

<b>David v City of New York</b>
2011 NY Slip Op 33116(U)
November 30, 2011
Supreme Court, New York County
Docket Number: 106604/11
Judge: Cynthia S. Kern
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## SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**PRESENT:**CYNTHIA S. KERN  
J.S.C.**PART**

52

Index Number : 106604/2011

DAVID, JOYCE

vs

CITY OF NEW YORK

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO.

106604/11

MOTION DATE

\_\_\_\_\_

MOTION SEQ. NO.

01

MOTION CAL. NO.

\_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

**PAPERS NUMBERED**

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**Cross-Motion:**  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

FILED

DEC 02 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/30/11

CYNTHIA S. KERN J.S.C.

(OK)

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITIONCheck if appropriate:  DO NOT POST  REFERENCE SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

JOYCE DAVID,

Plaintiff,

Index No. 106604/11

-against-

THE CITY OF NEW YORK, SHARI HYMAN and  
BARBARA DIFIORE,

Defendants.

**DECISION/ORDER**

**FILED**

DEC 02 2011

NEW YORK  
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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action against defendants the City of New York, Shari Hyman and Barbara DiFiore for defamation, abuse of process, prima facie tort and breach of implied contract to recover damages stemming from defendants' disclosure of plaintiff's suspected misconduct relating to her legal representation of the named defendant in the action of *People v. Darryl Littlejohn*, Indictment No. 1905/2006, Supreme Court, Kings County. Defendants now move pursuant to CPLR § 3211(a)(7) to dismiss plaintiff's complaint on the ground that it fails to state a cause of action for the above claims. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. At the time of the events in question, plaintiff was a

member of the Second Judicial Department's 18-B Panel, from which attorneys are randomly assigned to represent indigent defendants in criminal trials. On October 25, 2006, plaintiff filed a Notice of Appearance to represent Darryl Littlejohn, a criminal defendant. Shortly thereafter, plaintiff informed the presiding judge, the Honorable Cheryl Chambers, that her representation of Mr. Littlejohn would be pro bono. Despite this statement, on August 18, 2008, plaintiff filed a request to be appointed as paid 18-B counsel with the Honorable Abraham Gerges, who was assigned to the case in the interim.

After the conviction of Mr. Littlejohn at trial on all counts, plaintiff submitted a request to Judge Gerges for enhanced hourly rates of \$150.00 per hour as opposed to the statutory figure of \$75.00 for paid 18-B attorneys. Judge Gerges initially granted plaintiff's request but later rescinded this decision in 2010 because plaintiff "had originally agreed to do the case pro bono." After plaintiff submitted her final voucher with enhanced rates in August 2009, defendant Shari Hyman, Deputy Criminal Justice Coordinator, wrote a letter to the Grievance Committee for the Supreme Court of the State of New York, Appellate Division, Second Judicial Department on October 27, 2009. Defendant Hyman referred plaintiff to the Grievance Committee after learning about plaintiff's communication with the court regarding her pro bono representation of Mr. Littlejohn and subsequent request to be appointed as paid 18-B counsel.

In November 2009, the Grievance Committee commenced an investigation of plaintiff. Plaintiff was informed by defendant Hyman that her voucher would not be paid until the Grievance Committee made a determination in the investigation. The Grievance Committee notified plaintiff on October 7, 2010 that her actions had not been found to breach the Rules of Professional Conduct. Thus, on December 22, 2010, plaintiff was paid for her work on the Littlejohn case at the statutory rate, not at her requested enhanced rate, for an amount totaling

\$46,359.14. Plaintiff alleges that the delay in payment caused her to be evicted from her office space because of her inability to pay rent.

On March 16, 2010, plaintiff alleges that she was informed by a reporter from the New York Daily News that a City Hall employee - defendant Hyman - had provided the Daily News with information regarding the “ethics probe” of plaintiff. On March 21, 2010, the Daily News ran a story revealing that plaintiff was the subject of an investigation over her 18-B representation of Mr. Littlejohn and that her voucher “had been held up” as a result of said investigation. Upon information and belief, plaintiff alleges that defendants circulated the news story through the Office of Court Administration’s clipping service. Thus, plaintiff commenced the instant action against defendants for defamation, abuse of process, *prima facie* tort and breach of implied contract. She seeks \$3,045,225.00 in compensatory damages and \$10,000,000.00 in punitive damages.

Defendants’ motion to dismiss plaintiff’s defamation claim for failure to state a cause of action is granted. In order to state a claim for defamation, a plaintiff must plead “a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*.<sup>1</sup>” *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1<sup>st</sup> Dept 1999). Further, “the particular words complained of shall be set forth in the complaint.” CPLR §3016(a).

In the instant action, plaintiff’s defamation claim is dismissed for the following reasons. First, plaintiff fails to state a cause of action for defamation as she cannot show that the statements made about her are false. When a statement is true, it cannot be defamatory. See *Dillon*, 261 A.D.2d 34, 39. The Daily News story, with which plaintiff takes issue, states that

plaintiff was under investigation after submitting an invoice for her defense of Mr. Littlejohn and that the investigation was due to her request to be appointed as paid18-B counsel after she originally agreed to represent Mr. Littlejohn pro bono. As plaintiff cannot claim that the information published in the Daily News is false, since it is fully consistent with the facts alleged in plaintiff's complaint, her claim for defamation cannot stand.

Second, plaintiff's claim for defamation must be dismissed as she has not sufficiently alleged that defendant Hyman's letter to the Grievance Committee constituted defamation. It is well-settled that a defamation action concerning libel cannot be maintained unless it is premised on published assertions of fact as only assertions of fact can be proved false. *See Brian v. Richardson*, 87 N.Y.2d 46 (1995). Ms. Hyman's letter merely contains a summary of plaintiff's actions, which are undisputed by both parties and Ms. Hyman's opinion that plaintiff made conflicting representations to the court which was cause for concern and investigation by the Committee. Therefore, as plaintiff has not sufficiently alleged that any assertions of fact in Ms. Hyman's letter were false, her defamation claim must be dismissed.

Finally, plaintiff's defamation claim must be dismissed against defendant Barbara DiFiore as plaintiff's complaint does not state such a claim against Ms. DiFiore. It is well-settled that with regard to the publication of a defamatory article in a newspaper which is publicly circulated, "there is but [one] publication, and that [is] at the place where the newspaper is published." *See Zuck v. Interstate Pub. Corp.*, 317 F.2d 727, 730-33 (2d Cir. 1963). Plaintiff alleges that Ms. DiFiore sent the published Daily News article to a clipping service which then forwarded it to court personnel. However, an individual act of circulating a published article cannot qualify as the basis for a defamation claim. Thus, plaintiff's defamation claim must be

dismissed in its entirety.

Defendants' motion to dismiss plaintiff's claim of prima facie tort for failure to state a cause of action must also be granted. To properly plead prima facie tort, a plaintiff must allege that the tortfeasor acted maliciously, inflicted intentional harm by a legal action, and that plaintiff suffered special damages. *See Curiano v. Suozzi*, 63 N.Y.2d 113 (1984). The claim of "[p]rima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy." *Id.*

In the instant case, plaintiff's claim of prima facie tort must be dismissed as she has failed to properly plead such a claim. First, plaintiff's claim of prima facie tort must be dismissed as she has failed to allege malice or the intent to harm on the part of the tortfeasor. In her complaint, plaintiff alleges only that Ms. Hyman submitted a "false" report to the Grievance Committee which caused plaintiff economic harm. However, the mere fact that the Grievance Committee ultimately decided that plaintiff had not committed ethical violations does not make Ms. Hyman's report false nor does it reveal a malicious motive or intent to harm on the part of Ms. Hyman. Second, plaintiff's claim of prima facie tort must be dismissed as she has failed to allege that she suffered special damages. To demonstrate special damages, a plaintiff must show "specific and measurable loss." *Freihofe v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985). Plaintiff's complaint does not put forth any estimates of her losses; she merely claims that she "expended sums for her defense." Finally, plaintiff's claim of prima facie tort must be dismissed as plaintiff is incorrectly using prima facie tort as an alternative to her defamation claim. Plaintiff's cause of action appears to be one for defamation and not for prima facie tort. Prima facie tort cannot be used as a catch-all alternative for other causes of action. Thus,

"[w]here...complete relief can be accorded under classical tort concepts, prima facie tort may not be pleaded side by side with the pleading of a conventional tort." *Springer v. Viking Press*, 90 A.D.2d 315, 318 (1<sup>st</sup> Dept 1982). As complete relief can be accorded to plaintiff based on her claim that defamatory statements were made about her, her prima facie tort claim must fail. Thus, plaintiff's claim of prima facie tort must be dismissed.

Defendants' motion to dismiss plaintiff's claim of abuse of process for failure to state a cause of action is also granted. In order to prevail on an abuse of process claim, a plaintiff must establish the following elements: (1) a regularly issued process, either civil or criminal; (2) intent to do harm without excuse or justification; and (3) use of the process in a perverted manner to obtain a collateral objective. See *Curiano v. Suozzi*, 63 N.Y.2d 113 (1984).

In the instant action, plaintiff's claim of abuse of process must be dismissed as she has not sufficiently alleged the elements of an abuse of process claim. First, plaintiff's claim of abuse of process must be dismissed as plaintiff has failed to allege intent on the part of the defendants to do harm without excuse or justification. In her complaint, plaintiff failed to allege that Ms. Hyman's submission of the letter to the Grievance Committee was motivated by a desire to do harm without excuse or justification. Second, plaintiff's claim of abuse of process must be dismissed as plaintiff has failed to allege the use of a process in a perverted manner to obtain a collateral objective. Plaintiff alleges that defendants' reported her behavior to the Grievance Committee. However, defendants' reporting to the Grievance Committee their concerns regarding plaintiff's actions embodies, rather than perverts, the grievance process. Consequently, as plaintiff has not alleged the elements of an abuse of process claim, plaintiff's claim of abuse of process must be dismissed.

Finally, defendants' motion to dismiss plaintiff's claim of breach of implied contract for failure to state a cause of action is granted as well. To properly allege breach of implied contract, a plaintiff must specify the "essential terms of the purported personal services contract, including those specific provisions of the contract upon which liability is predicated, whether the alleged agreement was, in fact, written or oral, and the rate of compensation." *Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 A.D.2d 233, 234 (1<sup>st</sup> Dept 1994). Once the implied contract has been established, plaintiff must allege the provisions that have been breached.

In the instant action, plaintiff's claim of breach of implied contract must be dismissed as plaintiff has not alleged the essential terms of said contract nor has she alleged the specific provisions of said contract upon which liability is predicated. In her complaint, plaintiff points only generally to the "Rules and Regulations of the Assigned Counsel Plan" as the implied contract at issue. However, she does not allege any terms of said contract that were agreed upon between plaintiff and the City, such as whether they ever reached an understanding regarding the time of payment, the City's ability to delay payment pending investigation, or the amount of payment when it is subsequently reduced by the courts. Furthermore, even if plaintiff's references to the Assigned Counsel Plan were considered adequate allegations of the terms of an implied contract, which they do not, plaintiff has failed to allege what terms were breached by defendants, a requirement for pleading the claim of breach of implied contract. Thus, plaintiff's claim of breach of implied contract must be dismissed.

Accordingly, defendants' motion to dismiss plaintiff's complaint is granted. The Clerk is directed to dismiss the complaint in its entirety. This constitutes the decision and order of the court.

**FILED**

Dated: 11/30/11

DEC 02 2011

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J.S.C. \_\_\_\_\_

NEW YORK COUNTY  
COURT CLERK'S OFFICE

**CYNTHIA S. KERN**  
**J.S.C.**