

Kunkel v New York City Dept. of Bldgs.

2023 NY Slip Op 30934(U)

March 24, 2023

Supreme Court, New York County

Docket Number: Index No. 158997/2021

Judge: J. Mabelle Sweeting

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

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GEORGE KUNKEL,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF BUILDINGS, FRANK DAMIANI, AS A CHIEF INSPECTOR AND INDIVIDUALLY, HUGH MCQUILLAN, AS INSPECTOR AND INDIVIDUALLY, CHARLES COOPER, AS AN INVESTIGATOR OF THE DEPARTMENT OF BUILDINGS AND INDIVIDUALLY, MICHAEL CHOLOWSKY, SKY MATERIAL CORP., PETER J. BYRNE, (XYZ CORP (1-2) and JOHN DOE (1-2)) the last four Defendants being fictitious, the true names and capacities, whether individual, corporate, associate or otherwise, being unknown to the plaintiffs, it being intended to designate those persons or entities that are in some manner legally responsible for the occurrences herein alleged, in this complaint,

Defendants.

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INDEX NO.	158997/2021
MOTION DATE	02/21/2022
MOTION SEQ. NO.	001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS.

Defendant Peter Byrne (“Byrne”) seeks dismissal of the Civil Practice Law and Rules (“CPLR”) 3013, 3211 (a)(1), (a)(5), and (a)(7). The complaint asserts five causes of action against all of the defendants collectively: (1) malicious prosecution; (2) abuse of process; (3) aiding and abetting the malicious prosecution and abuse of process; (4) negligent infliction of emotional distress; and (5) intentional infliction of emotional distress. (NY St Cts Elec Filing [NYSCEF] Doc No. 12). The sixth and seventh causes of action are brought solely against defendant New York City Department of Buildings (“DOB”) for alleged violations of plaintiff’s civil rights under

city, state, and federal laws.¹ (*Id.*) This case stems from an administrative proceeding commenced by the DOB in front of the New York City Office of Administrative Trials and Hearings (OATH).² Plaintiff opposes the motion.

FACTS

Plaintiff is a licensed hoist machine operator (NYSCEF Doc No. 20 at ¶ 19). DOB brought an administrative proceeding against plaintiff, alleging that on December 1, 2016, plaintiff left a crane at 133-15 39th Avenue, Queens, New York, unsupervised and unattended with the engine in the on position and the boom extended (*id.* at ¶¶ 15, 20). DOB further alleged that plaintiff failed to cooperate with DOB's investigation into this incident and another Environmental Control Board violation and sought the revocation of plaintiff's hoist machine operator license (*id.* at ¶ 20). Defendant Byrne was the site safety manager at the jobsite on December 1, 2016. (NYSCEF Doc No. 20 at ¶¶ 8, 17). Byrne was one of several individuals who testified as a witness during the OATH trial. (*Id.* at ¶¶ 17; NYSCEF Doc No. 17 at 4; NYSCEF Doc No. 30 at 2). Byrne contends that he is not employed by DOB (NYSCEF Doc No. 17 at 4).

On July 28, 2020, Administrative Law Judge ("ALJ") Jocelyn McGeachy-Kuls issued a report and recommendation finding that DOB had failed to establish that plaintiff was negligent, incompetent, lacked knowledge of relevant laws and rules or that plaintiff failed to cooperate with DOB's investigations, and recommended dismissal of all charges (NYSCEF Doc No. 20 at ¶ 16; NYSCEF Doc No. 21). By letter dated October 9, 2020, the DOB Commissioner issued a

¹ The defendants listed in the caption of the complaint include: DOB, Hugh McQuillan, Charles Cooper, Michael Cholowsky, Byrne, as well as two unidentified individuals and two unidentified corporations.

² On February 24, 2022, DOB filed an answer to the complaint (NYSCEF Doc No. 25). Besides Byrne no other individually named defendant has appeared or otherwise responded to plaintiff's complaint.

determination adopting the report and recommendation of ALJ McGeachy-Kuls (NYSCEF Doc No. 20 at ¶ 16; NYSCEF Doc No. 31).

