UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE,

Plaintiff,

-against-

JOHN DOE,

Defendant.

OPINION & ORDER

No. 16 Civ. 0332 (NSR)

NELSON S. ROMÁN, United States District Judge

Plaintiff Jane Doe alleges that Defendant John Doe either intentionally or negligently inflicted severe emotional distress upon her when he surreptitiously filmed them having sexual intercourse in November 2013, without informing Plaintiff that he was recording the encounter or obtaining her consent to do so, and then posted the film to the internet for public viewing in February 2014. For these actions, Defendant was investigated by the New York Police Department and criminally charged with violating New York Penal Law § 250.45(1) and § 250.60(2)—unlawful surveillance in the second degree and dissemination of an unlawful surveillance in the first degree, respectively. Defendant entered a guilty plea to attempted versions of both of these crimes in November 2015.

Plaintiff now moves for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the issue of Defendant's liability, arguing that she is entitled to judgment in her favor as a matter of law because Defendant's allocution in the criminal action constitutes an admission of liability under the doctrine of collateral estoppel. Plaintiff also moves pursuant to Rule 12(b)(6) to dismiss Defendant's defamation based counterclaims. For the following reasons, Plaintiff's motion for summary judgment is GRANTED in part and DENIED in part, and her motion to dismiss is GRANTED.



Copies mailed/faxed to pro se defendant 7/14/2017
Chambers of Nelson S. Román, U.S.D.J.

## BACKGROUND

### I. Factual Overview[1]

In or around April 2013, Plaintiff and Defendant began dating. (Def.'s 56.1 ¶ 1.) In November 2013, Defendant placed his cell phone, set to the video function, on his bedside table to record a sexual encounter between Plaintiff and himself, without Plaintiff's knowledge or consent. (Pl.'s 56.1 ¶ 2; John Decl. ¶ 8.) Defendant disputes whether the filming was surreptitious, because while he did not inform Plaintiff that he was recording them (and indeed began recording when she was out of the room) (John Aff. ¶ 8), he argues that the phone was clearly visible on his bedside table the entire time and that she watched him eventually get out of bed and turn it off. (*Id.* ¶¶ 8-10.) Later, in February 2014, Defendant uploaded the video to a pornographic web site called X-Tube, again without Plaintiff's knowledge or consent. (Pl.'s 56.1 ¶ 3; John Aff. ¶ 14.) Defendant sent the link to the video to at least three other individuals. (Pl.'s 56.1 ¶ 4; John Aff. ¶ 14.)

Plaintiff discovered the video less than two days after it was posted and confronted Defendant, who took steps to remove the video from the Internet right away. (Def.'s 56.1 ¶ 16.) Altogether, the video received over 13,000 views. (Pl.'s 56.1 ¶ 3.) Plaintiff claims that Defendant's conduct has caused her severe emotional distress and anguish, leaving her depressed, anxious, humiliated, and embarrassed. (*Id.* ¶ 5.) Defendant disputes Plaintiff's description of the ramifications of these events on her health and emotional well-being, because Plaintiff has not provided medical confirmation of her alleged injuries. (Def.'s 56.1 ¶ 5.)

[1] The following factual background comes from the parties Local Rule 56.1 statements and declarations. (*See* Plaintiff's 56.1 Statement ("Pl.'s 56.1"), ECF No. 29; Decl. Jane Doe in Supp. Mot. ("Jane Decl."), ECF No. 30; Decl. Alan E. Sash in Supp. Mot. ("Sash Decl."), ECF No. 31; Defendant's 56.1 Statement ("Def.'s 56.1"), ECF No. 33; Aff. John Doe in Opp'n Mot. ("John Aff."), ECF No. 34.) Certain issues are in dispute as noted.

For his aforementioned conduct, the New York County District Attorney's Office charged Defendant with violating New York Penal Law § 250.45(1) and § 250.60(2)—unlawful surveillance in the second degree and dissemination of an unlawful surveillance in the first degree, respectively. (Def.'s 56.1 ¶ 6.) Defendant first pled guilty to these charges in open court on May 12, 2015. (Pl.'s 56.1 ¶ 7.) On November 10, 2015, Defendant withdrew his previously entered plea and entered a guilty plea to reduced charges of *attempted* unlawful surveillance and *attempted* dissemination of an unlawful surveillance, pursuant to the terms of his plea agreement with the District Attorney. (*Id.* ¶ 8; Sash Decl. Ex. 2 at 6 (¶¶ 3-10).)

While Defendant was ultimately sentenced based on the reduced charges, his allocution from the later proceeding establishes the same intentional conduct that established his guilt for the crimes as originally charged. (*See* Sash Decl. Ex. 2 at 6 (¶¶ 16-20) ("defendant . . . allocut[ed] to the completed crimes because that is what he did").) In particular, Defendant admitted to unlawfully videotaping the private sexual encounter:

> Defendant: For my own and another person's amusement and entertainment, I *intentionally* used and installed . . . an imaging device to surreptitiously view, broadcast, and record a person undressing and sexual and other intimate parts of such person at a place and time when such person had a reasonable expectation of privacy *without that person's knowledge and consent*.

(Pl.'s 56.1 ¶ 9 (emphasis added); *see also* Sash Decl. Ex. 2.) Defendant similarly admitted to unlawfully disseminating the video he created:

> Defendant: . . . I *intentionally* disseminated unlawfully and created a surveillance image, such image having been created by me—having been created for my own and another person's amusement by an imaging device that I used and installed . . . to surreptitiously view, broadcast, and record a person undressing and sexual and other intimate parts of such person at a time and place when that person had reasonable expectation of privacy *without such person's knowledge and consent*.

(*Id.* (emphasis added).)

For both crimes, Defendant was sentenced to three years of probation in lieu of jail time. (Sash Decl. Ex. 2 at 11 (¶¶ 9-11).)

### II. Procedural History

Plaintiff commenced this tort based diversity action on January 15, 2016. (*See* Compl. ¶ 3, ECF No. 1.) Her motion for summary judgment on the issue of liability was fully briefed as of December 30, 2016. (ECF No. 28.)

## LEGAL STANDARDS

### I. Standard on a Motion for Summary Judgment

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of pointing to evidence in the record, "including depositions, documents [and] affidavits or declarations," *id.* at 56(c)(1)(A), "which it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may also support an assertion that there is no genuine dispute by "showing . . . that [the] adverse party cannot produce admissible evidence [in] support" of such a contention. Fed. R. Civ. P. 56(c)(1)(B). If the moving party fulfills its preliminary burden, the onus shifts to the non-moving party to identify "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal citation and quotation marks omitted).

If "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," a motion for summary judgment should fail. *Id.* at 248; *accord Benn v. Kissane*, 510 F. App'x 34, 36 (2d Cir. 2013) (summ. order). Courts must "construe the evidence in the light most favorable to the non-moving party and draw[ ] all reasonable inferences in its favor." *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 720 (2d Cir. 2010) (internal

quotation marks omitted). The party asserting that a fact is genuinely disputed must support their assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c)(1). "Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment." *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir. 1999).

The nonmoving party "may not rely on conclusory allegations or unsubstantiated speculation." *FDIC v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (internal citation and quotation marks omitted). Similarly, "a party cannot create an issue of fact by submitting an affidavit in opposition to summary judgment that contradicts prior deposition testimony." *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 104 (2d Cir. 2010) (citing *Perma Research and Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969) (such affidavits "greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact"). But the mere fact that a non-movant's factual allegations in opposition are "self-serving" does not automatically render them insufficient to defeat summary judgment. *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 57 (2d Cir. 1998). Instead, summary judgment should be granted when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case," where "that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

In reviewing the record, "the judge's function is not himself to weigh the evidence and determine the truth of the matter," nor is it to determine a witness's credibility. *Anderson*, 477 U.S. at 249. Rather, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial." *Id.* at 250. If the Court finds that one party to a case has "no real

support for its version of the facts," a motion for summary judgment should be granted. *Community of Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 498 (2d Cir. 1962).

## II. Collateral Estoppel

"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 970, 973 (1979). "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980).

New York law governs the preclusive effect of a judgment from a New York state court. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81 (1984) ("the preclusive effect in federal court of petitioner's state-court judgment is determined by [state] law."); *see also Wight v. BankAmerica Corp.*, 219 F.3d 79, 87-88 (2d Cir. 2000). The Second Circuit has recognized that there is "no significant difference" between New York preclusion law and federal preclusion law. *Pike v. Freeman*, 266 F.3d 78, 90 n. 14 (2d Cir. 2001); *see also Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002) ("The parties agree that there is no discernable difference between federal and New York law concerning res judicata and collateral estoppel.").

The doctrine of collateral estoppel under New York law is applicable upon a showing of two factors: "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue

must have had a full and fair opportunity to contest the prior determination." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985). The federal test for the application of collateral estoppel distributes these same elements into a four-part test: "(1) the identical issue was raised in a previous proceeding; (2) the issue was 'actually litigated and decided' in the previous proceeding; (3) the party had a 'full and fair opportunity' to litigate the issue; and (4) the resolution of the issue was 'necessary to support a valid and final judgment on the merits.'" *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998).

**DISCUSSION**

Plaintiff asks the Court to grant her motion for summary judgment on the issue of liability on her claims for intentional infliction of emotional distress and negligent infliction of emotional distress. (Pl.'s Mem. in Supp. of Mot. for Summ. J. ("Pl.'s Mem.") at 6-7.) Plaintiff contends that there are no material facts at issue with regard to Defendant's liability, because Defendant admitted by way of his guilty plea to the conduct as alleged in her complaint as giving rise to her injuries. (*Id.*) Defendant opposes Plaintiff's motion on the basis that the doctrine of collateral estoppel is inapplicable. (Def.'s Mem. in Opp'n to Mot. ("Def.'s Opp'n.") at 3.)

As to Plaintiff's motion to dismiss his counter-claims, he asserts that he has alleged sufficient facts to support his claims of defamation.[2] Defendant claims that Plaintiff unlawfully informed the NYPD that the two were living together in Defendant's apartment in September 2014, which, he alleges, was the reason for his subsequent arrest. (Def.'s Answer and Counterclaims at 6, ECF No. 5.) Defendant further claims that Plaintiff contacted a New York Post reporter and made statements about him that were false and salacious. (*Id.* at 6-7.) The particular statements he claims she made, however, are not pleaded.

[2] Defendant has withdrawn his counterclaim against Plaintiff for violating two sections of the New York State Penal Law (unauthorized use of a computer (§156.05) and computer trespass (§156.10)). (Def.'s Opp'n at 4.)

Lastly, Defendant seeks reconsideration of the Court's Memorandum Endorsement denying his application for a pre-motion conference on the issue of whether the amount in controversy requirement for diversity jurisdiction was met. (*See* ECF No. 20.)

## I. Intentional Infliction of Emotional Distress

The Restatement [Second] of Torts § 46 provides that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such distress." Under New York law, in order to recover for the tort of intentional infliction of emotional distress, a plaintiff must prove four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 121 (1993). The *Howell* court noted that the tort is "as limitless as the human capacity for cruelty." *Id.* at 122. As such, a plaintiff claiming intentional infliction of emotional distress must demonstrate with particularity that the defendant's conduct was "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." *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 303 (1983) (quoting Restatement [Second] of Torts § 46, comment *d*).

### a. Defendant's Conduct

Of the four elements of a valid claim for intentional infliction of emotional distress, the requirement that the defendant's conduct be "extreme and outrageous" has received the highest scrutiny from New York courts. This element is "the most susceptible to determination as a matter of law," and is "designed to filter out petty complaints and assure that the emotional distress is genuine." *Chanko v. American Broadcasting Companies, Inc.*, 27 N.Y.3d 46, 56

(2016). Conduct that is offensive or even morally reprehensible is not outrageous enough to satisfy the requirement. *See id*.; *see also Murphy*, 58 N.Y.2d at 303; *see also Friehofer v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985).

However, New York courts have found that conduct that is part of a continuous pattern of malicious behavior, or conduct that will leave a lasting harm upon its victim, is extreme and outrageous enough to move past a dispositive motion. *See Halio v. Lurie*, 15 A.D. 62, 66 (2d Dep't 1961) (finding that plaintiff sufficiently pled all elements of claim against her ex-fiancé where he sent a series of harassing letters to her home); *see also Flatley v. Hartmann*, 138 A.D.2d 345, 346 (2d Dep't 1988) (finding that plaintiff's complaint based on a continuous series of harassing and threatening phone calls from neighbor was actionable). Furthermore, "when the actor's conduct is extraordinarily vindictive, it may be regarded as so extreme and so outrageous as to give rise to a cause of action for emotional distress." *Flamm v. Van Nierop*, 56 Misc. 2d 1059, 1060 (N.Y. Sup. Ct. 1968); *see also Esposito-Hilder v. SFX Broadcasting*, 236 A.D.2d 186, 190 (3d Dep't 1997) (holding that defendant's conduct—describing plaintiff's wedding photo, along with her name and workplace, as part of an "Ugliest Brides" radio segment—was extreme and outrageous enough for her claim to proceed).

Indeed, while the bar for "extreme and outrageous" conduct is a high one to clear, actions such as Defendant's in this case have been established by New York law to be "extreme and outrageous" enough to warrant recovery for intentional infliction of emotional distress. *See Dana v. Oak Park Marina*, 230 A.D.2d 204, 209 (4th Dep't 1997) (finding that defendant's installation of a video camera to surreptitiously view plaintiff and others in "various stages of undress for personal and unjustifiable purposes" was "extreme and outrageous" for purposes of a claim for intentional infliction of emotional distress); *see also Sawicka v. Catena*, 79 A.D.3d

848, 849-50 (2d Dep't 2010) (holding that supervisor's conduct in installing a camera in a workplace restroom constituted "conduct which is unquestionably outrageous and extreme."). Videotaping a person when she has a reasonable expectation of privacy is "extreme and outrageous" even if she is neither identified nor identifiable in the tape. *Salamone v. Oak Park Marina*, 259 A.D.2d 987, 988 (4th Dep't 1999).

Defendant argues that collateral estoppel should not apply in this case because the charge against him in civil court (causing emotional distress to plaintiff) differs from the charge against him in criminal court (unlawfully videotaping plaintiff and posting the tape on a website). (Def.'s Opp'n at 3.) Defendant misidentifies the issue that must be identical for the doctrine of collateral estoppel to apply. It is the conduct complained of in both cases (Defendant's unlawful surveillance of Plaintiff) that must be identical for purposes of collateral estoppel, not the named cause of action against Defendant. *See Kaufman*, 65 N.Y.2d at 455. Indeed, Defendant had "a full and fair opportunity to contest the prior determination" as to his culpability for the unlawful recording and dissemination of the sexual encounter between himself and Plaintiff, which is "decisive of the present action" and was fully decided in the criminal action. *Id.*

"Where a criminal conviction is based upon facts identical to those in issue in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from litigating the issue of his liability." *McDonald v. McDonald*, 193 A.D.2d 590, 590 (2d Dep't 1993). Such a rule is desirable because "a fact that, once established, after a full and fair trial, beyond a reasonable doubt, should not have to be relitigated in a context where a preponderance of the evidence is all that is required." *Id.* Even when a full criminal trial has not taken place, a guilty plea has preclusive effect under New York law when made "in a formal court proceeding following a thorough allocution establishing that

the defendant understands the rights he is waiving and that he has admitted each of the essential elements of the crime charged." *Halyalkar v. Board of Regents of State of New York*, 72 N.Y.2d 261, 269 (1988). When, in open court and under the penalty of perjury, Defendant pronounced that he recorded a sexual encounter between himself and Plaintiff without her consent and subsequently made that recording available to the public, he knowingly and intelligently admitted to the conduct underlying Plaintiff's claim for intentional infliction of emotional distress. (*See* John Aff. at ¶¶ 21-23.)

Accordingly, the first two elements of a valid claim for intentional infliction of emotional distress are easily met. Defendant's guilty plea admits conduct that establishes these elements as a matter of law.[3] Defendant acted in an extreme and outrageous manner when he filmed Plaintiff in a situation where she had a reasonable expectation of privacy, and then spread the content of that film on the Internet, where any member of the public could watch it. Defendant argues that cases involving unlawful surveillance in a bathroom are not analogous to the instant action, because private behavior in the bathroom is individual, while Plaintiff was not engaging in an individual, private act by having consensual sex with Defendant. (Def. Opp'n at 2.) Defendant's contention is misplaced, because it is Defendant's behavior (illegal videotaping) being analogized for purposes of the tort, not the behavior of Plaintiff. *See generally* Emily Poole, *Fighting Back Against Non-Consensual Pornography*, 49 U.S.F. L. Rev. 181, 200 (2015) (discussing the application of tort law to acts of "revenge porn" or dissemination of sexual acts without the consent of one of the participants).

[3] "It is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978). But a party other than the government may also assert collateral estoppel in a civil case based on a criminal conviction. *See United States v. Frank*, 494 F.2d 145, 160 (2d Cir. 1974) (noting that a conviction for mail fraud brought by the government would operate as collateral estoppel in favor of the victim in a civil suit).

Defendant's criminal allocution, an admission to wrongful conduct, also proves that he acted intentionally when he videotaped the sexual encounter. (*See* Pl.'s 56.1 ¶¶ 7-8 (quoting Defendant's allocutions to both charges, beginning, respectively, with "I intentionally used and installed…" and "I intentionally disseminated…").) Defendant claims that he did not act with intent to cause Plaintiff emotional harm, because when the two had discussed making a video of this nature in the past, Defendant did not "recall or believe she ever refused the idea." (John Aff. ¶ 9.) His belief, even if in good faith, is irrelevant insofar as he admits that he never expressly asked Plaintiff for her consent to be filmed on the date he created the recording at issue, and indeed admits that he never received it. (*See id.*) Even if he never intended to cause Plaintiff emotional harm, Defendant's failure to obtain Plaintiff's consent to record their sexual activity and posting that recording on a public website shows his "disregard of a substantial probability of causing[] severe emotional distress" sufficient to satisfy the second element of the tort. *Howell*, 81 N.Y.2d at 121.

**b. Plaintiff's Injuries**

On the remaining two elements, to be entitled to summary judgment on liability, Plaintiff must also show as a matter of law that Defendant's admitted conduct caused her alleged injuries, and that those injuries were severe. There is, however, a split among New York courts on the issue of whether medical evidence of a plaintiff's injuries is necessary to determine the causation and severity of those injuries.

Some courts have stated that claims of emotional injuries "must be supported by medical evidence, not the mere recitation of speculative claims." *Walentas v. Johnes*, 257 A.D.2d 352, 353 (1st Dep't 1999); *see also Singh v. U.S. Security Associates, Inc.*, No. 03 Civ. 2059 (FM), 2005 WL 236511, at *13 (S.D.N.Y. Feb. 1, 2005) (holding that plaintiff's claim that he suffered

from "heart pain" and nightmares as a result of losing his job was insufficient to defeat defendant's motion to dismiss his intentional infliction of emotional distress claim without medical evidence of causation); *see also Biberaj v. Pritchard Industries, Inc.*, 859 F. Supp. 2d 549, 565 (S.D.N.Y. 2012) (finding that plaintiff's claim that she became "ill" and had to leave work early as a result of her coworkers' insults was too speculative to survive defendant's motion to dismiss without medical evidence of causation). Other courts applying New York law have recognized that "[i]n some cases, the allegations are such that severe emotional distress requires no medical evidence." *Sylvester v. City of New York*, 385 F. Supp. 2d 341, 444 (S.D.N.Y. 2005).

