At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 24th day of July 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No: 530824/2024

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ELITE CARE LLC, ELI KOHN, and VICTORIA KOHN,

DECISION & ORDER

Plaintiff(s),

Mot. Seq. No. 1

-against-

JENNIFER RYBSTEIN and MARC RYBSTEIN,
Defendants.

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The following e-filed papers read herein: NYSCEF Doc. Nos.:

Notice of Motion/Affirmation in Support/Memorandum/Exhibits Annexed....	219 – 227
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The action before the Court arises out of a concurrent case in which Jennifer Rybstein, acting as the Administratrix of the Estate of Bronia Rybsztajn ("Plaintiff-Decedent"), brought a wrongful death action against Elite Care LLC (the "Wrongful Death Case").[1] In the Wrongful Death Case Complaint, filed October 7, 2022, Rybstein alleged that Elite Care LLC was negligent in caring for the Plaintiff-Decedent, leading to a fall, which resulted in Plaintiff-Decedent's passing soon after (*see* Index No. 529182/2022, NYSCEF Doc No. 1). On April 28, 2023, Rybstein's counsel moved to amend the complaint, asking to join defendants to the action (*see* Index No. 529182/2022, NYSCEF Doc No. 16). In their proposed amendment, Rybstein's counsel writes, in paragraph one, "[d]efendants Elite Care LLC and Eli Kohn managed to do what the Third Reich could not: kill Bronia Rybsztajn through their negligence, gross negligence, and fraud" (*see* Index No. 529182/2022, NYSCEF Doc No. 18).

[1] Index No. 529182/2022

Upon the filing of this proposed amended complaint to NYSCEF, a website and email account began releasing negative statements, some of which were directly from the public pleadings, to the community about Elite Care LLC, Eli Kohn, and others (*see* NYSCEF Doc No. 1). As a result, Elite Care LLC and it's owners Eli Kohn and Victoria Kohn (collectively, the "Plaintiffs") brought a new lawsuit, the current action, against Jennifer Rybstein and Marc Rybstein (collectively, the "Defendants"), filing their Complaint on August 9, 2023 (*id.*). In their amended complaint, filed on October 7, 2024, Plaintiffs added Orndee Omnimedia, INC., Merrell Strategy INC., and Alexandrea Merrell, the alleged creators and maintainers of the website that posted the comments at issue, as new defendants. In their amended complaint, Plaintiffs included causes of action for, inter alia, defamation (Cause of Action One), libel (Cause of Action Two), and tortious interference on behalf of the Plaintiffs (Cause of Action Four) (*see* NYSCEF Doc No. 212). The Defendants now seek to dismiss the first and second causes of action on two theories. The first is on the theory of litigation privilege. The second theory is dismissal pursuant to CPLR 3211 (a)(7). Next, the Defendants seek dismissal of the fourth cause of action claiming it to be duplicative of the first cause of action (Mot. Seq. No. 1).

In their motion, the Defendants' counsel claims that neither Defendant sent the anonymous emails or posted on the website, nor did they have someone do it on their behalf (*see* NYSCEF Doc No. 220). Next, the Defendants argue that the content included on both the website and in the emails was information taken directly from NYSCEF which, by that time, was public record and subject to absolute litigation privilege.[2] Furthermore, the Defendants claim that Plaintiffs cannot and do not allege any factual basis behind their assertion that either of the Defendants is responsible for the emails and website. The only way they could show a factual basis, according to the Defendants, is if they pointed to what was written which, as the Defendants point out, is straight from the public NYSCEF documents that are covered by the litigation privilege. Next, the Defendants claim that, pursuant to CPLR 3211 (a) (7), the Plaintiffs'

[2] When a statement is made during any stage of a judicial proceeding in communication with witnesses, counsel, the court, or among parties, litigation privilege grants immunity from claims such as defamation and libel to the source of the statement (*see Davidoff v. Kaplan*, 217 AD3d 918, 920 [2023]).

complaint should be dismissed for failure to state a cause of action. The Defendants claim Plaintiffs' entire defamation and libel claims are based completely on speculation since there are no actual facts pointing to a connection between them and the emails and website. Furthermore, they claim that Plaintiffs' complaint concedes that they have no actual knowledge of the responsible party, quoting the clause: "indicating that the sender of the emails was a party to the events described therein and/or acting at the direct behest of a party to the same" (*see* NYSCEF Doc No. 1). Therefore, the Defendants claim causes of action one (defamation) and two (libel) must be dismissed since they fail to assert facts in support of an element of the claim. Finally, the Defendants argue that cause of action number four (tortious interference with prospective business relations) must be dismissed because it is duplicative of Plaintiffs' defamation claims as a matter of law.

Plaintiffs oppose the motion, arguing that in a prior motion to dismiss made against the original complaint, the Defendants' motion was decided on the merits, and therefore is barred from being brought again pursuant to CPLR 3211 (e) (the "Single Motion Rule"). Plaintiffs rebut the claim that there is no cause of action by claiming that, pursuant to CPLR 3211(a) (7), they simply must state a cause of action, not the accuracy of it, which Plaintiffs claim to have done. Furthermore, Plaintiffs claim that the Defendants already admitted, in a motion to reargue from a separate case, that the Defendant, Jennifer Rybstein, sent the emails and set up the website. With respect to the Defendants' litigation privilege claim, Plaintiffs argue that the defamation and tortious interference was done outside the context of litigation and is therefore not protected. Finally, Plaintiffs argue that their cause of action for tortious interference is not duplicative to their claim of defamation since the standard for the former is lower and therefore, a plaintiff is not required to allege the specific tortious statements that were made, unlike defamation. Plaintiffs ask the Court to deny the Defendants' motion in its entirety claiming that the Single Motion Rule bars the Defendants' motion to dismiss, and, even if it did not, the motion still fails on the merits.

Before the Court analyzes the Defendants' requests for relief, the Court will first address Plaintiffs' contention that, pursuant to CPLR 3211 (e), the requests must be dismissed because they have already been decided on the merits and are therefore barred from being brought again.

The Single Motion Rule, stated in CPLR 3211(e), states, in pertinent part, that a party may move to dismiss on grounds specified in 3211 (a) only once (CPLR 3211 [e]). Furthermore, the Second Department has held that when a motion to dismiss has been decided on its merits, that motion is barred from being brought again by the Single Motion Rule (*see generally Newlands Asset Holding Trust v Vasquez*, 218 AD3d 786, 788 [2d Dept 2023]). Finally, as Plaintiffs note in their opposition, the single motion rule applies to amended pleadings (*see generally 2497 Realty Corp v Fuertes*, 232 AD3d 451, 451 [1st Dept 2024]; *Postiglione v Sacks & Sacks, LLP*, 2022 NY Slip Op 30148[U] [Sup Ct, Kings County 2022]).

In Mot. Seq. No. 1N,[3] the Defendants filed an Order to Show Cause requesting the Court dismiss, inter alia, the defamation and libel causes of action in the first complaint (*see* NYSCEF Doc Nos. 3- 4). In the Court's Decision and Order on that motion, the Court ruled that the "Defendants' motion seeking dismissal of Plaintiffs' first cause of action for defamation and third cause of action for libel is *denied*" (*see* NYSCEF Doc No. 25) (emphasis added).[4] Since the decision to dismiss causes of action one and two were based on the merits, they are barred from being brought again in any subsequent motion stemming from the original or amended complaint (*see Newlands*, 218 AD3d at 788). The Defendants, however, argue that, because the amended complaint added new defendants, the Plaintiffs' causes of action have changed to incorporate these defendants. Therefore, the Defendants claim that their motion to dismiss is new since it addresses novel causes of action. Looking at the amended complaint, the Court finds that while new defendants have been added to the suit, the causes of action against the original Defendants has not changed. Furthermore, merely adding a new defendant is irrelevant when the causes of action against the original defendant stays the same (*see Eisai Co., Ltd. v Pfizer Inc.*, 2022 NY Misc LEXIS 37943 [Sup Ct, NY County, Mar. 25 2022, index No. 651311/2021]). For this reason, the Court finds that the present motion to dismiss the first and second causes of action is barred pursuant to CPLR 3211 (e). Accordingly, the

[3] The original action was brought in Nassau County. Upon transfer to Kings County the motion sequences brought in Nassau County were marked with an "N" at the end.
[4] In the original complaint, libel was the third cause of action; in the amended complaint, libel is the second cause of action (*see* NYSCEF Doc. Nos. 1 & 212).

Defendants' only remaining argument concerns the fourth cause of action asserting tortious interference. In their prior motion to dismiss the original complaint (Mot. Seq. No. 1N), the Defendants requested dismissal of the tortious interference cause of action for Plaintiffs' failure to specifically allege a third-party business relation with which the Defendants interfered (*see* NYSCEF Doc No. 4).[5] The Defendants did not, however, argue that this cause of action was duplicative of the defamation action. When a defendant had the full opportunity to raise their CPLR 3211 (a) arguments in their original motion to dismiss but failed to do so, they may not introduce that argument in a subsequent motion (*see Ross v Epstein*, 26 AD2d 658, 659 [2d Dept 1966]; *Horvath v Budin, Reisman, Kupferberg & Bernstein LLP*, 2023 NY Slip Op 31124[U] [Sup Ct, NY County 2023]; *Landes v Provident Realty Partners II, L.P.*, 137 AD3d 694, 694 [1st Dept 2016]). In the prior motion, the Defendants did not argue that the tortious interference argument was duplicative despite it being fully available at the time of the first motion,[6] and therefore the motion to dismiss this cause of action is denied.

Accordingly, it is hereby,

ORDERED, that Defendants' motion (Mot. Seq. No. 1) is denied in its entirety.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

[5] The Hon. Rhonda E. Fischer dismissed the Defendants' motion, filed against the original complaint, allowing it to remain in the Plaintiffs' amended complaint (*see* NYSCEF Doc. No. 25). Additionally, in the original complaint, tortious interference was the seventh cause of action; in the amended complaint, it is the fourth cause of action.
[6] The tortious interference cause of action in the original complaint is identical to that one made in the amended complaint (*see* NYSCEF Doc. Nos. 1 & 212).