LEGAL STANDARDS

When assessing the adequacy of a pleading on a motion, pursuant to CPLR 3211 (a) (7), “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 W., Inc.*, 178 AD3d at 835; *see Leon* 84 NY2d at 88).

CPLR 3013 provides that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action.”

On a motion, pursuant to CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*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]).

““On a motion to dismiss a cause of action pursuant to CPLR 3211 (a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff” (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011], quoting *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]).

DISCUSSION

Statute of Limitations

Defendant Byrne contends that plaintiff's malicious prosecution, abuse of process and intentional infliction of emotional distress claims are barred by the statute of limitations pursuant to CPLR 3211 (a)(5) (NYSCEF Doc No. 17 at 10-11, 15-16, 22-23). Byrne contends that since the ALJ's report and recommendation was issued on July 28, 2020, the statute of limitations expired on July 28, 2021, and plaintiff's malicious prosecution, abuse of process and intentional infliction of emotional distress claims are time-barred as this action was not commenced until September 30, 2021 (NYSCEF Doc No. 17 at 10, 16, 22). In opposition, plaintiff asserts that the correct accrual date is October 9, 2020, the date the DOB Commissioner adopted the ALJ's report and recommendation, and thus plaintiff's malicious prosecution, abuse of process and intentional infliction of emotional distress claims are timely (NYSCEF Doc No. 30 at 7, 10, 12-13).

A cause of action for malicious prosecution is governed by a one-year statute of limitations and accrues upon the termination of the underlying lawsuit, namely, upon a determination favorable to plaintiff, notwithstanding a pendency of an appeal (CPLR 215 [3]; *Syllman v Nissan*, 18 AD3d 221, 222 [1st Dept 2005]; *Spinale v Guest*, 270 AD2d 39, 40 [1st Dept 2000]). Similarly, a cause of action for abuse of process is governed by a one-year statute of limitations (CPLR 215 [3]; *Beninati v Nicotra*, 239 AD2d 242, 242 [1st Dept 1997]). The statute of limitations begins to run when "the last of the [underlying] proceedings . . . [is] concluded" (*Benyo v Sikorjak*, 50 AD3d 1074, 1077 [2d Dept 2008]). A claim for intentional infliction of emotional distress is also governed by a one-year statute of limitations (CPLR 215 [3]; *Yong Wen Mo v Gee Ming Chan*, 17 AD3d 356, 358 [2d Dept 2005]).

The Court of Appeals has held that there are two requirements for fixing the time when agency action is deemed final and binding. “First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party” (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]).

Here, plaintiff’s causes of action did not accrue until the ALJ’s determination was finalized and the DOB Commissioner adopted the report and recommendation on October 9, 2020. Accordingly, Byrne has failed to meet his burden for an order granting dismissal of plaintiff’s malicious prosecution, abuse of process and intentional infliction of emotional distress claims as against him, pursuant to CPLR 3211 (a)(5).

CPLR 3013

Byrne argues that the complaint fails to satisfy the pleading requirements of CPLR 3013 by making vague and ambiguous assertions against defendants collectively “despite the fact that these defendants are separate, distinct entities/individuals with vastly different interactions among one another” (NYSCEF Doc No. 17 at 8-9; NYSCEF Doc No. 32 at 1-2). Other than the two causes of action specifically asserted against DOB, the other five causes of action refer to defendants collectively rather than making individualized allegations (*see generally* NYSCEF Doc No. 20). Plaintiff counters that Byrne’s argument concerning the deficiencies in the pleadings is a “litigation ploy to delay these proceedings” (NYSCEF Doc No. 30 at 7).

Failure to distinguish the specific tortious conduct charged to each defendant in a pleading is generally impermissible (*Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 [1st Dept 1981] [dismissing claims where, *inter alia*, “causes of action are pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant”]). CPLR 3013 is satisfied so long as the pleading gives notice of the transactions or occurrences giving rise to a claim (*Colleran v Rockman*, 232 AD2d 322, 323 [1st Dept 1996]).

Here, while the complaint provides sufficient notice of the transaction giving rise to the claims to withstand Byrne’s pre-answer motion to dismiss (*cf. Mid-Hudson Val. Fed. Credit Union v. Quartararo & Lois, PLLC*, 155 AD3d 1218, 1220 [3d Dept 2017], *affd* 31 NY3d 1090 [2018]), it remains infirm on other grounds. The complaint fails to allege facts sufficient to satisfy the elements of plaintiff’s malicious prosecution, abuse of process, aiding and abetting and negligent and intentional infliction of emotional distress claims as against Byrne.

First Cause of Action – Malicious Prosecution

Byrne contends that plaintiff’s first cause of action fails because plaintiff did not sufficiently plead three of the elements necessary to state a claim for malicious prosecution, (NYSCEF Doc No. 17 at 11-14), namely, (1) that Byrne initiated or commenced the OATH proceeding against plaintiff; (2) actual malice; and (3) special injury.

“The elements of an action for malicious prosecution are: (1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice” (*Colon v City of New York*, 60 NY2d 78, 82 [1983], *rearg denied* 61 NY2d 670 [1983]).³ In a civil action, the party asserting the cause of action must also demonstrate special damages (*Castro v East End Plastic, Reconstructive & Hand Surgery, P. C.*, 47 AD3d 608, 609 [2d Dept 2008]). “Failure to establish any one of these elements defeats the entire claim” (*Brown v Sears Roebuck & Co.*, 297 AD2d 205, 208 [1st Dept 2002]).

To be liable for malicious prosecution the defendant must do more than testify or report an incident to the police (*see Barrett v Watkins*, 82 AD3d 1569, 1572 [3d Dept 2011]). Rather, a civilian complainant must “giv[e] advice and encouragement or importun[e] the authorities to act” (*Brown*, 297 AD2d at 209 [internal quotation marks and citation omitted]) such as knowingly providing false information or playing an active role in the prosecution (*Baker v City of New York*, 44 AD3d 977, 980 [2d Dept 2007], *lv denied* 10 NY3d 704 [2008]).

Byrne contends that he is entitled to dismissal of the malicious prosecution claim, because he did not initiate the administrative proceeding as against plaintiff (NYSCEF Doc No. 17 at 10-12). Byrne contends that he testified as a witness at the proceeding pursuant to a non-party subpoena (*id.* at 12). Byrne also argues that plaintiff does not plead any facts that even allege that Byrne played an active role in plaintiff’s prosecution. (*Id.*). Plaintiff counters that “Defendant Byrne had the choice of telling the truth but chose to go along with DOB’s accusations. Defendant Byrne knew or should have known that his testimony will assist DOB in the prosecution of the Plaintiff” (NYSCEF Doc No. 30 at 8-9). In response, Byrne argues that plaintiff’s assertion is

³ In *Thompson v Clark* (596 US—, —, 142 S Ct 1332, 1341 [2022]), the United States Supreme Court clarified that claims for malicious prosecution can be brought absent an affirmative indication of innocence of the criminal prosecution. Rather “[a] plaintiff need only show that his prosecution ended without a conviction.” (*Id.*)

insufficient and depicts a passive action by Byrne rather than active participation (NYSCEF Doc No. 32 at 3-4). Further, Byrne argues, it is well settled that a witness cannot be liable for malicious prosecution based on testimony – even testimony that is false – at a pre-trial proceeding. (*Id.* at 4).

