

**Rao v Cameron**

2022 NY Slip Op 30449(U)

February 10, 2022

Supreme Court, New York County

Docket Number: Index No. 161382/2018

Judge: James d'Auguste

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

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CARINA RAO,

Plaintiff,

Index No.: 161382/2018

-against-

SCOTT J. CAMERON, ROBERT M. GEWALD, and  
PARAKLETE, H.H.C., LLC,

Defendants.

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**Hon. James E. d'Auguste, J.S.C.**

In this underlying action, plaintiff Carina Rao makes claims for defamation, undue influence, conversion and breach of fiduciary duty. In motion sequence 001, defendant Robert M. Gewald (Gewald) moves, pursuant to CPLR 3211(a) (3) and (7), for an order dismissing the complaint. In motion sequence 002, defendant Scott J. Cameron (Cameron) moves, pursuant to CPLR 3211 (a) (2), (3), (7) and (8), and also pursuant to CPLR 302 (a), for an order dismissing the complaint. Cameron is also seeking costs, disbursements and attorneys' fees. In motion sequence 003, defendant Paraklete, H.H.C., LLC (Paraklete) moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint. Motion sequence numbers 001, 002 and 003 are hereby consolidated for disposition.

**BACKGROUND AND FACTUAL ALLEGATIONS**

Plaintiff resides in New York, New York. Nina Rao Cameron Gewald (Nina Rao) is plaintiff's aunt and not a party in this action. Gewald is married to Nina Rao. Cameron is Nina Rao's son and resides in Virginia. Paraklete is a home health care agency and provided aides to take care of Nina Rao in her home during the subject period.

The complaint states that plaintiff and Nina Rao “have had a lifetime close relationship.” NYSCEF Doc. No. 1, Complaint, ¶ 6. In 2002, among other things, Nina Rao named plaintiff as a beneficiary in certain life insurance policies and appointed plaintiff as co-executor of Nina Rao’s will. Nina Rao also appointed plaintiff as a “pay on death” (POD) beneficiary for several of Nina Rao’s bank accounts and has gifted plaintiff several pieces of jewelry throughout the years. Every time Nina Rao would make a gift, she would attach a written note, “indicating the Plaintiff’s name along with the corresponding item of jewelry.” *Id.*, ¶ 8.

Nina Rao allegedly suffers from dementia and, commencing in December 2017, she started to act irrationally. For instance, she “accused her part time caregivers of stealing jewelry,” when it “was later discovered that Nina Rao had actually hid the jewelry.” *Id.*, ¶ 16. In January 2018, Nina Rao called the police and accused Gewalt of poisoning her. As another example, Nina Rao allegedly called a federal judge and left messages “requesting that the [j]udge call the FBI on her niece, the Plaintiff.” *Id.*, ¶ 60.

On February 1, 2018, plaintiff’s birthday, Nina Rao gave plaintiff a bag of jewelry. “The aide, who was working for Nina Rao on that day, noted this on her report.” *Id.*, ¶ 26. The complaint states the following, in relevant part:

“In February of 2018, Nina Rao began accusing the Plaintiff of stealing her jewelry, having an affair with Dr. Gary Horbar, and working together with Dr. Horbar to poison her. Upon information and belief, and for reasons to be discovered, one of Nina’s aides had allegedly convinced Nina Rao that the Plaintiff stole jewelry and other items or personal property. This was done while Nina Rao’s dementia was allegedly acute.”

*Id.*, ¶ 20.

Plaintiff claims that the defendants have been “encouraging these fabrications,” and have been repeating them to “Nina Rao’s doctors, her caregivers, caregiver agencies, family members,

and close friends.” *Id.*, ¶ 21, 32. For instance, on March 10, 2018, Cameron and his wife allegedly advised Nina Rao and Gewald that plaintiff had a public criminal record and that her husband changed his name, which plaintiff states is not true. In addition, Cameron “allegedly told Nina Rao that the plaintiff had been encouraging the aides to overmedicate Nina Rao.” *Id.*, ¶ 21. “Upon information and belief, Nina Rao has told unrelated, independent parties that Defendant, Scott Cameron, provided Nina with information that the Plaintiff stole her jewelry and that the plaintiff named herself on Nina Rao’s bank accounts and life insurance policy.” *Id.*, ¶ 61.

With respect to Gewald, the complaint states that, on February 28, 2018, Gewald told Nina Rao’s sister that plaintiff is a bank thief, jewelry robber and that the sister should not trust plaintiff or be left alone with her. On March 5, 2018, he allegedly told Nina Rao’s physician that plaintiff stole from them. On March 11, 2018, Gewald purportedly advised Nina Rao’s aide that plaintiff has a criminal record on the internet and that her husband changed his name. On the same date, he allegedly told Nina Rao that he “told the nice young man at Chase Bank that [plaintiff] is a bank thief.” *Id.*, ¶ 52. Further, on March 22, 2018, Gewald advised a bank that plaintiff “is a bank thief who was putting herself on my wife’s bank accounts.” *Id.*, ¶ 54 (quotation marks omitted). The bank called Adult Protective Services (APS), who, after making a home visit, allegedly diagnosed both Gewald and Nina Rao with dementia. On March 28, 2018, Gewald again called Nina Rao’s relatives and stated that plaintiff stole from them, that she cannot be trusted and that the relatives should not be alone with plaintiff.

Regarding Paraklete, in addition to what is set forth above, the complaint sets forth that, on March 24, 2018, a third-party aide heard Paraklete employee Rodica Candea (Rodica) telling

Nina Rao that plaintiff was a thief who stole Nina Rao's jewelry. On March 31, 2018, Rodica allegedly told a Paraklete aide, in front of Nina Rao, that the aide should call the police if plaintiff attempts to visit because plaintiff is a thief who cannot be trusted.

In February 2018, Nina Rao also changed her will, revoking many of the original bequests to plaintiff. These revocations were "based on the erroneous belief that the false statements wrongfully expressed to her by the Defendants and Nina Rao's aide about the Plaintiff were true." *Id.*, ¶ 39. In addition, Gewald and Cameron did not prevent Nina Rao from changing her will, despite being aware that she had dementia. The complaint states that, although plaintiff and Nina Rao, "discussed the designation of the jewelry for over a decade . . . . [a]s an act of good faith," plaintiff returned the bag of jewelry to Nina Rao. *Id.*, ¶ 29.

In March 2018, Nina Rao allegedly executed a new Power of Attorney (POA) naming Cameron as attorney in fact. The complaint states that Cameron allowed for this to take place, despite knowing that Nina Rao suffered from dementia. Cameron then allegedly used this POA "to reverse the financial arrangements that Nina Rao made for her niece, the Plaintiff, years before the dementia set in." *Id.*, ¶ 37. "Upon further information and belief, the Defendant, Scott Cameron, removed the Plaintiff's name from Nina Rao's bank accounts and life insurance policy." *Id.*, ¶ 62. For example, on March 10, 2018, Cameron closed one of Nina Rao's accounts at Chase Bank and opened it up as a new account naming himself as beneficiary. In March 2018, Nina Rao or the defendants allegedly removed plaintiff as a designee of Nina Rao's life insurance policies.

In December 2018, plaintiff commenced this action. In the first cause of action, defamation, plaintiff alleges that all defendants engaged in defamation *per se* when they

intentionally openly communicated several false statements; including that plaintiff stole Nina Rao's jewelry, bank accounts and life insurance policies and that plaintiff had been encouraging the aides to overmedicate her. Plaintiff claims that her reputation was damaged by these slanderous statements. "Allegedly, the aide and Defendant, Robert Gewald, fabricated a story that the Plaintiff was having an affair with Nina Rao's physician, Dr. Horbar, in order to 'over medicate' Nina Rao so that the Plaintiff could coerce her." *Id.*, ¶ 67. Plaintiff is seeking punitive damages against Cameron and Gewald for their allegedly outrageous and defamatory conduct.

In the second cause of action, undue influence, plaintiff alleges that Cameron, "the alleged attorney in fact for his mother, Nina Rao, under an allegedly invalid Power of Attorney, exercised undue influence in procuring his mother's POD accounts, which she had specifically opened for the benefit of the Plaintiff upon death." *Id.*, ¶ 73. Plaintiff is seeking equitable relief, "by an order rescinding the Durable Power of Attorney." *Id.* at 15.

The third cause of action, grounded in conversion, alleges that Cameron, with the assistance of Gewald, "wrongfully exercised the right of ownership over Nina Rao's accounts at Chase Bank, M & T, HSBC, Popular Community Bank . . . ." *Id.*, ¶ 80. These bank accounts had been designated as POD accounts and had named plaintiff as a beneficiary. By obtaining a "suspect Power of Attorney as attorney in fact for Nina Rao," Cameron "allegedly altered said accounts naming himself as beneficiary or closed said accounts and transferred those funds into accounts in his own name." *Id.*, ¶¶ 81, 82. Plaintiff is requesting an order rescinding the POA, voiding the altered POD designations and reinstating the prior beneficiary designations.

The fourth cause of action alleges that, based on the actions described in the complaint, Cameron breached his fiduciary duty to plaintiff and to Nina Rao. The complaint states the

following, in relevant part:

“Upon information and belief, if the suspect Power of Attorney is deemed legally valid, Scott Cameron allegedly exceeded his power by transferring assets belonging to Nina Rao for the purpose of advancing his own interests. As such, the Defendant, Scott Cameron, breached his fiduciary duty to Nina Rao, resulting in the conversion of Nina Rao’s assets and interfering with the Plaintiff’s beneficiary rights.”

*Id.*, ¶ 85.

Gewald’s Motion to Dismiss (motion sequence 001) and Plaintiff’s Opposition

Gewald argues that the cause of action for defamation must be dismissed because the statements are not pleaded with adequate specificity. According to Gewald, the allegations in the complaint that plaintiff was a “bank thief and jewelry robber,” or that she “stole,” are “mere phrases,” that, “by implication cannot be the exact words in their entirety uttered by defendant.” NYSCEF Doc. No. 6, Gewald’s motion to dismiss at 5. In addition, some of the allegations do not specify to whom the statements were made. Further, the complaint does not specify the exact language Gewald used when he went visited the banks and advised them that plaintiff committed “forgery.”

In the alternative, Gewald argues that the allegedly defamatory statements are protected by an absolute privilege as they were stated to Nina Rao, his spouse. The remaining statements are also protected by qualified privilege, as they were stated to family members, medical staff, financial advisers and lawyers. For example, Gewald argues that he had a “qualified privilege to speak with his bank about whose names should be permitted on his and his wife’s accounts to protect their financial interests.” *Id.* at 9. According to Gewald, plaintiff is also unable to establish that he made any of the alleged statements with malice. For instance, although Gewald allegedly warned family members and others who were in charge of his wife’s care to watch out

for plaintiff, these statements were made to protect his wife, not to injure plaintiff.

With respect to conversion, Gewald asserts that plaintiff has no standing to assert this claim. According to Gewald, plaintiff never had any ownership interests in the POD accounts owned by Nina Rao, who is still alive. He argues that “[p]laintiff cannot properly plead a claim for conversion in property she never owned.” *Id.* at 1. Gewald also argues that the cause of action grounded in conversion should also be dismissed as the complaint only alleged that Cameron, and not Gewald, changed any accounts or beneficiaries.

In opposition, plaintiff argues that the complaint has sufficiently identified the time, place and manner of the defamatory statements. She maintains that “[f]alsely communicating that the Plaintiff is a bank thief and jewelry robber, so she shouldn’t be trusted; that Plaintiff has a criminal record on the internet; and that Plaintiff committed forgery on bank accounts and stole jewelry, is actionable because it impugned Plaintiff’s integrity and reputation and caused her harm.” NYSCEF Doc. No. 19, Plaintiff’s memorandum of law at 5 (internal quotation marks and citation omitted). Plaintiff continues that the defamatory statements Gewald made to Nina Rao are not protected by spousal privilege as there is no indication that these defamatory statements were confidential communications. Even if either the absolute or qualified privilege is applicable, these defamatory statements would allegedly not be protected because Gewald acted with actual malice in making them. According to plaintiff, she can establish that Gewald acted with malice because Gewald knew the defamatory statements were false and because he was the one who fabricated the stories.

Plaintiff does not oppose Gewald’s arguments with respect to the conversion claim.

Cameron’s Motion to Dismiss (motion sequence 002) and Plaintiff’s Opposition

Cameron argues that the causes of action grounded in undue influence, conversion and breach of fiduciary duty should be dismissed as plaintiff lacks standing to sue. Specifically, Cameron argues that the cause of action for conversion is not viable as plaintiff “did not own or have a right in the property alleged to have been converted.” NYSCEF Doc. No. 15, Cameron’s memorandum of law at 2. Cameron explains that Nina Rao is the owner of the accounts. According to Cameron, while Nina Rao is still alive, she has the prerogative to change the distribution of her assets. Although plaintiff argues that she was a beneficiary, she did not have control over these accounts. As a result, plaintiff purportedly has no standing to assert these claims either on her own behalf or on Nina Rao’s behalf.

Similarly, plaintiff has no standing to assert a claim of undue influence over Nina by anyone. According to Cameron, Nina Rao is presumed competent “unless proven otherwise in an appropriate proceeding.” *Id.* at 15. Furthermore, even if plaintiff had standing to sue, undue influence is not a stand-alone cause of action. In addition, there can be no viable claim for breach of fiduciary duty as Cameron does not owe plaintiff a fiduciary duty. “Even if true, Carina has no basis or standing to assert the claim. She is not Nina’s agent under power of attorney and has not alleged that she is.” *Id.* at 14.

Cameron argues that the complaint should be dismissed for lack of personal jurisdiction. Cameron is a domiciliary of Virginia. Even construing the complaint liberally, Cameron visits New York infrequently. He continues that plaintiff “asserts no contacts with New York sufficient to exercise general or specific jurisdiction against Scott.” *Id.* at 17. In any event, the cause of action is insufficient, as the alleged defamatory statements are paraphrased and do not set forth the time, place and manner of each false statement alleged. Even if the statements were

adequately pled, they would be protected by a qualified privilege, as they are “privileged common interest communications with Scott’s family members and other individuals and advisors assisting in the care and protection of Nina, his mother.” *Id.* at 8. Further, plaintiff would not be able to “pierce the privilege defense,” as she allegedly cannot establish that Cameron’s statements were motivated by malice. *Id.* at 9.

According to Cameron, the complaint is “without good faith basis, [and] is brought solely for the purpose to harass . . .” *Id.* at 18. Cameron continues that the complaint is “frivolous within the meaning of 22 NYCRR § 130-1.1” and is seeking costs, disbursements and attorneys’ fees. *Id.*

In opposition, plaintiff states that she has standing to sue as she was defamed in New York by Cameron. Furthermore, this Court has jurisdiction over the matter, as the complaint not only states that Cameron visited his mother once or twice a year, but also states that Cameron has recently begun to visit his mother more than in the past. Plaintiff reiterates the merits of her defamation claim.

Plaintiff does not address Cameron’s arguments with respect to the conversion claim. She argues that she has established causes of action for undue influence and breach of fiduciary duty as Cameron engaged in self-dealing and made changes to Nina Rao’s bank accounts after Nina Rao’s dementia was acute.

#### Paraklete’s Motion to Dismiss (motion sequence number 003) and Plaintiff’s Opposition

Similar to the other defendants, Paraklete argues that the cause of action alleging defamation is defective as it fails to meet the pleading requirements. First, Paraklete contends that the complaint contains mere phrases and not exact words. Next, Paraklete claims that

defendants were grouped together. Paraklete also notes that, according to the complaint, Nina Rao herself had been accusing plaintiff of taking her jewelry. Paraklete also argues that the complaint does not state to whom the defamatory statements were made. It continues that plaintiff does not allege to have been a party to the conversations where Rodica allegedly defamed her.

Even if the statements could be attributed to Paraklete employees, they are protected by the qualified privilege applicable to healthcare providers. It argues that Nina Rao's aides, "carry the responsibility of preventing people from entering Nina's home for Nina's protection. Moreover, Paraklete's employees would have a moral and social duty to warn Nina and other individuals caring for Nina that plaintiff is a 'thief.'" Rosedale affirmation in support, ¶ 17. In addition, malice allegedly cannot be found as the statements were "made out of concern for Nina who was in their care, not hostility towards plaintiff." *Id.*, ¶ 21.

In opposition, plaintiff argues that she has pleaded the statements with adequate specificity, as the complaint includes the "time, place, and manner of the false statement and to whom [it] was made." NYSCEF Doc. No. 31, plaintiff's memorandum of law at 4. Plaintiff continues that Paraklete knew that the statements were false, as Paraklete was aware that Nina Rao had gifted the jewelry to plaintiff and that Nina Rao was suffering from dementia. In addition, privilege is not applicable because, as the communications were "fabricated" by Paraklete's employees, they were not made in good faith. *Id.* at 7. In the alternative, even if a qualified privilege did apply between Paraklete and third parties, plaintiff has sufficiently alleged that Paraklete made the statements with malice.

## DISCUSSION

### I. Gewald's Motion to Dismiss (motion sequence 002)

#### Defamation

Defamatory statements “tend[] to expose a person to public contempt, hatred, ridicule, aversion or disgrace . . . .” *Thomas H. v Paul B.*, 18 NY3d 580, 584 (2012). To successfully plead a defamation claim, plaintiff must set forth the following elements: “a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se.” *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). “[S]poken defamatory words are slander; written defamatory words are libel.” *Albert v Loksen*, 239 F3d 256, 265 (2d Cir 2001). A statement is considered slander per se, if, in relevant part, it “charg[es] plaintiff with a serious crime . . . .” *Lieberman v Gelstein*, 80 NY2d 429, 435 (1992). When pleading a defamation claim, “the particular words complained of . . . shall be set forth in the complaint.” *See* CPLR 3016 (a). “The complaint also must allege the time, place and manner of the false statement and specify to whom it was made.” *Dillon v City of New York*, 261 AD2d at 38.

Here, Gewald argues that the allegations in the complaint fail to meet the specificity requirement of CPLR 3016 (a) as, among other things, they use phrases and do not set forth the time, place, manner of the statement or to whom it was made. However, for the majority of the statements made, this contention is without merit. For example, on specific dates in both February and March 2018, Gewald allegedly told his relatives that plaintiff was a bank thief, jewelry robber and advised them not to be alone with plaintiff. On a specific date he announced

to bank employees that plaintiff used forgery to put herself on Nina Rao's accounts and that she is a bank thief. In addition, the complaint specifies several dates where Gewald told Nina Rao that plaintiff committed a criminal activity by stealing the diamond bracelet and that she is a bank thief, that she has a criminal record on the internet and that plaintiff added her own name to the life insurance policy. He also told Nina Rao's doctor, on a specified date, that plaintiff stole from them.

Nonetheless, the remaining allegedly defamatory statements, including the allegations regarding plaintiff having an affair with the doctor in order to over medicate Nina Rao, are not actionable. As set forth in the complaint, these allegations are not pleaded with specificity as they lack the time, place and manner of the false statements and do not specify to whom they were made.

Gewald argues that, even if the statements were defamatory, they would be protected by the absolute privilege granted to communications between spouses. The marital privilege is "[n]ot protective of all communications, [and] attaches only to those statements made in confidence . . . ." *Matter of Vanderbilt (Rosner-Hickey)*, 57 NY2d 66, 73 (1982). Here, Gewald has not established that the marital privilege is applicable; Gewald either made the statements to Nina Rao in the presence of someone else or repeated the same statements to other third parties.

Gewald maintains that a qualified privilege would also apply, as all of the alleged statements were made to Nina Rao's family or to professionals who were looking out for Nina Rao's well-being. "A qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding interest or duty." *Santavicca v*

*City of Yonkers*, 132 AD2d 656, 657 (2d Dept 1987); *see also Foster v Churchill*, 87 NY2d 744, 751 (1996) (“Even though a statement is defamatory, there exists a qualified privilege where the communication is made to persons who have some common interest in the subject matter”). Nonetheless, the defense of qualified privilege will be forfeited if plaintiff can establish that “defendant’s statements were uttered with malice, which includes either common-law malice (motivated by spite or ill will) or constitutional malice (statements made with a high degree of awareness of their falsity).” *Silverman v Clark*, 35 AD3d 1, 11 (1st Dept 2006); *see also Phelan v Huntington Tri-Vil. Little League, Inc.*, 57 AD3d 503, 505 (2d Dept 2008) (“However, where the plaintiff can demonstrate that the communication made by the defendant was not made in good faith but was motivated solely by malice, the protection provided by the qualified privilege will be inapplicable”).

Here, Gewalt’s allegedly defamatory statements are not protected by the qualified privilege as plaintiff has sufficiently pleaded that the statements were made with malice. Specifically, as set forth in the complaint, Gewalt allegedly made statements questioning plaintiff’s integrity and accusing her of being a thief, despite being highly aware that the statements were false. As Gewalt’s statements constitute slander *per se*, “the law presumes that damages will result, and they need not be alleged or prove.” *Lieberman v Gelstein*, 80 NY2d at 435.

As malice is also sufficiently pleaded, the allegations set forth above are sufficient to establish a claim for defamation. It is well settled that, where, like here, in opposition to a dismissal motion, “[a]lthough allegations of malice may not rest on mere surmise and conjecture . . . a plaintiff is not obligated to show evidentiary facts to support her allegations of malice.”

*Pezhman v City of New York*, 29 AD3d 164, 169 (1st Dept 2016) (internal citation omitted).

Courts have held that “a defamation complaint should not be dismissed on a pre-answer motion to dismiss based on a qualified privilege claim where, as here, the content and context of the alleged defamatory statements in the complaint or supporting materials on the motion are sufficient to potentially establish malice or are such that malice can be inferred.” *Weiss v Lowenberg*, 95 AD3d 405, 406 (1st Dept 2012) (internal quotation marks and citations omitted).

“Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005). Accordingly, at this motion to dismiss stage, plaintiff adequately sets forth a cause of action for defamation.

#### Conversion

Plaintiff did not oppose Gewalt’s arguments for why the conversion claim should be dismissed. As plaintiff did not oppose Gewalt’s motion with respect to this cause of action, she has abandoned it. *See e.g. Cassell v City of New York*, 159 AD3d 603, 603 (1st Dept 2018) (“Plaintiff’s claim of municipal liability under 42 USC § 1983 is abandoned because, in the motion court, he did not oppose the City’s argument that the complaint had failed to state a section 1983 claim”); *see also Hanig v Yorktown Cent. Sch. Dist.*, 384 F Supp 2d 710, 723 (SD NY 2005) (“[B]ecause plaintiff did not address defendant’s motion to dismiss with regard to this claim, it is deemed abandoned and is hereby dismissed”). Accordingly, Gewalt is granted dismissal of the claim for conversion.

#### Punitive Damages

In order to be entitled to punitive damages, a private litigant “must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.” *Macy’s Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 57 (1st Dept 2015) (internal quotation marks and citation omitted). Here, as Gewalt’s conduct was alleged to be part of a private transaction and was not directed at the public generally, plaintiff’s request for punitive damages is denied.

## II. Cameron’s Motion to Dismiss (motion sequence 002)

In Cameron’s dismissal motion, he argues that the second, third and fourth causes of action should be dismissed for lack of standing and failure to state a claim.<sup>1</sup> In response, without providing any caselaw, plaintiff alleges that she has standing to pursue her claims as she was defamed by Cameron in New York. Cameron also argues that, as a domiciliary of Virginia, the complaint should be dismissed as against him for lack of personal jurisdiction. In response, plaintiff does not proffer any arguments regarding long arm jurisdiction or provide any caselaw. She only notes that, as the complaint alleged that Cameron recently started to visit his mother more than once or twice a year, the court has jurisdiction over Cameron. The complaint also alleges that Cameron breached his fiduciary duty to Nina Rao and to plaintiff by transferring Nina Rao’s assets for the purpose of advancing his own interests and interfering with plaintiff’s beneficiary rights. As set forth below, the court agrees that plaintiff lacks standing to pursue the claims against Cameron for conversion, undue influence and breach of fiduciary duty and they

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<sup>1</sup> On the face of the motion, Cameron states that he is also moving to dismiss the complaint pursuant to CPLR 3211 (a) (2) for lack of subject matter jurisdiction. However, Cameron does not provide any reason for this dismissal in his motion papers. In any event, there is no basis for dismissal on this ground.

are dismissed.

It is well settled that a party may not proceed with an action in the absence of standing. *Stark v Goldberg*, 297 AD2d 203, 204 (1st Dept 2002). “Standing is a threshold determination...” *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 (1991). “The existence of an injury in fact -- an actual legal stake in the matter being adjudicated -- ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution.” *Id.* at 772 (internal quotation marks and citation omitted).

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.” *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). Here, plaintiff never took ownership over any of the accounts, as they are payable upon death. Moreover, plaintiff has not alleged that she is Nina Rao’s agent and has not legally established that Nina Rao’s right to change her beneficiaries should be altered due to dementia. Accordingly, plaintiff does not have standing to pursue the cause of action for conversion and it is dismissed.

Similarly, plaintiff does not have standing to pursue a claim for undue influence. First, “undue influence is not a cause of action but grounds for rescission of a contract.” *See e.g. Weinberg v Kaminsky*, 2017 NY Slip Op 31628 (U), \*\*2 (Sup Ct, NY County 2017). *Compare Matter of Nealon*, 57 AD3d 1325, 1327 (3d Dept 2008) (“Turning to the claim alleging undue influence, however, we reach a different result and conclude that factual issues preclude summary judgment”). Second, to the extent that plaintiff is seeking to use undue influence as a

ground to rescind any of the contracts referred to in the complaint, she has no standing to do so. Similarly, even if undue influence was treated as its own claim, plaintiff does not have standing to assert a claim for rescission of Nina Rao's power of attorney or other documents based on undue influence.

Lastly, "[i]n order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Daly v Kochanowicz*, 67 AD3d 78, 95 (2d Dept 2009) (internal quotation marks and citations omitted). Plaintiff has no standing to pursue a breach of fiduciary claim on Nina Rao's behalf. In addition, she has not alleged any sort of fiduciary duty owed to her by Cameron.

#### Defamation/Lack of Jurisdiction

"[A] New York court may not exercise personal jurisdiction over a non-domiciliary unless two requirements are satisfied: the action is permissible under the long-arm statute (CPLR 302) and the exercise of jurisdiction comports with due process." *Williams v Beemiller, Inc.*, 33 NY3d 523, 528 (2019). However, defamation claims are exempt from CPLR 302 (a) (2) and (3) and are "accorded separate treatment to reflect the state's policy of preventing disproportionate restrictions on freedom of expression . . . ." *SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 18 NY3d 400, 404 (2012). Under CPLR 302 (a) (1) the "jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transaction." *Rushaid v Pictet & Cie*, 28 NY3d 316, 323 (2016). In relevant part, "[a] suit will be deemed to have arisen out of a party's activities in New York if there is an articulable nexus,

or a substantial relationship, between the claim asserted and the actions that occurred in New York.” *Best Van Lines, Inc. v Walker*, 490 F3d 239, 246 (2d Cir 2007) (internal quotation marks and citations omitted); *see also Paterno v Laser Spine Inst.*, 24 NY3d 370, 379 (2014) (New York’s “long-arm statute requires that the cause of action arise from the non-domiciliary’s actions that constitute transaction of business”).

In brief, plaintiff alleges that Cameron made defamatory statements about plaintiff to Nina Rao and Gewald, and that Nina Rao herself changed her will and her power of attorney as a result. Plaintiff has not alleged that Cameron, for instance, defamed plaintiff while transacting business at the bank or that these transactions even took place in New York. As a result of this decision, there are no viable claims in connection with any of Cameron’s alleged activities in New York. With respect to the remaining claim for defamatory statements, “New York courts do not interpret ‘transact[ing] business’ to include mere defamatory utterances sent into the state.” *Best Van Lines, Inc. v Walker*, 490 F3d at 248. It is undisputed that Cameron is a non-domiciliary. Accordingly, plaintiff’s allegations are insufficient for the court to exercise personal jurisdiction over Cameron and, for this reason, the defamation claim is dismissed.

#### Attorneys’ Fees

Cameron’s request for attorneys’ fees as a form of sanctions, is denied. Although plaintiff was not successful in pursuing her claims against Cameron, the court does not find the commencement of this action to be frivolous or made in bad faith. *See e.g. Parks v Leahey & Johnson*, 81 NY2d 161, 165 (1993) (“Although plaintiff cannot prevail on the merits of his fraud cause of action, bringing that claim was not an abuse of judicial process approaching sanctionable conduct”).

### III. Paraklete's Motion to Dismiss (motion sequence 003)

With respect to Paraklete, the complaint states that, on February 1, 2018, Nina Rao gifted plaintiff jewelry and that an unidentified Paraklete aide noted this on Nina Rao's chart. Subsequently, also in February 2018, Nina Rao accused plaintiff of taking her jewelry. The same paragraph in the complaint alleges that one of the Paraklete aides convinced Nina Rao that plaintiff had stolen her jewelry. However, as set forth in the complaint, the aide, presumably Rodica, allegedly made those statements in March 2018, after Nina Rao herself started to accuse plaintiff.<sup>2</sup> Furthermore, plaintiff was not a party to the conversations and the complaint does not identify to which third-party aide Rodica was speaking. It is well settled that "[f]ailure to state the particular person or persons to whom the allegedly defamatory statements were made also warrants dismissal." *CSI Group, LLC v Harper*, 153 AD3d 1314, 1320 (2d Dept 2017). Accordingly, the defamation cause of action alleged against Paraklete is dismissed for lack of specificity.

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<sup>2</sup> On March 24, 2018, a third-party aide heard Rodica speaking with Nina Rao in her bedroom telling Nina Rao that the Plaintiff 'is a thief' . . . that Plaintiff 'stole all your jewelry.'"

"On March 31, 2018, Rodica told a Paraklete aide in front of Nina Rao that the [neither] Plaintiff nor her husband can visit her aunt, Nina Rao, and to call the police if the Plaintiff attempted to visit, because the Plaintiff 'stole her jewelry' and that the Plaintiff 'can't be trusted because she is a thief.'"

Complaint, ¶¶ 24, 25.

**CONCLUSION**

Accordingly, it is hereby,

**ORDERED** that the motion by defendant Robert M. Gewald seeking to dismiss the complaint as against him (motion sequence 001) is granted to the extent that cause of action grounded in conversion is dismissed, and the motion is otherwise denied; and it is further,

**ORDERED** that the remaining claim for defamation shall continue; and it is further,

**ORDERED** that Robert M. Gewald shall serve and file an answer to the complaint within 20 days from the date of this order; and it is further

**ORDERED** that the motion by defendant Scott J. Cameron seeking to dismiss the complaint as against him (motion sequence number 002) is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against Scott J. Cameron; and it is further,

**ORDERED** that the motion by defendant Paraklete, H.H.C., LLC seeking to dismiss the complaint as against it (motion sequence number 003) is granted and the complaint is hereby severed and dismissed in its entirety as against Paraklete, H.H.C., LLC; and it is further,

**ORDERED** that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

2/10/2022

DATE



JAMES D'AUGUSTE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE