

Roehm Perlman Family Trust v Adelman Matz, P.C.

2024 NY Slip Op 35161(U)

October 1, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 630170/2023

Judge: James Hudson

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INDEX NO.: 630170/2023

**Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVJ
Memorandum Decision**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE: 2/20/24 (#002)
SUBMIT DATE: 10/2/24
Mot. Seq. #: **002 – MotD**

-----X
ROEHM PERLMAN FAMILY TRUST a/k/a
ROEHM PERLMAN TRUST; JEFFREY
PERLMAN both derivatively and on behalf of
Nominal Defendants THE RELATIONSHIP
MARKETING FACTORY LLC, IQUEUE
RESPONSE MANGEMENT LLC, and UNITED
INSURED LLC,

LUBLINER LAW, PLLC
Attorneys for the Plaintiffs
2 Park Avenue, Floor 20
New York, NY 10016

FURMAN KORNFIELD & BRENNAN, LLP
Attorneys for Defendants Adelman Matz,
P.C., Gary Adelman, Sarah M. Matz
88 Pine Street, 32nd Floor
New York, NY 10005

Plaintiffs,

-against-

ADELMAN MATZ, P.C.; GARY ADELMAN;
SARAH M. MATZ; and Nominal Defendants THE
RELATIONSHIP MARKETING FACTORY LLC,
IQUEUE RESPONSE MANAGEMENT LLC, and
UNITED INSURED LLC,

Defendants.
-----X

Adelman Matz, P.C., Gary Adelman, Esq. and Sarah M. Matz, Esq. request an order:

- 1) pursuant to **CPLR 3211 (a) (5), (7)** dismissing the complaint, with prejudice, as against them, on statute of limitations grounds, and for plaintiffs’ failure to state a cause of action;

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2) granting fees and costs of this action to the defendants; and 3) granting sanctions against the plaintiffs.

This is an action alleging defamation *per se*, and breach of fiduciary duty by defendant counsel Adelman Matz, P.C., Gary Adelman, Esq. and Sarah M. Matz, Esq. (“Adelman Defendants”) with regard to their representation of plaintiff Jeffrey Perlman individually, and legal malpractice in their representation of the Roehm Perlman Family Trust a/k/a Roehm Perlman Trust, The Relationship Marketing Factory LLC, Iqueue Response Management LLC, and United Insured LLC (“Perlman Plaintiffs”).

There is an active, related breach of contract action also pending before the Court, entitled *The Relationship Marketing Factory LLC and Iqueue Response Management LLC v. Jeffrey Perlman and the Roehm Perlman Family Trust a/k/a Roehm Perlman Trust* and third-party complaint entitled *Jeff Perlman and the Roehm Family Trust v. Ellen Ryan and Timothy Ryan*, Index No. 207470/2022.

This matter and the related case concern the members of the domestic limited liability company The Relationship Marketing Factory, LLC. The company was formed and operated by members Jeffrey Perlman and Ellen Ryan. Mr. Perlman and Ms. Ryan later formed a second company, Iqueue Response Management, LLC. A more detailed discussion of the interrelationships among the parties may be found in the September 18th, 2023 order in the earlier, related action.

The Court will now consider the motion (seq. no. 002) by the Adelman defendants.

The Court must accept the allegations made in the complaint as true, accord them the benefit of every reasonable inference, and determine only whether the allegations

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support any cognizable legal theory (*Connolly v. Long Island Power Authority*, 30 NY3d 719, 728, 70 NYS3d 909, 94 NE 471 [2018]). The Court will not consider whether the complaint will survive a summary judgment motion (*Redwood Property Holdings, LLC v. Christopher*, 211 AD3d 758, 177 NYS3d 895 [2d Dept 2022]).

The Adelman defendants argue that the complaint against them should be dismissed for failure to state a cause of action upon which legal relief may be granted (**CPLR 3211 [a] [7]**).

The complaint consists of three (3) causes of action, designated as Count One, Two and Three. Each Count incorporates by reference the preceding complaint paragraphs. The Court will consider them in the order plead.

Count One of the complaint alleges defamation *per se* by the Adelman defendants against Jeffrey Perlman. It states: “Defendants’ defamatory statements constitute defamation *per se* because they impugn Jeff’s honesty, trustworthiness, dependability and professional fitness and abilities” (NYSCEF Doc. No. 1, para. 54).

An allegation of defamation *per se* requires the pleading of special damages contemplating the loss of something having economic or pecuniary value; in addition to pleading the elements of defamation. The Perlman plaintiffs must therefore allege being charged with a serious crime, or that the statement tends to injure them in their trade, business, or profession (*Laguerre v. Maurice*, 192 AD3d 44, 50, 138 NYS3d 123 [2d Dept 2020]). The balance of the elements of defamation *per se*, imputation of a loathsome disease or the unchastity of a woman, do not apply in this case.

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Count One does not allege that Mr. Perlman committed a serious crime, nor that he has been injured in his trade, business or profession. Complaint allegations must afford the parties notice of the underlying transactions or occurrences as required. “It is only a want of notice or the absence of a material element that violates **CPLR 3013**” (*Patrick M. Connors, Siegel, N.Y. Prac. §208* [6th ed., December 2023]). Count One of the complaint does not plead the necessary elements for defamation *per se* and will be dismissed.

Count Two of the complaint alleges a breach of fiduciary duty owed by the Adelman defendants to Mr. Perlman. That breach is alleged to be both the sending of defamatory correspondence and representing Ellen Ryan and Timothy Ryan “. . . in litigation in which they have filed documents containing statements about Jeff [Perlman] that they know are false, in addition to advocating in Ellen’s interests and against Jeff’s interests” (NYSCEF Doc. No. 1, para. 61). Ellen Ryan is Mr. Perlman’s business partner. Timothy Ryan, C.P.A., is Ms. Ryan’s brother and served as the accountant for the LLC parties.

To establish a *prima facie* case for breach of fiduciary duty, the plaintiffs must allege: 1) the existence of a fiduciary relationship; 2) misconduct by the defendants; and 3) damages directly caused by the defendants’ misconduct (*Village of Kiryas Joel v. County of Orange*, 144 AD3d 895, 898, 43 NYS3d 51 [2d Dept 2016]).

The complaint references two letters from Gary Adelman, Esq., which Mr. Perlman alleges show a fiduciary relationship and duty owed to him personally, by the Adelman defendants. The first, dated April 13th, 2022 is addressed to Mr. Perlman (NYSCEF Doc. No. 5). It is prefaced with the statement “We are the litigation counsel for Relationship Marketing Factory LLC (‘Client’ or ‘RMF’).” It discusses a draft Membership Interests

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Purchase Agreement between “you, our Client, and Ellen Ryan, the managing member of RMF. . .” The second, dated May 19th, 2022 is a letter from Gary Adelman, Esq. to Richard Lubliner, Esq. in response to a May 4th, 2022 letter from Attorney Lubliner (NYSCEF Doc. No. 7). It is prefaced: “**FOR SETTLEMENT PURPOSES ONLY / CONFIDENTIAL INADMISSIBLE**”. It opens by stating “As you know, we represent Relationship Marketing Factory LLC (‘RMF’)”. It states multiple issues which constitute cause for termination of Mr. Perlman as defined by Article 1.1 of the RMF Operating Agreement.

Count Two also alleges that representation by the Adelman defendants of Ellen Ryan and Timothy Ryan “in litigation in which they have filed documents containing statements about Jeff that they know are false” constitutes a breach of fiduciary duty owed by the Adelman defendants to Mr. Perlman (NYSCEF Doc. No. 1, para. 61). The referenced litigation and documents are not identified.

Counsel for the Adelman defendants argues that his client was clearly not the attorney for Jeffrey Perlman and does not owe him any fiduciary duty. Counsel cites to *Polovy v. Duncan*, 269 AD2d 111, 112, 702 NYS2d 61 [1st Dept 2000] for the principle that a lawyer for an entity represents the corporation, not its employees. Counsel further cites to *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 562, 883 NYS2d 147, 910 NE2d 976 [2009]; quoting “It is well settled that a corporation’s attorney represents the corporate entity, not its shareholders or employees. . .”

Counsel for Mr. Perlman argues in opposition that the Adelman defendants’ position that they represent the LLCs and not Ms. Ryan “as against Jeff” is without merit (NYSCEF Doc. No. 47, P. 18). His argument that the Adelman defendants cannot represent the entity

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without also representing the individual shareholders is unsupported by caselaw or statute. Counsel for Mr. Perlman does not dispute that the Adelman defendants are counsel for RMF.

By incorporation of prior complaint paragraphs into Count Two, counsel for Mr. Perlman alleges that, by e-mail, Attorney Adelman admitted having served as counsel to Mr. Perlman and Ms. Ryan; creating a fiduciary duty towards Mr. Perlman. That e-mail from Attorney Adelman to Mr. Perlman states: "As we represent the Company (RMF), we can help you effectuate the agreement. We cannot represent either one of you. As it is amicable, both of you [Ms. Ryan and Mr. Perlman] can decide whether to hire an independent lawyer to advise you" (NYSCEF Doc. No. 49).

That statement is consistent with Attorney Adelman's position that, with regard to the transactions at issue he represented RMF, not Mr. Perlman.

Mr. Perlman has not demonstrated the existence of a fiduciary relationship between himself and the Adelman defendants. Count Two of the complaint will be dismissed.

Count Three of the complaint alleges legal malpractice by the Adelman defendants in their representation of the Perlman LLC plaintiffs. In order to satisfy the elements of legal malpractice, the Perlman LLC plaintiffs must allege that the Adelman defendants, while acting as their counsel, failed to exercise the ordinary, reasonable skill and knowledge commonly possessed by a member of the legal profession and that their breach of this duty proximately caused the Perlman LLC plaintiffs to sustain actual and ascertainable damages. The complaint must plead actual, ascertainable damages that

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resulted from the attorneys' negligence (*Guliyev v. Banilov & Associates, P.C.*, 221 AD3d 589, 591, 198 NYS3d 400 [2d Dept 2023]).

Count Three does not allege actual, ascertainable damages. It alleges, without substantiation or explanation, that the Adelman defendants, while representing the Perlman LLC plaintiffs, "violated the New York Rules of Professional Conduct in multiple instances while representing RMF, IQ [Iqueue Response Management LLC] and United [United Insured LLC]" (NYSCEF Doc. No. 1, para. 65). Count Three of the complaint will be dismissed.

In short, Counts 1, 2 and 3 of the complaint do not state a cause of action upon which legal relief may be granted.

The Adelman defendants also request dismissal of the complaint as against them for defamation *per se* due to the expiration of the applicable one-year statute of limitations ("SOL"), (CPLR 3211 [a] [5]). They bear the burden of establishing, *prima facie*, that the Perlman LLC plaintiffs brought the instant action after their time to sue had run. The Adelman defendants must establish when the cause of action accrued and that the filing is time-barred. Upon that determination, the burden shifts to the Perlman LLC plaintiffs to raise a question of fact whether the declared SOL was inapplicable, tolled, or timely commenced (CPLR 3211 [a] [5]; *Buss v. Stryker Corporation*, 226 AD3d 959, 959, 211 NYS3d 112 [2d Dept April 24, 2024]).

The Adelman defendants argue that the allegation of defamation is time-barred by the one-year statute of limitations pursuant to CPLR 215 (3). They note that the letters which are alleged to be defamatory in nature, are dated April 13th, 2022 and May 19th,

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2022; and that the instant action was filed December 6th, 2023. They argue that the statute of limitations for defamation had expired prior to the filing of the case at bar.

Counsel for the Perlman LLC plaintiffs argues in opposition that the alleged defamatory statements are not time-barred due to their being republished in the complaint. Counsel does not address that the letters were not republished by the Adelman defendants. Nor does counsel address that the statute of limitations expired seven (7) months prior to the filing of the complaint.

Counsel for the Adelman defendants further argues that, in any case, any allegation of republication is without merit. Counsel cites to *Gottwald v. Sebert*, 40 NY3d 240, 253, 197 NYS3d 694, 220 NE3d 621 [2023], in support of its premise that the litigation privilege applies granting absolute immunity from liability for defamation where the writings are material and pertinent to the case.

The Perlman LLC plaintiffs have not demonstrated that the one-year statute of limitations was inapplicable, tolled, or that their action was timely commenced.

The Court finds that the statute of limitations for defamation had expired prior to the filing of the action (**CPLR 3211 [a] [5]**).

In light of the Court's holding, it is not necessary to consider the movant's remaining contentions.

Accordingly, it is

ORDERED, that the motion (seq. no. 002) by defendants Adelman Matz, P.C., Gary Adelman, Esq. and Sarah M. Matz, which requests, pursuant to **CPLR 3211 (a) (5), (7)**, dismissal of the complaint, with prejudice, is granted; and it is further

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ORDERED, that the request for an award of fees and costs to the defendants, is denied; and it is further

ORDERED, that, under the circumstances the Court declines to consider the request for sanctions, which is denied.

This memorandum also constitutes the Order of the Court.

Dated: October 1st, 2024
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court