SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9
----------X

PETER LEIBMAN,

Plaintiff,

-against-

ST. FRANCIS COLLEGE,

Defendant.
----------X

DECISION / ORDER

Index No.: 509907/2020

Motion Seq. No. 1

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of defendant's motion to dismiss the complaint

Papers	**NYSCEF Doc.**
Notice of Motion, Memo, Affirmation, and Exhibit Annexed	6-9
Affirmation in Opposition and Memo	12-13
Replying Memo	15

Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

Defendant moves, in Mot. Seq. #1, pre-answer, to dismiss the complaint. Defendant claims that it is entitled to dismissal pursuant to CPLR 3211(a)(7), as the complaint fails to state a cause of action.

Plaintiff is employed by defendant St. Francis College. Plaintiff alleges that he was hired as an associate professor in 2005 and became a tenured professor in January 2015. He asserts that he is the Director of Student Teaching for the defendant, and since his assumption of that position, he claims he "was instrumental in tripling the number of students [enrolled in defendant's] Education Department."

In 2015, plaintiff became involved with a federally funded program for Veterans, called "Troops to Teachers" ("TTT"). He claims that he facilitated a $2.4 million grant for the program from the DoD to defendant.

Plaintiff alleges that his efforts in advancing TTT and related courses for Veterans were thwarted by the administrative staff at the college. He claims the Academic Dean denied his request to teach one of the classes for Veterans. Plaintiff then sought permission to establish a post-baccalaureate program for Veterans, but the proposal was rejected by the Provost, because "the Education Department would need to apply and receive accreditation." Plaintiff then attempted to meet with the Director of Media Relations at the college, to publicize the TTT program, but received no response. In addition, defendant was "chronically tardy in paying [plaintiff] for the work he performed for [TTT]." The college also delayed executing the TTT contract with the DoD for more than a year, which prevented plaintiff from hiring support staff and also delayed his being paid for his work in this program.

Plaintiff also alleges that, unrelated to the TTT program, in December 2014, the Academic Dean directed some of defendant's faculty to "harass and obstruct" plaintiff in "many facets of his employment" and "attempted to interfere with [plaintiff's] efforts to obtain tenure." After "several . . . galling acts by [the Academic Dean]" plaintiff's "condition was so dire that he was . . . rushed by ambulance to NYU Medical Center." Plaintiff avers that the Dean's conduct "culminated" in a "serious cardiac event" and resulted in the placement of a heart monitor.

Additionally, in 2018, plaintiff claims that the college's President told him that he was considering replacing plaintiff in the TTT program, which caused plaintiff's heart monitor to alert his cardiologist of an atrial fibrillation. Plaintiff asserts that his salary associated with the TTT program was reduced soon thereafter. Plaintiff was not removed from the program but, in June 2019, he resigned from the TTT program to "preserve both his physical and mental health."

Plaintiff commenced this action on June 12, 2020. The complaint sets forth claims of tortious interference with business relationships [relating to plaintiff's relationships and agreements with the DoD] (first cause of action), intentional infliction of emotional distress (second cause of action), breach of the covenant of good faith and fair dealing [seeming to relate to the DoD contract with the NYC Department of Education and defendant] (third cause of action), and prima facie tort [referring to "malicious staff conduct" that caused plaintiff to sustain "significant medical conditions" and "professional embarrassment"] (fourth cause of action).

In this motion, defendant moves, pre-answer, to dismiss the complaint for failing to state a cause of action [CPLR 3211 (a) (7)]. Defendant contends that the tortious interference claim is supported solely by conclusory allegations and is otherwise defective; the intentional infliction of emotional distress claim is wholly conclusory; the breach of the covenant of good faith and fair dealing claim is defective; and the prima facie tort claim must be dismissed because the "sole motive" for the alleged misconduct is "disinterested malevolence."

In plaintiff's memorandum of law in opposition, he voluntarily withdraws the first and third causes of action in the complaint, leaving the second (intentional infliction of emotional distress) and the fourth (prima facie tort). He otherwise opposes the motion to dismiss. Plaintiff argues that he adequately alleges a cause of action for intentional infliction of emotional distress with his allegations of a "campaign of harassment or intimidation." Plaintiff also responds that the prima facie tort claim is properly pled in that he alleges that defendant caused him to suffer the intentional infliction of harm that resulted in special damages (i.e., his medical conditions and professional embarrassment).

Discussion

"In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a) (7) 'the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail' " (*Quinones v Schaap*, 91 AD3d 739, 740 [2012], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 [1977]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (*Hense v Baxter*, 79 AD3d 814, 815, 914 NYS.2d 200 [2010]). "[H]owever, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [internal quotation marks omitted]).

Intentional Infliction of Emotional Distress

"The elements of [a valid claim for] intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Klein v Metropolitan Child Servs., Inc.,* 100 AD3d 708, 710 [2d Dept 2012]; *see Marmelstein v Kehillat New Hempstead: Rav Aron Jofen Community Synagogue,* 11 NY3d 15, 22–23 [2008]).

Whether the alleged conduct is "extreme or outrageous" may be determined as a matter of law on a motion to dismiss the complaint (*see e.g. Petkewicz v Dutchess County Dept. of Community & Family Servs.*, 137 AD3d 990, 990-91 [2d Dept 2016]; *see also Murphy v Am. Home Products Corp.*, 58 NY2d 293, 303 [1983]; Restatement of

Torts Second § 46 [1], cmt. d ["Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."]). "[C]onclusory assertions are insufficient to set forth a cause of action sounding in the intentional infliction of emotional distress" (*Klein v Metro. Child Servs, Inc.*, 100 AD3d 708, 711 [2d Dept 2012]).

Plaintiff's allegations of extreme and outrageous conduct committed on behalf of or at the direction of defendant are too speculative and conclusory to adequately state a viable claim for intentional infliction of emotional distress. Plaintiff alleges that the Academic Dean "directed a number of the College's faculty to harass and obstruct [plaintiff] in many facets of his employment" and "attempted to interfere with [plaintiff's] efforts to obtain tenure." Plaintiff alleges that he suffered a cardiac event following "several particularly galling acts by this Dean" but does not allege what those acts were. He alleges that the Provost denied his proposal to start a program for Veterans at the college and that the Academic Dean denied a request to teach certain classes for Veterans at the college. He further alleges that the President "discussed" removing him at Director of TTT at a meeting and, later, his salary for work on TTT was reduced without explanation. Finally, plaintiff alleges that a website post by defendant about the TTT program failed to mention him, despite the fact that he "almost singlehandedly established the program."

Accepting as true the allegations in the complaint regarding the defendant's conduct, and according the plaintiff the benefit of every possible favorable inference, the alleged conduct was not so extreme and outrageous to satisfy the first element of the cause of action for intentional infliction of emotional distress (*Petkewicz v Dutchess*

County Dept. of Community & Family Servs., 137 AD3d 990, 990-91 [2d Dept 2016]). Plaintiff's allegations state "little more than the conclusion that" plaintiff suffered extreme and grievous mental distress, heart problems, and professional embarrassment as a result of the conduct of certain staff members (*see Klein v Metro. Child Servs., Inc.*, 100 AD3d 708, 711 [2d Dept 2012]). "[T]he conduct alleged must consist of more than mere insults, indignities, and annoyances" (*Leibowitz v Bank Leumi Trust Co. of New York,* 152 AD2d 169, 181-82 [2d Dept 1989]). Here, plaintiff's allegations that are not bare, speculative, or conclusory only assert professional slights or annoyances. He is still a tenured professor at defendant college.

To be clear, the bar is high to establish conduct which was extreme and outrageous and thus states a claim for intentional infliction of emotional distress. In one case, a doctor's erroneous pronouncement of heart attack patient's death was not found to be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community, as required for an intentional infliction of emotional distress claim, where the doctor and emergency department nursing staff believed the patient was dead. (see *Cleveland v Perry*, 175 A.D.3d 1017 [4th Dept 2019]).

The Court of Appeals, the highest court in New York State, recently stated, in a case where a TV news show depicted the death of the plaintiff's close relative, and the family was not advised that it would be broadcast (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 57-58 [2016]),

> The conduct at issue here for purposes of the fifth cause of action—the broadcasting of a recording of a patient's last moments of life without consent—would likely be considered reprehensible by most people, and we do not condone it. Nevertheless, it was not so extreme and outrageous as to satisfy our exceedingly high legal standard. The

> footage aired by ABC was edited so that it did not include decedent's name, his image was blurred, and the episode included less than three minutes devoted to decedent and his circumstances. We cannot conclude that defendants' conduct in allowing the broadcasting of that brief, edited segment is more outrageous than other conduct that this Court and the Appellate Division Departments have determined did not rise to the level required to establish "extreme and outrageous conduct" sufficient to state a cause of action for intentional infliction of emotional distress. For example, we did not deem a newspaper's conduct sufficiently outrageous when it published a picture of a person in a psychiatric facility—thereby informing the world that the photographed person was a patient at such a facility—even though the residents were photographed by someone trespassing on facility grounds and the facility had expressly requested that the newspaper not publish pictures of residents (*see Howell*, 81 NY2d 115 at 118). Similarly, the conduct of a television station has been deemed insufficiently outrageous when the station displayed recognizable images of rape victims after repeatedly assuring them that they would not be identifiable (*see Doe v American Broadcasting Cos.*, 152 AD2d 482, 483, 543 NYS2d 455 [1st Dept 1989], *appeal dismissed* 74 NY2d 945, 549 NE2d 480, 550 NYS2d 278 [1989]).
>
> We conclude that defendants' conduct here, while offensive, was not so atrocious and utterly intolerable as to support a cause of action in the context of this tort.

Prima Facie Tort

"The requisite elements for a cause of action for prima facie tort are (1) an intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" (*Diorio v Ossining Union Free School Dist.*, 96 AD3d 710, 712 [2d Dept 2012]). "A critical element of the cause of action is that the plaintiff suffer specific and measurable loss, which requires an allegation of special damages (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]).

While plaintiff argues that "[d]isinterested malevolence was the motivation for [defendant's] conduct," he does not assert that it was the "sole" motivation (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983] [noting that a plaintiff must allege that the defendant's "*sole* motivation was disinterested malevolence"]). Here, plaintiff also alleges that defendant interfered with his business

relationships “based on Defendant's own self-interest,” and that “Defendants engaged in such malicious conduct with the intent to improperly benefit themselves at the expense of Plaintiff” (E-File Doc 8, ¶ 36 [Complaint]).

Plaintiff’s allegations of malicious intent are contradicted by his allegations of profit motivation (*see e.g. Princes Point, LLC v AKRF Eng'g, P.C.*, 94 AD3d 588, 589 [1st Dept 2012] [dismissing a cause of action for prima facie tort where “plaintiff's allegation of malevolence is contrary to its allegation concerning defendants' alleged profit motives”]).

Accordingly, defendant’s motion to dismiss the complaint is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: March 23, 2021

ENTER:

Hon. Debra Silber, J.S.C.