Blau v Amir
2024 NY Slip Op 35479(U)
May 21, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 623071/2023
Judge: Vincent J. Martorana
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

INDEX NO: 623071/2023

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

JONATHAN BLAU and FUSION FAMILY WEALTH LLC,

Plaintiffs,

- against-

MORAN AMIR,

Defendant.

ORIG. RETURN DATE: 01/26/24
ADJOURNED DATE: 02/01/24
MOTION SEQ. NO.: 001 - MotD

PLTF'S/PET'S ATTY:
Fox Rothschild LLP
49 Market Street
Morristown, New Jersey 07960

DEFT'S/RESP'S ATTY:
Bond, Schoeneck & King, PLLC
225 Old Country Road
Melville, New York 11747

Upon efiled documents numbered 6-19, 22-42, 44-49; it is

ORDERED that Defendant's motion seeking dismissal of Plaintiff's complaint is granted in part and denied in part.

Plaintiff commenced the within action by filing a summons and complaint on September 15, 2023, which was followed by a supplemental summons and amended complaint filed on October 18, 2023, and a second amended complaint that was filed on December 11, 2023, without leave of court. No stipulation to amend appears in the record. Defendant now moves, pre-answer, seeking dismissal of Plaintiffs' complaint pursuant to CPLR§3211(g), 3211(a)(1) and 3211(a)(7). Defendant also seeks attorneys' fees and punitive damages, pursuant to Civil Rights Law §70-a.

Plaintiff's Second Amended Complaint alleges that Plaintiffs acted as Defendant's money manager and that Defendant deliberately published false statements about them, "degrading Blau and Fusion" " with the knowing intent that [the statements would] be considered statements of fact." Plaintiffs further allege that Defendant's "false and defamatory statements are damaging to Blau and Fusion and their reputation in the community." The causes of action are titled "Count One- Defamation: Libel and Slander," "Count Two- Intentional Infliction of Emotional Distress," "Count Three- Tortious Interference with Prospective Economic Advantage," "Count Four- Tortious Interference with Contractual Relations," "Count Five- Trade Libel," "Count Six- False Light."

The alleged false statements cited by Plaintiffs as the basis of their claims in their second amended complaint (also referred to herein as the "complaint"), were contained in a Google review posted by Defendant on September 10, 2023 ("Review"). Such Review was supplemented in November 2023 with a statement referencing the within action. Plaintiffs do not include the full

Review in their pleading. The cited content includes: "Though the market nosedived in that time and started to recover this year, I netted zilch" and "Any gains in the investments went to pay their fees." Defendant later added that she is "now being sued by the owner of Fusion for leaving this review." It is unclear if Plaintiffs' action is based upon the entirety of the posted statement or these few fragments. In opposition to the within motion, Plaintiffs reference additional content from the post. The full Review is submitted by the parties and is considered to supplement the pleading.

Defendant asserts that, on or about March 23, 2022 pursuant to a written agreement, she invested $2,600,000.00 with Plaintiffs (Account 1), and permitted Plaintiffs to take over management of one of her existing accounts which contained $65,530.13 (Account 2). In 2023, Defendant invested an additional $1,100,000 into Account 1. Plaintiff "Fusion was authorized, without prior consultation, to, inter alia, buy, sell, trade and allocate in and among stocks, bonds, cash and cash equivalents, mutual funds, exchange traded funds, sub-advisers, investment managers, programs and/or private investment funds and other securities and/or contracts relating to same." Plaintiff Fusion Family Wealth LLC's ("Fusion") fees were based upon the market value of assets, pursuant to a fee schedule. Defendant attests that, based upon her total earnings, which was the sum of $9,791.20, and the fees paid, which was the sum of $44,950.52, her net result was a loss: -$35,159.32. Defendant terminated the agreement on or about September 8, 2023. Defendant claims that she posted a Google review on September 10, 2023, expressing that she was disappointed in having a net loss and further stating that the funds Fusion invested in underperformed as compared to the Standard and Poors gains. She asserted that an investor would be better off directly investing their own funds in an ETF. Plaintiff filed suit against Defendant on September 15, 2023. Defendant then amended her review to mention that Plaintiff had sued her over her post.

Defendant seeks dismissal of Plaintiffs' complaint, pursuant to CPLR§3211(a)(7) and 3211(g) on the grounds that it violates the Anti-SLAPP statute.