Viewing the allegations in the light most favorable to plaintiff, the complaint fails to allege that Byrne commenced or initiated the proceedings and fails to plead that Byrne played an active role in the prosecution. Notably, there are no allegations that Byrne knowingly provided false information to DOB (*see Brown*, 297 AD2d at 210 [provision of information defendant knew to be false was sufficient to demonstrate initiation of criminal proceeding]). Further, there are no allegations in the complaint indicating that Byrne encouraged DOB to act or move forward with the charges against plaintiff. Based on the information in the ALJ’s report and recommendation, which was attached as an exhibit to the complaint, (NYSCEF Doc No. 21), Byrne was called as a witness at the OATH trial, and he testified as to the events as he believed them to be on October 1, 2016 (NYSCEF Doc No. 21 at 3-5).

Byrne further contends that plaintiff’s allegations fail to demonstrate the requisite element of actual malice or to allege any facts demonstrating how Byrne acted with actual malice (NYSCEF Doc No. 17 at 12-13). Byrne contends that the complaint is filled with “bare-boned, conclusory statements” (*id.* at 13). In opposition, plaintiff fails to provide further explanation or factual elaboration as to how Byrne acted maliciously. Instead, plaintiff rests solely on the conclusory assertions in his complaint, namely, that Byrne’s “motives were improper in order to actively assist the NYCDOB to prosecute plaintiff” (NYSCEF Doc No. 30 at 9). Notwithstanding plaintiff’s contentions, there are no factual assertions that Byrne knowingly provided false information to DOB in retaliation against or to specifically cause plaintiff harm. Plaintiff does not

allege any facts sufficient to rise to the level of actual malice, “i.e., some deliberate act punctuated with awareness of ‘conscious falsity’” (*Santoro v Town of Smithtown*, 40 AD3d 736, 738 [2d Dept 2007] [internal quotation marks and citations omitted]).

Moreover, here, no improper motive is alleged and, in opposition, plaintiff fails to provide any information as to why Byrne would have testified falsely against plaintiff. As argued by Byrne in reply, the assertion of an improper motive is contradicted by the decision and order attached to plaintiff’s opposition wherein the DOB Commissioner concluded that Byrne had no motive to lie (NYSCEF Doc No. 32 at 6; NYSCEF Doc No. 31 at 2 [“the record is void of possible motives Mr. Byrne would have to lie. To the contrary, Mr. Byrne testified that he liked you and did not want to see you lose your license”]).

Finally, Byrne contends that plaintiff fails to sufficiently allege special damages (NYSCEF Doc No. 17 at 13-15). Malicious prosecution also requires a showing of some special damage to, or interference with, personal or property rights beyond the damages normally attendant upon being sued (*Honzawa v Honzawa*, 268 AD2d 327, 329 [1st Dept 2000]). A plaintiff must demonstrate that he or she suffered specific and measurable loss (*id.*). “[A]llegations of special damages must be fully and accurately stated and [even] round figures, with no attempt at itemization, do not sufficiently state special damages” (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 93 [1st Dept 2015] [internal citation and quotation marks omitted]).

Paragraph 28 of the complaint alleges that plaintiff “sustained serious damages, including but not limited to: past and future financial loss; past and future wage loss; business losses; damage to his reputation; past and future damage to his businesses; emotional distress; humiliation; embarrassment; mental anguish; inconvenience; legal fees; costs associated with the legal expenses; expenses incurred by plaintiff directly in connection with the litigation; all in an amount

estimated to be in excess of \$1,000,000.00 (One Million Dollars)” (NYSCEF Doc No. 20 at ¶ 28). These general categories of damages are insufficient to plead special damages (*Engel v CBS, Inc.*, 93 NY2d 195, 206–207 [1999]). In opposition, plaintiff merely alleges that “the prosecution has severely interfered with his business as a crane operator in the City of New York” (NYSCEF Doc No. 30 at 9). However, vague and non-specific allegations of business losses fail to establish a concrete identifiable harm necessary to establish special damages (*Ivancev v Garrido*, 184 AD3d 422, 423 [1st Dept 2020][general allegations that plaintiff lost his per diem employment and was unable to find employment failed to demonstrate special injury]; *Dermigny v Siebert*, 79 AD3d 460, 460 [1st Dept 2010][general allegations that plaintiff did not receive employment offers was insufficient to plead special injury]). As presently alleged, the complaint fails to support a claim for malicious prosecution against Byrne.

Second Cause of Action – Abuse of Process

Byrne contends that plaintiff’s second cause of action fails to assert any facts sufficient to satisfy the requisite elements for an abuse of process claim (NYSCEF Doc No. 17 at 16). In opposition, plaintiff merely recites the elements of an abuse of process cause of action without amplification of his pleadings (NYSCEF Doc No. 30 at 11).

“Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective” (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; see also *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn, Local 1889, AFT AFL-CIO*, 38 NY2d 397, 403 [1975] [The Court of Appeals found that the issuance of subpoenas for 87 teachers to appear to testify at a hearing on

the same day, without staggering the appearances, was intended to harass rather than to obtain the appearances of witnesses, thereby perverting a lawful process to obtain a collateral objective]). “Some irregular activity in the use of judicial process for a purpose not sanctioned by law must be alleged. Wrongful or malicious motive alone is not enough” (*Raved v Raved*, 105 AD2d 735, 736 [2d Dept 1984] [citation omitted]; *see also Andesco, Inc. v Page*, 137 AD2d 349, 357 [1st Dept 1988]). Legal process is “a direction or demand that the person to whom it is directed ... perform or refrain from doing some proscribed act” (*Julian J. Studley, Inc. v Lefrak*, 41 NY2d 881, 884 [1977], quoting *Williams v Williams*, 23 NY2d 592, 596 [1969] [internal quotation marks omitted]; *see also, Buccieri v Franzreb*, 201 AD2d 356, 358 [1st Dept 1994]). “The key to this tort is not impropriety in obtaining the process, but rather impropriety in using it” (*Matter of Simithis v 4 Keys Leasing & Maintenance Co.*, 151 AD2d 339, 341 [1st Dept 1989]). Actions generally giving rise to an abuse of process claim, by virtue of their interference with person and property, are actions for attachment, execution, garnishment, sequestration, arrest, criminal prosecution, and the issuance of a subpoena (*Williams*, 23 NY2d at 596 n 1).

The complaint fails to state a claim for abuse of process as there are no allegations that defendant Byrne initiated the OATH proceeding or testified at the OATH trial based on some ulterior motive to harm or gain some collateral objective or corresponding detriment to plaintiff. Plaintiff merely alleges that “[d]efendants brought the lawsuit against [p]laintiff for improper, ulterior purposes, which included the harassment of [p]laintiff” (NYSCEF Doc No. 20 at ¶ 31). As there are no allegations that defendant Byrne improperly used process “after it was issued” (*Curiano*, 63 NY2d at 117), plaintiff’s abuse of process claim against Byrne is dismissed.

Third Cause of Action – Aiding and Abetting Malicious Prosecution & Abuse of Process

To recover damages for aiding and abetting tortious conduct, a plaintiff must allege knowledge of the alleged tortious conduct by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the tortious conduct (*see Land v Forgione*, 177 AD3d 862, 864 [2d Dept 2019]; *see also IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570-571 [1st Dept 2011], *affd* 19 NY3d 850 [2012] [aiding and abetting tortious interference]). “Substantial assistance requires an affirmative act on the defendants part; mere inaction can constitute substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff” (*Baron v Galasso*, 83 AD3d 626, 629 [2d Dept 2011] [internal quotation marks and citation omitted]).

With regard to plaintiff’s claims alleging aiding and abetting malicious prosecution and abuse of process, such claims suffer from the same infirmity in that plaintiff fails to set forth allegations sufficient to demonstrate the underlying torts (*see Raghavendra v Brill*, 2014 NY Slip Op 33961 [U], **17 [Sup Ct, NY County 2014], *affd* 128 AD3d 414 [1st Dept 2015]). Here, plaintiff failed to allege that Byrne had actual knowledge of the alleged underlying misconduct (*see ALP, Inc. v Moskowitz*, 204 AD3d 454, 460 [1st Dept 2022]). As Byrne argues, plaintiff’s conclusory allegation that “[d]efendants knew or should have known that the wrongful conduct was occurring,” (NYSCEF Doc No. 20 at ¶ 38), is insufficient to sustain plaintiff’s claim.

Further, plaintiff failed to allege conduct by defendant Byrne sufficient to demonstrate that Byrne provided substantial assistance in the prosecution of the charges against plaintiff. Plaintiff does not even attempt to cure these deficiencies in opposition, rather he merely sets forth the elements of the claim for aiding and abetting and concludes, without more, that “[d]efendant has aided and abetted the DOB prosecution against [p]laintiff” (NYSCEF Doc No. 30 at 11).

Accordingly, plaintiff's aiding and abetting malicious prosecution and abuse of process claims against Byrne are dismissed.

Fourth Cause of Action – Negligent Infliction of Emotional Distress; and Fifth Cause of Action – Intentional Infliction of Emotional Distress

Byrne argues that plaintiff's fourth cause of action for negligent infliction of emotional distress should be dismissed for failure to state a claim (NYSCEF Doc No. 17 at 20-22).

“A cause of action to recover damages for negligent infliction of emotional distress ... generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety” (*Bernstein v. E. 51st St. Dev. Co., LLC*, 78 AD3d 590, 591 [1st Dept 2010], quoting *Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004] [internal quotation marks omitted]). Recently, in *Brown v New York Design Center, Inc.*, 2023 N.Y. Slip Op. 01228(2023), the Appellate Division First Department held, in a break from its prior precedent, that extreme and outrageous conduct is no longer an essential element to state a claim for negligent infliction of emotional distress. Nevertheless, fatal to plaintiff's claim here, is that plaintiff fails to allege facts sufficient to meet the first element, which is to establish that Byrne owed a legal duty to plaintiff. Devoid on this record is any evidence of an agency relationship between Byrne and DOB, nor is such a relationship alleged in the Complaint (NYSCEF Doc No. 17 at 21; NYSCEF Doc No. 32 at 12-13).

Further, plaintiff's cause of action against Byrne for negligent infliction of emotion distress fails since an essential element of a cause of action for negligent infliction of emotional distress is the breach of a legal duty owed to the plaintiff by the defendant (*see Offor v Mercy Med. Ctr.*, 171

AD3d 502, 503 [1st Dept 2019], *lv denied* 34 NY3d 909 [2020] [dismissal of negligent infliction of emotional distress claim by employee against her employer was appropriate, where alleged conduct underlying claim involved intentional, not negligent, conduct, employee failed to allege requisite guarantee of genuineness, and employee did not allege that employer owed her duty separate from general obligations as employer]). Additionally, the misconduct alleged relates to DOB's interference in plaintiff's future employment prospects and is not attributed to Byrne. (NYSCEF Doc No. 17 at 21; NYSCEF Doc No. 32 at 12-13.)

As to plaintiff's claims sounding in the intentional infliction of emotional distress, such allegations in the complaint are conclusory and plaintiff's opposition fails to cure the pleading deficiencies. Accordingly, such claims are denied.

Plaintiff's Request for Leave to Replead


Plaintiff's request for leave to replead (NYSCEF Doc No. 30 at 13) is denied, without prejudice, for failure to submit a proposed amended complaint or submit evidentiary proof to support his request (*see Parker Waichman LLP v Squier, Knapp & Dunn Communications, Inc.*, 138 AD3d 570, 571 [1st Dept 2016]).

CONCLUSION

For all the reasons set forth herein, it is hereby:

ORDERED that Motion Sequence Number 001, filed by defendant Peter Byrne to dismiss the complaint as against him is **GRANTED** with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

This is the Decision and Order of this court.

<u>3/24/2023</u> DATE		 J. MACHELDE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE