Bibliotechnical Athenaeum v National Lawyers Guild, Inc.
2017 NY Slip Op 30625(U)
March 30, 2017
Supreme Court, New York County
Docket Number: 653668/16
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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BIBLIOTECHNICAL ATHENAEUM,

Plaintiff,

-against-

NATIONAL LAWYERS GUILD, INC. and THE NATIONAL LAWYERS GUILD FOUNDATION, INC.,

Defendants.

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Index No. 653668/16
Motion Sequence 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Defendants National Lawyers Guild, Inc. and The National Lawyers Guild Foundation, Inc. (collectively "the Guild" or "Defendant") move pursuant to CPLR 3211(a)(7)[1] and Business Corporation Law 1312(a)[2] for an order dismissing plaintiff Bibliotechnical Athenaeum's ("Plaintiff") complaint[3] in its entirety. In the alternative Defendant seeks an order pursuant to CPLR 3024(b) striking certain paragraphs of the Complaint as unnecessarily prejudicial and pursuant to 22 NYCRR 1200 (Professional Conduct Rule 3.7) for an order disqualifying Plaintiff's counsel, David Abrams, Esq., from representing the Plaintiff in this action.

Plaintiff describes itself as an "Israeli organization" with places of business in New York and Israel.[4] Defendant is described as a not-for-profit corporation with a principal place of business in

[1] CPLR 3211(a)(7) provides that a party may move to dismiss a complaint on the ground that the pleading fails to state a cause of action.

[2] BCL 1312(a) provides that "[a] foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute . . . as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation."

[3] A copy of the complaint is submitted as Plaintiff's exhibit B ("Complaint").

[4] Complaint, ¶5. Plaintiff was incorporated by the State of Israel, Ministry of Justice, Corporations Authority on March 8, 2016. A copy of its certificate of incorporation is annexed to Plaintiff's papers as Exhibit C. On March 11, 2016 Plaintiff registered to do business in New York with the New York State Department of State. See Plaintiff's Exhibit D.

New York County.[5] According to the Complaint, the Defendant regularly holds conferences and events that are open to the public (*id.* at ¶14). In August of 2016, Defendant held a "Law for the People" convention in Manhattan which included an annual award banquet. The Defendant offered attendees the opportunity to purchase advertising to be included in a "Dinner Journal" (Plaintiff's Exhibit F). Plaintiff purports to quote from Defendant's website (Complaint ¶17):

> Show your support for the NLG with an ad in our annual Dinner Journal! Distributed at the Banquet of the #Law4thePeopleConvention, placing an ad in the journal is a great way to congratulate our outstanding honorees, publicize your firm or organization, or just share a message of your own!

On or about June 26, 2016, David Abrams submitted on behalf of the Plaintiff the following advertisement to be included in the Dinner Journal (Plaintiff's Exhibit H):

> Bibliotechnical Athenaeum
> Congratulations to the Honorees
> 4 Shlomtzion St. Elazar
> Gush Etzion 9094200
> State of Israel

The proposed advertisement was emailed to the Defendant by Mr. Abrams with the following message (*id*):

> Hi, I am interested in placing the attached advertisement in the upcoming dinner journal.
> Is it a problem that the organization is Israeli? I realize that this is a sensitive issue.
> If everything is okay, shall I pay the $200 online with credit card?
> Thanks. Dave.
> Dave Abrams

On June 27, 2016 Mr. Abrams followed up with the Defendant, also by email (*id.*):

> Hi, further to my last e-mail, I have made the $200 payment.
> I am re-submitting the ad in jpg and pdf form; Please let me know if there are any issues.
> Thanks, Dave
>
> David Abrams
> Principal Officer
> Bibliotechnical B & W Ltd.
> 305 Broadway, Ste. 601
> New York, NY 10007
> 646-801-3456

[5] Complaint, ¶6.

That same day the Defendant responded that it was barred from accepting money from Israeli organizations (*id.*):

> Hi David,
> Thank you for reaching out. Unfortunately, we have a resolution barring us from accepting funds from Israeli organizations. Your refund to your credit card will be processed tomorrow . . . .
> Best,
> NLG National Office

The next day Defendant refunded Plaintiff's $200 payment (Complaint ¶ 21).

Plaintiff filed its Summons and unverified Complaint on July 7, 2016. Both documents were signed by David Abrams as "Attorney for the Plaintiff" (see 22 NYCRR 130-1.1(a)).

The Complaint alleges that the Defendant violated the New York State Human Rights Law[6] and the New York City Human Rights Law[7] by rejecting Plaintiff's advertisement on discriminatory grounds. The Complaint seeks compensatory and punitive damages not to exceed $100,000; an injunction ordering Defendant to cease engaging in discriminatory conduct; and costs, interest, and reasonable attorney's fees.

In lieu of an answer the Defendant filed this motion to dismiss. Defendant argues that both the First Amendment to the United States Constitution and New York's common law permit a publication to refuse to accept advertisements and that its annual dinner is not a place of "public accommodation" as that term is defined in the New York State Human Rights Law. Defendant also argues that Plaintiff lacks standing to bring this action; that under BCL 1312(a) Plaintiff has not qualified to do business in New York State and thus cannot maintain this action; that paragraphs 3 and 10-13 of the Complaint should be stricken as prejudicial; and that Plaintiff's counsel should be disqualified because he will be Plaintiff's primary witness at trial.

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[6] NY Executive Law 290, *et seq.*

[7] NYC Administrative Code 8-502, *et seq.*

I. Standing

The standing issue should be addressed first. In *Soc'y of Plastics Indus. v County of Suffolk*, 77 NY2d 761 (1991) the Court of Appeals set forth the following guidelines for determining whether an organization has standing to sue (*id.* at 775, emphasis in original):

> *First*, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. *Second*, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. *Third*, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members. These requirements ensure that the requisite injury is established and that the organization is the proper party to seek redress for that injury.

Defendant contends that the Complaint does not reveal the names of Plaintiff's members, if any, or describe Plaintiff's purpose, making it impossible to determine whether Plaintiff's claim requires the participation of its individual members. The court disagrees. The core of Plaintiff's claim is that Bibliotechnical Athenaeum as an organization was the object of intentional discrimination. If true, Bibliotechnical Athenaeum's members *ipso facto* were the recipients of that same discrimination. Accordingly, Bibliotechnical Athenaeum has alleged a defined injury - a cognizable harm not directly suffered by its individual members or by members of the public. As such there is no reason why this lawsuit would require the participation of Bibliotechnical Athenaeum's individual members as opposed to the organization itself.

In addition, both the State's and the City's Human Rights Laws are extremely broad in scope in terms of the class of "persons" they seek to protect from discriminatory acts. The New York State Human Rights Law provides (Executive Law §§ 296(2)(a), 297(9)):

> It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof.

* * * *

> Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages . . . and such other remedies as may be appropriate. . . .

The term "person" includes "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." *Id.* at § 292(1).

The New York City Human Rights Law similarly provides (NYC Administrative Code 8-502):

> [A]ny person claiming to be a person aggrieved by an unlawful discriminatory practice . . . an act of discriminatory harassment or violence . . . shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate.

The term "person" includes "one or more natural persons, proprietorships, partnerships, associations, group associations, organizations, governmental bodies or agencies, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." *Id.* at 8-102(1).

On a motion to dismiss, the court must give Plaintiff's allegations the benefit of every possible inference, and assume its allegations to be true. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Here, Plaintiff alleges that it is an organization that was the target of discrimination in a place of public accommodation based upon its national origin. It would thus appear that Plaintiff is a "person" entitled to the protections of the Human Rights Laws as either an organization or corporation. In light of the above I find that Plaintiff has standing to commence this action.

The court rejects the Defendant's contention that Plaintiff is not qualified to do business in New York State. The uncontroverted evidence submitted by Plaintiff shows that it was qualified in New York State on March 11, 2016 under its Israeli name, Bibliotechnical Blue & White, Ltd., and on March 17, 2016 received permission from the New York Secretary of State to use the name Bibliotechnical Athenaeum in New York County.

Accordingly, Defendants' motion to dismiss the Complaint based upon standing and BCL 1312(a) grounds is denied.

II. First Amendment

With respect to the Defendant's First Amendment challenge, the United States Constitution provides that "Congress shall make no laws . . . abridging the freedom of speech, or of the press . . . ." In some instances "compulsion to speak may be as violative of the First Amendment as prohibitions on speech." *Zauderer v Office of Disciplinary Counsel of Supreme Court*, 471 US 626, 650 (1985); *see also Wooley v Maynard,* 430 US 705 (1977); *West Virginia Bd. Of Ed. v Barnette*, 319 US 624 (1943).

Relying upon *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v Tornillo*, 418 US 241 (1974), Defendant argues that organizational publications such as printed programs fall within the ambit of the First Amendment. In *Tornillo*, the Supreme Court struck down Florida's "right of reply" statute which required that if a newspaper assailed a political candidate's character or record, the candidate could demand that the newspaper print a reply of equal prominence and space. As later explained by the Supreme Court in *Pacific Gas & Electric Co. v Public Utilities Com.*, 475 US 1, 10 (1986), the Florida statute directly interfered with the newspaper's right to speak in two ways. "First, the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message." Second, "the newspapers 'treatment of public issues and public officials -- whether fair or unfair -- [constitutes] the exercise of editorial control and judgment.' Florida's statute interfered with this 'editorial control and judgment' by forcing the newspaper to tailor its speech to an opponent's agenda, and to respond to candidates' arguments where the newspaper might prefer to be silent." *Id.* at 10 (quoting *Tornillo*, 418 US at 258).

Since *Tornillo*, several courts have dismissed lawsuits against newspapers that have refused to print advertisements. For example, in *Mississippi Gay Alliance v Goudelock*, 536 F2d 1073 (5th Cir. 1976), cert. den. 430 US 982 (1977), a student newspaper at a state funded university newspaper refused to print an advertisement. The court held that the newspaper did not have to print the advertisement "because University authorities had nothing to do with the rejection and since the record

suggested nothing but discretion by the editor, First Amendment interdicts judicial interference with the editorial decision." *Id.* at 1075. Similarly, in *Chicago Joint Board v Chicago Tribune Co. et al*, 435 F.2d 470 (7th Cir. 1970), cert. den. 402 US 973 (1971), where a union sought to place an advertisement in the defendant's newspaper as part of its campaign to limit the importation of foreign made clothing, the court upheld the newspaper's right not to publish the advertisement. *See also United Food & Commercial Workers Local 919, etc. v Ottaway Newspapers, Inc.*, 1991 US Dist. LEXIS 20844, *8 (D. Conn. Nov. 12, 1991) (newspaper not required to publish union advertisement); *Morrow v USA Today Newspaper*, 1988 US Dist. LEXIS 4368, *2 (SDNY May 16, 1988) (newspapers not required to print prisoner's classified advertisement); *Leeds v Meltz*, 85 F3d 51, 53 (2d Cir. 1996) (law student newspaper not required to publish advertisement).

Unlike *Tornillo* and its progeny, the Defendant in this case is not a traditional newspaper. For this reason Defendant's reliance thereon may be misplaced. The court is also skeptical of Defendant's claim that requiring it to publish Plaintiff's advertisement in the Dinner Journal would be tantamount to compelled expressive conduct so as to trigger the protections of the First Amendment. In this regard, it has been held that conduct is considered inherently expressive when there is "'[a]n intent to convey a particularized message'" and there is a likelihood that the intended '"message [will] be understood by those who view[] it'". *Texas v Johnson*, 491 US 397, 404 (1989) (quoting *Spence v Washington*, 418 US 405, 410-411 [1974]). The court cannot make such a determination on this motion since Defendant has neglected to provide a copy of the Dinner Journal as part of the record.[8]

[8] This case may be more in line with the Supreme Court's decision in *PruneYard Shopping Center v Robins*, 447 US 74 (1980), in which a shopping center owner sought to deny access to a group of students who wished to hand out pamphlets in the shopping center's common area. The California Supreme Court held that the students' access was protected by the California State Constitution. The shopping center owner appealed on the ground that such ruling violated his First Amendment rights. The Supreme Court held that the shopping center did not have a constitutionally protected right to exclude the pamphleteers from the area open to the public at large since there was no indication that such access affected the owner's First Amendment rights. It is notable that the shopping center owner, similar to the Defendant in this case, did not object to the content of the pamphlets. *But see James v*

This case is also distinguishable from *Tornillo* because it involves alleged discrimination, which is not protected by the First Amendment. *See Cyntje v Daily News Pub. Co.*, 551 F. Supp. 403, 405 (D.V.I. 1982) ("So long as [newspaper's refusal to publish the paid advertisement] is not the result of racial discrimination or based on an otherwise invidiously discriminatory classification among those seeking to place advertisements, a publication cannot, under the guarantees of a free press found in . . . the First Amendment to the U.S. Constitution . . . be compelled to print or to disseminate a paid advertisement."); *see also Pittsburgh Press Co. v Pittsburgh Commission on Human Relations*, 413 U.S. 376, 389 (ordinance prohibiting newspapers from listing help-wanted advertisements in sex-designated columns upheld).

In this same vein, the New York Court of Appeals has long recognized that free speech restrictions are consistent with the First Amendment where they serve to protect against discrimination. In *N.Y. State Club Ass'n v City of New York*, 69 NY2d 211 (1987), a consortium of some 125 private clubs, many of whom were allegedly organized along national origin, religious, ethnic and gender lines, challenged the New York City Human Rights Law as soon as it was enacted. The Association argued that the law violated its members' right to free speech and association under the First Amendment. In rejecting that argument, the Court drew a distinction between the clubs' general activities and the specific practice of discrimination – "The law evinces an intent not to dictate the selection policies or activities of the private clubs except to the extent necessary to ensure that they do not automatically exclude persons from membership or use of the facilities on account of invidious discrimination." *Id.* at 223. The law also "employed the least restrictive means to achieve its ends" and "plaintiff has made no showing that its members' free speech rights will be abridged -- either in altering the policies or functions of the various organizations . . . or in creating a chilling effect on the behavior of club members." *Id.* at 223. More importantly, the Court held that "although plaintiff's

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Board of Education, 37 NY2d 891, 896 (1975) (Fuchsberg, J., dissenting) (finding a student yearbook to be a publication susceptible to First Amendment analysis).

constituent members have a right to free speech and to association, they lack the right to practice invidious discrimination . . . in the distribution of important business advantages and privileges. . . . Any incidental intrusion on protected free speech rights accomplished by the local measure is no greater than is necessary to fulfill the State's legitimate purpose . . . ." *Id.*

As this is a motion to dismiss the court must assume Plaintiff's allegations are true. *Leon,* 84 NY2d at 87-88. According to the Complaint, the Defendant denied Plaintiff the right to place an advertisement in the Dinner Journal not because of the content of the advertisement, but solely because Plaintiff is an Israeli corporation. Such alleged discrimination may be enough to take this case outside the scope of *Tornillo* for First Amendment purposes. *See N.Y. State Club Ass'n, supra*; *Pittsburgh Press Co., supra*; *Cyntje, supra.* Accordingly, at this juncture Defendant's First Amendment challenge to Plaintiff's Complaint is denied, without prejudice.

III. "Public Accommodation" and "Distinctly Private"

The Defendant next argues that it is exempt from the requirements of the Human Rights Law because its annual dinner and related Dinner Journal are not "public accommodations". The court disagrees.

It is evident from Executive Law § 292(9) that courts should interpret the scope of "public accommodations" liberally since the statute lists dozens of locations like hotels, restaurants, music halls, and retail establishments as covered venues.[9] This "broad and inclusive language" and long list

[9] Executive Law 292(9) provides in relevant part that the "term 'place of public accommodation, resort or amusement' shall include . . . all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses,

of covered establishments "is illustrative, not specific . . . and the doctrine of *expressio unius est exclusio alterius*[10] has no application. Indeed, we are guided in the opposite direction because the Legislature has repeatedly amended the statute to expand its scope." *Cahill v Rosa*, 89 NY2d 14, 21 (1996). The list of places exempt from the scope of the Human Rights Law[11], which includes institutions that are "distinctly private", "stands in contrast to the expansive language identifying those included within the definition of a 'place of public accommodation.'" *Cahill*, 89 NY2d at 21. The New York City Human Rights Law is substantially similar to the New York State law, and also exempts "distinctly private" organizations (NYC Administrative Code 8-102(9)).

The Defendant argues that New York courts have rejected attempts to expand the scope of "public accommodation" when in fact the opposite is true.[12] In reality, courts and the Legislature have

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gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls, public rooms, public elevators, and any public areas of any building or structure."

[10] "The express mention of one thing excludes all others"

[11] "Such term shall not include kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which proves that it is in its nature distinctly private. In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business. An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other provision of law." Executive Law 292(9).

[12] The cases Defendant cites to show otherwise are distinguishable on their facts. *E.g. New York Roadrunners Club v State Div. of Human Rights*, 55 NY2d 122, 126 (1982) (running club that required "participants to use only their feet" under no obligation to admit wheelchair participants); *Ness v Pan American World Airways*, 142 AD2d 233, 241 (2d Dept 1988) (airlines travel program was not a place of public accommodation because it was a marketing tool not open to the general public); *Thompson v Andy Warhol Found. for the Visual Arts*, 2015 NY Misc. LEXIS 2866, *8 (Sup. Ct. NY Co. Aug. 3,

gradually expanded the category of venues that fall within the scope of "public accommodation" from innkeepers, theaters, and other places of public amusement to include many private establishments and organizations that "are to some extent public." *Ness*, 142 AD2d at 238. For example, in *Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401 (1983), the Court of Appeals held that the United States Power Squadrons organization and its local chapters were places of public accommodation within the meaning of Executive Law § 292(9) because its "widespread public activities to promote [its] goals and to solicit public interest and participation in its [boating] courses are . . . the equivalent of systematically offering a service or accommodation to the public . . ." *Id.* at 411. In another case, the facilities of a fraternal organization became a place of public accommodation for the one night that they were used to stage a fashion show to which the general public was invited. *See Batavia Lodge No. 196, Loyal Order of Moose v New York State Div. of Human Rights*, 43 AD2d 807 (1973), *rev'd on other grounds* 35 NY2d 143 (1974). And in *Matter of Walston & Co. v New York City Commn. on Human Rights*, 41 AD2d 238 (1st Dept 1973), an investment company trading in stocks and commodities was deemed a place of public accommodation since it was "an establishment dealing in services to the public." *Id.* at 241. Even dental offices have been held to be places of public accommodation. *Cahill*, 89 NY2d at 25.

On the papers currently before me, I find that the Defendant's annual dinner falls within the scope of both the New York State and New York City Human Rights Laws. Defendant's events are generally "open to the public" and it "regularly operates places of public accommodation, resort, or amusement in that it puts on conferences which take place in the public areas of structures and in which food and lodging is offered." (Complaint ¶¶ 14, 30); *see also Cahill*, 89 NY2d at 25 ("all places serving food and drink to the public"); *Matter of Gifford v McCarthy*, 137 AD3d 30, 35 (3d Dept 2016). This particular event, NLG's 2016 annual convention, appears to have been no different. The

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2015, Wooten, J.) ("Warhol Authentication Board is a non-profit organization and thus is not a place of public accommodation.").

program flyer indicates that the convention was to take place over five days in August of 2016 in New York City. The entire event was co-sponsored by the New York University School of Law Public Interest Law Center. The flyer contains information about the Defendant's origins and current activities, depicts the names and photographs of the convention's honorees, and contains a schedule of the convention's various programs and workshops. The flyer makes clear that both NLG and non-NLG members were able to attend any of the programs and the annual dinner. Particularly persuasive is that the flyer openly solicits advertisements in the Dinner Journal (Plaintiff's Exhibit F, p. 3):

> Pay tribute to the awardees with a message in the 2016 #Law4thePeople Convention Dinner Journal!
>
> Each year, the NLG National Office publishes a keepsake booklet in honor of the NLG awardees. The Dinner Journal is distributed at the Friday Night Banquet and cherished by Guild members for years to come. Placing an ad in the journal is a great way to congratulate our outstanding honorees, recognize this year's keynote speaker, Elle Hearns, publicize your firm or organization, or just share a message of your own – all while supporting the Guild! To learn more about our honorees and reserve ad space, visit nlg.org/dinnerjournal

All of this information comes from Plaintiff's papers. For whatever reason, neither side has submitted a copy of the Dinner Journal. The importance of this omission cannot be overstated. Without a copy, the court has no way of knowing whether it contained only advertisements and the biographies of those being honored at the dinner or something more, no way to determine what organizations, if any, were permitted to advertise, and no way to determine the validity of Defendant's claim of compelled speech.

Defendant also has not shown that it is so "distinctly private" that it is exempt from having to comply with the Human Rights Laws. The "hallmark of a 'private' place within the meaning of the Human Rights Law is its selectivity or exclusivity, and persons seeking the benefit of the exemption have the burden of establishing that their place of accommodation is 'distinctly' private." *Cahill*, 89 NY2d at 22. Defendant has not met this burden, instead merely stating in a conclusory manner that it

is "a progressive bar association committed to advancing civil rights and liberties, and it provides representation for persons who voice dissent from governmental policies."[13]

In light of all of the foregoing - in particular the substantial body of case law which interprets the phrase "public accommodation" broadly, Plaintiff's allegation that the annual dinner and offer to advertise in the Dinner Journal were open to the public, and Plaintiff's uncontroverted claim that it was denied the ability to advertise based solely on its national origin - the court finds that Plaintiff has plead a colorable claim against the Defendant under the New York State and New York City Human Rights Laws.

IV. Motion to Strike

The Defendant next argues that four paragraphs of the Complaint should be stricken as prejudicial pursuant to CPLR 3024(b), which provides that a "party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." The specific allegations at issue are as follows (¶¶ 3, 10-13):

> 3. It should be emphasized that this action does not challenge the Defendants' right to criticize Israel; to hold anti-Israel or anti-Semitic views; or to advocate for policies based on such views.
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> * * * *
>
> 10. Since its formation in the 1940s, Israel has been the target of boycott movements by its enemies, starting with the Arab League boycott of Israel which began some 70 years ago in 1945. Indeed, the modern movement to boycott Israel can trace its roots back to 1922 when the Fifth Palestine Arab Congress in Nablus called for a boycott of Jewish goods.
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> 11. Due to various factors such as evolving diplomatic relations, peace treaties, and political events as well as Israel's economic success, the Arab League boycott of Israel subsequently lost steam and became essentially ineffective by the 1990s. This set the stage for the most recent campaign by Israel's opponents to delegitimize and economically isolate the Jewish State which is known as the Boycott Divestment and Sanctions campaign or BDS Movement and which was launched approximately 10 years ago. In its latest incarnation, the anti-Israel boycott movement is not being imposed by a foreign country however the ultimate goal is the same.
>
> 12. Although the BDS Movement is cast as a human rights effort, it makes no attempt to boycott countries or entities which hang homosexuals; torture political opposition; or deny voting rights to their citizenry. Nor does it target (besides Israel) any of the many countries such as Turkey, Russia, or Morocco, which militarily occupy disputed territory. Instead the BDS Movement

[13] Affirmation of Jonathan Wallace, Esq. dated September 1, 2016 (quoting *Cohen v. City of New York*, 255 FRD 110, 113-114 [SDNY Nov. 10, 2008])

> remains lock focused on Israel. Indeed, there are prominent supporters of the BDS movement who have admitted that their goal is to put an end to the Jewish State.
>
> 13. Thus, the BDS Movement is just a new spin on an old idea – to end Israel's existence through economic pressure, this time with the patina of human rights advocacy to lend legitimacy to its efforts.

"In reviewing a motion pursuant to CPLR 3024(b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." *Soumayah v Minnelli*, 41 AD3d 390, 392 (1st Dept 2007); *see also New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391, 391 (1st Dept 2005). "It is generally held that the test . . . is whether the allegation is relevant, in an evidentiary sense, to the controversy, and therefore, admissible at trial." *Wegman v Dairylea Coop.*, 50 AD2d 108, 111 (4th Dept 1975).

Neither party disputes that the complained of allegations are of a highly sensitive nature. Still, paragraph 3 is relevant and should remain in the Complaint because it helps to frame Plaintiff's claims against this particular Defendant. But the allegations contained within paragraphs 10-13, as they are currently plead, have nothing to do with this Defendant and/or this particular controversy. As such their relevance to this action is attenuated at best and should be stricken. Defendant's motion to strike is therefore granted with respect to paragraph 10-13, and otherwise denied.

V. Motion to Disqualify

Defendant argues that Plaintiff's counsel must be disqualified from representing the Plaintiff in this matter because he will likely be Plaintiff's only deposition and trial witness. In this regard, Rule 3.7(a) of the Rules of Professional Conduct provides (22 NYCRR 1200.0):

> A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless (1) the testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal.

The party seeking to disqualify counsel bears the heavy burden of showing that disqualifying counsel is appropriate (*Campbell v McKeon*, 75 AD3d 479, 481 (1st Dept 2010); *Falk v Gallo*, 73 AD3d 685, 685 [2d Dept 2010]) by demonstrating the likelihood "that the testimony to be given by the witness is necessary" (*S & Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-446 [1987]). A finding of necessity "takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence." *Id* at 446. In examining whether or not to disqualify counsel, the court must be mindful that a party is generally entitled to be represented by counsel of its choice. That right may "not be abridged absent a clear showing that disqualifying counsel is warranted." *Falk*, 73 AD3d at 685-86.

On the facts presented here, the court finds that the disqualification of Mr. Abrams is necessary. *See Davin v JMAM, LLC*, 27 AD3d 371, 371 (1st Dept 2006); *Gould v Decolator*, 131 AD3d 448, 449 (2d Dept 2015). As set forth above, there can be no question that Mr. Abrams personally contacted the Defendant to place the advertisement in the Dinner Journal. His email signature line indicates that he was then Plaintiff's principal officer. While the emails certainly speak for themselves, under the circumstances the Defendant must be permitted to take Mr. Abrams' deposition and will almost certainly have to question or cross-examine him should this case proceed to trial. Mr. Abrams appears to be the only individual associated with the Plaintiff with personal knowledge of the material facts of this case, many of which are highly contested, including the nature of the Plaintiff's business and interests, its activities in Israel and New York State, and the facts and circumstances surrounding its request to advertise in the Dinner Journal in the first place. As previously noted by the court, Mr. Abrams signed the complaint on behalf of Bibliotechnical Athenaeum.

It is interesting that despite Defendant's arguments Mr. Abrams does not claim that Bibliotechnical Athenaeum has any other members or employees, and more importantly that such members or employees, if they exist, have knowledge of the facts and circumstances at issue. Having presented the names of no other employees, members, executives, individuals - *anyone* who might be

able to competently testify on Plaintiff's behalf - the court has no choice but to conclude that Mr. Abrams is Plaintiff's primary and only witness. Under these circumstances he cannot be permitted to continue to represent the Plaintiff in this action.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant's motion is granted in part and denied in part; and it is further

ORDERED that Defendant's motion to dismiss the Complaint is denied; and it is further

ORDERED that Defendant's motion to strike is granted only with respect to paragraph 10-13 of the Complaint, and is otherwise denied; and it is further

ORDERED that Defendant's motion to disqualify David Abrams, Esq. from representing the Plaintiff in this action is granted; and it is further

ORDERED that the proceedings in this matter are stayed for 60 days from the date of entry of this decision and order to enable Plaintiff to retain substitute counsel; and it is further

ORDERED that Plaintiff's is directed to retain substitute counsel during said 60-day period, who shall file a notice of appearance with the Clerk of the Court no later than 60 days from the date of entry of this decision and order; and it is further

ORDERED that Plaintiff's substitute counsel and Defendant's counsel shall appear for a preliminary conference in Part 30 at 60 Centre Street, Room 412, on June 12, 2017, at 9:30AM; and it is further

ORDERED that, unless otherwise directed by the court, within 20 days after said preliminary conference Plaintiff's substitute counsel shall E-file an amended complaint that is consistent with this decision and order. This constitutes the decision and order of the court.

DATED: 3-30-17

SHERRY KLEIN HEITLER, J.S.C.

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