CPLR §3211(g) provides, in part,

> 1. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."

The anti-SLAPP statutes have created "an accelerated summary dismissal procedure, which applies when a defendant in a SLAPP suit moves pursuant to CPLR 3211(a)(7) to dismiss the complaint" (***Reeves v. Associated Newspapers, Ltd.***, --- NYS3d ----, 2024 WL 1514154, at 1 1st Dept. 2024]). Once a party moving pursuant to CPLR§3211(a)(7) establishes that an action is one involving public petition and participation, the opposing party who is advancing the claims must demonstrate that the claims have a substantial basis in law in order to resist dismissal (***Mable Assets, LLC v. Rachmanov***, 192 AD3d 998, 146 NYS3d 147, 150 [2d Dept. 2021]). That is, once movant makes a sufficient showing that the action meets Civil Rights Law §76-a criteria, the burden shifts to the adverse party to establish the meritoriousness of their claim by "demonstrat[ing] that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR §3211(g); *see* ***VIP Pet Grooming Studio, Inc. v. Sproule***, 224 AD3d 78, 83, 203 NYS3d 681, 685 [2d Dept. 2024]; ***Mable Assets, LLC v. Rachmanov***, 192 AD3d 998, 146 NYS3d 147 [2d Dept. 2021]). Therefore, the burden on a motion to dismiss pursuant to CPLR §3211(g) (involving the SLAPP statutes) is shifted from requiring the movant to "establish a dispositive procedural or substantive defense on the merits of the action, as otherwise required under other provisions of CPLR 3211" (***VIP Pet Grooming Studio, Inc. v. Sproule***, *supra* at 83). Instead such movant "...need only establish that the true nature of the action is one within the scope of anti-SLAPP. The actual burden of proof as to the action's meritoriousness is thereupon shifted in the context of anti-SLAPP immediately to the plaintiff, which is unique" (***Id*** at 83).

"To withstand dismissal under CPLR 3211(g)(1), the claims pleaded must have "a substantial basis in law," which requires "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (***Smartmatic USA Corp. v. Fox Corp.***, 213 AD3d 512, 512, 183 NYS3d 402, 404 [1st Dept. 2023] (*citing* ***Golby v. N & P Engineers & Land Surveyor, PLLC***, 185 AD3d 792, 793, 128 NYS3d 34, 36 [2d Dept. 2020] (which defines "substantial basis in law" as used in CPLR§3211[h], referencing citations omitted here)); *see also* ***Reeves v. Associated Newspapers, Ltd.***, *supra* (which looks to the legislative history of CPLR§3211(h) which cites, in part, ***300 Gramatan Avenue Associates v. State Division of Human Rights***, 45 NY2d 176, 408 NYS2d 54 [1978] defining "substantial basis").

"[T]he "substantial basis" standard applicable under CPLR 3211(g) is more exacting than the liberal pleading standard applicable to ordinary CPLR 3211(a)(7) motions. Under the CPLR 3211(a)(7) standard, the question is whether a cognizable cause of action is manifested, presuming the complaint's factual allegations to be true, and according the pleading the benefit of every possible favorable inference (*internal citations omitted*). By contrast, a court reviewing the sufficiency of a pleading under CPLR 3211(g) must look beyond the face of the pleadings to determine whether the claim alleged is supported by substantial evidence" (***Reeves v. Associated Newspapers, Ltd.***, *supra* at 9).

Civil Rights Law §76-a as broadly expanded by amendment in 2020, provides, in part:

1. For purposes of this section:
(a) An "action involving public petition and participation" is a claim based upon:
(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.
(*sections omitted*)
(d) "Public interest" shall be construed broadly, and shall mean any subject other than a purely private matter.
2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with

knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.
(*section omitted*)

New York courts tend to broadly interpret what constitutes a matter of public concern (***Aristocrat Plastic Surgery, P.C. v. Silva***, 206 AD3d 26, 29, 169 NYS3d 272, 274 [1st Dept. 2022]). As referenced above, Civil Rights Law §76-a (1) (d) defines public interest as anything other than a 'purely private matter.' "To make the determination of whether content is arguably within the sphere of legitimate public concern, allegedly defamatory statements "can only be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences" (***Huggins v. Moore***, 94 NY2d 296, 302, 704 NYS2d 904 [1999] (considering alleged defamation involving a newspaper column)(*quoting* ***Gaeta v. New York News***, 62 NY2d 340, 349). "Courts must examine [the statement's] " 'content, form, and context' " (***Huggins v. Moore***, *supra (quoting* ***Dun & Bradstreet v. Greenmoss Bldrs***., 472 US 749, 761)). "Matters of "public concern" include "matter[s] of political, social, or other concern to the community," even those that do not "affect the general population" (***Kesner v. Buhl***, 590 F Supp3d 680, 693 [SDNY 2022](interpreting New York SLAPP statutes), *aff'd sub nom. Kesner v. Dow Jones & Co., Inc*., 2023 WL 4072929 [2d Cir. 2023](internal citations omitted). Matters that have been found to qualify as matters of public concern, include reporting about improper business practices (***Kesner v. Buhl***, *supra*), a review of a medical provider's services posted on an internet platform (***Aristocrat Plastic Surgery, P.C. v. Silva***, *supra*), an article about the arrest of a private party on criminal charges (***Hayt v. Newsday***, LLC, 176 AD3d 787, 108 NYS3d 204 [2d Dept. 2019]), a broadcast regarding pre-settlement loans offered to plaintiffs in personal injury lawsuits (***Park v. Park***, 208 AD3d 1244, 1245, 174 NYS3d 470 [2d Dept. 2022]), along with other matters.

Civil Rights Law §76-a (2) imposes a requirement that, where the truth or falsity of a communication is material to a cause of action, the party asserting the claim must establish by clear and convincing evidence that such communication "was made with knowledge of its falsity or with reckless disregard of whether it was false."

Defendant argues that her Google review ("Review") was substantially true, was about a matter of public concern, and was posted without malice. She also states that it was opinion. Defendant further asserts that Plaintiffs filed the within action "to silence, embarrass, and punish" her and that the Court should, under Civil Rights Law §70-a, award her attorneys' fees and punitive damages.

The 2020 amendment to Civil Rights Law §70-a mandates that "costs and attorney's fees shall be recovered" by a defendant in a public participation action who prevails on a CPLR §3211(g) motion or a CPLR§3212(h) motion. Other compensatory damages may be awarded "upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights" (Civil Rights Law §70-a [b]). Punitive damages may be awarded "upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights" (Civil Rights Law §70-a [c]). Therefore, if a claim is dismissed as a SLAPP suit, the party who was granted dismissal is entitled to a mandatory award of attorneys' fees (***Reeves v. Associated Newspapers, Ltd.***, *supra* (granting a pre-answer motion to dismiss with an award of attorneys' fees).

Plaintiffs argue that Defendant's Review does not concern a matter of public interest because it is about her personal finances. They seem to assert that personal asset management is more private than the provision of medical services; therefore the case at bar is distinguishable from cases finding that online reviews of medical providers are a matter of public concern. They claim that her assertions are demonstrably false and that there is a substantial basis in law for their claims.

As much of the argument on the within motion references additional content from the Review, and the context of the statements is key to the court's analysis, the final version of the Review is set forth as follows:

> My experience with Fusion has been upsetting. I recently withdrew my funds from their management. I invested a sizeable chunk of my personal wealth a year and a half ago. I made no money in that period. Though the market nosedived in that time and started to recover this year, I netted zilch. Any gains in the investments went to pay their fees. Moreover, when reviewing the ETFs they invested my funds in, many were underperforming funds that returned significantly less than the S&P gains. Don't trust your money with Fusion. Jonathan, the owner, will get on the phone and talk your head off about how great your returns will be...but the facts don't show that. You're paying a lot of fees without much gain. They had not issued a trade on my account for several months when I took over my account. You're better off sticking your money in an ETF yourself; Fusion adds no value other than locking up your money if you are an erratic investor type.
>
> I originally posted this review in September 2023. I am editing the review to include that I am now being sued by the owner of Fusion for leaving this review. I was served the lawsuit about a month later.

Plaintiffs assert that Defendant fails to consider the tax loss harvesting that netted her a long term wealth benefit. They also assert that she should be assessing performance on September 6, 2023, the last day that they claim to have managed her account, as opposed to September 8, 2023,which is the day Defendant claims that she regained access over her accounts. Plaintiffs claim that Defendant netted approximately $30,000, after fees, along with a $65,000 tax benefit, as a result of tax loss harvesting. Defendant asserts that she isn't interested in the tax benefit, she wanted "gains on her investments," and that even if she accepted the disputed $30,000 figure, that was a less than 1% return on her investment, which she deems to be "zilch." Plaintiffs also state that there was trading activity on Defendant's account six weeks prior to her taking over her account, not 'several months,' as she claimed. Additionally, Plaintiffs state that the funds in which Defendant's assets were invested were highly rated by Morningstar rating system and that her returns were 2.6 % at a time when S&P returns were at approximately 0.65%.

Plaintiffs sent an email to Defendant on September 9, 2023, explaining the gains from tax loss harvesting. Defendant responded that it was "a stone cold fact" that she "netted no gains in the investments and any gains in the investments went to pay [Plaintiffs'] fees." She further claimed that "any monkey can invest in these S&P ETFs and get a better return." In another email of that same date, Defendant requested a fee rebate, claiming that she understood that the market had performed poorly but that Defendant Fusion profited heavily off her losses. In response, Defendants again explained tax loss harvesting of approximately $320,000, and noted that the benefits of their strategy for long term investing would not be best realized on a short term time horizon in a bear market.

Defendant's Google Review was posted in a public forum and was a commentary on the services rendered by a financial services company. This is not a purely private matter. As such, under the vastly expanded definition provided by Civil Rights Law §76-a, Defendant's Review was a "communication in a place open to the public or a public forum in connection with an issue of public interest." Therefore, Civil Rights Law §76-a applies, and to avoid dismissal, it is Plaintiffs' burden to establish that Plaintiffs' claims have a substantial basis in law (CPLR §3211[g]). Since the truth or falsity of the statements made by Defendant are central to Plaintiffs' claims, it will ultimately be Plaintiffs' burden to establish that such communication "was made with knowledge of its falsity or with reckless disregard of whether it was false." (Civil Rights Law §76-a [2]).

Plaintiffs argue that Defendant's assertions are not opinion and are demonstrably false. They provide copies of emails showing that they explained to Defendant that she had gained value as a result of tax loss harvesting, documentation in support of their assertions that the funds in which Defendant's assets were invested were highly rated by an industry ratings agency, that the funds Defendant was invested in outperformed Vanguard's Standard and Poor's 500 ETF, and that a trade was made on July 20, 2023.

A claim for libel or slander must set forth the particular words complained of but their application to the claimant may be stated generally (CPLR §3016[a]). "The elements of a cause of action to recover damages for defamation are (1) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (2) published without privilege or authorization to a third party, (3) amounting to fault as judged by, at a minimum, a negligence standard, and (4) either causing special harm or constituting defamation per se" (***Laguerre v. Maurice***, No. 2018-11567, 2020 WL 7636435, at 3 [2d Dept. 2020]; *see also* ***Levy v. Nissani***, 179 AD3d 656, 115 NYS3d 418 [2d Dept. 2020]; ***Stone v. Bloomberg L.P.***, 163 AD3d 1028, 83 NYS3d 78 [2d Dept. 2018]; ***El Jamal v. Weil***, 116 AD3d 732, 733–34, 986 NYS2d 146, 147–49 [2d Dept 2014]).

If the alleged defamation is libel *per se* or slander *per se*, the law presumes damages will result (***Kasavana v. Vela***, 172 AD3d 1042, 100 NYS3d 82, 87–88 [2d Dept. 2019]; ***Laguerre v. Maurice***, No. 2018-11567, 2020 WL 7636435, at 3 [2d Dept. 2020]; ***LeBlanc v. Skinner***, 103 AD3d 202, 214–15, 955 NYS2d 391 [2d Dept. 2012]). "A statement is defamatory *per se* if it (1) charges the plaintiff with a serious crime; (2) tends to injure the plaintiff in her or his trade, business or profession; (3) imputes to the plaintiff a loathsome disease; or (4) imputes unchastity to a woman" (***Levy v. Nissani***, 179 AD3d 656, 657–60, 115 NYS3d 418, 420–22 [2d Dept. 2020]; *see also* ***Laguerre v. Maurice***, No. 2018-11567, 2020 WL 7636435, at *3 [2d Dept. 2020]; ***Kasavana,*** *supra*]). If the language complained of is not one of the "*per se*" exceptions, then special damages, the loss of something with economic or pecuniary value, generally must be plead (***Elias v. Massimillo***, 166 AD3d 726, 726–27, 85 NYS3d 775, (Mem)–776 [2d Dept. 2018]; ***El Jamal v. Weil***, *supra*; ***Liberman v. Gelstein***, 80 NY2d 429, 605 NE2d 344 [1992]).

It is up to the Court to decide whether or not the statements at issue are "'reasonably susceptible of a defamatory connotation...'"(***Silsdorf, v. Levine***, 59 NY2d 8, 462 NYS2d 822[1983] *quoting* ***James v Gannett Co.***, 40 NY2d 415, 419). The Court must consider the full content of the statement and the circumstances of its issuance and the likely effect on the ordinary reader (***Silsdorf,*** *supra*). The full context surrounding the communication and the general tenor of the expression must be considered from the point of view of a reasonable person (***Immuno AG. v. Moor-Jankowski***, 77 NY2d 235, 243, 566 NYS2d 90 [1991]).

A pure expression of opinion, which does not suggest that it is based upon facts unknown to the reader and is not predicated upon false facts, is speech protected by the First Amendment of the United States Constitution (***Steinhilber v. Alphonse***, 68 NY2d 283, 289–90, 508 NYS2d 901 [1986]; ***Davis v. Boeheim***, 24 NY3d 262, 998 NYS2d 131[2014]). Where a statement appears to be opinion but conveys the impression that it is predicated upon supporting facts which are unknown to the party reading or hearing the statement, such statement is mixed opinion, which is actionable (***Stega v. New York Downtown Hosp***., 31 NY3d 661, 669, 82 NYS3d 323 [2018]; ***Greenberg v. Spitzer***, 155 AD3d 27, 62 NYS3d 372 [2d Dept. 2017]). "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 (***Davis v. Boeheim***, *supra* at 262 *quoting Steinhilber*, 68 NY2d at 290 (*additional citation omitted*); *see also* ***Levy v. Nissani***, 179 AD3d 656, 115 NYS3d 418 [2d Dept. 2020]).

In determining whether a statement conveys fact or opinion, "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 libel plaintiff"" (***Brian v. Richardson***, 87 NY2d 46, 51, 637 NYS2d 347 [1995] *quoting* ***Immuno AG.,*** *supra*; *see also* ***Udell v. NYP Holdings, Inc.***, 169 AD3d 954, 94 NYS3d 314 [2d Dept. 2019]). Also relevant to the analysis is "the content of the communication as a whole, its tone and apparent purpose" (***Davis v. Boeheim***, 24 NY3d 262, 269, 998 NYS2d 131[2014]). The court must additionally consider the nature of the forum and its likely effect upon the perception of the reasonable reader (***Id***.; ***600 W. 115th St. Corp. v. Von Gutfeld***, 80 NY2d 130, 140, 603 589 NYS2d 825 [1992]). In sum, 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 262, 270, 998 NYS2d 131 [2014] (*quoting* ***Mann v. Abel***, 10 NY3d 271, 276, 856 NYS2d 31[2008] (*additional citations omitted*); *see also* ***Davis,*** *supra;* ***Crime Victims Center, Inc. v. Logue***, 181 AD3d 556, 119 NYS3d 550 [2d Dept. 2020]).

Furthermore, if the statements are factual, and therefore capable of being proven true or false, "[t]ruth is an absolute defense to a defamation action (***Udell v. NYP Holdings, Inc.***, 169 AD3d 954, 956, 94 NYS3d 314, 316 [2d Dept. 2019]). In determining whether or not a statement constitutes truth, "[a] workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. 'When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done'"(*internal citation omitted*) (***Fleckenstein v. Friedman***, 266 NY 19, 23, 193 NE 537, 538 [1934]; *see also* ***Udell v. NYP Holdings, Inc.***, 169 AD3d 954, 956, 94 NYS3d 314, 316 [2d Dept. 2019]; ***Greenberg v. Spitzer***, *supra*).

Here, portions of Defendant's Review could be viewed as opinion. For example, the assertion that Fusion's services add no value; however this statement is made alongside other statements which suggest that Fusion was not actively managing her money and that the actions they did take showed a lack of skill or insight. This too, could potentially be construed as opinion, but taken together with the affirmative statement that she netted nothing and that Fusion primarily invested her funds in ETFs that were generally underperforming and returned less than S&P funds, there is a suggestion that Defendant knows certain facts (how Fusion invested her money) that, if known by the readers of the Review, would show Fusion in a negative light. Therefore, the Review is mixed opinion, which is actionable (***Greenberg v. Spitzer***, *supra*). It should also be noted that several of the statements contained in the Review are capable of being established as true or false and that if Fusion's version of events were published, it would have a very different effect on the reader as Defendant's version of events (***Udell v. NYP Holdings, Inc.***, *supra*).

As Defendant has established that her Review was a matter of public concern, in order to survive dismissal, Plaintiffs must establish that her statements were made with "knowledge of its falsity or with reckless disregard of whether it was false." (Civil Rights Law §76-a [2]). Considering that Plaintiffs explained to Defendant the gains from tax loss harvesting and that the difference in returns between Defendant's ETFs and S&P 500 funds was something that could have easily been verified, Plaintiffs have made a sufficient showing that Defendant knew or had reckless disregard for whether or not her statements were false. Furthermore, as the statements would tend to injure Plaintiffs in their trade or profession, Plaintiffs have made a sufficient showing that their defamation claim has a substantial basis, for the purposes of resisting dismissal under the CPLR§3211(g) standard. It is noted that any content deficiencies with respect to the pleading of the alleged defamatory statement, was supplemented by the submissions on this motion. Defendant's motion to dismiss Plaintiffs' complaint in its entirety based upon CPLR§3211(g), is therefore denied.

Defendant also seeks dismissal based upon CPLR§3211(a)(7). In considering this portion of Defendant's motion, the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (***Chanko v. Am. Broad. Companies Inc.***, 27 NY3d 46, 29 NYS3d 879 [2016]; ***Goshen v. Mut. Life Ins. Co. of New York***, 98 NY2d 314, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). Bare legal conclusions are not presumed to be true and do not receive the benefit of such favorable inference (***Grant v. DiFeo***, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; ***TMCC, Inc. v. Jennifer Convertibles, Inc.***, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]). Affidavits submitted to remedy any defects in the complaint may be considered (***Chanko v. Am. Broad. Companies Inc.***, *supra;* ***Leon v Martinez,*** *supra*); however, if evidentiary material is considered, "the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one'" (***Sokol v. Leader***, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (*quoting*

Guggenheimer v Ginzburg, 43 NY2d at 275); ***Porat v. Rybina***, 177 AD3d 632, 111 NYS3d 625 [2d Dept. 2019]). In considering evidentiary material in support of a motion to dismiss on this basis, whether or not plaintiff might ultimately survive a summary judgment motion or prevail on the merits is not part of the analysis (***Doe v. Ascend Charter Sch.***, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; ***Neuman v. Echevarria***, 171 AD3d 767, 97 NYS3d 203 [2d Dept. 2019]; ***Sokol v. Leader***, *supra*).

Defendant additionally asserts CPLR§3211(a)(1) as a basis for dismissal. Dismissal on this basis would require Defendant to submit documentary evidence of undisputed and unambiguous authenticity "that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim" (***Hohwald v. Farm Family Casualty Insurance Company***, 66 NYS3d 316; 155 AD3d 1009 [2d Dept. 2017] (*quoting* ***Botach Mgt. Group v. Gurash***, 138 AD3d 771, 772, 31 NYS3d 80 [2d Dept 2016]; *see also* ***Grant v. DiFeo***, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; ***Palero Food Corp. v. Zucker***, 186 AD3d 493, 129 NYS3d 104 [2d Dept. 2020]).

Plaintiffs' "Count One" for defamation, in combination with the submission in opposition to the within motion, support a finding that Plaintiffs have a cause of action for defamation. No documentary evidence presented would conclusively dispose of this claim. Therefore the portion of Defendant's motion seeking dismissal of the defamation cause of action is denied.

Plaintiffs' "Count Two" is for intentional infliction of emotional distress. The elements of such a claim are: (1) extreme and outrageous conduct that goes beyond the bounds of decency (2) intent to cause or disregard of the likelihood of causing severe emotional distress (3) a causal connection between the conduct and injury and (4) severe emotional distress (***Chanko v. Am. Broad. Companies Inc.***, 27 NY3d 46, 56–57, 29 NYS3d 879 [2016] ; ***Ruggiero v. Contemporary Shells, Inc.***, 160 AD2d 986, 554 NYS2d 708 [2d Dept. 1990]; ***Tartaro v. Allstate Indem. Co.***, 56 AD3d 758, 868 NYS2d 281 [2d Dept. 2008]). In order to state a claim for intentional infliction of emotional distress, the conduct alleged must be so extreme as to "...go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (***Taggart v. Costabile***, 131 AD3d 243, 250, 14 NYS3d 388, 393 [2d Dept. 2015] *(quoting* ***Murphy v. American Home Prods. Corp***., 58 NY2d at 303, *quoting* Second Restatement § 46, Comment d); see also ***Ajie Chen v. Deliso,*** 169 AD3d 761, 91 NYS3d 895 [2d Dept. 2019]; ***Scialdone v. Derosa***, 148 AD3d 741, 742–43, 48 NYS3d 471, 473 [2d Dept. 2017]).

Here, the allegations in Plaintiffs' "Count Two" fail on their face. Nothing stated in Defendant's Review could be construed as beyond all possible bounds of decency. It is also unclear that a business entity can suffer emotional distress, but the court need not decide on this basis. The allegations are insufficient to meet the basic elements of such a claim. Plaintiffs' "Count Two" for intentional infliction of emotional distress is dismissed pursuant to CPLR §3211(a)(7), for failure to state a cause of action.

Plaintiffs' "Count Three" asserts tortious interference with prospective economic advantage.

A claim for tortious interference with prospective business relations requires a showing that a plaintiff "...had a business relationship with a third party, that the defendant knew of that relationship and intentionally interfered with it, that the defendant's actions were motivated solely by malice or otherwise constituted illegal means, and that the defendant's interference caused injury to the plaintiff's relationship with the third party" (***684 E. 222nd Realty Co., LLC v. Sheehan***, 185 AD3d 879, 879–80, 128 NYS3d 273, 275 [2d Dept. 2020]; ***Tri-Star Lighting,*** *supra*; ***106 N. Broadway, LLC v. Lawrence***, 189 AD3d 733, 137 NYS3d 148 [2d Dept. 2020]). A tortious interference claim must also meet a "more culpable conduct" standard (***Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc.,*** 131 AD3d 583, 585–86, 15 NYS3d 814, 817–18 [2d Dept. 2015] (quoting *NBT Bancorp. v. Fleet/Norstar Fin. Group,* 87 NY2d 614); *see also* ***Carvel Corp. v. Noonan***, 3 NY3d 182, 189, 818 NE2d 1100 [2004]). Such standard requires that the interference be effectuated by use of wrongful means, such as a crime or independent tort directed at the third party with whom the plaintiff seeks to do business, or for the sole purpose of harming the plaintiff (***Id.***; ***106 N. Broadway, LLC v. Lawrence,*** 189 AD3d 733, 137 NYS3d 148 [2d Dept. 2020]). Where there is an economic motivation on the part of the adverse party, it cannot be said that the sole purpose of the action is causing harm (***Law Offices of Ira H. Leibowitz,*** *supra;* ***Out of Box Promotions, LLC v. Koschitzki***, 55 AD3d 575, 577–78, 866 NYS2d 677 [2d Dept. 2008]).

Plaintiffs' "Count Three" alleges a vague and speculative economic harm cause by Defendants statements. Plaintiffs explain, in opposition to Defendant's motion, that such harm is the result of Defendant's statement on Google being made to " third parties whom Fusion have or may have contractual relations with." This is insufficient to state a cause of action for tortious interference with prospective business relations. Plaintiffs' "Count Three" is dismissed pursuant to CPLR§3211(a)(7).

Plaintiffs' "Count Four" alleges tortious interference with contractual relations. A cause of action for tortious interference with contract consists of an allegation that a valid contract existed between the plaintiff and a third party; that Defendant knew about the contract; that Defendant intentionally procured breach of the contract without justification or rendered performance impossible and that a breach occurred which resulted in damages (***Lama Holding Co. v. Smith Barney Inc.***, 88 NY2d 413, 424, 668 NE2d 1370 [1996]; ***Kronos, Inc. v. AVX Corp.***, 81 NY2d 90, 94, 612 NE2d 289 [1993]; ***Affordable Hous. Assocs., Inc. v. Town of Brookhaven,*** 150 AD3d 798, 799, 55 NYS3d 111, 113 [2d Dept.2017]; ***Tri-Star Lighting Corp. v. Goldstein***, 151 AD3d 1102, 58 NYS3d 448 [2d Dept. 2017]; ***Kimso Apartments, LLC v. Rivera***, 180 AD3d 1033, 119 NYS3d 519 [2d Dept 2020]; ***Astro Kings, LLC v. Scannapieco***, 2020 WL 3554654, at *1 [2d Dept. 2020]). A tortious interference claim must be supported by more than speculation and must assert that, but for Defendant's actions, the breach would not have occurred (***Kimso***, *supra;* ***Burrowes v. Combs***, 25 AD3d 370, 808 NYS2d 50 [2d Dept. 2006]; ***Ferrandino & Son, Inc. v. Wheaton Builders, Inc., LLC***, 82 AD3d 1035, 920 NYS2d 123 [2d Dept. 2011]; ***White Knight of Flatbush, LLC v. Deacons of Dutch Congregation of Flatbush***, 159 AD3d 939, 72 NYS3d 551 [2d Dept. 2018]).

Plaintiffs' "Count Four" alleges vaguely that Defendant "knew or should have known about" existing contracts that Plaintiffs had with individuals. They assert that Defendant's Review "played a material and substantial part in leading others to and/or constituting a proximate cause for [unnamed and unidentified] others to cease contractual relations or contractual dealings with or not to deal at all with" Plaintiffs. They also mention verbal statements and emails that are not described with any specificity anywhere else. Plaintiffs' "Count Four" fails to meet basic pleading requirements for tortious interference with contractual relations. "Count Four" is dismissed pursuant to CPLR§3211(a)(7).

Plaintiffs' "Count Five" asserts trade libel. "The tort of trade libel or injurious falsehood consists of the knowing publication of false matter derogatory to the plaintiff's business of kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment" (***Waste Distillation Tech., Inc. v. Blasland & Bouck Engineers, P.C.***, 136 AD2d 633, 634, 523 NYS2d 875 [2d Dept. 1988]; *see also* ***Global Merchants, Inc. v. Lombard & Co.***, 234 AD2d 98, 650 NYS2d 724 [1st Dept. 1996]). "The communication must play a material and substantial part in inducing others not to deal with the plaintiff, with the result that special damages, in the form of lost dealings, are incurred" (***Waste Distillation Tech., Inc. v. Blasland & Bouck Engineers, P.C.***, *supra* at 634 (*citing* ***SRW Assoc. v. Bellport Beach Prop. Owners***, 129 AD2d 328, 331, 517 NYS2d 741 [2d Dept 1987](*injurious falsehood*); see also (***Banco Popular N. Am. v. Lieberman***, 75 AD3d 460, 462, 905 NYS2d 82, 85 [1st Dept. 2010]. "In pleading special damages, actual losses must be identified and causally related to the alleged tortious act" (***Waste Distillation Tech., Inc. v. Blasland & Bouck Engineers, P.C.***, *supra* at 633; *see also* ***L.W.C. Agency, Inc. v. St. Paul Fire & Marine Ins. Co.***, 125 AD2d 371, 509 NYS2d 97 [2d Dept. 1986]).

Plaintiffs' Count Five generally asserts that "publication and verbal dissemination" of statements made by Defendant played a substantial part in causing others to cease their dealings with Plaintiffs or to avoid dealing with them, resulting in unspecified damage. These allegations are insufficient to state a cause of action for trade libel.

Plaintiffs' "Count Six" asserts "False Light." Defendant argues that no such cause of action is recognized under New York State Law. In Plaintiffs' opposition papers, Plaintiffs state that they withdraw their claim for false light, without prejudice.

Based upon the foregoing, the portion of Defendant's motion seeking dismissal of Plaintiffs' complaint based upon CPLR§3211(g), is denied and Defendant's request for attorneys' fees and punitive damages is denied. Such denial is without prejudice to other rights Defendant may have under Civil Rights Law. The portion of Defendant's motion seeking dismissal of Plaintiffs' complaint , pursuant to CPLR§3211(a)(7), is granted as to Plaintiff's second, third, fourth, fifth and sixth causes of action (named in the complaint as Counts Two through Six). The portion of Defendant's motion seeking dismissal of Plaintiffs' complaint pursuant to CPLR§3211(a)(1) or CPLR§3211(a)(7), is denied as to Plaintiffs' first cause of action for defamation (named in the complaint as Count One).

Any determinations as to sufficiency of claims or assessments of facts which were made for the purposes of this motion should not be construed as determinations of fact that would have bearing on the ultimate success or failure of Plaintiffs' remaining claim or Defendant's defenses.

Dated: May 21, 2024
Riverhead, New York

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION