seq. four) to dismiss the amended complaint is only **granted to the extent** that the fifth (aiding and abetting prima facie tort), sixth (aiding and abetting intentional infliction of emotional distress) and the seventh (aiding and abetting negligent infliction of emotional distress) are dismissed; the BLKGG Defendants' dismissal motion is otherwise **denied**; and it is further

ORDERED that defendants shall electronically file an answer to the amended complaint within 20 days of service of this decision and order with notice of entry.

This constitutes the decision and order of this court.

E N T E R

J. S. C.

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT