Jesberger v CVS Health Solutions, LLC
2021 NY Slip Op 34339(U)
November 4, 2021
Supreme Court, Nassau County
Docket Number: Index No. 604027/2021
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 30
NASSAU COUNTY

ROBERT JESBERGER,

Plaintiff,

- against -

Index No.: 604027/2021
Motion Seq. No.: 01
Motion Date: 06/29/2021
XXX

CVS HEALTH SOLUTIONS, LLC, and its subsidiaries and affiliated corporation, CVS ALBANY L.L.C. d/b/a CVS PHARMACY and PAULA MARTIN, individually,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's Verified Complaint; and move for an order directing plaintiff to pay defendants' attorneys' fees, costs and disbursements for having to defend against this frivolous lawsuit. Plaintiff opposes the motion.

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about April 1, 2021. *See* Defendants' Affirmation in Support Exhibit A.

In support of the motion, counsel for defendants asserts, in pertinent part, that, "[p]laintiff commenced this lawsuit alleging causes of action sounding in defamation and defamation *per se*, negligent infliction of emotional distress based on alleged HIPAA violations, intentional infliction of emotional distress based on alleged HIPAA violations, and negligent hiring, retention and supervision. Plaintiff claims the within lawsuit stems from an incident that took place 'on or about November, 2020', at the CVS located at 417 North Broadway, Jericho, New York. Plaintiff claims that he picked up newspapers which he intended to pay for, however he realized he forgot his wallet and left the store, admitting he did not pay for the newspapers. The subject action is completely without merit and frivolous. The affidavit of Ms. Martins, the allegations contained in plaintiff's own complaint, the documentary evidence and the video surveillance - which depicts plaintiff walking into the vestibule of CVS on multiple occasions and taking newspapers without paying – prove that the within case is without merit, intended to harass and maliciously harm CVS and Ms. Martins, and should be dismissed in its entirety with prejudice. Additionally, the defendants should be awarded attorneys' fees, costs and disbursements expended in the course of the defense of the within frivolous action.... Plaintiff alleges that on or about November 2020, he was a customer of the CVS store located at 417 North Broadway, Jericho, New York. It is claimed that 'on or about' November 2020, he went to the subject CVS to get his medications as well as newspapers, and that he walked in, picked up newspapers, and proceeded to the pharmacy. It is claimed that plaintiff then realized he did not have his wallet, so he went to his car to retrieve same. Plaintiff claims that at that time, a pharmacist, Ms. Martins, accused him of stealing the newspaper.... Plaintiff further alleges that 'on or about November 30th', at approximately 3:57 p.m., Ms. Martins spoke with 'Plaintiff's assistant' and told her that plaintiff was no longer permitted in the store and that he could take his business somewhere else.... Plaintiff claims that '[o]n or about December 3rd', Ms. Martins informed plaintiff's physician, Dr. Tejara that plaintiff was banned from the pharmacy as they had seen him stealing newspapers on multiple occasions and that they had him on camera doing so…. Plaintiff also claims that on Friday, December 4th, Ms. Martins told 'Plaintiff's assistant' that she had called the police and that she called Dr. Tejara as well." *See id.*

As indicated, defendants submit the Affidavit of defendant Paula Martins i/s/h/a Paula Martin ("Martins") in support of the instant motion. *See* Defendants' Affirmation in Support Exhibit E. Martins states, in pertinent part, that, "I am employed by CVS as a pharmacist, and have been since November, 1994. Since its opening in February, 1995, I have worked at the CVS Pharmacy located at 417 North Broadway, Jericho, New York. Based on my employment and experience, I have personal knowledge of the day-to-day operations in the pharmacy and in the subject CVS store. The statements made in this Affidavit are the truth based on my own personal knowledge of the facts and circumstances and observation of Plaintiff's actions. It is my understanding, from reading the within complaint, that plaintiff has made allegations of defamation, defamation *per se*, negligent infliction of emotional distress, intentional infliction of emotional distress, and negligent hiring in his complaint. It is my understanding, also from reading the within complaint, that plaintiff alleges that 'on or about November, 2020', plaintiff went to the CVS store to pick up prescriptions as well as newspapers and that he did pick up a newspaper, but then realized he did not have his wallet, so he went to the car to retrieve them. It is then stated that 'Martin, a pharmacist who was working at the time accused him of stealing the newspaper.'… Even though plaintiff does not state a particular date in his complaint, but rather alleges the interaction occurred 'on or about November, 2020' I recall observing plaintiff taking newspapers from the vestibule of CVS on October 28, 2020. I recall the date as it was my daughter's birthday and at the end of my shift I went to the Whole Foods Supermarket, located next to CVS, to purchase a birthday cake. I then returned to the CVS as my car was parked in the CVS lot, and I observed plaintiff walk into the vestibule, take newspapers and then walk out of the vestibule, toward his vehicle. This is evidenced by the video annexed hereto as Exhibit 'F'.

On that date, I told plaintiff I was a pharmacist at the store and he would have to pay for the newspapers. Plaintiff stated that he takes newspapers every day and then pays for them at the end of the week. He then turned and entered his vehicle. Following plaintiff's departure with the newspapers, I proceeded into the store and asked the cashiers and the store manager, whether the plaintiff, or anyone, ever took newspapers and then paid for them at the end of the week. This was expressly denied as same would violate CVS corporate policy. On November 30, 2020, plaintiff again returned to the store, and was observed taking newspapers from the vestibule. This is also evidenced by the video annexed to the motion as Exhibit 'F'. I have had no interaction with plaintiff whatsoever after October 28, 2020 to date. In my capacity as a pharmacist, I contacted plaintiff's doctor, Dr. Tejara, and left a voicemail for the doctor, requesting that he contact me. I never received a return call from Dr. Tejara, and never spoke with Dr. Tejara or anyone from his office. I did not indicate on the voicemail that plaintiff had stolen newspapers. Plaintiff alleges in his complaint that on December 3, 2020, I spoke with his physician, Dr. Tejara, and advised him that plaintiff was banned from the pharmacy as he was stealing newspapers. I have reviewed my calendar and work sign in book and I affirm that I did not work on December 3, 2020. I did not have any conversation with Dr. Tejara at all and certainly did not speak with him on December 3, 2020 as plaintiff alleges. The pharmacy did receive a call from an individual who indicated that she was plaintiff's sister at the end of November, 2020. The individual was requesting information about me, personally, and indicated that her brother has a lot of money and that he wanted me fired. Based on the threatening language, I did indicate to the individual that the pharmacy was no longer comfortable filling plaintiff's prescriptions. I did not ever indicate that plaintiff was 'banned' from the store as alleged in the complaint, and in fact, to my knowledge, plaintiff still shops in the store. I did not ever speak to plaintiff's 'assistant' or sister after that one brief call. In my career, working at CVS, I have never had any disciplinary actions or complaints made against me. I do not personally know the plaintiff and have not, and do not, harbor any animosity or ill will against the plaintiff. I have never published any statements concerning the plaintiff. I have never breached any duty owed to the plaintiff. I have never made any statements about the plaintiff with any malicious intent and certainly have not made any statements intending to harm his reputation in the community." *See id. See also* Defendants' Affirmation in Support Exhibits A and F.

Counsel for defendants argues, in pertinent part, that, "based on the video surveillance and the affidavit of Ms. Martins, the defendants (*sic*) defense is founded upon documentary evidence and as such, for that reason, the complaint must be dismissed.... Here, the allegations in plaintiff's complaint completely fail to establish a cause of action for defamation or defamation *per se* against the defendants. Initially, as it pertains to the allegation in the complaint that Ms. Martins spoke with plaintiff's 'assistant', the assistant is never identified, and the particulars (*sic*) words used are not set forth in the complaint.... Plaintiff's allegations that Ms. Martins spoke to 'Plaintiff's assistant' fails to comply with CPLR §3016. For that reason alone the allegation is insufficient to assert a cause of action of defamation. Further, with regard to the allegation that Ms. Martins spoke with plaintiff's physician, Dr. Tejara and said that plaintiff was banned from the pharmacy, again, the specific and particular words allegedly used by Ms. Martins are not set forth. Furthermore, the time of the alleged exchange is not indicated in the complaint, which is again, fatal to plaintiff's claims of defamation.... Even if the particular words were specified, which they are not, the complaint still fails to state a cause of action as plaintiff blanketly states he has been damaged in the sum of $1,000,000.00 without any corroboration thereof. The plaintiff only alleges that a statement was made to his assistant and that a statement was made to his doctor. Plaintiff claims in paragraph 2 of his complaint that he is an owner of a body shop. He does not indicate that he has lost any business or suffered any damages as a result of the alleged statements to his doctor or his 'assistant', which is a necessary element of the cause of action of defamation.... With regard to plaintiff's allegation of defamation *per se*, a statement is defamatory per se if it (1) charges the plaintiff with a serious crime; (2) tends to injure the plaintiff in her or his trade, business, or profession; (3) imputes that the plaintiff has a loathsome disease; or (4) imputes unchastity to a woman. [citation omitted]. Here, not one of the elements is met. There is (*sic*) allegation of any 'serious' crime against plaintiff. Even if the allegation were true, that Ms. Martins said plaintiff stole newspapers, the crime can hardly by perceived as 'serious'. To constitute defamation *per se*, the words must charge plaintiff with a specific identifiable offense. The preferred modern rule elsewhere is that whether the offense is punishable by indictment or information, it is slander per se if it involves moral turpitude or is punishable by imprisonment in a federal or state institution. [citation omitted]. Here, taking a newspaper, worth $1.50 is not punishable by imprisonment in a federal or state institution. Finally, and importantly, if the statement that plaintiff took newspapers from the store without paying was uttered in the first instance, it was true. The video annexed as Exhibit 'F', shows the surveillance from October 28, 2020, November 16, 2020 and November 30, 2020. On all three of those occasions, plaintiff is seen walking into the vestibule at CVS, taking newspapers, and walking out without paying. The absolute frivolity of this lawsuit is astounding, given the fact that plaintiff, did, in fact, take newspapers from CVS without paying. If all CVS customers felt so entitled, as to take items from the store without paying, then the business would certainly fail.... Initially, plaintiff asserts that Ms. Martins utilized plaintiff's private information to access Dr. Tejara's phone number and then called the doctor to accuse plaintiff of theft.... As noted in Ms. Martins affidavit, she never spoke to Dr. Tejara and had only left a voicemail for the doctor to call her. First and foremost, it is well-settled law that there is no basis for private causes of action for HIPAA violations. The Courts have routinely acknowledged that HIPAA and its regulations do not create a private cause of action. [citation omitted].... A cause of action to recover damages 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 [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety' [citation omitted]. Here, there is absolutely no allegation that plaintiff fears for his safety or physical well-being. The purported cause of action fails as a matter of law initially because there is no private cause of action under HIPAA and as such no breach by the defendants, and secondly, because the necessary elements of a cause of action for negligent infliction of emotional distress are not set forth in the complaint.... Similar to the plaintiff's assertion of negligent infliction of emotional distress, the plaintiff's third cause of action also fails as a matter of law and must be dismissed. Plaintiff again alleges purported violations of HIPAA, and again, there is no private cause of action for same, and as such, that fact alone is fatal to plaintiff's claim in the third cause of action. Under New York law, a cause of action alleging intentional infliction of emotion 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" [citation omitted].... Here, plaintiff fails to assert that there was any 'outrageous' conduct of the defendants. Ms. Martins affirms that she saw plaintiff take newspapers and simply stated that he would have to pay for them. He then left. There was no other exchange. In fact, the video shows that plaintiff has, on multiple occasions, walked into the store, taken newspapers without paying and walked out. Ms. Martins has affirmed that she never spoke to Dr. Tejara about the plaintiff, but even if she had, there is solid evidence that plaintiff left the store without paying for newspapers. There is no agreement in place with the plaintiff or any other of the many thousands of patrons of CVS stores, that anyone may take items, whether it be newspapers or otherwise, from the store without paying at that time. There is no agreement that any of the thousands of customers may pay later on or some other time. If there is any conduct that is outrageous in this lawsuit it is that of the plaintiff. Furthermore, plaintiff in his complaint asserts he took a newspaper and walked to the pharmacy, only then realizing he did not have his wallet, which is in direct contradiction to the video, which unequivocally shows that plaintiff took newspapers from the vestibule and walked out on *multiple occasions*. No allegation (*sic*) in plaintiff's complaint or Ms. Martins' statement come close to extreme and outrageous conduct. In fact, when analyzing the high burden of proof to establish the element of extreme and outrageous conduct compared to plaintiff's cause of action for intentional infliction of emotional distress, the only conclusion to be made is that plaintiff's allegations are frivolous at best and meritless.... To establish a cause of action based on negligent hiring, retention and supervision, it must be shown that 'the employer knew or should have known of the employee's propensity for the conduct which caused the injury.' [citation omitted]. Here, plaintiff alleges that CVS knew or should have known of Ms. Martins' propensity to falsely accuse plaintiff of criminal acts and acts of moral turpitude. Again, Plaintiff's complaint has failed to allege any facts that Ms. Martins had a propensity for conduct to cause injury or that CVS knew or should have known of such conduct. In fact, as proved by the video and the affidavit of Ms. Martins, plaintiff did take newspapers from CVS without paying, and more than once at that. Ms. Martins never 'falsely' accused plaintiff of anything. Furthermore, Ms. Martins has worked for CVS for over 25 years with not so much as a complaint or disciplinary note on her record. She is a licensed pharmacist and a value to the community. The allegation that CVS negligently hired a licensed pharmacist, who had no issues, complaints or disciplinary actions for over 25 years is beyond meritless." *See* Defendants' Affirmation in Support Exhibits A, E and F.

In opposition to the motion, counsel for plaintiff contends, in pertinent part, that, "[p]laintiff Robert Jesberger ('Jesberger') is a successful and reputable owner and operator of Mid-Island Collision, Inc., one of the top premier auto body repair facilities in the Country.... He is well known in the Nassau and Suffolk County Communities due to his business and his charitable works. From November 2020 and prior to, Jesberger was a frequent customer at the

CVS located at 417 North Broadway in Jericho, NY (hereinafter referred to as 'CVS'), and as a result of his longstanding patronage, was well known to the employees of the store.... On or about November 2020, Jesberger frequented CVS to get his medications as well as newspapers, as he had for at least ten years.... Jesberger walked in and picked up newspapers and then proceeded to the pharmacy. When he realized that he did not have his wallet or identification on his person, he went to his car to retrieve them.... At that aforementioned time, an employee and pharmacist of CVS, Defendant Paula Martin ('Martin'), accused Jesberger of stealing the newspaper.... Jesberger and Martin proceeded to have words back and forth and Jesberger left the CVS.... On or about November 30, 2020, at approximately 3:57p.m., Martin spoke with Jesberger's assistant and told her that Jesberger was no longer permitted in CVS and that he could take his business elsewhere.... On or about December 3, 2020, Martin informed Jesberger's physician, Dr. Tejara, that Jesberger was banned from the pharmacy as they had seen him stealing newspapers on multiple occasions and that they had him on camera doing so.... Martin also informed Dr. Tejara that she had reported the incident to the police.... On Friday, December 4, 2020, Martin repeated to Jesberger's assistant that she had called the police and that she called Dr. Tejara as well.... Martin also informed Jesberger's assistant that she spoke to one of her co-workers regarding the situation." *See* Defendants' Affirmation in Support Exhibit A.

Counsel for plaintiff argues, in pertinent part, that, "[d]efendants' motion to dismiss must be denied as the evidence submitted in support of their motion does not qualify as 'documentary evidence' under C.P.L.R. § 3211(a)(1).... Here, Defendants seek to improperly offer the following documents in support of their motion to dismiss, namely: (1) Affidavit of Defendant Paula Martins dated May 25, 2021 ...; and (2) certain portions of Video Surveillance.... Affidavits do not meet the requirements for documentary evidence. [citation omitted]. Here, Defendants offer the Affidavit of Defendant Paula Martins, an individually named Defendant in the instant litigation, in support of their motion to dismiss pursuant to C.P.L.R. § 3211 (a)(1)....

The video surveillance offered by Defendants does not fall under the intendment of 'documentary evidence.' If the evidence submitted in support of the motion is not 'documentary,' the motion must be denied. [citation omitted]. Furthermore, the video surveillance offered by Defendants is not authenticated by any individual responsible for and familiar with the operation of the building's video recording surveillance system, and is not offered as a true and accurate representation as what was before the camera. [citations omitted]. Furthermore, the splices of video surveillance offered in support has gaps in dates and times, and does not conclusively establish what Defendants claim it to be. In fact, it raises more questions, than answers them. Since the video surveillance is not documentary evidence, is not properly authenticated, and does not conclusively establish what Defendants purport the video surveillance to be, it should not be considered." *See* Defendants' Affirmation in Support Exhibits E and F.

Counsel for plaintiff also argues, in pertinent part, that, "[t]he substance of Jesberger's defamation cause of action meets the requisite standards. As recounted above, the Complaint clearly establishes that Martin falsely and contemptibly accused Jesberger of stealing newspapers on multiple occasions from CVS, that she made false statements to Jesberger's physician Dr. Tejara, Jesberger's assistant, and to her co-workers that Jesberger stole newspapers on multiple occasion and that she had reported the incidents to the police, and that Jesberger was banned from CVS.... Martin unequivocally accused Jesberger of committing crimes that were untrue, and as a result, Jesberger suffered great embarrassment and substantial damage to his reputation.... Additionally, Plaintiff has sufficiently plead (*sic*) the time, place, and manner of the false statements, and to whom they were made. On or about November 30, 2020, at approximately 3:57p.m., Martin spoke with Jesberger's assistant and told her that Jesberger was no longer permitted in CVS and that he could take his business elsewhere.... On or about December 3, 2020, Martin informed Jesberger's physician, Dr. Tejara, that Jesberger was banned from the pharmacy as they had seen him stealing newspapers on multiple occasions and that they had him on camera doing so.... Martin also informed Dr. Tejara that she had reported the incident to the police.... On Friday, December 4, 2020, Martin repeated to Jesberger's assistant that she had called the police and that she called Dr. Tejara as well.... Martin also informed Jesberger's assistant that she spoke to one of her co-workers regarding the situation.... Based on the pleadings and the aforementioned, Jesberger has plead (*sic*) a valid cause of action for defamation and defamation *per se*, and Defendant's (*sic*) motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) should be denied. The tort of intentional infliction of emotional distress ('IIED') has four elements: '(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.' [citation omitted]. Here, Plaintiff's Complaint adequately states claims for IIED. The Complaint addresses each element above, namely, that Defendant Martin improperly utilized Jesberger's private information to access Dr. Tejara's name and telephone number, and that Martin called Dr. Tejara to accuse Jesberger of theft.... The Complaint further pleads that Martin's conduct was intentional and motivated by dislike and animus toward Jesberger, and intended to cause him severe and grievous emotional harm.... As a result of Martin's actions, Jesberger was caused to suffer severe and grievous emotion distress and resultant damages.... Additionally, Plaintiff has adequately stated a claim for negligent infliction of emotional distress. The Complaint alleges that Defendants owed a duty to its (*sic*) customers, including Jesberger, to safeguard Plaintiff's private information and to refrain from using it from improper purposes.... The Complaint further alleges that Defendants breached their duty when Martin used that information for improper purposes, including Martin's telephone call to Dr. Tejara.... It was foreseeable that Defendants' breach of duty would cause harm to the plaintiff, and that Defendants' actions have caused the plaintiff to suffer severe and grievous emotional distress and resultant damages. Accordingly, Plaintiff has adequately stated claims for negligent and intentional infliction of emotional distress, and Defendants' application requesting dismissal of those claims must necessarily be denied. An employer has a duty to use reasonable care in the employment, training and supervision of its employees to find out whether they are competent to do their work without harm to others. [citation omitted]. An employer fails in this duty where it knows that an employee is incompetent, has vicious propensities, and has a bad disposition, and the employer fails to use reasonable care to correct or remove the employee.... An employer also fails in the duty of reasonable care when it knows of facts that would lead a reasonably prudent person to conduct an investigation which could have uncovered the information about the employee and fails to do so.... Here, Defendant CVS knew or should have known of Martin's proposensity (*sic*) to falsely accuse Jesberger of criminal acts and acts of moral turpitude, and Plaintiff pleads the same. Specifically, the Complaint alleges that CVS owed a duty to its customers, including the plaintiff who was likely to come into contact with their employees, including Martin, and to insure that their employees including Martin did not use their position to cause harm to their customers, including Jesberger.... The Complaint further pleads that CVS knew or should have known of Martin's propensity to falsely accuse Jesberger of criminal acts and acts of moral turpitude, and that CVS knew or should have known that Martin's behavior would harm Jesberger.... Since Plaintiff has adequately stated a claim for negligent hiring, retention, supervision, and direction, Defendants' application for dismissal of this claim must necessarily be dismissed. Defendant's (*sic*) application for sanctions, attorneys' fees, costs, and disbursements should be denied, as Plaintiff has demonstrated a valid cause of action and since Defendants have not set forth a prima facie basis to be entitled to sanctions against Plaintiff. Defendants offer video surveillance as conclusive support of their argument that Plaintiff's Complaint is patently frivolous and designed to harass and annoy the Defendants. In the first instance, this Court should not consider the video surveillance for the aforementioned reasons stated herein. As demonstrated, Plaintiff's Complaint has set forth a valid cause of action and is based in law and fact." *See* Defendants' Affirmation in Support Exhibits A and F.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), 'the court will 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.''' *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) *quoting Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) *quoting Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiffs can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiffs can ultimately establish the truth of their allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the Verified Complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v.*

Thomas R. Stachecki Gen. Contr., LLC, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) … a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, *supra* at 88.

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the facts as true, accord the plaintiffs the benefit of every possible favorable inference and determine only if the facts as alleged fit within any cognizable legal theory. *See Noonan v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). While allegations of a complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions are not presumed to be true. *See Baron v. Galasso*, 83 A.D.3d 626, 921 N.Y.S.2d 100 (2d Dept. 2011).

Whether statements at issue are reasonably susceptible of a defamatory connotation is, in the first instance, a legal determination for the court. *See Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 550 N.Y.S.2d 251 (1989). The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, which causes special harm or constitutes defamation *per se*. *See Salvatore v. Kumar*, 45 A.D.3d 560, 845 N.Y.S.2d 384 (2d Dept. 2007). A defamatory statement is one which tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of people in the community. *See Knutt v. Metro Intl., S.A.*, 91 A.D.3d 915, 938 N.Y.S.2d 134 (2d Dept. 2010). It is for the court to determine in the first instance whether a particular publication, when considered as a whole, is susceptible of a defamatory meaning. *See Aronson v. Wiersma*, 65 N.Y.2d 592, 493 N.Y.S.2d 1006 (1985). A cause of action sounding in defamation which fails to comply with CPLR § 3016(a)[1] mandates dismissal. *See Simpson v. Cook Pony Farm Real Estate, Inc.*, 12 A.D.3d 496, 784 N.Y.S.2d 633 (2d Dept. 2004).

Additionally, a defamation complaint must set forth the particular words allegedly constituting defamation, and it must also allege the time, place, and manner of the false statement and specify to whom it was made. *See Arvanitakis v. Lester*, 145 A.D.3d 650, 44 N.Y.S.3d 71 (2d Dept. 2016).

Plaintiff's defamation allegations are not sufficiently specific with respect to the particular words that defendant Martins allegedly used and to whom they were stated, nor do they allege the time, place and manner of these alleged false statements. *See* CPLR § 3016(a). Furthermore, the Court does not find that the alleged statement made by defendant Martins are statements which tended to expose plaintiff to hatred, contempt or aversion, or to induce an evil or unsavory opinion of plaintiff in the minds of a substantial number of people in the community.

Recovery is permitted for negligently induced emotional harm without physical injury when there is a duty of care owed by the defendant directly to the plaintiff, and a breach of that duty results in creating an unreasonable risk of bodily harm to the plaintiff or threat to the plaintiff's own physical safety. *See Peter T. v. Children's Village, Inc.*, 30 A.D.3d 582, 819 N.Y.S.2d 44 (2d Dept. 2006); *Perry v. Valley Cottage Animal Hospital*, 261 A.D.2d 522, 690

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[1]CPLR § 3016(a) requires that the particular words complained of must be set forth in the complaint, as well as the time, place and manner of the false statement and to whom the statement was made.

N.Y.s.2d 617 (2d Dept. 1999). The Court finds that plaintiff failed to plead any of the elements of negligent infliction of emotional distress in his Verified Complaint.

The elements for a claim of intentional infliction of emotional distress are: extreme and outrageous conduct; intent to cause, or disregard of a substantial probability of causing severe emotional distress; a causal connection between the conduct and the injury; and severe emotional distress. *See Howell v. New York Post Co.*, 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993).

Here, none of the allegations of the Verified Complaint can serve as a basis for a claim of intentional infliction of emotional distress. The conduct alleged is not so extreme, outrageous, utterly reprehensible and intolerable (*see Fischer v. Maloney*, 43 N.Y.2d 553, 402 N.Y.S.2d 991 (1978)) in society so as to sustain a cause of action for intentional infliction of emotional distress.

Generally, when an employee was acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of *respondeat superior*, and no such claim may proceed against the employer for negligent hiring, retention, supervision or training. *See Ambroise v. United Parcel Service of America*, 143 A.D.3d 929, 40 N.Y.S.3d 444 (2d Dept. 2016). However, such a claim is permitted when punitive damages are sought based upon facts evincing gross negligence or recklessness in the hiring or retention of the employee. *See Quiroz v. Zottola*, 96 A.D.3d 1035, 948 N.Y.S.2d 87 (2d Dept. 2012); *Henry v. Sunrise Manor Center for Nursing and Rehabilitation*, 147 A.D.3d 739, 46 N.Y.S3d 649 (2d Dept. 2017).

In order to assert a claim for punitive damages, a plaintiff must comply with strict pleading requirements. *See Rocanova v. Equitable Life Assurance Soc. of U.S.*, 83 N.Y.2d 603, 612 N.Y.S.2d 339 (1994). The elements required for pleading a claim of punitive damages are (1) defendant's conduct is actionable as an independent tort; (2) such conduct is of an egregious nature; and (3) such conduct is directed at the public generally. *See id.*

The Court finds that plaintiff's Verified Complaint fails to plead any of the three (3) aforementioned elements. Based upon the fact that plaintiff has failed to properly assert a claim for punitive damages, he is not permitted to bring claims for negligent hiring, retention, supervision or training.

Therefore, based upon the above, the branch of defendants' motion, pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiff's Verified Complaint, is hereby **GRANTED**.

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence;..." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Lift Ins. Co. of NY.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting Scadura v. Robillard,* 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1*, *supra*, *citing* SIEGEL, PRACTICE

COMMENTARIES; MCKINNEY'S CONSLAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) *quoting Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). However, in order to make such a showing neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211(a)(1). *See Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiff's factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

The Court finds that the documentary evidence submitted by defendants in their moving papers does not resolves all factual issues as a matter of law and conclusively disposes of the claims at issue in the Verified Complaint.

Accordingly, the branch of defendants' motion, pursuant to CPLR § 3211(a)(1), for an order dismissing plaintiff's Verified Complaint, is hereby **DENIED**.

22 NYCRR 130-1.1 deals with Costs and Sanctions. It reads, in pertinent part,

> "(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart....
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both....
> (c) For purposes of this Part, conduct is frivolous if:
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, Including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

"Pursuant to 22 NYCRR 130–1.1, sanctions may be imposed against a party or the party's attorney for frivolous conduct." *Keyspan Generation, LLC v. Nassau County*, 118 A.D.3d 949, 991 N.Y.S.2d 46 (2d Dept. 2014). "Conduct during litigation, ... is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false." *Id. quoting*

Mascia v. Maresco, 39 A.D.3d 504, 833 N.Y.S.2d 207 (2d Dept. 2007). "The decision of whether to award sanctions and the amount or nature of those sanctions is generally entrusted to the trial court's sound discretion." *Matter of Khan-Soleil v. Rashad*, 111 A.D.3d 727, 974 N.Y.S.2d 798 (2d Dept. 2013). The Court has carefully reviewed the record before it and guided by the foregoing precepts hereby declines to award costs and sanctions. *See id.*

Therefore, the branch of defendants' motion, for an order directing plaintiff to pay defendants' attorneys' fees, costs and disbursements for having to defend against this frivolous lawsuit, is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:

ENTERED
Nov 08 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
November 4, 2021