Shusterman v Shusterman
2022 NY Slip Op 34219(U)
December 9, 2022
Supreme Court, New York County
Docket Number: Index No. 652263/2021
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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INDEX NO. 652263/2021

MOTION SEQ. NO. 001

CAROL SHUSTERMAN,
Plaintiff,

- against-

ROBERT SHUSTERMAN, ALI GOLDSMITH, and AARON GOLDSMITH,
Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for **DISMISSAL**.

On April 6, 2021, plaintiff commenced this action against defendants Robert Shusterman ("Robert"), Ali Goldsmith ("Ali"), and Aaron Goldsmith ("Aaron") seeking repayment of multiple allegedly unpaid loans and return of her jewelry and an annuity.[1] (NYSCEF Doc. No. 2, *complaint*). Robert is plaintiff's brother, and Ali is Robert's daughter and plaintiff's niece. Aaron is Ali's husband. Ali and Aaron are both practicing attorneys.

On April 30, 2021, Ali and Aaron (collectively, "defendants") answered the complaint and counterclaimed for defamation *per se*, libel, frivolous action and harassment, slander, and infliction of emotional distress (NYSCEF Doc. No. 3, *answer with counterclaims*). Plaintiff filed a reply to the counterclaims on May 7, 2021. (NYSCEF Doc. No. 8, *reply*). On May 10, 2021, all claims against Robert were dismissed by stipulation. (NYSCEF Doc. No. 9, *stipulation of discontinuance*).

Defendants now move, pursuant to CPLR 3211(a), for an order dismissing the complaint and, pursuant to CPLR 8303-a and 22 NYCRR 130-1.1, for an award of costs and an order imposing sanctions upon plaintiff. (NYSCEF Doc. No. 10, *notice of motion*). Plaintiff opposes the motion to dismiss and cross-moves for summary judgment, pursuant to CPLR 3212, seeking dismissal of defendants' counterclaims. (NYSCEF Doc. No. 20, *notice of cross motion*). After careful review of the record and the relevant case law, defendants' motion seeking dismissal is granted in part; defendants' motion seeking costs and sanctions is denied, and plaintiff's cross-motion for summary judgment is granted.

Addressing first the motion to dismiss, it is well-settled that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts

[1] Traditionally, this court would not refer to the parties by their first names, but as the complaint and the papers submitted with respect to these motions have done so, for ease and clarity the court's decision and order will be styled in an identical fashion.

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]).

Pursuant to CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. (see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].) "A paper will qualify as documentary evidence only if it satisfies the following criteria: (1) it is unambiguous; (2) it is of undisputed authenticity; and (3) its contents are essentially undeniable" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [internal quotation marks and citation omitted]).

A defendant may also move to dismiss a cause of action on the ground that it is barred by the statute of limitations, where defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired. (see CPLR 3211[a][5]; *Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]; *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008].) "To meet its burden, the defendant must establish, *inter alia*, when the plaintiff's cause of action accrued." (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016] [internal quotation marks and citation omitted]). "If the defendant meets that burden, then the burden shifts to the plaintiff 'to aver evidentiary facts establishing that the action was timely or to raise a question of fact as to whether the action was timely.'" (*Lake v New York Hosp. Med. Ctr. of Queens*, 119 AD3d 843, 844 [2d Dept 2014], quoting *Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611 [2d Dept 2009].) "The plaintiff may do so by averring evidentiary facts establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies." (*CRC Litig. Trust v Marcum, LLP*, 132 AD3d 938, 938-939 [2d Dept 2015].)

"On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Pacific W., Inc. v E & A Restoration, Inc.*, 178 AD3d 834, 835 [2d Dept 2019]; *see Leon*, 84 NY2d at 87–88). When "evidentiary material is submitted . . . on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and the motion should not be granted unless the movant can show that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it." (*Pacific Western, Inc.*, 178 AD3d at 835; *see Leon*, 84 NY2d at 88).

Defendants move for dismissal of the complaint on the grounds that plaintiff fails to state a claim and documentary evidence contradicts plaintiff's allegations. Additionally, defendants seek costs and sanctions as against plaintiff asserting that the complaint is frivolous.

Upon review of the pleadings, defendants' motion to dismiss plaintiff's first (Recission – Lack of Consideration) and second (Recission -Unconscionability) causes of action is granted. Rescission of a contract is generally permitted when the breach is "material and willful, or if not

willful, so substantial and fundamental as to strongly tend to defeat the object of the parties making the contract." (*Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]). Here, no cause of action for rescission is asserted as against defendants, and there are no factual allegations demonstrating that defendants were parties to the contract between plaintiff and Robert. Plaintiff only mentions Aaron's participation in the preparation of the contract and plaintiff's generosity towards Ali and Aaron and their children (NYSCEF Doc. No. 2 at ¶¶ 16-17, 19). The claims appear to only be asserted as against Robert, who is no longer a party to this action (NYSCEF Doc. No. 2 at wherefore clause; NYSCEF Doc. No. 9; NYSCEF Doc No. 29 at 7 ["Robert is no longer a defendant in the instant action"]), and rescission is, thus, unavailable since plaintiff has dismissed a necessary party. (*Frymer v Bell*, 99 AD2d 91, 95 [1st Dept 1984] ("[i]n an action for rescission, all parties to the agreement must be brought before the court"].)

In her third cause of action, plaintiff seeks repayment of multiple loans and return of her jewelry and annuity. Specifically, plaintiff alleges that she loaned defendants hundreds of thousands of dollars that have not been repaid (NYSCEF Doc No. 2 at ¶ 29 [i]-[ii]). Defendants contend that dismissal is warranted because the "[c]omplaint does not afford Movants with any notice as to any specific damages that [p]laintiff allegedly suffered due to [d]efendants['] failure to repay purported loans, let alone the times provided, the terms of repayment, the dates of demand for repayment, etc." (NYSCEF Doc No. 13 at 8-9, *memorandum of law*). Defendants also argue that several of the transactions occurring in 2014 or earlier are barred by the statute of limitations, i.e., a "$50,000 unrepaid loan to Aaron for the down payment for the purchase of their home, a $70,000 unrepaid payment for Ali and Aaron's second home, $23,000 to Ali and Aaron for the purchase of a co-op apartment, $13,000 in rent for a rental home . . . after their residence was damaged and made uninhabitable after a storm." (NYSCEF Doc. No. 13 at 18).

Plaintiff does not meaningfully dispute defendants' statute of limitations argument in her opposition, (NYSCEF Doc. No. 33 at 3), and except for the $50,000.00 check, plaintiff concedes that the funds related to defendants' housing expenses were gifts (NYSCEF Doc No. 22 at ¶ 14 ["I had previously made some other smaller payments to them for a prior apartment, and for a temporary home after Hurricane Sandy had damaged their home, which I had considered gifts"]). Accordingly, any claims seeking repayment of the $70,000.00, $23,000.00 and $13,000.00 housing-related disbursements are dismissed.

As for the $50,000.00 check, the check presented by plaintiff is dated September 30, 2004 (NYSCEF Doc. No. 23, *check*), and this action was commenced on April 6, 2021. Thus, the statute of limitations concerning breach of any agreement for repayment would have expired over a decade ago. Additionally, plaintiff concedes the untimeliness of this claim and asserts that the check is only submitted as evidence "to disprove the defendants' repeated contention that no transaction between the parties was ever considered a loan." (NYSCEF Doc. No. 33 at 2, *memorandum in reply*). Accordingly, any claim for the repayment of the $50,000.00 check dated September 30, 2004, is dismissed (*see M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 NY3d 798, 800 [2009] [dismissal appropriate where "plaintiff's own evidentiary submissions conclusively establish [there is] no cause of action." (internal quotation marks and citation omitted)].)

Defendants contend that: all the money they received were inter vivos gifts rather than loans; plaintiff never requested repayment; and this lawsuit is a result of Ali not taking plaintiff's side in a legal and financial dispute between plaintiff and Robert (NYSCEF Doc. No. 13 at 14-18).

In order to have a valid inter vivos gift, the recipient must prove three essential elements: donative intent; delivery sufficient to divest the donor of dominion and control over the property; and acceptance. (see *Gruen v Gruen*, 68 NY2d 48, 53 [1986]; *Matter of Szabo*, 10 NY2d 94, 98 [1961].) The donee bears the burden of proving the gift by clear and convincing evidence. (see *Matter of Roberts v Jossen*, 99 AD2d 1002, 1002 [1st Dept 1984], *affd as mod* 63 NY2d 875 [1984].) The person who attempts to establish an inter vivos gift has a heavy burden and the proof must be of great probative force and must clearly establish every element of a gift. (see *Matter of Schroeder*, 113 App Div 204, 210 [1st Dept 1906], *affd* 186 NY 537 [1906].)

A loan is a contract, and "[t]o form a binding contract there must be a meeting of the minds, such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal quotation marks and citations omitted].) "In determining whether the parties entered into a contractual agreement, and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds." (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977].) Courts "must look to the attendant circumstances, the situation of the parties, and the objectives they were striving to attain." (*Ruane v Allen-Stevenson School*, 82 AD3d 615, 616 [1st Dept 2011]).

Plaintiff contends that she should not be penalized for not requiring a written loan agreement and previously seeking repayment of the money from defendants, her "close family members," when she knew they were unable to repay it (NYSCEF Doc. No. 22 at ¶ 3). She alleges that there was a "certain understanding" between the parties that certain larger transactions were loans, not gifts (NYSCEF Doc. No. 22 at ¶ 9). Plaintiff's opposition primarily focuses on four transactions: 1) a loan to Aaron for $50,000.00 *via* check dated September 30, 2004; 2) $151,419.90 loaned to Ali to pay her student loan debt on May 8, 2017; 3) $9,500.00 wire transfer to Aaron; and 4) another wire transfer for $9,500.00 on April 20, 2018 (NYSCEF Doc. No. 22 at ¶¶ 14-16; NYSCEF Doc. No. 24; NYSCEF Doc. No. 29 at 9, 12-13; NYSCEF Doc. No. 33 at 2).[2] Here, viewing the allegations in the light most favorable to plaintiff, she adequately alleges the existence of an oral agreement through the parties' course of dealing.

To refute plaintiff's contention of an oral agreement, defendants must provide evidence sufficient to show a donative intent. (see *Gruen*, 68 NY2d at 53). Plaintiff repeatedly denies that these transactions were gifts and defendants have failed to provide any written acknowledgment that the money was a gift. .To further indicate lack of donative intent, in opposition, plaintiff provided an affidavit (NYSCEF Doc. No. 22); a copy of a check dated September 30, 2004, issued to defendant Aaron marked "for loan" (NYSCEF Doc. No. 23); a check written for Ali's

[2] As stated above, the claim for the $50,000.00 is dismissed as untimely.

student loan (NYSCEF Doc. No. 25); and documentation of a wire transfer of money to Aaron (NYSCEF Doc. No. 24) (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1974] [a court may freely consider affidavits submitted by the plaintiff "to remedy defects in the complaint"].)

Defendants' reliance on the affidavit from Ali and email and text messages from plaintiff is misplaced, as they are insufficient to establish entitlement to relief on a pre-discovery motion to dismiss (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007] [affidavits may be considered "to remedy pleading defects not to offer evidentiary support for properly pleaded claims"]; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008] ["(a)ffidavits submitted by a [defendant] will almost never warrant a dismissal under CPLR 3211 *unless* they establish conclusively that the [plaintiff] has no claim or cause of action"] [emphasis in original; internal quotation marks and citation omitted]). Defendants' evidence does not resolve all factual issues and does not conclusively dispose of plaintiff's claims; many unanswered questions remain as to plaintiff's intent. (*see Lawrence*, 11 NY3d at 596–597] [denial of motion to dismiss affirmed where unresolved questions remained, and the full record was not developed].) Taking the allegations in the complaint as true and resolving all inferences in favor of plaintiff, there is no clear and convincing evidence of a donative intent by plaintiff as to the 2017 payment of $151,419.90 for Ali's student loan debt and the wire transfers to Aaron.[3] Accordingly, that branch of the motion seeking to dismiss these transactions is denied.

Plaintiff seeks the return of gold jewelry she alleges Ali removed from her apartment in or about October 2018. (NYSCEF Doc. No. 2 at ¶ 24). Contrary to defendants' contention, plaintiff has pleaded a cognizable cause of action for replevin. To state a cause of action for replevin, a plaintiff must allege that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff (*see Hofferman v Simmons,* 290 NY 449, 455-456 [1943]; *Matter of Bolin v Nassau County Bd. of Coop. Educ. Servs.,* 52 AD3d 704, 707 [2d Dept 2008]; *Salatino v Salatino,* 13 AD3d 512, 513 [2d Dept 2004].) Plaintiff has also alleged sufficient facts to state a claim for conversion. "Conversion occurs 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." (*Family Health Mgt., LLC v Rohan Devs., LLC*, 207 AD3d 136, 139 [1st Dept 2022] [internal quotation marks and citations omitted].)

In this case, plaintiff alleges that in October 2018, Ali removed "certain valuable gold jewelry from [her] apartment," and failed and refused to return them (NYSCEF Doc. No. 2 at ¶ 24; NYSCEF Doc. No. 22 at ¶ 13; NYSCEF Doc. No. 29 at 2). Thus, plaintiff clearly identified specific items of personal property that belonged to her and alleged that the items were removed from plaintiff's apartment without her knowledge or permission (NYSCEF Doc. No. 2 at ¶ 24)

[3] Defendants' argument that plaintiff's cause of action is barred by the statute of frauds, (NYSCEF Doc. No. 30 at ¶ 32), is not entitled to consideration as it is raised for the first time in Aaron's reply affirmation. (*Mehmet v Add2net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009].) In any event, the statute of frauds would not bar any oral agreement between the parties because it would have been capable of being performed within one year (*Foster v Kovner*, 44 AD3d 23, 26 [1st Dept 2007].)

and that Ali has refused to return it after demand (NYSCEF Doc. No. 31 at 5). Accordingly, defendants' request for dismissal of the claim seeking return of the gold jewelry is denied.

Defendants' request to dismiss any claim concerning the transfer of the annuity is granted. Plaintiff alleges that in 2019, she transferred a John Hancock annuity totaling approximately $113,000.00 in value to Ali (NYSCEF Doc. No. 2 at ¶ 27). In opposition to defendants' motion, plaintiff asserts that she transferred the annuity to Ali for her to be of "assistance to [plaintiff] if [plaintiff] ran out of funds in [plaintiff's] later years, and that, when [plaintiff] died, [Ali] would inherit it" (NYSCEF Doc. No. 22 at ¶ 11). Based on plaintiff's statement that she intended to make a present transfer to Ali, and willingly transferred the annuity to Ali without an expectation of its return, a donative intent may be inferred.

Plaintiff's own statement demonstrates her intent to relinquish her ownership of the annuity (*Gruen*, 68 NY2d at 53-54 [donor's conduct, letters, and statements supported finding that donor intended to transfer ownership of painting]). It is irrelevant that plaintiff wanted the annuity to be used for her care, a donor's "motivation for making the gift or the wisdom of [the donor] making it is irrelevant to the question of whether [the donor] intended to make it." (*Knight v Knight*, 182 AD2d 342, 344 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]). The remaining elements of a gift have also been met, as delivery of the annuity was made by transfer to Ali, and it was accepted by Ali (NYSCEF Doc. No. 2 at ¶ 27; NYSCEF Doc. No. 22 at ¶¶ 10-11). Thus, there is no basis for plaintiff's claim concerning the transfer of the annuity (*see Wardak v Golden*, 2019 WL 64806241, *1 [Sup Ct, NY County Sept. 23, 2019, Index No. 151080/2019, D'Auguste, J.] ["[a] gift, [] requires no consideration, and depends upon no agreement, but upon the voluntary act of the donor only, and is accomplished by a delivery of the gift"] [citation omitted]).

Defendants' motion to dismiss any claim plaintiff may have asserted for being a guarantor for the Mercedes car lease is dismissed as moot. Defendants have presented evidence that the car was returned as of April 2020 (NYSCEF Doc. No. 15 at 29-31) (*see Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 964 [2d Dept 2018], *affd* 34 NY3d 250 [2019] ["(b)y showing (with evidence) that a material fact as claimed by the plaintiff was not a fact at all, (the defendant) established its entitlement to dismissal of the action pursuant to CPLR 3211 (a) (7)"]). And, plaintiff admits that the subject Mercedes was returned at the end of the lease period and that the parking tickets have been paid (NYSCEF Doc. No. 2 at ¶ 25). In any event, plaintiff concedes that the allegations concerning the car lease was included in the complaint as an example of her generosity to defendants over the years (NYSCEF Doc. No. 29 at 10). Accordingly, any claim concerning the car lease is dismissed. Thus, that branch of the motion seeking dismissal of the third cause of action is partially granted.

Defendants argue that plaintiff's fourth cause of action for unjust enrichment is devoid of any allegations or legal assertions to support her claim and was instituted simply to further harass, annoy, and defame defendants (NYSCEF Doc. No. 13 at 14). Plaintiff responds that a claim is stated because she alleges that defendants were enriched at plaintiff's expense, and it was against equity and good conscience to permit defendants to retain what is sought to be recovered and that the parties have a close relation that could cause reliance or inducement (NYSCEF Doc. No. 29 at 5-6).

Plaintiff must allege three elements to plead a claim for unjust enrichment: (1) "the other party was enriched," (2) "at plaintiff's expense," and (3) "that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." (*see Georgia Malone & Co. v Rieder,* 86 AD3d 406, 408 [1st Dept 2011] [internal quotation marks and citation omitted], *affd* 19 NY3d 511, 516 [2012].) "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). "Where there is a bona fide dispute as to the existence of a" valid agreement between the parties, a plaintiff's unjust enrichment claim may proceed (*Lembro v Rosania*, 187 AD3d 544, 544 [1st Dept 2020] [internal quotation marks omitted]; *Nichols v SG Partners, Inc.*, 2010 NY Slip Op 30174[U] [Sup Ct, NY County Jan. 25, 2010, Index No. 109439/2009, Edmead, J.] [motion denied where there was a bona fide dispute as to the existence of a contract, plaintiff allowed to proceed on both breach of contract and quasi-contract theories].) Here, defendants dispute that plaintiff is entitled to repayment of the money she paid for Ali's student loan and gave to Aaron for payment of au pair services. Plaintiff additionally asserts that she did not receive any benefit as a result of these loans. Accordingly, plaintiff's unjust enrichment claim may proceed.

Finally, defendants have not demonstrated that plaintiff's lawsuit is completely without merit. There is a dispute as to whether several of the transactions between the parties were gifts or loans. Therefore, defendants' request for sanctions and penalties against plaintiff pursuant to 22 NYCRR § 130-1.1 is denied. (*see Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999].)

Turning next to plaintiff's motion for summary judgment, plaintiff moves for dismissal of defendants' counterclaims for defamation (first counterclaim), libel (second counterclaim), frivolous action and harassment (third counterclaim), slander (fourth counterclaim), and infliction of emotional distress (fifth counterclaim). Defendants contend that plaintiff defamed Ali by alleging in the publicly filed complaint, visible to defendants' colleagues in the legal field, that Ali stole plaintiff's jewelry and refused to repay loans, as well as, verbally conveyed these allegations to defendants' other family members (NYSCEF Doc. No. 3 at ¶¶ 28-30, 32, 36-37, 76, 78-84).

A movant seeking summary judgment pursuant to CPLR 3212 in its favor "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The evidentiary proof tendered must be in admissible form. (*see Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065, 1067 [1979].) "This burden is a heavy one and on a motion for summary judgment, 'facts must be viewed in the light most favorable to the non-moving party'" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [citation omitted]), "and every available inference must be drawn in the [non-moving party's] favor." (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

In support of her motion, plaintiff relies upon her affidavit, as well as several underlying communications via text and email between plaintiff and Ali. Plaintiff contends that defendants failed to "allege a single specific date, a single specific utterance or a single specific person to whom a statement by [her] was ever published that is defamatory." (NYSCEF Doc. No. 22 at ¶ 20). Plaintiff further contends that "criticism is not defamation." (*id.*). Plaintiff argues that her contention that Ali had wrongfully taken and withheld her gold jewelry is "privileged" as it is made in, and relevant to, the court-filed pleading. (*id.*).

In opposition, defendants submit an affirmation from Aaron who is also the attorney for defendants (NYSCEF Doc. No. 30). The court concurs that Aaron's affirmation is inadmissible under CPLR 2106(a) (NYSCEF Doc. No. 33 at 3, 8-9). Aaron was required to submit an affidavit since he is a party to the action. (see *Household Fin. Realty Corp. of N.Y. v Cioppa*, 153 AD3d 908, 910 [2d Dept 2017].) The court also concurs that defendants' opposition fails to comply with 22 NYCRR 202.8-g (NYSCEF Doc. No. 33 at 4-5). Rather than respond to each numbered paragraph, defendants responded with "generalized non-denials." (*id.* at 4). Defendants' failure to submit a counterstatement of material facts to each numbered paragraph means that the material facts contained in plaintiff's statement of material facts should be deemed admitted. (see 22 NYCRR 202.8-g(c) ["(e)ach numbered paragraph in the statement of material facts required to be served by the moving party may be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party"]; *Reus v ETC Hous. Corp.*, 72 Misc 3d 479, 483-484 [Sup Ct, Clinton County 2021], *affd* 203 AD3d 1281 [3d Dept 2022]). However, this court waives compliance with 22 NYCRR 202.8-g(c) in the interests of justice. (*see Barberan-Calderon v Mohabir*, 2022 WL 6792527, *1 [Sup Ct, Queens County Aug. 1, 2022, Index No. 721782/2021, Esposito, J.] [plaintiff's noncompliance with section 202.8-g waived in the interest of justice].)

Upon a review of the foregoing, this court finds that plaintiff has established a *prima facie* entitlement to summary judgment on defendants' counterclaims. By failing to substantively oppose the arguments in plaintiff's motion papers, defendants have failed to raise an issue of fact sufficient to warrant denial.

That branch of plaintiff's cross-motion seeking dismissal of defendants' counterclaims for defamation *per se*, libel, and slander is granted. "Defamation is the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [her] in the minds of right-thinking persons, and to deprive [her] of their friendly intercourse in society." (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [internal quotation marks and citation omitted].) A claim for defamation must allege special damages unless it is one for defamation *per se*. (*Epifani v Johnson*, 65 AD3d 224, 233-234 [2d Dept 2009].) A claim of defamation *per se* exists when the statement: charges the complainant with a serious crime; injures the complainant's standing in her trade, business or profession; alleges that the complainant has a loathsome disease; or "imput[es] unchastity to a woman." (*id.* at 234). To state a cause of action for defamation, the complainant must state the words complained of with particularity, should not be generalized, and should specify the time, manner, and persons to whom the specific words were said. (*see Dillon v City of New York*, 261

AD2d 34, 38 [1st Dept 1999]; *Geddes v Princess Props. Intl.*, 88 AD2d 835, 835 [1st Dept 1982]; CPLR 3016[a].)

Defendants contend that the statements contained in paragraph 23 of the complaint concerning Ali's "theft" of plaintiff's jewelry and her refusal to repay loans is defamatory and libelous (NYSCEF Doc. No. 3 at ¶¶ 28, 30, 32, 36-37). Plaintiff's statements in the complaint are directly pertinent to the litigation (*see Lacher v Engel*, 33 AD3d 10, 13 [1st Dept 2006] ["(i)t is well established that a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation"].) Thus, the statements in the complaint that Ali stole plaintiff's jewelry (NYSCEF Doc. No. 2 at ¶ 28) and refused to repay loans (*id.* at ¶ 37) are absolutely privileged. (*see Kaye v Trump*, 58 AD3d 579, 580 [1st Dept 2009], *lv denied* 13 NY3d 704 [2009] ["the statements made in the complaints in the actions instituted against plaintiff are absolutely privileged"]; *Saratirschwell for Mayor, Inc. v Kramer*, 2022 NY Slip Op 33279[U], **5-6 [Sup Ct, NY County Sept. 30, 2022, Index No. 154123/2021, Kraus, J.] [finding that the fact that the statements complained of were made in a pleading rendered them absolutely privileged].)

Defendants' defamation counterclaim also lacks specificity. Defendants summarily contend that plaintiff's statements were "insulting and slanderous," and "berating and disparaging" to Ali's character and reputation (NYSCEF Doc. No. 3 at ¶¶ 78-84). Defendants fail to provide the specific offending words that were spoken, contending that they had not transcribed the voicemail messages (NYSCEF Doc. No. 13 at 4; NYSCEF Doc. No. 30 at ¶ 28). Defendants were required to provide evidence, in admissible form, in opposition to plaintiff's motion for summary judgment, and mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. (*see Zuckerman*, 49 NY2d at 562.)

Defendants' argument that they would provide copies of the transcribed recordings during discovery is unavailing (*see BCRE 230 Riverside LLC*, 59 AD3d at 283 ["(d)ismissal of a claim need not await disclosure where it is otherwise deficient in failing to allege in haec verba the particular defamatory words and is based instead on a paraphrased version"] [internal quotation marks and citations omitted].) By failing to set forth the offending words in the counterclaim or providing supporting evidence in opposition to the plaintiff's motion, dismissal of defendants' defamation counterclaim is required. (*see Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454-455 [1st Dept 2008]; *Shane v Rosenwaks*, 2021 NY Slip Op 31141[U], **4 [Sup Ct, NY County Mar. 31, 2021, Index No. 152545/2019, Saunders, J.] [where plaintiff only provided a summary of the conversation, claim for defamation and defamation *per se* dismissed for plaintiff's failure to provide particulars as to "what exact defamatory words were spoken, when, where, by whom, or to whom;" allegations found to be too "vague, general, and indirect"]; *Henriques v Linville,* 30 Misc 3d 1215[A] [Sup Ct, NY County 2011].) Thus, the counterclaims premised on defamation *per se*, libel, and slander are dismissed.

Defendants' counterclaim for harassment is also dismissed as "New York does not recognize a common-law cause of action to recover damages for harassment." (*Zuckerbrot v Lande*, 75 Misc 3d 269, 300 [Sup Ct, NY County 2022] [internal quotation marks and citation omitted]). Additionally, New York does not recognize an independent cause of action seeking the imposition of sanctions under CPLR 8303-a and 22 NYCRR 130-1.1 (see *Calastri v*

Overlock, 125 AD3d 554, 555 [1st Dept 2015]; *Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 968 [2d Dept 2011].) Accordingly, the third counterclaim is dismissed in its entirety.

With respect to defendants' counterclaims for the negligent or intentional infliction of emotional distress – the complainant must establish: "(i) extreme and outrageous conduct; (ii) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (iii) causation; and (iv) severe emotional distress." (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993].) The standard for what is extreme and outrageous conduct for this cause of action is incredibly high. (*id.* at 122 [noting that the "requirements of the rule are rigorous, and difficult to satisfy"] [citation omitted].) Here, defendants contend that plaintiff engaged in conduct such as leaving "menacing and harassing written and voice messages." (NYSCEF Doc. No. 3 at ¶¶ 42-75). This dispute, between plaintiff and her family members, while rife with very strong emotions and feelings of unhappiness, disappointment, betrayal and disloyalty, does not involve conduct rising to the level of "utterly reprehensible behavior" as required by the law. (see *Kaye*, 58 AD3d at 579; *Owen v Leventritt*, 174 AD2d 471, 472 [1st Dept 1991], *lv denied* 79 NY2d 451 [1991] ["(m)ere threats, annoyance or other petty oppressions, no matter how upsetting, are insufficient to constitute the tort of intentional infliction of emotional distress"]; *Shane*, 2021 NY Slip Op 31141 [U], **5 [allegations that defendants made defamatory and false statements that plaintiff and her husband tricked her father into loaning them money and stole her mother's jewelry were not "sufficiently outrageous" to support claim of intentional infliction of emotional distress]). Accordingly, the request to dismiss the counterclaims for the infliction of emotional distress is granted. It is hereby

ORDERED that the branch of the motion by defendants ALI GOLDSMITH and AARON GOLDSMITH seeking dismissal of plaintiff's first and second causes of action is granted and the first and second causes of action are dismissed; and it is further

ORDERED that the branch of defendants ALI GOLDSMITH and AARON GOLDSMITH's motion seeking dismissal of the loan transactions for defendant ALI GOLDSMITH's $151,419.90 student loan debt and the $19,000.00 wire transfer to defendant AARON GOLDSMITH is denied; and it is further

ORDERED that the branch of defendants ALI GOLDSMITH and AARON GOLDSMITH's motion seeking dismissal of the third cause of action, to the extent it seeks the return of plaintiff's gold jewelry, is denied; and it is further

ORDERED that the branch of defendants ALI GOLDSMITH and AARON GOLDSMITH's motion seeking dismissal of the third cause of action, to the extent it seeks the return of the 1) $50,000.00 loan to AARON GOLDSMITH for the down payment for the purchase of defendants' home, 2) $70,000.00 payment for defendants' second home, 3) $23,000.00 payment to defendants for the purchase of a co-op apartment, 4) $13,000.00 payment for rent of a rental home, 5) the car lease, and 6) annuity, is granted and said claims are dismissed; and it is further

ORDERED that that branch of the motion seeking dismissal of the fourth cause of action for unjust enrichment is denied; and it is further

ORDERED that the branch of defendants ALI GOLDSMITH and AARON's motion seeking costs and sanctions is denied; and it is further

ORDERED that all claims asserted as against defendant ROBERT SHUSTERMAN are dismissed (NYSCEF Doc. No. 9, *stipulation of discontinuance*); and it is further

ORDERED that the cross motion by plaintiff for summary judgment is granted and defendants' counterclaims are dismissed in their entirety; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants.

This constitutes the decision and order of this court.

December 9, 2022

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:				
	☐ **CASE DISPOSED**		☒ **NON-FINAL DISPOSITION**	
	☐ **GRANTED**	☐ **DENIED**	☒ **GRANTED IN PART**	☐ **OTHER**