When there are "special circumstances out of which would arise 'an especial likelihood of genuine and serious mental distress . . . [that would serve] as a guarantee that the claim is not spurious,'" the latter set of courts have forgone the need for medical proof of causation or severity of emotional injuries. *Hering v. Lighthouse 2001, LLC*, 21 A.D.3d 449, 451 (2d Dep't 2005) (quoting *Johnson v. State of New York*, 37 N.Y.2d 378, 382 (1975)). Thus, the Second Department has found that "[w]hile evidence of a specific medical diagnosis or course of treatment may be relevant to the issue of damages, it is not essential to the prosecution of [] an inherently genuine claim." *Plunkett v. NYU Downtown Hospital*, 21 A.D.3d 1022, 1023 (2d Dep't 2005); *see also Massaro v. Charles J. O'Shea Funeral Home*, 292 A.D.2d 349, 351 (2d Dep't 2002) (finding that "the fact that [plaintiff] ha[d] not sought psychological counseling for his alleged injuries, while relevant to the issue of damages, [did] not necessarily preclude his recovery").

Defendant argues that the Court should deny Plaintiff's motion for summary judgment because she has not offered any medical evidence attesting to the source or severity of her

alleged emotional injuries. (Def. Opp'n. at 3.) However, the conduct to which Defendant has admitted is of the type that guarantees an "especial likelihood of genuine and serious mental distress" on the part of Plaintiff sufficient to overcome the need for medical corroboration. *See Johnson*, 37 N.Y.2d at 382; *see also Sawicka*, 79 A.D.3d at 850 ("The evidence is sufficient, as a matter of law, to establish that [surreptitiously filming plaintiffs in the restroom] caused plaintiffs severe emotional distress."); *see also Murphy v. Murphy*, 109 A.D.2d 965, 966-67 (3d Dep't 1985) (holding that the court will infer the existence of severe emotional distress and proximate cause when "it is substantially certain that such distress will result from the actions taken").

Plaintiff's allegations against Defendant in the instant case differ substantially from those in other New York cases where a lack of corroborating medical testimony was fatal to a claim for intentional infliction of emotional distress. *See Walentas*, 257 A.D.2d at 353 (where plaintiff claimed he suffered emotional injury when his landlord commenced litigation for unpaid rent); *see also Singh*, 2005 WL 236511 at *13 (where plaintiff claimed he suffered emotional injury when he lost his job); *Biberaj*, 859 F. Supp. 2d at 565 (where the court could not draw a definitive connection between plaintiff's ailments and the allegedly tortious conduct of her work supervisors). In each of the aforementioned cases, the conduct complained of did not rise to the same extreme level as the conduct exhibited by Defendant in this case.

Similarly, expert medical testimony is not necessary to establish causation and severity when the finder of fact "must draw only a common sense causal connection between a plaintiff's injury and one precipitating cause." *Young v. Southwest Airlines Co.*, No. 14 Civ. 1940 (LDH) (RLM), 2017 WL 1247921 at *3 (E.D.N.Y. Feb. 3, 2017); *see also Topor v. State*, 176 Misc. 2d 177, 180-81 (Ct. Cl. 1997). This is such a case. Plaintiff's complaint alleges that the public exposure of her private sexual behavior caused her to develop depression, humiliation, and

anxiety, among other ailments. (Jane Decl. ¶ 6.) Moreover, while Defendant argues that Plaintiff has put forth no medical evidence of her alleged injuries, he has not provided the Court with any alternative explanation for Plaintiff's alleged injuries. Thus, even viewing the undisputed facts in the light most favorable to Defendant, he fails to offer any evidence that conflicts or minimizes Plaintiff's testimony.

These are injuries that a reasonable finder of fact would logically attribute to Defendant's abhorrent conduct, even absent medical corroboration of such a connection. The Court determines that Plaintiff's injuries meet the requisite threshold. Accordingly, Plaintiff is granted summary judgment on the issue of liability on her intentional infliction of emotional distress claim. Defendant's arguments will be better suited to a determination of what damages, if any, are owed to Plaintiff.

**II. Negligent Infliction of Emotional Distress**

A plaintiff is entitled to recover for negligent infliction of emotional distress when she has sustained a mental or emotional injury not as a result of another's intent, but as a result of another's negligence. *See Consolidated Rail Corp v. Gottschall*, 512 U.S. 532, 544 (1994) ("The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms."). Under New York law, a plaintiff can establish a claim for negligent infliction of emotional distress if her injuries arise out of one of three theories: (i) the bystander theory, (ii) the "zone of danger" theory, or (iii) the direct duty theory. *See Taggart v. Constabile*, 131 A.D.3d 243, 252 (2d Dep't 2015); *see also Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 504 (1983).

Under the bystander theory, a plaintiff may recover for emotional injuries resulting from a defendant's negligence if (a) she witnessed the death or serious injury of a family member due to the defendant's actions, and (b) the defendant's actions also threatened the plaintiff with physical injury. *See Bovsun v. Sanperi*, 61 N.Y.2d 219, 230-31 (1984). A claim for relief under the "zone of danger" theory would arise out of similar facts, where defendant's actions posed an actual risk to plaintiff's physical safety, or caused plaintiff to fear for his or her own physical safety. *See Taggart*, 131 A.D.3d at 252.[4] Under the direct duty theory, a plaintiff may recover for physical or emotional injuries caused by a defendant's breach of a duty owed to that plaintiff. *See Kennedy*, 58 N.Y.2d at 504; *see also Battalla v. State*, 10 N.Y.2d 237, 239 (1961). As this case does not involve a situation where either the bystander theory or the "zone of danger" theory would apply, Plaintiff's claim must be evaluated under the direct duty theory.

**a. The Duty Owed to Plaintiff by Defendant**

Usually, in order to recover for negligent infliction of emotional distress, the duty owed to a plaintiff by a defendant must be specific to the particular person claiming to have been emotionally harmed. *See Druschke v. Banana Republic, Inc.*, 359 F. Supp. 2d 308, 315 (S.D.N.Y. 2005) (holding that plaintiff's claim for negligent infliction of emotional distress "requires proof of a duty owed by defendant to plaintiff that is far more specific than the generalized duty to avoid negligently injuring another"); *see also Kojak v. Jenkins*, No. 98 Civ. 4412 (RPP), 1999 WL 244098, at *9 (S.D.N.Y. April 26, 1999) (finding that "[w]hen the duty owed is not unique to the plaintiff, recovery for NIED is not available").

[4] While some New York courts have found that a plaintiff must prove "extreme and outrageous" conduct in order to recover to negligent infliction of emotional distress, the Second Department has recently recognized that "notwithstanding case law to the contrary, extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress." *Taggart*, 131 A.D.3d at 255.

However, the New York Court of Appeals has allowed recovery for negligent infliction of emotional distress under the direct duty theory in a case where defendant's duty was not directly owed to a *specific* plaintiff. *See Ornstein v. New York City Health and Hospitals Corp.*, 10 N.Y.3d 1, 2 (2008). In *Ornstein*, a nurse sought recovery for negligent infliction of emotional distress after she was stuck in the hand with a used hypodermic needle that was left in the bedding of a patient with AIDS. *See id.* The Court held that the nurse's claim could survive a motion to dismiss, because "[t]here [was] no question that in [that] case, defendants owed plaintiff a duty of care." *Id.* The holding in *Ornstein* establishes an exception to the direct duty theory by recognizing that a duty specific to a targeted group of individuals within a population (such as nurses in a hospital) is sufficient to establish a direct duty to one such individual. *See id.*; *see also Ornstein v. New York City Health and Hospitals Corp.*, 27 A.D.3d 180, 192-93 (1st Dep't 2006) (dissent) (lower appellate court in *Ornstein* discussing the breach of a duty "owed to certain plaintiffs").

Here, the duty owed to Plaintiff by Defendant is analogous to the duty owed to the nurse in *Ornstein*. Plaintiff was part of a targeted group of individuals to whom Defendant owed a duty of care—specifically, Defendant owed a special duty to women with whom he was in a sexual relationship. This duty existed because "[i]t has long been established under New York law that a violation of a statutory duty imposed for the benefit of a *particular class* gives rise for a claim of damages by that class." *Doe v. United States*, 520 F. Supp. 1200, 1202 (S.D.N.Y. 1981) (emphasis added); *see also Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 138 (1965).

New York Penal Law § 250.45(1), to which Defendant plead guilty prior to the instant action, provides that a person is guilty of unlawful surveillance in the second degree when:

> For his own or another person's amusement [or] entertainment… he or she intentionally uses or installs… an imaging device to

> surreptitiously view, broadcast or record a person dressing or undressing or the sexual or other intimate parts of such person at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent.

The language of this statute contemplates that Plaintiff was a part of the class of people whom this statute was written to benefit, and Defendant's behavior of the type that the statute was meant to prevent and subsequently punish. Furthermore, in a criminal case also arising from a defendant filming sex with his unsuspecting girlfriend, the Third Department recognized that "the statute's legislative history supports the conclusion that the Legislature intended its application to [such] conduct." *People v. Piznarski*, 113 A.D.3d 166, 173 (3d Dep't 2013). There, the Third Department cited a 2003 memorandum issued in support of the enactment of the unlawful surveillance statute that remains instructive with regard to demonstrating Plaintiff's membership in the specific class of women that the statute was intended to protect:

> Women throughout … New York State have unknowingly been videotaped while engaging in sexual relations. Several women in this category have attempted to file complaints alleging that their partner made these videotapes without their knowledge or permission and are now showing them to friends and others, and even posting the video footage on the internet. These women were turned away without a remedy.

L. 2003, ch. 69, Governor's Program Bill Mem. No. 12, 2003 N.Y. Legis. Ann., at 54. It is clear that this statute was enacted for the particular benefit of women in Plaintiff's position, and "set forth a duty owed directly to plaintiff that may serve as a basis for a cause of action for the negligent infliction of emotional distress." *See Dana*, 230 A.D.2d at 208.

Both the language and the history of New York's laws against unlawful surveillance and the dissemination thereof support the Third Department's conclusion in *Piznarski*:

> When a person knowingly undresses and engages in sexual relations with another person, *he or she should be able to do so with the reasonable expectation that his or her actions are limited to that particular time and place* and that his or her naked body and/or

> sexual acts will not be memorialized and/or repeatedly viewed at any time by the other person present or by anyone else with whom that person decides to share the recordings.

*Piznarski*, 113 A.D.3d at 176 (emphasis added). Defendant is generally required not to violate the law. But moreover, Defendant owed a direct special duty to Plaintiff to refrain from causing her the type of harm she has allegedly suffered. *See Kennedy*, 58 N.Y.2d at 504 (holding that "when there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred"); *see also Dana*, 230 A.D.2d at 208.

**b. Whether Defendant Negligently Breached that Duty**

While Defendant's duty to Plaintiff may be analogous to the duty owed to the plaintiff in *Ornstein*, Defendant's conduct here was clearly intentional, not negligent. In *Ornstein*, the plaintiff's claim for negligent infliction of emotional distress could proceed past the defendant's motion to dismiss, in part, because she was harmed by a negligent act—the nurse did not contend that a hospital employee had intentionally left a contaminated needle in the patient's bed. *See Ornstein*, 10 N.Y.3d at 2. Perhaps if Defendant had accidentally posted a secretly recorded encounter, and Plaintiff claimed that the combined intentional (recording) and unintentional (posting) acts were the basis for her negligence claim, then she would be able to pursue such a claim. But under these facts, Defendant's conduct constitutes an intentional or reckless tort, rather than a negligent breach of a duty owed.

Because Defendant's criminal testimony establishes that he acted intentionally, both when he filmed and when he distributed the sexual encounter between Plaintiff and himself, Plaintiff's motion for summary judgment as to Defendant's liability for negligent infliction of emotional distress must be denied.

## III. Plaintiff's Motion to Dismiss Defendant's Counterclaims

Defendant has two remaining counterclaims against Plaintiff.[5] Both of these claims sound in defamation.[6] Under New York law, offending statements only constitute defamation deserving of a legal remedy if they "tend[] to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of [his] friendly intercourse in society." *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 379 (1996) (citing *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 N.Y.208, 211-12 (1926)); *see also Kimmerle v. N.Y. Evening Journal*, 262 N.Y. 99, 102 (1933) ("Written words, the effect of which is to invade privacy and to bring undesired notoriety, are without remedy, unless they also appreciably affect reputation."). "It is for the court to determine in the first instance whether the particular challenged statements are susceptible of a defamatory meaning." *G.L. v. Markowitz*, 101 A.D.3d 821, 822 (2d Dep't 2012) (citing *Aronson v. Wiersma*, 65 N.Y.2d 592, 593 (1985)). A defamatory statement is one that an average reader or listener would recognize as harmful to one's reputation. *See Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 296 (2d Dep't 1981) (citing *Mencher v. Chesley*, 297 N.Y. 94, 100 (1947)).

There are four elements Defendant must prove to state a valid claim for defamation under New York law: (1) that Plaintiff's statements were false, (2) that she published those statements to a third party without authorization, (3) that the level of fault amounted to at least negligence on the part of the publisher, and (4) that the statements constituted defamation *per se* or, in the

[5] Defendant indicates that he would like to withdraw his first counterclaim against Plaintiff for unlawfully accessing his personal computer. (Def.'s Opp'n at 4.) Because Defendant has withdrawn this claim, Plaintiff's motion to dismiss it is granted without opposition.

[6] Defendant's claims that Plaintiff made false statements must be evaluated under the law of defamation, rather than the law of fraud or misrepresentation, because the latter claims would require Defendant to have relied on Plaintiff's statements to his own detriment. *See Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dep't 2007).

alternative, caused special damages.[7] *Dillon v. City of New York*, 261 A.D.2d. 34, 38 (1st Dep't 1999); *see also Gargiulo v. Forster & Garbus Esqs.*, 651 F. Supp. 2d 188, 192 (S.D.N.Y. 2009). Because a defamatory statement must be false in order for a plaintiff to recover, "[t]ruth provides a complete defense to defamation claims." *Dillon*, 261 A.D.2d. at 39.

First, Defendant alleges that Plaintiff informed officers of the New York Police Department that he and she lived together in Defendant's apartment, and that "the NYPD would not have effectuated Defendant's arrest but for [Plaintiff's] false allegations." (Def.'s Countercl. at ¶ 7.) Even accepting Defendant's allegations as true, as is required on a motion to dismiss, this counterclaim fails because Plaintiff's statement was not defamatory *per se* under New York law, nor did it cause Defendant special damages.

Defamation *per se* exists only when the party alleging defamation can prove that the defamatory statement was so harmful to his or her reputation that damages are assumed simply from the utterance of the statement. Courts have found defamation *per se* to exist within statements "(i) charging plaintiff with a serious crime; (ii) [tending] to injure another in his or her trade, business, or profession; (iii) [asserting] that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992) ("When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven."). Here, Plaintiff's statement that she lived in Defendant's apartment cannot be said to be harmful enough for the Court to infer the likelihood of damage to Defendant's reputation.

[7] While under New York law, pursuant to C.P.L.R. § 3016(a), a cause of action sounding in defamation must be pleaded with specificity, a defamation claim brought in federal court does not require such particularized pleadings. *See Thorsen v. Sons of Norway*, 996 F. Supp. 2d 143, 163-64 (E.D.N.Y. 2014). Pleading requirements in federal courts are governed by the liberal requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure, which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief." *Id.*

Because Plaintiff's statement was not defamatory *per se*, Defendant would need to allege special damages in order to meet the fourth element of a valid defamation claim. But Defendant's contention that he was damaged by Plaintiff's statement because it led to his initial arrest as party to a "domestic dispute" is baseless. Under New York Criminal Procedure Law § 530.11, a family court or criminal court proceeding may be instituted against a perpetrator of domestic violence (including disorderly conduct, harassment, stalking, and myriad other offensive behaviors) upon a "member of the same family or household." Under the statute, "member[s] of the same family or household" are defined as "[p]ersons who are not related by consanguinity or affinity and who are or have been in an intimate relationship *regardless* of whether such persons have lived together at any time." (emphasis added). Plaintiff's statement that the two parties lived together, even if that statement was demonstrably false, was not the cause of Defendant's initial arrest, because if the arrest was predicated on a claim of domestic violence, the residence of either party had no bearing on the arrest. The "intimate relationship" between Plaintiff and Defendant, established unequivocally by Defendant's guilty plea (and his affidavit submitted to this Court), was sufficient grounds for his arrest. (*See* Sack Decl. Ex. 2 at 7; John Aff. ¶¶ 2, 13.) Since Defendant's first counterclaim fails to allege the existence of defamation *per se* or special damages, this claim must be dismissed pursuant to Rule 12(b)(6).

Second, Defendant alleges in his second counterclaim that Plaintiff made "false and salacious" statements about him to a reporter at the New York Post. This claim also sounds in defamation. Defendant's affidavit states: "Curiously, a [New York] Post reporter placed a false and salacious story on the internet and social media even before the police arrested me. Only Plaintiff or someone acting directly on her behalf could have contacted the media and disseminated false statements." (John Aff. ¶ 19.) Defendant argues that this claim should

survive a motion to dismiss because he has satisfied the liberal pleading standard required by Rule 8(a)(2). While it is true that the pleading standard for defamation claims in federal court is more relaxed than the standard required in New York state court, the Supreme Court has stated that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

On the basis of his pleadings, Defendant's claim that Plaintiff spread a "false and salacious" story about him to a New York Post reporter is too conclusory to survive Plaintiff's motion to dismiss. According to Defendant's own affidavit, he is unable to state with certainty that Plaintiff was the individual who gave information about him to a reporter. Despite Defendant's contentions that only Plaintiff could have informed the New York Post of this story, the author of the article quotes exclusively "law-enforcement sources," casting significant doubt upon the plausibility of Defendant's claim. (Sash Reply Decl. Ex. F, ECF No. 36.) Furthermore, the topic of the New York Post article of which Defendant complains is his arrest for videotaping a sexual encounter with his girlfriend—a story that Defendant has admitted was true." *See Dillon*, 261 A.D.2d. at 39 ("Truth provides a complete defense to defamation claims."). The only fact in the article that Defendant can claim is false is the allegation that Plaintiff and Defendant shared his apartment, which is not defamatory as a matter of law. Defendant's second counterclaim must be dismissed because he does not offer facts that raise a "reasonable expectation" that evidence proving defamation will be revealed by further discovery. *Twombly*, 550 U.S. at 556.

## IV. Subject Matter Jurisdiction

Finally, Defendant requests that the Court reconsider the propriety of its jurisdiction in this matter, because Plaintiff has not offered sufficient proof to allege that her injuries meet the amount in controversy requirement set by 28 U.S.C. § 1332. (*See* ECF No. 20.) However, because there is nothing in the record to establish to a legal certainty that Plaintiff's alleged damages do not meet the statutory threshold necessary for diversity jurisdiction, the Court's jurisdiction over this matter is proper. *See Chase Manhattan Bank, N.A. v. Am. Nat. Bank & Trust Co. of Chicago*, 93 F.3d 1064, 1070 (2d Cir. 1996) ("It is well settled that 'the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.'") (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938)).

## CONCLUSION

For the foregoing reasons, Plaintiff's motion seeking partial summary judgment in her favor is GRANTED in part and DENIED in part, and her motion seeking dismissal of Defendant's counterclaims is GRANTED. Principles of collateral estoppel render Defendant liable for Plaintiff's injuries, whatever they may be, as a matter of law. Despite Defendant's oft-stated contention that "the transcript [of his allocutions] speaks for itself," it does not speak in his favor. (*See, e.g.*, Def.'s 56.1 ¶ 8.) Plaintiff is, therefore, granted summary judgment in her favor on the issue of liability for her claim of intentional infliction of emotional distress. She must, however, be denied summary judgment on her claim for negligent infliction of emotional distress. Furthermore, both of Defendant's remaining counterclaims must be dismissed without prejudice, because he has failed to allege sufficient facts to set forth claims for defamation.

The case shall proceed to discovery on the determination of damages owed. The Clerk of the Court is respectfully directed to terminate the motion at ECF No. 28. The parties are directed to contact Judge Smith to inform her of the disposition of this motion and schedule a conference.

Dated: July 14, 2017
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge