[* 1]

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

PRESENT: _____ PART 40

Justice

Index Number : 104819/2010

OTERO, GEORGIA

VS.

HOUSTON STREET OWNERS CORP.

SEQUENCE NUMBER : 001

DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court grants defendants' motion to dismiss the complaint in part and orders a hearing on whether the entire complaint is to be dismissed due to inadequate service, pursuant to the accompanying decision. C.P.L.R. § 3211 (a)(7) and (8). The court will notify the parties of the time to appear for the hearing.

FILED

FEB 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/20/12

Lucy Billings

LUCY BILLINGS J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

----------x

GEORGIA OTERO and JORGE OTERO,

Plaintiffs

- against -

HOUSTON STREET OWNERS CORP., CHAIM BABAD, BABAD MANAGEMENT CO., and HOUSTON STREET MANAGEMENT CO.,

Defendants

----------x

Index No. 104819/2010

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue to recover damages for invasion of privacy from defendants' installation of cameras on premises where plaintiffs were tenants. Defendants Chaim Babad and Houston Street Owners Corp. owned and defendants Babad Management Co. and Houston Street Management Co. managed the premises. Defendants move to dismiss the complaint on the grounds of a documentary defense, failure to state a claim, and lack of personal jurisdiction. C.P.L.R. § 3211(a)(1), (7), and (8). The court grants defendants' motion to the extent set forth and for the reasons explained below.

II. JURISDICTION OVER DEFENDANTS

The court will dismiss a complaint for lack of personal jurisdiction over defendants if plaintiffs fail to adhere to statutory service requirements. Kurshan v. Townhouse Mgt. Co., 223 A.D.2d 402, 403 (1st Dep't 1996). See Flick v. Stewart-

Warner Corp., 76 N.Y.2d 50, 56-57 (1990); Pressley v. Shneyer, 56 A.D.3d 263 (1st Dep't 2008); Lazarevich v. Lotwin, 176 A.D.2d 646, 647 (1st Dep't 1991). In two affidavits dated April 30, 2010, plaintiffs' attorney, Leonard Flamm, attests that on April 14, 2010, at 11:05 a.m., he delivered the summons and complaint to Ari "Doe" at "1531 57th Street, Brooklyn, New York," and that he was a person of suitable age and discretion. Aff. of Jordan Sklar Ex. B. Flamm attests that he knew the person served "to be an employee (Office Manager) of the Defendant and he identified himself as the person authorized to accept service for" defendants. Id. The first affidavit was to show service on Babad. The second affidavit was to show service on all three corporate defendants.

C.P.L.R. § 308(2) permitted plaintiffs to serve Babad "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business." See Pressley v. Shneyer, 56 A.D.3d 263; Schorr v. Persaud, 51 A.D.3d 519, 520 (1st Dep't 2008). While Flamm establishes that he served Babad at his place of business pursuant to C.P.L.R. § 308(2), Pressley v. Shneyer, 56 A.D.3d 263; Schorr v. Persaud, 51 A.D.3d at 520, the affidavit nowhere indicates compliance with the mailing requirement. Solis Eng'g Servs. v. Donald, 258 A.D.2d 425, 426 (1st Dep't 1999); Caruso v.

Raju, 249 A.D.2d 256, 257 (2d Dep't 1998). No hearing is necessary to determine this deficiency. Flamm's first affidavit would require dismissal of the complaint against Babad. Pena v. Bros, 62 A.D.3d 466 (1st Dep't 2009).

Delivery of a summons and complaint "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" constitutes personal service on the corporate defendants. C.P.L.R. § 311(a)(1); Fashion Page v. Zurich Ins. Co., 50 N.Y.2d 265, 271 (1980); Martin v. Archway Inn, 164 A.D.3d 843, 844 (1st Dep't 1990). Although an office manager is not a title listed in C.P.L.R. § 311(a)(1), delivery to a lower ranked employee acting as the corporation's managing or general agent may qualify as valid service. Fashion Page v. Zurich Ins. Co., 50 N.Y.2d at 271; Martin v. Archway Inn, 164 A.D.2d at 845. See Daniels v. King Chicken & Stuff, Inc., 35 A.D.3d 345 (2d Dep't 2006); Lewis v. R.H. Macy & Co., 213 A.D.2d 605 (2d Dep't 1995). Thus service on a person not listed in C.P.L.R. § 311(a)(1) may constitute proper service on a corporation if that person claims to be authorized to accept service, and the process server reasonably relies on that claim. Fashion Page v. Zurich Ins. Co., 50 N.Y.2d at 272-73; Arvanitis v. Bankers Trust Co., 286 A.D.2d 273 (1st Dep't 2001); Martinez v. Church of St. Gregory, 261 A.D.2d 179, 180 (1st Dep't 1999); Martin v. Archway Inn, 164 A.D.2d at 845. See Matter of Bart-Rich Enters., Inc. v. Boyce-Canandaigua, Inc., 8 A.D.3d at 1120. Since Flamm attests that

the person he served identified himself as authorized to accept service on the corporate defendants' behalf, plaintiffs have set forth a prima facie showing of adequate service on the corporate defendants. C.P.L.R. § 311(a)(1); Bevilacqua v. Bloomberg, L.P., 70 A.D.3d 411, 412 (1st Dep't 2010). See NYCTL 1998-1 Trust & Bank of N.Y., 7 A.D.3d 459, 460 (1st Dep't 2004).

In rebuttal, Babad, an officer of defendant Houston Street Owners Corp. and a principal of defendants Babad Management Co. and Houston Street Management Co., attests that no person named "Ari" ever worked at 1531 57th Street, Brooklyn, New York. Babad attests that Sheldon Becker worked there, but was neither the office manager, nor authorized to accept service on behalf of Babad Management Co., Houston Street Owners Corp., or Houston Street Management Co.

Sheldon Becker further attests that on April 14, 2010, when he was an employee of Babad Management, a person asked if Becker could accept papers for Babad and the corporate defendants. When Becker responded that he could not do so, the person left papers on a desk. Becker denies claiming that he was authorized to accept service on any party's behalf or that he was an office manager. Defendants' affidavits specifically contradict Flamm's affidavits and therefore require an evidentiary hearing regarding at least the corporate defendants. Bevilacqua v. Bloomberg, L.P., 70 A.D.3d at 412; Finkelstein Newman Ferrara LLP v. Manning, 67 A.D.3d 538 (1st Dep't 2009); Poree v. Bynum, 56 A.D.3d 261 (1st Dep't 2008); NYCTL 1998-1 Trust & Bank of N.Y. v.

Rabinowitz, 7 A.D.3d at 460.

Plaintiffs seek to resolve this factual dispute and also to show adequate service on Babad by opposing defendants' motion with two subsequent affidavits by Flamm. They set forth that "on July 15, 2010, at 11:45 a.m., at 1531 57th Street in Brooklyn, New York," he delivered the summons and complaint to "Mr. Rubin, the Tenancy/Leasing Manager," and "Stuart Neuman, the Property Manager," for plaintiffs' residence, who "identified themselves as" Babad's employees, the corporate defendants' officers, and "the persons authorized to accept service of process" on defendants' behalf. Joint Aff. of Pls. in Opp'n Ex. 1. Flamm describes Rubin's and Neuman's physical appearance and characterizes them as persons of suitable age and discretion. Flamm further attests that he mailed the summons and complaint to Babad at that address.

In reply, the affidavit of Isaac Rubin, Babad Management's employee, contradicts Flamm's supplemental account of the service by denying that Rubin identified himself as defendants' officer or authorized to accept service for defendants or that Flamm inquired into Rubin's authority. Rubin also attests that Neuman also was not authorized to accept service for defendants and did not even speak to Flamm. While plaintiffs' new affidavits of service show adequate re-service on defendants, including Babad, Rubin's specific rebuttal warrants an evidentiary hearing regarding all defendants. Bevilacqua v. Bloomberg, L.P., 70 A.D.3d at 412; Finkelstein Newman Ferrara LLP v. Manning, 67

A.D.3d 538; Poree v. Bynum, 56 A.D.3d 261; NYCTL 1998-1 Trust & Bank of N.Y. v. Rabinowitz, 7 A.D.3d at 460.

III. PLAINTIFFS' CLAIMS

Findings in favor of all defendants after a hearing may dispose of this action entirely. In the event of another outcome, however, the court addresses defendants' remaining grounds for dismissal of plaintiffs' various claims.

Plaintiffs allege that defendants' installation of a camera near plaintiffs' apartment entrance invaded their privacy and caused damages based on several theories. Defendants claim that plaintiffs lacked a reasonable expectation of privacy in the hallway accessible to the public and that the camera recorded only the hallway outside the apartment, as a device to determine who in fact resided in the apartment.

A. Applicable Standards

The court may dismiss a complaint where documentary evidence utterly refutes plaintiffs' allegations and conclusively establishes a defense as a matter of law. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 571 (2005); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002); McCully v. Jersey Partners, Inc., 60 A.D.3d 562 (1st Dep't 2009). Upon defendants' motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(1) or (7), the court may not rely on facts alleged by defendant to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding

those facts and completely negates the allegations against defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiffs' favor. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002); Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001).

B. Intentional Infliction of Emotional Distress

To establish plaintiffs' claim of intentional infliction of emotional distress, plaintiffs must show (1) defendants engaged in extreme and outrageous conduct, (2) with intent to cause or in disregard of a substantial probability that the conduct would cause severe emotional distress, (3) a causal connection between defendants' acts and plaintiffs' injury, and (4) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993); Suarez v. Bakalchuk, 66 A.D.3d 419 (1st Dep't 2009). To

support the first element alone, plaintiffs must show that defendants' conduct was "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 11 N.Y.3d 15, 22-23 (2008); Howell v. New York Post Co., 81 N.Y.2d at 122; Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303 (1983); Suarez v. Bakalchuk, 66 A.D.3d 419.

Defendants' commission of a criminal offense may support a finding of outrageous conduct. See Roe v. Barad, 230 A.D.2d 839, 840 (2d Dep't 1996); Laurie Marie M. v. Jeffrey T.M., 159 A.D.2d 52, 55 (2d Dep't 1990). The New York Penal Law violation plaintiffs rely on, however, proscribes surveillance only of a "person at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent." N.Y Penal Law § 250.45(1) and (2). A legitimate expectation of privacy is a demonstrated "expectation of privacy that society recognizes as reasonable." People v. Ramirez-Portoreal, 88 N.Y.2d 99, 108 (1996). The validity of an expectation of privacy depends on the circumstances. Id. at 109.

While plaintiffs' expectation of privacy in their apartment behind the closed door is reasonable, see People v. Mercado, 68 N.Y.2d 874, 876 (1986), an expectation of privacy in the hallway is not reasonable because it is accessible to other persons. People v. Funches, 89 N.Y.2d 1005, 1007 (1997); People v. Fabelo, 277 A.D.2d 130, 130-31 (1st Dep't 2000). Plaintiffs admit that the camera recorded what occurred inside their apartment only

when its entrance door was open, yet contend that the camera somehow intruded on their intimate activities. Plaintiffs do not deny that it would have done so only when their entrance door was open.

Plaintiffs further claim that defendants installed the camera to humiliate them to the point of vacating their rent stabilized apartment. Penal Law § 250.45(3) also prohibits surveillance without consent in specified rooms for no legitimate purpose. People v. Evans, 27 A.D.3d 905, 906 (3d Dep't 2006). Plaintiffs fail to allege, however, that the camera recorded any room to which the statutory prohibition applies. Therefore plaintiffs fail to show that defendants violated any of Penal Law § 250.45's provisions.

Plaintiffs' allegations that defendants' camera allowed views into their apartment falls short of extreme and outrageous behavior. Even if the camera's location were considered a trespass into plaintiffs' apartment, it would not constitute atrocious, indecent, or utterly despicable conduct meeting the requirements for an intentional emotional distress claim. Howell v. New York Post Co., 81 N.Y.2d at 126. While installation of a camera to view plaintiffs surreptitiously where they legitimately expected privacy may constitute extreme and outrageous conduct, Sawicka v. Catena, 79 A.D.3d 848, 849-50 (2d Dep't 2010), plaintiffs maintain no reasonable expectation of privacy in the hallway where defendants installed the camera, nor where it viewed into plaintiffs' apartment only when plaintiffs themselves

opened the door. See Howell v. New York Post Co., 81 N.Y.2d at 126. Insofar as defendants' installation may be considered harassment under the New York Rent Stabilization Code, 9 N.Y.C.R.R. § 2525.5, the determination of whether defendants committed harassment is for the New York State Division of Housing and Community Renewal. 9 N.Y.C.R.R. § 2526.2(c)(2); Sohn v. Calderon, 78 N.Y.2d 755, 765 (1991); Edelstein v. Farber, 27 A.D.3d 202 (1st Dep't 2006); Maqo, LLC v. Singh, 47 A.D.3d 772, 773 (2d Dep't 2008). Therefore, regardless of the outcome of a hearing on service, the court grants defendants' motion to dismiss plaintiffs' claim of intentional infliction of emotional distress. C.P.L.R. § 3211(a)(7).

C. Prima Facie Tort

The elements of a prima facie tort are: (1) intentional infliction of harm, (2) causing special damages, (3) without justification or excuse, (4) by otherwise lawful acts. Freihofer v. Hearst Corp., 65 N.Y.2d 135, 142-43 (1985); Curiano v. Suozzi, 63 N.Y.2d 113, 117 (1984); Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332 (1983); Posner v. Lewis, 80 A.D.3d 308, 312 (1st Dep't 2010). Plaintiffs must plead a "specific and measurable loss" from the tortious conduct to establish special damages. Freihofer v. Hearst Corp., 65 N.Y.2d at 143. See Curiano v. Suozzi, 63 N.Y.2d at 117; DeMicco Bros., Inc. v. Consolidated Edison Co. of N.Y., Inc., 8 A.D.3d 99, 100 (1st Dep't 2004); Vigoda v. DCA Prods. Plus, 293 A.D.2d 265, 266 (1st Dep't 2002); Havell v. Islam, 292 A.D.2d 210 (1st Dep't 2002).

Malevolence must be the sole motivation for defendants' injurious actions. Curiano v. Suozzi, 63 N.Y.2d at 117; Burns Jackson Miller & Spitzer v. Lindner, 59 N.Y.2d at 333; Posner v. Lewis, 80 A.D.3d at 312.

Plaintiffs' allegation in their complaint that defendants placed the camera to force plaintiffs and the other rent regulated tenants to leave in itself demonstrates a purpose beyond the disinterested malevolence required to sustain plaintiffs' prima facie tort claim. Havell v. Islam, 292 A.D.2d 210; Smukler v. 12 Lofts Realty, 156 A.D.2d 161, 163 (1st Dep't 1989); Rad Adv. v. United Footwear Org., 154 A.D.2d 309, 310 (1st Dep't 1989). Plaintiffs' affidavit opposing defendants' motion nevertheless clarifies that defendants initially installed a camera motivated by an interest in driving out tenants through surveillance of their infrequent residence, but, when the camera failed to accomplish that purpose, defendants intended their continued use solely to injure plaintiffs.

Plaintiffs' affidavit alleges the requisite harm and damages in that the surveillance eventually forced them to leave the apartment and caused them marital difficulties and expenses for mental health services. The camera also compelled Jorge Otero to disclose to his wife Georgia Otero that when she was not in the apartment another woman visited, causing additional expenses for counseling and medication, and compelling Georgia Otero to resign from her job and hire an employee to replace her so she could remain at home. Plaintiffs claim $2,500.00 per month for an

alternative residence, $10,000.00 per year in psychiatric expenses, and $42,000.00 per year for the employee. Thus, even though the complaint failed to plead disinterested malevolence or special damages, plaintiffs' affidavit supplements their complaint and cures those deficiencies. Sargiss v. Magarelli, 12 N.Y.3d 527, 531 (2009); Nonnon v. City of New York, 9 N.Y.3d at 827; Amaro v. Gani Realty Corp., 60 A.D.3d 491, 492 (1st Dep't 2009).

D. Civil Rights Law §§ 50 and 51

Under New York law, any right to privacy derives only from New York Civil Rights Law §§ 50 and 51. Messenger v. Gruner + Jahr Print. & Publ., 94 N.Y.2d 436, 441 (2000); Howell v. New York Post Co., 81 N.Y.2d at 123; Freihofer v. Hearst Corp., 65 N.Y.2d at 140. Use of a person's name, portrait, or other picture in advertising or a trade without prior written consent is a misdemeanor. N.Y. Civ. Rights Law § 50; Messenger v. Gruner + Jahr Print. & Publ., 94 N.Y.2d at 441; Stephano v. News Group Publs., 64 N.Y.2d 174, 182 (1984). Persons whose name, portrait, or picture is knowingly used under circumstances that violate Civil Rights Law § 50 may recover damages for injuries sustained from that use. N.Y. Civ. Rights Law § 51; Messenger v. Gruner + Jahr Print. & Publ., 94 N.Y.2d at 441; Bement v. N.Y.P. Holdings, 307 A.D.2d 86, 89 (1st Dep't 2003); Molina v. Phoenix Sound, 297 A.D.2d 595, 596 (1st Dep't 2002); Hernandez v. Wyeth-Ayerst Labs., 291 A.D.2d 66, 69 (1st Dep't 2002). The statutes must be construed narrowly, however, limiting them to non-consensual

commercial appropriations of a living person's name, portrait, or picture. Messenger v. Gruner + Jahr Print. & Publ., 94 N.Y.2d at 441; Finger v. Omni Publs. Intl., 77 N.Y.2d 138, 141 (1990); Stephano v. News Group Publs., 64 N.Y.2d at 183; Guerrero v. Carva, 10 A.D.3d at 105, 115-16 (1st Dep't 2004).

To establish that defendants violated these statutes, plaintiffs thus must plead and prove defendants' (1) use of plaintiffs' picture (2) within the state of New York, (3) for purposes of advertising or trade, (4) without plaintiffs' written consent. Molina v. Phoenix Sound, 297 A.D.2d at 597. Plaintiffs claim defendants' use of the images captured by the camera, either to determine who resided in their apartment or to force out rent regulated tenants, was a trade purpose. While pleading a trade purpose to support plaintiffs' Civil Rights Law claim is inconsistent with pleading disinterested malevolence to support their prima facie tort claim, plaintiffs may plead alternatively. C.P.L.R. § 3014; Finkelstein v. Warner Music Group Inc., 14 A.D.3d 415, 416 (1st Dep't 2005). See Citi Mgt. Group, Ltd. v. Highbridge House Ogden, LLC, 45 A.D.3d 487 (1st Dep't 2007).

Civil Rights Law §§ 50 and 51 do not define advertising or trade purposes, but advertising purposes include use of a name, portrait, or picture in a publication which, as a whole, is distributed to advertise or solicit use of a product or service. Beverley v. Choices Women's Med. Ctr., 78 N.Y.2d 745, 751 (1991); Guerrero v. Carva, 10 A.D.3d at 116; Morse v. Studin, 283 A.D.2d 622 (2d Dep't 2001). A name, portrait, or picture is used for

trade purposes if its use is to attract trade to a business entity. See Ippolito v. Lennon, 150 A.D.2d 300, 302-303 (1st Dep't 1989). The content of any text associated with the name, portrait, or picture, rather than a motive for pecuniary gain, determines whether the use is for trade or for excluded newsworthy purposes. Stephano v. News Group Publs., 64 N.Y.2d at 185. See Finger v. Omni Publs. Intl., 77 N.Y.2d at 141-42; Bement v. N.Y.P. Holdings, 307 A.D.2d at 90. Whether defendants actually attracted customers or profited through the publication, however, are factors showing advertising or trade purposes. Rall v. Hellman, 284 A.D.2d 113, 114 (1st Dep't 2001).

In any event, plaintiffs allege nothing that would support an advertising or a trade purpose. Without this essential element, they fail to sustain a claim under the Civil Rights Law.

IV. CONCLUSION

For the above reasons, the court grants defendants' motion to dismiss plaintiffs' claims for intentional infliction of emotional distress and for violation of New York Civil Rights Law §§ 50 and 51. C.P.L.R. § 3211(a)(7). The court grants defendants' motion to dismiss plaintiffs' remaining prima facie tort claim for lack of personal jurisdiction, C.P.L.R. § 3211(a)(8), only to the extent of ordering a hearing, but otherwise denies defendants' motion to dismiss that claim. C.P.L.R. § 3211(a)(1) and (7). This decision constitutes the court's order.

DATED: January 20, 2012

LUCY BILLINGS, J.S.C.