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

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ARIEL MOR ESQ. (a/k/a ARI MOR, ESQ)
Individually, and ARI MOR ESQ., P.C.,

Index No. 158193/2018

Plaintiffs,

Mot. Seq. No. 003

-against-

IMBESI LAW P.C., VINCENT JAMES IMBESI, BRITTANY SLOANE WEINER, and JOHN and JANE DOES #1-100

First name of DEFENDANTS being fictitious and Unknown to Plaintiffs and Persons intended to be Added Herein a Defendant(s),

Defendants.

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Hon. James E. d'Auguste:

In this action, inter alia, to recover damages for libel, defendants Imbesi Law P.C. (Imbesi Law), Vincent James Imbesi (Imbesi), and Brittany Sloane Weiner (Weiner), move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the amended complaint insofar as asserted against them.

BACKGROUND

From October 2017 to October 2018, plaintiff Ariel Mor Esq. (aka Ari Mor) and his law firm plaintiff Ari Mor Esq., P.C. (together Mor) subleased an office space from Imbesi Law pursuant to two separate lease agreements (Lease Agreements, NYSCEF Doc. Nos. 12, 13). The space subleased by Mor was part of a larger office suite utilized by Imbesi Law.

According to Mor, the phone lines in his subleased space never operated and Imbesi Law effectively blocked him from accessing internet and printing services (Amended Complaint at ¶ 13, NYSCEF Doc. No. 46). Additionally, Mor alleges that the air conditioning units in the subleased space failed on a consistent basis and that Imbesi intentionally turned off the power to

the unit, making it impossible for Mor to work there for more than two hours at a time (*id.* at ¶¶ 14, 16). Further, Mor asserts that Imbesi posted notices throughout the office suite meant to embarrass and harass Mor and to prevent him from being able to conduct business at the premises (*id.* at ¶ 17). Collectively, the notices indicated that Mor failed to pay his rent for May and June 2018 and failed to pay his share of the electricity bill from February to July 2018 (*id.* at Exh 6).

Mor acknowledges that he stopped paying rent in May of 2018, but claims he stopped doing so because of the aforementioned allegations, which he asserts amounted to a constructive eviction (*id.* at ¶ 18-19). Mor alleges that after he refused to pay rent, John and Jane Does #1-100 (the Doe defendants), who Mor believes to be Imbesi and/or his law partner Weiner, began posting "numerous and repeated false and defamatory statements" on various websites, including Yelp.com (*id.* at ¶ 18-20). The Yelp reviews, some of which Mor reproduces in his amended complaint, are purported to be made by individuals who retained and/or did business with Mor (*id.* at ¶ 20).

According to Mor, he never did business with any of these individuals and the statements posted by them "anonymously under fake aliases" are fabricated (*id.* at ¶¶ 19, 22-35). Mor believes that Imbesi and/or Weiner created fake accounts in order to post these "defamatory reviews" (*id.* at ¶ 34).

Mor asserts that the statements posted in these Yelp reviews ruined his reputation and "had the effect of lowering [his] good will and worthiness in the estimation of the community, deterring others from associating or dealing with [him], and otherwise exposing [him] to contempt and ridicule" (*id.* at ¶¶139-140). He alleges that "[a]ny client or prospective client

who investigates and/or searches [him] on, inter alia, www.Google.com and/or www.Yelp.com [would quickly find] the Defamatory Statements" (*id.* at ¶142).

On September 4, 2018, Mor commenced the instant action against Imbesi Law, Imbesi, Weiner, and the Doe defendants, alleging causes of action for: libel; libel per se; injurious falsehood; tortious interference with prospective business advantages, opportunities and relations; fraud; violation of section 349 of the General Business Law (General Business Law 349); breach of contract; commercial tenant harassment under section 22-902 of the Administrative Code of the City of New York (Administrative Code 22-902); partial constructive eviction; and for a declaration that the statements posted on the internet are defamatory and/or defamatory per se (Original Complaint, NYSCEF Doc. No. 1).

In the interim, Imbesi Law initiated a summary non-payment proceeding in the New York City Civil Court against Mor, entitled *Imbesi Law P.C. v Law Offices of Ari Mor, Esq., P.C.* (L&T Index No. 064133/2018). On September 4, 2018, Mor moved by order to show cause to remove the non-payment proceeding and to consolidate it with the instant action. On October 29, 2018, this court granted Mor's motion (Order [Mot. Seq. No. 001], NYCEF Doc. No. 24).

Thereafter, Imbesi Law, Imbesi and Weiner moved to dismiss the original complaint insofar as asserted against them. By order dated May 8, 2020 (the prior order), this court granted their motion to the extent of (1) dismissing the causes of action alleging violation of General Business Law 349 and commercial harassment under Administrative Code 22-902, and (2) dismissing the causes of action for libel, libel per se, breach of contract, and a declaratory judgment with leave to replead these claims with specificity and serve an amended complaint as to those causes of action within 30 days (Order [Mot. Seq. No 002], NYSCEF Doc. No. 44). The court denied, as moot, those branches of the motion which were to dismiss the causes of action

for injurious falsehood, tortious interference, fraud, and partial constructive eviction, on the ground that those causes of action were withdrawn by Mor in opposing the motion (*id.*).

On June 7, 2020, Mor filed an amended complaint against the same defendants asserting causes of action for (1) libel, (2) libel *per se,* (3) breach of implied covenant of good faith and fair dealing, (4) commercial tenant harassment under Administrative Code 22-902, and (5) seeking a declaration that defendants have committed libel and/or libel per se (Amended Complaint, NYSCEF Doc. No. 46).

Now before the court is a motion by Imbesi Law, Imbesi, and Weiner (hereinafter the moving defendants) to dismiss the amended complaint as against them pursuant to CPLR 3211 (a)(1) and (7). For the following reasons, their motion is denied.

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" and the court must "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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). On a CPLR 3211(a)(1) motion to dismiss based on documentary evidence, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id. at* 88 [internal quotation marks and citations omitted]).

Libel and Libel Per Se

"The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory" (*Brian v Richardson*, 87 NY2d 46, 50-51 [1995]). A defamatory statement is one that "tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks and citations omitted]).

A complaint alleging defamation "must set forth the particular words allegedly constituting defamation (*see* CPLR 3016[a]), and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made" *(Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009][quotation marks and citations omitted]).

The Court of Appeals has stated:

> "In determining the sufficiency of a defamation pleading, we consider whether the contested statements are reasonably susceptible of a defamatory connotation [and] [i]f, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action. We apply this liberal standard fully aware that permitting litigation to proceed to discovery carries the risk of potentially chilling free speech, but do so because, as we have previously stated, we recognize as well a plaintiff's right to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets [the] minimal standard necessary to resist dismissal of [the] complaint"

(*Davis v Boeheim*, 24 NY3d 262, 268 [2014][internal quotation marks and citations omitted]).

In the prior order, this court dismissed the causes of action for libel and libel pers se on the ground that the original complaint failed to set forth "the particular words complained of" (CPLR 3016[a]). The court noted that while Mor alleged in the complaint that defendants made numerous false and defamatory statements on the internet, and annexed copies of various Yelp reviews as exhibits to the complaint, Mor failed to delineate in the complaint exactly which

statements were defamatory. The court granted Mor leave to replead these causes of action to specify which statements in each Yelp review are alleged to be defamatory.

The causes of action in the amended complaint alleging libel and libel per se now describe the alleged defamatory statements with the requisite specificity. In paragraph 20 of the amended complaint (NYSCEF Doc. No. 46), Mor reproduces the following Yelp reviews, which he collectively refers to as "the Defamatory Statements," and delineates the words that are alleged to be defamatory, which appear below in bold: [1]

(1) A one-star (out of five) review, dated "5/15/18," posted by user "JR," which states:

> "I had a truly horrible experience with Ari Mor. He is an **unscrupulous character** who did very little, avoided any contact, and bullied us into giving him money after he did almost nothing. **He is a predatory con artist and is a sleazy lawyer**. Also, he went to Thomas Jefferson Law School, which you should PLEASE google. It is a factory mill degree law school that is also incredibly unscrupulous. Here is the link to a NYTimes article on it:
>
> NYtimes.com/2016/03/07/b…
>
> I am traumatized from my experience with Ari Mor and do not wish him on anybody. He is not an experienced lawyer. Instead, he is a **smooth talking con artist who knows little about NYC housing law** and does a lot of pomp and circumstance to **swindle desperate people.** Please beware."

(2) A zero-star review, dated "Jun 29, 2018," posted by user "Sally S.," which states:

> "**This guy went crazy in a law office I was at. He was cursing and screaming and banging walls. You would not believe how unprofessional he was. I think he did not pay his rent for 50 days and was upset.** Not sure what his problem is."

(3) A one-star review, dated "8/6/2018," posted by user "Janie H.," which states:

> "We contracted with this guy. He seemed ok at first BOY were we wrong. **He literally attacked a lawyer – yelling 'fucking faggot' among other slurs.** I think he is being evicted from his law office (at least I saw a legal document trying to evict him for failing to pay his rent.) The office is SUPER convenient. So that is a plus.

[1] Other than adding bold type to denote the precise words Mor alleges to be defamatory, the spelling, punctuation, capitalization, and spacing in these reviews is quoted as it appears in the amended complaint.

> I am not sure what causes him to go off and attack people using anti gay slurs. Not cool with me. He is a loose cannon. See the lawsuit filed against his law firm. It claims to have video of this dope attacking a lawyer while threatening to kill him (you cannot make this stuff up!!)
>
> Please do your own diligence. Maybe he was having a bad day?"

(4) A zero-star review, dated "Aug 10, 2018," posted by user "Shana F.," which states:

> "I never write reviews but need to warn public of my opinion. Contracted with Ari Mor law firm months ago. I now find out his landlord has filed to evict him for failing to pay!!!! The legal docs again this guy claim he threatens others around him including using anti gay comments. **He appears to bully anyone that speaks out against him** though this dog appears to be all bark and no bite in my opinion. **Check out all of the yelp reviews he has deleted** – huge indication of insecure man. Read the legal documents filed AGAINST Ari Mor's law firm and make your own decision. Yes, Mr. Mor you can try to sue me for defamation, but truth is defense, so good luck."

(5) A two-star "updated review," dated "8/24/2018," posted by user "G.F.," from Manhattan, which is identical to the review posted by user "JR" on "5/15/18." Below the "updated review," is a one-star review, denominated "previous review," dated "8/17/2018," that is also identical to the review posted by "JR" on "5/15/18."

(6) A one-star review, dated "8/22/2018," posted by user "Fran F.," from Montclair, NJ, that is also identical to the review posted by "JR" on "5/15/18."

(7) A one-star review, dated "8/24/2018," posted by user "Gina G.," from Towaco, NJ, which states:

> "It was coo coo crazy, mean and creepy all at the same time. **Do you think his reviews are real? My opinion is NO WAY. The fact is that, attorneys don't usually get many reviews.** Maybe 1-3 at the most over a period of 10 years. This guy is wet behind the years. Just 4 years out of school, and can't even make a phone call. There are many great attorneys with long careers and absolutely no reviews, because an attorney is not the sort of business that most people write reviews about. I certainly wouldn't have thought to do it if he hadn't texted my about how great he is on YELP.
>
> I called Ari Mor & left message on various days but didn't hear back. I tried again a week later on 6/21, and he actually answered quickly told me I could email all the case information and got off the phone. I immediately emailed everything & didn't hear back. I called & left messages and sent a text on 6/27. Finally, on 6/28 he emails stating, 'Can

we speak tomorrow afternoon'. I immediately responded letting him know that I would be having medical therapy & asked if we could speak in the evening instead. He didn't respond. When I came home from the doctor I felt very ill and tried to email him again. I asked, 'Can we speak some time tomorrow?' He didn't respond and when I called the next day there was no answer. I tried to call his # numerous times but never received any call back. On 7/7 I texted again and he responded by text stating that he had been on vacation. He claimed that we had had a time to speak but that I never called (total lie). I texted back, 'I usually assume that if I am not able to correspond back timely other counsel will be pursued.' I then asked if he had ever looked over my documents. He responds, 'I had which is why we had scheduled the last call time.' (We had no call time scheduled). What he texted after was disturbing. He texted first, "I was contemplating your request to take the matter on contingency basis.' Then his next text, "I'm unable to do that at the moment.' Then another text, 'I don't work on Contingency. My fee for Article 78 is $5k & 25%.' Followed by text stating, "My fees are set & there are many people happy to pay them for my work. I urge you to read my Yelp reviews.' (Yes he actually wrote this!) Then he went on sending 5 more babbling text to me and then a last one which stated, 'I had asked a few of my colleagues if they were interested in picking up your matter on contingency & I had no response btw."

(8) A one-star review, dated "9/2/2018," posted by user "Gore G.," from Cliffside Park, NJ,

which states:

"OK – Everyone **this con artist pays for reviews**. I have wondered how such a disgusting person could have so many positive reviews. **He hired a service that writes fake reviews** (check out how a positive review arrives when anyone writes a negative review).

The service pays for posts from San Francisco then changes the location of the fake review.

I posted this review several times since 2017.

Here it is:
I am traumatized from my experience with Ari Mor and do not wish him on anybody. He is not an experienced lawyer. Instead, he is a smooth talking **con artist who knows little about NYC housing law** and does a lot of pomp and circumstance to **swindle desperate people**. Please beware.

I had a truly horrible experience with Ari Mor. **He is an unscrupulous character** who did very little, avoided any contact, and bullied us into giving him money after he did almost nothing. **He is a predatory con artist and is a sleazy lawyer**. Also, he went to Thomas Jefferson Law School, which you should PLEASE google. It is a factory mill degree law school that is also incredibly unscrupulous. Here is the link to a NYTimes article on it:

NYtimes.com/2016/03/07/b…"

(9) A two-star review, dated "9/2/2018," posted by user "Turner T.," from Manhattan, NY, that is nearly identical to the one-star review posted by user "Gina G." on "8/24/2018."

(10) A one-star review, dated "9/3/2018," posted by user "Edgar E.," from Kearny, NJ, which states:

> "I wrote back in early 2018 and checked back. I noticed the **fake reviews** too but never put two and two together. It confused me that anyone would write anything positive about **a man with an obvious mental disorder**. **How did this derelict get into law school?**
>
> Old Review: I was facing an illegal eviction where my landlord terminated my lease and wanted me out of my apartment of 6 years. I was going thru a stressful time thinking that I was going to lose my apt. I decided to search on Yelp for some good Housing Attorneys. Upon my search I ran across Ari Mor. This guy had so many positive reviews. I went thru them most. i was sure i found the right attorney to represent my case.
>
> I called Mr. Mor. He asked me to send him all the documents i had including all letters sent by my landlord. He immediately told me that it will cost me $500 via QP. In addition he said he would take my case on contingency. This meant that he would receive a percentage of whatever monies were awarded thru this case. Mr. Ari Mor sent the letter over to my landlord. Days went by i reached out to Mr. Mor to see if he had heard back from the landlord regarding the letter we submitted in response their termination. He claimed he called, left a message and didn't hear back. Days went by and we haven't gotten a reply to our letter. I reached out to Mr. Mor numerous occasions and he was always unavailable or was on vacation. Each time i called and texted i had to wait days before he replied.
>
> I decided to take matters in to my own hands and gave my landlord's attorney a call to see if they had received this 'Demand Letter' sent by Ari Mor. While on the phone I may have heard some laughter in the background then the person answered that Yes in fact they reviewed it but cannot discuss anything with me but only my attorney and he hadn't called.
>
> My first court appearance arrived and the day before Mr. Ari Mor told me that wouldn't be available to appear in court due to family emergency. And that i should call back after court. I was under the impression i had an attorney hired. I went to court and got an adjournment to seek an attorney. Mr. Mor had never signed up on the website as my attorney. So i had none listed. I immediately fired Mr. Mor via email, text. Had i not fired Ari Mor and hired a new attorney, i would have been evicted at this very moment.

> I am now out of $500 for a dumb letter suggested by Mr. Mor but thank god i still have my apt no thanks to him.
> my new attorney won our case."

The moving defendants point out that the amended complaint alleges that the persons who posted these Yelp reviews are the "Named Defendants/DOE Defendant(s) (believed to be Defendant Vincent James Imbesi, Esq. and/or Defendant Brittany Sloane Weiner, Esq.)" (Amended Complaint at ¶ 18, NYSCEF Doc. No. 46), and thus fails to specifically identify which defendant actually made the challenged statements. They cite support for the proposition that this warrants dismissal of Mor's defamation claims *(see Jackie's Enters., Inc. v Belleville*, 165 AD3d 1567, 1571 [3d Dept 2018]["the complaint does not sufficiently identify the specific third persons to whom the statements were allegedly made *or identify which of the three defendants made any of the alleged statements*"][emphasis added]; *Murphy v City of New York*, 59 AD3d 301, 301 [1st Dept 2009]["The complaint failed to establish all the elements of defamation, inasmuch as plaintiff did not allege the time, the manner and the persons to whom the publication was made, *nor did he identify the person who made it*"][emphasis added and citation omitted]; *Trakis v Manhattanville Coll.*, 51 AD3d 778, 781 [2d Dept 2008][plaintiff "never identified who spoke the remarks"]).

However, as Mor points out, the First Department has held that a plaintiff's failure to identify exactly which defendant made a particular defamatory statement is not necessarily fatal to a defamation claim (*see Cedeno v Pacelli*, 192 AD3d 533, 534 [1st Dept 2021][plaintiffs' failure to specify exactly what words were spoken by which defendant was not fatal to defamation claim "since the amended complaint contain(ed) the dates, text, context, URLs, and other information about the defamatory statements(,) allege(d) that the (named defendants) were responsible for authoring, publishing, or causing others to publish them(, and t)here (were) no

allegations that the John Does acted independently of the (named defendants)"[citation omitted]; *see also Fletcher v Dakota, Inc.*, 99 AD3d 43, 55 [1st Dept 2012]["While some of these allegations do not specify exactly which of the defendants made a particular statement, that is not a fatal defect"]).

The moving defendants also assert that the defamation causes of action should be dismissed because Mor did not sufficiently allege the time these publications were made. This argument is unavailing because each Yelp review indicates the date on which it was posted.

Additionally, the moving defendants unpersuasively argue that the defamation claims should be dismissed because the alleged defamatory statements are true. While truth is an absolute defense to a defamation claim (*see Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]), the moving defendants have not established that the alleged defamatory statements are true.

The court also disagrees with the moving defendants' contention that the statements complained of constitute non-actionable statements of opinion. "Since falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, only statements alleging facts can properly be the subject of a defamation action" (*Davis v Boeheim*, 24 NY3d at 268 [internal quotation marks and citations omitted]). "Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008][internal citations omitted]). "Distinguishing between fact and opinion is a question of law for the courts, to be decided based on what the average person hearing or reading the communication would take it to mean" (*Davis v Boeheim*, 24 NY3d at 269 [internal quotation marks and citations omitted]).

The inquiry "is whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff" (*id.* at 269-270 [internal quotation marks and citations omitted]).

"While a pure opinion cannot be the subject of a defamation claim, an opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, . . . is a mixed opinion and is actionable" (id. at 269 [internal quotation marks and citations omitted]). "What differentiates an actionable mixed opinion from a privileged, pure opinion is the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person being discussed" (*id.* at 269 [2014][internal quotation marks and citations omitted]).

In deciding whether statements are assertions of fact as opposed to nonactionable expressions of opinion, the court must consider:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact"

(*Davis v Boeheim,* 24 NY3d at 276 [quotation marks and citations omitted]). The third factor "requires that the court consider the content of the communication as a whole, its tone and apparent purpose" (*id.* at 270). "Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff" (*id.* [internal quotation marks and citations omitted]). For example, "[e]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in

public debate, heated labor dispute, or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole" (*Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 41-42 [1st Dept 2011][internal quotation marks and citations omitted]).

Here, some of the statements proffered as a basis for Mor's defamation claim are actionable and some are non-actionable. The statements characterizing Mor as "unscrupulous," "a predatory con artist," and a "sleazy lawyer," and describing him as "a smooth talking con artist who knows little about NYC housing law and does a lot of pomp and circumstance to swindle desperate people" are non-actionable in that they suggest that the authors were merely expressing their opinion based on "negative business interaction[s] with" Mor (*Torati v Hodak*, 147 AD3d 502, 503 [1st Dept 2017]; *see Crescendo Designs, Ltd. v Reses*, 151 AD3d 1015, 1016 [2d Dept 2017]["given the context in which the challenged statements were made and viewing the content of the review as a whole, a reasonable reader would have believed that the writer of the review was a dissatisfied customer who utilized the Yelp website to express an opinion"]). In addition, terms such as "smooth talking" and "sleazy" do not have a precise meaning and are incapable of being proven true or false (*see Board of Mgrs. of Brightwater Towers Condominium v Shlivko*, 186 AD3d 553, 554 [1st Dept 2020]).

However, the following statements are actionable as factual assertions: that Mor has a "mental disorder," "bull[ies] anyone that speaks out against him," "went crazy" in his office by "cursing and screaming and banging the walls," attacked another attorney by "yelling 'fucking faggot' among other slurs," posted fake Yelp reviews, and hired a service to write fake Yelp reviews. Therefore, contrary to the moving defendants' contention, Mor sufficiently alleges a cause of action for libel. The moving defendants argue that these alleged false factual accusations should nevertheless be considered non-actionable expressions of opinion in that they

were anonymously posted on a consumer review website. In this regard, they rely on a number of cases which they contend stand for the proposition that a comment made in the context of an online review is not actionable (*citing Torati v Hodak*, 147 AD3d 502, 503 [1st Dept 2017][finding that statements in anonymously posted on-line reviews were not actionable because while they contained "elements of both fact and opinion, when viewed in context, they suggest to a reasonable reader that the author was merely expressing his opinion based on a negative business interaction with plaintiffs," and noting that readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts]; *Crescendo Designs, Ltd. v Reses*, 151 AD3d 1015, 1016 [2d Dept 2017]["given the context in which the challenged statements were made and viewing the content of the review as a whole, a reasonable reader would have believed that the writer of the review was a dissatisfied customer who utilized the Yelp website to express an opinion"]; *Stolatis v Hernandez*, 161 AD3d 1207 [2d Dept 2018]["given the context in which the statements . . . were made, and viewing the content of the post as a whole, as well as the content of the other contemporaneous posts on the same Facebook pages, a reasonable reader would have believed that the defendant was communicating his opinion"]; *Matter of Woodbridge Structured Funding, LLC v Pissed Consumer*, 125 AD3d 508, 509 [1st Dept 2015]["Although some of the statements are based on undisclosed, unfavorable facts known to the writer, the disgruntled tone, anonymous posting, and predominant use of statements that cannot be definitively proven true or false, supports the finding that the challenged statements are only susceptible of a nondefamatory meaning, grounded in opinion"]).

However, these cases do not establish a blanket rule that all statements posted anonymously on Yelp, or other on-line review websites, are automatically insulated from

liability for defamation. None of them hold that these websites confer "a license to make false factual accusations and thereby unjustly destroy individuals' reputations" (*Brian v Richardson*, 87 NY2d 46, 52 [1995]["an article's appearance in the sections of a newspaper that are usually dedicated to opinion does not automatically insulate the author from liability for defamation"]). Indeed, the Court of Appeals has "repeatedly emphasized that the forum in which a statement has been made, as well as the other surrounding circumstances comprising the 'broader social setting,' are only useful gauges for determining whether a reasonable reader or listener would understand the complained-of assertions as opinion or statements of fact" (id.).

Here, the writers were not utilizing Yelp just to communicate an opinion. Significantly, a reasonable reader could believe accusations that plaintiff was "cursing and screaming and banging walls" in his office, the he paid a service to write fake Yelp reviews, and that he attacked another attorney by "yelling fucking faggot among other slurs," do not represent opinions or hyperbole, but are conveying facts about the plaintiff (*see Davis v Boeheim*, 24 NY3d at 269-270 ["The dispositive inquiry . . . is whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff"][internal quotation marks and citations omitted]).

As to the cause of action for libel per se, a defamation plaintiff must plead and prove that he or she suffered special damages unless the defamation falls into one of four per se categories (*see Epifani v Johnson*, 65 AD3d at 233-234). "When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven" (*id.* at 234). The four per se categories include "statements that tend to injure the plaintiff in her trade, business or profession" (*Nolan v State of New York*, 158 AD3d 186, 195 [1st Dept 2018]).

Since the statements at issue tend to injure Mor in his trade, business, or profession, they are actionable as libel per se.

Thus, this branch of the motion is denied.

Breach of the Implied Covenant of Good Faith and Fair Dealing

In the prior order, this court dismissed, with leave to replead, the cause of action for breach of contract on the ground that the original complaint did not specify which provisions of Mor's rental agreements Imbesi Law breached. In his amended complaint, Mor does not plead a cause of action for breach of contract. Instead, he asserts a cause of action for breach of the implied covenant of good faith and fair dealing against Imbesi Law.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002][internal quotation marks and citations omitted]; *see Moran v Erk*, 11 NY3d 452, 456 [2008]).

Here, the amended complaint alleges that Imbesi Law breached the implied covenant of good faith and fair dealing by turning off the power to Mor's office space while Mor was trying to conduct client meetings. It further alleges that the phone lines to Mor's office space were not operational and that Imbesi blocked him from accessing internet and printing services.

The subleases, which are annexed to the amended complaint, do not include any terms obligating Imbesi to provide phone, internet or printing services (*see Vanlex Stores, Inc. v BFP 300 Madison II LLC*, 66 AD3d 580, 581 [1st Dept 2009]["the implied covenant of good faith and fair dealing inherent in every contract cannot be used to create terms that do not exist in the writing"]; *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268 [1st Dept 2003]["While the

covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights"]). However, Mor is also alleging that by turning off the power to his office space when he met with clients, Imbesi Law's actions undermined Mor's ability to conduct business there, which was the fundamental objective of Mor's subleases with Imbesi Law. Thus, the allegations in the amended complaint plead a cause of action for breach of the implied covenant of good faith and fair dealing. The court's role in deciding this motion is not to determine whether Mor will ultimately succeed on the claim.

The moving defendants argue that this claim should be dismissed because it is merely a substitute for a non-viable breach of contract claim. However, "[a] party may be in breach of its implied duty of good faith and fair dealing even if it is not in breach of its express contractual obligations" (*Chase Manhattan Bank, N.A. v Keystone Distributors, Inc.*, 873 F Supp 808, 815 [SDNY 1994]).

The cases relied upon by the moving defendants in this regard are distinguishable. In *Phoenix Capital Invs. LLC v. Ellington Mgt. Group, L.L.C.*, the court dismissed the breach of implied covenant of good faith and fair dealing claim because enforcing it would have been inconsistent with the provisions of the contract, which is not the case here (*Phoenix Capital Invs. LLC v. Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]).

The moving defendants' reliance on *Triton Partners v Prudential Sec.* (301 AD2d 411, 411 [1st Dept 2003]) is similarly misplaced. In that case the plaintiff pleaded a breach of contract claim seeking to enforce the terms of an oral agreement pursuant to which defendant purportedly promised to proceed with the terms of the transaction at issue. The court held that the breach of contract claim was correctly dismissed inasmuch as the terms of the oral agreement

plaintiff was seeking to enforce conflicted with the terms of an engagement letter that permitted the defendant to terminate the contract without cause on ten days notice. The court held that the breach of the covenant of good faith and fair dealing claim was properly dismissed "since it was merely a substitute for a nonviable breach of contract claim" and that "[a] party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive" (*id.* at 411 [quotation marks and citations omitted]). The instant case is distinguishable because the breach of implied covenant of good faith and fair dealing claim is not inconsistent with a clause in the lease agreements Mor sought to enforce in his breach of contract claim. *Sheth v New York Live Ins. Co.* (273 AD2d 72, 73 [1st Dept 2000]), is distinguishable on the same basis.

Thus, this branch of the motion is denied.

Commercial Tenant Harassment under Administrative Code 22-902

Administrative Code 22-902 prohibits a landlord from engaging in "commercial tenant harassment," which is defined as "any act or omission [that] would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property." Such conduct includes, "causing repeated interruptions or discontinuances of one or more essential services," "causing an interruption or discontinuance of an essential service for an extended period of time," "causing an interruption or discontinuance of an essential service where such interruption or discontinuance substantially interferes with a commercial tenant's business," and "engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant's business" (Administrative Code 22-902 [a][ii][2-4], [10]).

In the prior order, this court dismissed Mor's claim for commercial tenant harassment under Administrative Code 22-902 on the ground that Mor failed to annex a copy of the rental agreement to the complaint and as such, failed to adequately plead a violation section 22-902.

Now, Mor has annexed the rental agreements to his amended complaint and alleges that the following constitutes commercial harassment under the statute: (1) Imbesi Law turned off the power to his unit while he was meeting with clients or otherwise conducting business therein, making it impossible for him to be in the unit for more than an hour or two at a time, and (2) Imbesi Law annoyed Mor and disrupted his ability to meet clients/conduct business within the subject premises by posting harassing notices all over the office so as to annoy harass, and cause embarrassment to Mor and to prevent him from being able to meet clients or conduct business within the subject premises.

The moving defendants point out that in the prior order, the court did not dismiss the commercial tenant harassment claim with leave to replead. Therefore, they assert, it was improper for Mor to again include this claim in the amended complaint.

In the prior order, the court dismissed this cause of action solely for failure to annex the lease agreement to the complaint. Not dismissing the cause of action with leave to replead was inconsistent with the intent of the court as demonstrated by the court dismissing the breach of contract claim with leave to replead on the same basis (*see* CPLR 5019[a]; *Johnson v Societe Generale S.A.*, 94 AD3d 663, 664 [1st Dept 2012][a correction under CPLR 5019(a) is permitted even were a substantial right of a party is affected, where the error "is clearly inconsistent with the intentions of the court and the parties as demonstrated by the record"]).

The moving defendants assert that dismissal of this cause of action is also warranted on the merits. In so arguing, they refer the court to the contentions raised by them in support of

their first motion to dismiss. In support of their first motion to dismiss, the moving defendants argued that Mor improperly pleaded the commercial tenant harassment claim against Weiner and Imbesi because they were not parties to the lease agreements and cannot be liable for Imbesi Law's contractual obligations. However, in the amended complaint, Mor pleads this claim against Imbesi Law only. In support of their prior motion, the moving defendants did not set forth a basis for dismissing the commercial tenant harassment claim against Imbesi Law and set forth no basis for doing so on the merits in support of the instant motion.

Thus, this branch of the motion is denied.

Declaratory Judgment

In the fifth cause of action, Mor is seeking a judgment declaring that the purported "Defamatory Statements are defamatory/libelous and/or defamatory/libelous per se" (Amended Complaint at ¶ 258, NYSCEF Doc. No. 46). Given that Mor's libel and libel per se causes of action are viable, the court declines to dismiss this cause of action.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendants Imbesi Law P.C., Vincent Imbesi, and Brittany Weiner to dismiss the amended complaint against them is denied.

This constitutes the decision and order of the court.

Dated: March 10, 2022

ENTER:

J.S.C.