Tax Club, Inc. v Precision Corp. Servs.
2011 NY Slip Op 32852(U)
October 14, 2011
Supreme Court, New York County
Docket Number: 114278/2010
Judge: Joan A. Madden
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[* 1]
SCANNED ON 10/25/2011

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11
Justice

Index Number : 114278/2010
TAX CLUB
VS.
PRECISION CORPORATE SERVICES
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

otion to/for _____

_____ | No(s). _____
_____ | No(s). _____
_____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision/order.

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

FILED
OCT 25 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 14, 2011

_____, J.S.C.
HON. JOAN A. MADDEN J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------X

THE TAX CLUB, INC. and MANHATTAN PROFESSIONAL GROUP, INC.,

INDEX NO.: 114278/2010

Plaintiffs,

-against-

PRECISION CORPORATE SERVICES, GARY ADAM CARROLL, ZACH OLSON, and KALE GOODMAN,

Defendants.

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FILED

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

Defendants Precision Corporate Services ("Precision"), Gary Adam Carroll ("Carroll"), Zach Olson ("Olson") and Kale Goodman ("Goodman") (collectively, "Defendants") move for an order dismissing the Amended Complaint pursuant to CPLR 3211(a)(1), 3211(a)(3), 3211(a)(7), 302 and 327(a), asserting that (i) plaintiff The Tax Club, Inc. ("Tax Club") lacks the capacity to sue, (ii) this court lacks personal jurisdiction over defendants, (ii) New York State is an inconvenient forum, and (iv) the complaint fails to state a cause of action. Plaintiffs oppose the motion, which is granted in part and denied in part.

BACKGROUND

Except when otherwise noted, the following facts are based on the allegations in the Amended Complaint, which must be accepted as true for the purposes of this motion.

Tax Club is a Utah corporation with a place of business in New York (Am. Compl. ¶ 1). Plaintiff Manhattan Professional Group, Inc. ("MPG") is a corporation organized pursuant to the laws of the State of New York (Am. Compl. ¶ 2). Defendant Precision is a Utah corporation with its principal place of business in Saint George, Utah (Am. Compl. ¶ 3). Defendants Carroll,

Olson and Goodman are employees of Precision and are Utah domiciliaries (Am. Compl. ¶ 4-6).

Tax Club and MPG are sister corporations and have the same shareholders; they each provide tax services to small-sized and newly formed businesses, including tax preparation and strategies that are affordable to the small business owner (Am. Compl. ¶ 7-10). MPG also provides services with respect to business plans and websites (Am. Compl. ¶ 8). Defendant Precision allegedly offers similar services as Plaintiffs and is in competition with Plaintiffs (Am. Compl. ¶ 12). As part of their business models, Tax Club, MPG, and Precision acquire leads on potential clients from various so-called "Lead Providers." Precision engages some of the same Lead Providers that Plaintiffs engage, and some of the potential customers offered by the Lead Providers are given to both Plaintiffs and Precision (Am. Compl. ¶ 13-16). It can be inferred from the pleadings and supporting affidavits that the Plaintiffs and Precision actively solicit the potential customers, which results in the possibility of simultaneous solicitation of the same potential customers.

Plaintiffs allege that while MPG was soliciting a potential customer, Jason Verga, who is a New York resident, Precision was soliciting him as well (Am. Compl. ¶ 16-18). The pleadings are silent as to when these solicitations occurred, though Precision claims to have received the so-called "leads" with Mr. Verga's contact information on it on August 12, 2010 (Olson Aff., ¶ 14). Moreover, Defendants provide an engagement letter between Precision and Mr. Verga as evidence that Mr. Verga purchased a package of services from Precision on August 16, 2010 (Olson Aff. ¶ 15-16; Olson Aff., Ex. B). Therefore, it appears that while Mr. Verga was solicited by both MPG and Precision, Mr. Verga purchased services only from Precision, thereby becoming a Precision client on August 16, 2010.

On or about August 25, 2010, Precision sent a "client alert" email to several of its existing clients, including Mr. Verga, which is the source of the allegedly defamatory statements

at issue in this action (Olson Aff., ¶ 18). The email states as follows:

> It has come to our attention that another company by the name of "Tax Club-My Essential Planning-Manhattan Professional Group-MCP-ICM-Premier Wealth" is aggressively soliciting unneeded services to some of our clients. In some curcumstances [sic] they are falsely stating that Precision Corporate Services has referred them, is associated with or is endorsing their services. **To clarify, we Precision Corporate Services do not support or endorse the activity or services of "Tax Club-My Essential Planning-Manhattan Professional Group-MCP-ICM-Premier Wealth."** We do not conduct any business with them. If you are contacted by this company simply do not accept the call and if you do, please beware of the aggressive false tactics they employ. Am Comp. ¶ 23, Exhibit (emphasis in the original).

Defendants claim to have sent the email in response to various complaints Precision received from its clients regarding solicitation calls to them by Tax Club in which Tax Club claimed to be affiliated with Precision in some capacity (Olson Aff., ¶ 18). Particularly, Plaintiffs take issue with the following statements:

(1) MPG and/or Tax Club is soliciting "unneeded services to some of our clients"

(2) MPG and/or Tax Club "falsely stat[es] that Precision Corporate Services has referred them"

(3) MPG and/or Tax Club employs "aggressively false tactics"

Plaintiffs allege that as a result of these statements made to Mr. Verga and other potential clients they have lost potential business and the Defendants have injured their reputation in business, causing them to suffer damages.

This action was commenced on October 29, 2010. Defendants moved to dismiss the original complaint; however they withdrew the motion after Plaintiffs filed an Amended Complaint on February 28, 2011. The Amended Complaint asserts causes of action for libel per se and interference with prospective business advantage. Defendants now move to dismiss the

Amended Complaint, and Plaintiffs oppose the motion.

TAX CLUB'S CAPACITY TO SUE

Defendants first argue that the claims asserted by Tax Club must be dismissed as Tax Club lacks the capacity to sue under BCL §1312(a). Specifically, Defendants maintain that Tax Club is a foreign corporation doing business in the State of New York without authority, and BCL §1312(a) directly prohibits such a corporation from maintaining any action or special proceeding. Defendants point to the Amended Complaint ¶ 1, in which Tax Club is described as a "Utah [corporation] with a place of business at 350 Fifth Avenue, Suite 6015, New York, NY 10118," to establish that Tax Club is "doing business" in New York. They additionally point to the New York Department of State records which reflect that no entity called Tax Club is registered as either a domestic or foreign corporation licensed to do business in New York (Kochman Aff., Ex. B).

Plaintiffs acknowledge in their brief that Tax Club lacks capacity to sue in New York under BCL §1312(a). (Plaintiffs Memorandum of Law, p. 1, fn. 1). However, as the defamatory statements were made with respect to Tax Club and MPG, which is a New York corporation, Tax Club's lack of legal authority to sue does not provide a basis for dismissing the Amended Complaint. However, the claims asserted by Tax Club should be dismissed as there is no dispute that it is in violation of BCL §1312. Highfill, Inc. V. Bruce and Iris, Inc., 50 AD3d 742 (2d Dept 2008)(foreign corporation doing business in New York was barred from maintaining breach of contract action in New York based on its failure to obtain requisite authorization to do business in the state). Furthermore, plaintiffs do not indicate that they intend to cure the violation prior to the resolution of the action. Compare Horizon Bankcorp v. Pompee, 82 AD3d 935 (2d Dept 2011)(denying motion to dismiss based on BCL § 1312 when plaintiff resolved any issue with respect to capacity by filing for and obtaining authority to do business in

New York); Uribe v. Merchants Bank of N.Y., 266 A.D.2d 21 (1st Dep't 1999)(a violation of BCL § 1312 can be cured during pendency of action) .

Accordingly, the Amended Complaint is dismissed with respect to the claims asserted by Tax Club.

PERSONAL JURISDICTION

Defendants next argue that the Amended Complaint must be dismissed pursuant to CPLR 302(a) since the court lacks personal jurisdiction over the Defendants. Defendants claim that all of Precision's employees, documents and operations are located in Utah, and that Precision has no facility, office or bank account in the State of New York (Olson Aff., ¶ 4-8). Additionally, they maintain that Plaintiffs have not included facts in the Amended Complaint that would provide a basis for personal jurisdiction, which is their burden. Teplin v. Manafort, 81 A.D.2d 531 (1st Dep't 1981).

Plaintiffs counter that personal jurisdiction exists over the Defendants under CPLR 301 and New York's long arm statute, CPLR 302(a)(1). Specifically, plaintiffs assert that Precision's interactive website which offers free tax consultation services to users who submit information about themselves and enables users to engage in "live chats" with Precision's representatives to obtain tax help and other services constitutes "doing business" in New York for the purposes of CPLR 301 and "transacting of business" under CPLR 302(a)(1). Plaintiffs also assert that Precision obtains revenues from New York residents such that Precision is "doing business" in New York. However, plaintiffs do not claim that products and services can be purchased using Precision's website.

Plaintiffs also argue that there is jurisdiction in New York based on Precision relationship with its client, Mr. Verga, who is a resident of New York. Precision claims to "promote constant communication between our clients" and their Tax Advisors (Ladd Aff., Ex.

A). Plaintiffs also note that Mr. Verga had purchased a year of personal and business tax return preparation and unlimited tax consulting, among other things (Olson Aff., ¶ 15). Furthermore, they allege that the Client Alert email sent to Mr. Verga was part of the relationship between Precision and Mr. Verga

With respect to the individual defendants, Plaintiff's argue that they have "material ownership and management interests in Precision," and since they likely knew of or exerted control over the defamatory Client Alert e-mail, discovery is warranted to uncover their connection to the statements.

Plaintiffs' argument that there is personal jurisdiction over defendants under "doing business test" provided by CPLR 301 based on Precision's interactive website and their revenue from New York customers is unavailing. "A foreign corporation is amenable to suit in New York under CPLR 301 if it has engaged in such a continuous and systematic course of 'doing business' here that a finding of 'presence' jurisdiction is warranted." Lanoil Resources Corp. v. Alexander & Alexander Services, Inc., 77 N.Y.2d 28, 33-34 (1990). Here, Precision's solicitation of business in New York through its interactive website and its collection of revenues from New Yorkers is insufficient to establish the type of presence needed to satisfy CPLR 301. Id. In particular, the Precision's interactive website permitting New York customers to communicate with Precision is insufficient to establish jurisdiction under 301 in the absence of evidence that the website allowed customers to purchase goods and services or other evidence of evidence of its systematic course of business in New York). see Haber v. Stadium, Inc., 22 Misc3d 1129(A) (Sup Ct NY Co. 2009)(finding that interactive website which, *inter alia*, provided a forum for customers to ask and receive answers to questions and a vehicle to obtain a price quote from defendant was insufficient to satisfy the "doing business" test under CPLR 301 when the website did not enable user to order or purchase products and a relatively limited

volume of business was generated in New York); Parsons v. Kal Kan Food, Inc., 68 A.D.3d 1501, 1502 (3d Dept 2009)(holding that the mailing of its brochures and affording access to its website to New York customers was insufficient to establish jurisdiction in New York under CPLR 301);compare, Thomas Publishing Company v. Industrial Quick Search, Inc., 237 F. Supp 489, 492 (SD NY 2002)(finding defendant did business in New York based on allegations that defendant regularly solicits business in New York through interactive website, lists 269 New York entities on the website, contacted 75 sales associates in New York, and features 75 paid advertisers from New York). .

Thus, defendants cannot be subject to personal jurisdiction in New York unless plaintiffs can show that New York's long-arm statute confers jurisdiction over defendants.[1] See Copp v. Ramirez, 62 A.D.3d 23, 28 (1st Dep't), lv. denied 12 NY3d 711 (2009); see also Best Van Lines, Inc. v. Walker, 490 F.3d 239, 248 (2nd Cir. 2007). The burden rests on the Plaintiffs, as the party asserting jurisdiction, to show that facts "may exist" to exercise personal jurisdiction over the defendants. Id.

New York's long-arm jurisdiction is governed by CPLR 302, which provides in relevant part, as follows:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
> 2. commits a tortious act within state, *except as to a cause of action for defamation of character* arising from the act; or

[1] Although the complaint asserts a cause of action for tortious interference with prospective business advantage, as well as for defamation, the court's analysis of the long-arm statute will be limited to whether there is long-arm jurisdiction based on the defamation cause of action since, as indicated below, the tortious interference claim fails to state a cause of action.

> 3. commits a tortious action without the state causing injury to person or property within the state, *except as to a cause of action for defamation of character* arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent courts of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the states, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state, and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or posses any real property situated within the state. (emphasis added).

Defamation actions are expressly exempted from CPLR 302(a)(2) and (3), so as "to avoid unnecessary inhibitions on freedom of speech or the press." Legros v. Irving, 38 AD2d 53, 55 (1st Dep't. 1971), appeal dismissed, 30 NY2d 653 (1972); accord SPCA of Upstate New York, Inc. v. American Working Collie Association, 74 AD3d 1464, (3rd Dep't. 2010), lv granted, 15 NY3d 716 (2010).

The only provision at issue with respect to the defamation claim is CPLR 302(a)(1), which requires both that 1) a defendant transact business within the state, and 2) the defamation claim arises from the defendant's transaction of that business. See Ehrenfeld v. Bin Mahfouz, 9 NY3d 501 (2007). "If either prong of the statute is not met, jurisdiction cannot be conferred under CPLR § 302(a)(1)." Johnson v. Ward, 4 NY3d 516 (2005); accord Copp v. Ramirez, supra at 28.

With respect to the first prong, in determining whether a defendant has transacted business within the meaning of CPLR 302(a)(1), courts look to the totality of a defendant's activities within the state, to decide if it has transacted business in such a way that it constitutes "purposeful activity," which is defined as "some act by which the defendant purposefully avails [itself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." McKee Electric Co. Inc. v. Rauland-Borg Corp., 20 NY2d 377, 382 (1967) (quoting Hanson v. Denckla, 357 US 235, 253 (1958). The statute does not require that

the defendant is physically present in the state when transacting business within the state. Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13 (1970). Additionally, on a motion to dismiss, plaintiff only has the burden to prove that facts "may exist" to exercise personal jurisdiction over the defendant. Hessel v. Goldman, Sachs & Co., 281 A.D.2d 247 (1st Dep't), lv denied, 97 NY2d 625 (2001).

In defamation cases, the transaction of business test is construed narrowly so that when the "defamatory publication constitutes the alleged 'transact[ion] of business' for the purposes of section 302(a)(1) something more than the distribution of the libelous statement must be made within the state to establish long-arm jurisdiction over the person distributing it." Best Van Lines, Inc. v. Walker, supra at 248. Therefore in this case, in order for personal jurisdiction to exist on the Defendants, they must have had some activity within New York other than the e-mail such that they "purposely availed [themselves] of the privilege of conducting activities" within New York, thereby invoking the benefits and protection of New York law. McKee Electric Co., supra at 382.

As a preliminary matter, Precision's use of its interactive website to solicit New York customers is not sufficient to satisfy the transacting of business test. Arouh v. Budget Leasing, Inc., 63 AD3d 506 (1st Dept 2011)(holding that defendant's negotiation of potential purchase of automobile via email and telephone by New York customer after viewing defendant's website did not constitute "the transaction of business in New York'); Haber v. Stadium, Inc., 22 Misc3d 1129(A)(mere solicitation of customers through interactive website did not constitute the transaction of business in New York).

However, in this case, Precision concedes that it did business with Mr. Verga, a New York resident, and this business consists of preparation of corporate documents, one year of personal and business tax return preparation, unlimited tax consultation, and monthly statements.

On this record while this activity may be the only business Precision has done within New York, "proof of one transaction in New York is enough to invoke jurisdiction, even though the defendant never entered into New York." Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460 (1988). Therefore, the agreement between Mr. Verga and Precision amounts to a transaction of business as required by CPLR 302(a)(1). See J & D Supply Group v. Dydacomp Dev. Corp., 306 AD2d 739 (3d Dept 2003)(solicitation of business in New York together with agreement to provide services to New York resident constituted transacting of business in New York for purposes of long arm statute).

As indicated above, for long arm jurisdiction to exist, it must also be shown that the cause of action arises from the transaction of business within New York. Here, the cause of action was based on the Client Alert e-mail sent on August 25, 2010 (Olson Aff., ¶ 18). Precision concedes that the Client Alert was sent exclusively to Precision clients, including Mr. Verga. Therefore, the e-mail, which contains the allegedly defamatory statements, arose out of Precision's transaction of business within New York, and personal jurisdiction exists within the meaning of New York's long-arm statute. While it can be inferred from the record that Mr. Verga received the relevant e-mail as a result of the transaction of business in New York between himself and Precision, the same cannot be said for the other Precision clients. Thus, at this juncture, long arm jurisdiction exists only to the extent of the claim arising out of email sent to Mr. Verga or, in the event discovery reveals that the email was sent to other New York clients of Precision and that the purportedly defamatory statements in the email arose out Precision's transaction of business with them in New York.[2] CPLR 302(a)(1).

[2]Precision also argues that the finding of personal jurisdiction over it in New York would violate due process. However, it cannot be said that due process is violated by requiring Precision to defend this action to the extent it is based on an email send to a New York resident with whom it transacts business in New York. See generally, Zottola v. AGI Group, Inc., 63 A.D.3d 1052, 1052 (2d Dept 2009).

With respect to defendants Olson, Carroll, and Goodman, personal jurisdiction in New York does not exist simply based on their status as employees or owners of Precision, and plaintiffs are required to allege sufficient facts that establish that the individual defendants transacted business in New York and that the cause of action arose from that transaction of business. Arch Speciality Ins. Co. v. Entertainment Speciality Ins. Services, Inc., 2005 WL 696897, *3 (SD NY 2005). To establish that the individual defendants transacted business in New York, it must be shown that they "played a significant role in the activities that gave rise to [the]...action." Id. *4.

Here, there are no allegations or evidence that any of the individual defendants were personally involved or aware of the e-mail, or that they benefitted from it or exercised control over the email. Moreover, as stated before, the e-mail alone is insufficient to have transacted business in New York. Therefore, even assuming the individual defendants authored the e-mail, which has not been alleged, there must be other activity conducted by the individual defendants in relationship to Mr. Verga account or other New York customers to subject them to personal jurisdiction in New York. Accordingly, the complaint is dismissed against the individual defendants for lack of personal jurisdiction.

FORUM NON CONVENIENS

Defendants also move to dismiss the complaint on the theory of forum non conveniens pursuant to CPLR 327(a). Defendants claim that all of the witnesses and documents are located in Utah, and Defendants would be significantly burdened to have to litigate in New York. Defendants highlight that Precision maintains no offices or facilities in New York, and since the company is small, the company would have trouble functioning during the course of the litigation. Additionally, they assert that New York has little connection to this action, since any alleged wrongful conduct taken by Precision would have arisen out of Utah, and any injury to

the Plaintiffs would be felt primarily in Utah. While MPG is a New York corporation, Defendants argue that it was only added as a plaintiff to avoid dismissal pursuant to BCL §1312, and that Utah is an alternative forum that has a significant interest in adjudicating this action, as both the Defendants and Tax Club are Utah corporations. Therefore, the Defendants urge the court to use its discretion to dismiss under CPLR 327(a).

Plaintiffs counter that New York is the proper venue, as there are potential witnesses who are located in New York, such as existing clients who received the allegedly defamatory e-mail in New York. Plaintiffs also assert that since the place of injury was in New York, it has a greater interest in hearing the litigation than Utah. Additionally, Plaintiffs point to the fact that plaintiff MPG is a New York corporation, and there is a presumption for allowing New York residents to choose New York as their forum to bring suit.

It is well settled that, New York courts "need not entertain causes of action lacking a substantial nexus with New York." Martin v. Mieth, 35 N.Y.2d 414, 418 (1974). The doctrine of forum non conveniens, codified in CPLR 327 (a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 478-479 (1984), cert denied, 469 US 1108 (1985).

The burden is on the party challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation. Brodherson v. V. Ponte & Sons, 209 A.D.2d 276, 277 (1st Dep't 1994) ("It is well settled that the burden of establishing that New York is an inconvenient forum rests squarely with the party challenging that forum"). "Generally, 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'" (Anagnostou v. Stifel, 204 A.D.2d 61, 61 (1st Dep't 1994) (citation omitted); See also Sweeney v. Hertz Corp., 250 A.D.2d 385, 386 (1st Dep't 1998) ("It

is well settled that a plaintiff's choice of forum should not be disturbed absent a balance of factors strongly favoring the defendants")).

Although not every factor is necessarily articulated in every case, collectively, the courts consider and balance the following factors in determining an application for dismissal based on forum non conveniens: existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of documents; the location of a majority of the witnesses; and the burden on New York courts (See Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474 ; World Point Trading PTE, Ltd. v. Credito Italiano, 225 A.D.2d 153 (1st Dep't 1996); Evdokias v. Oppenheimer, 123 A.D.2d 598 (2d Dep't 1986)). The state of plaintiff's residence "is generally 'the most significant factor'" in determining a forum non conveniens motion. Sweeney v. Hertz Corp., 250 A.D.2d at 386 (citation omitted).

Plaintiff MPG is a New York corporation, and therefore MPG's choice to bring suit in New York should be respected unless Defendants can establish that balancing the factors strongly weighs in their favor. Here, not only is MPG a New York corporation but the purportedly defamatory statements were directed at New York residents. Furthermore, while certain documents and witnesses may be located in Utah, it cannot be said that "the State of Utah has the only significant connections to and interest in this dispute."

Thus, as a balancing of the relevant factors reveals that defendants have not met the "heavy burden" of demonstrating that this action should be dismissed on forum non conveniens grounds (see, Yoshida Printing Co. v Aiba, 213 A.D.2d 275 (1st Dep't 1995)), the motion to dismiss with respect to CPLR 327(a) must be denied.

FAILURE TO STATE A CLAIM

Defendants also move to dismiss the complaint for failure to state a cause of action,

pursuant to CPLR 3211(a) (7).

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause if action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 N.Y.2d 268 (1977); Morone v. Morone, 50 N.Y.2d 481 (1980). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference." Morgenthow & Latham v. Bank of New York Company, Inc., 305 A.D.2d 74, 78 (1st Dep't 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep't 1999), aff'd, 94 N.Y.2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id., quoting, Guggenheim v. Ginzburg, 43 N.Y.2d at 275. However, dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader . . . is not a fact at all and . . . no significant dispute exists regarding it." Acquista v. New York Life Uns. Co., 285 A.D.2d 73, 76 (1st Dep't 2001), quoting, Guggenheim v. Ginzburg, 43 N.Y.2d at 275.

Defendants argue that the first cause of action for libel per se must fail as there are no allegations that the relevant e-mail was sent with an intent to harm, and that the common interest privilege protects any statements made by Precision to its clients. Additionally, Defendants argue that the statements made were a matter of opinion, and not fact, and therefore not actionable.

With respect the second cause of action for interference with prospective business advantage, Defendants assert that Plaintiffs' failure to specifically allege "but for" the alleged defamation, prospective business would have been accomplished is fatal to this claim (Id., p. 21). Defendants further argue that there are no facts alleged that show the statements were made for

the "sole purpose of harming Plaintiffs and their business reputation," as required for such a claim (Id., p. 22).

Plaintiffs contend that contrary to the Defendant's position, fault is presumed when the action, like the instant one, involves private concerns, and that the allegedly defamatory statements are facts, and therefore actionable as a matter of law. As for the claim for interference with prospective business advantage Plaintiffs assert that allegations that their business losses were "as a proximate result of" the statements is sufficient to state a claim

The elements for a claim for defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum a negligence standard, and, it must either cause special harm or constitute defamation per se." Dillon v. City of New York, 261 A.D.2d 34, 38 (1st Dep't 1999) (citation omitted). The determination of whether a statement expresses fact or opinion is a question of law for the court, to be resolved "on the basis of what the average person hearing or reading the communication would take it to mean." Steinhilber v. Alphonse, 68 N.Y.2d 283, 290 (1986). Additionally, speech that can be categorized as opinion, as opposed to fact, is non actionable. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). The Court of Appeals generally analyzes the following factors to distinguish fact from opinion: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.'" Gross v. New York Times Co., 82 N.Y.2d 146, 153 (1993) (quoting Steinhilber v. Alphonse, supra).

Applying these factors, certain words and phrases used by Precision in the e-mail can be categorized as opinion, and therefore is protected speech. Specifically, the statements that MPG

acted "aggressively" can be readily understood by those reading the e-mail to be Precision's opinion about MPG's activity. In keeping with this analysis, it is not possible to say, as a matter of fact, whether a company acted aggressively. Likewise, the statement that MPG uses "false tactics" is protected opinion since the statement is vague and indefinite and a subjective characterization. See Morrison v. Poulet, 227 AD2d 599, 599 (2d Dept 1996)(statements that characterized plaintiff as "'unprofessional, disrespectful , rude, and even accusatory [and] verbally abusive'" constituted nonactionable opinion).

That being said, however, certain other statements made by Precision are factual, such as the statement that MPG "falsely stat[ed] that Precision Corporate Services has referred them." Notably, this statement can be readily understood and proven to be true or false, and can be understood in the context of an email from a business to its client to be factual. Likewise, the statement that MPG "solicits unneeded services" in the context of the email can be understood as a factual statement regarding the manner in which MPG does business.

Accordingly, the motion to dismiss must be denied to the extent that the Precision sent e-mail contained statements about Plaintiff's that are factual in nature. That being said, those parts of the e-mail that were identified above as non-actionable statements of opinion or as being too vague to be actionable do not provide a basis for a defamation claim.

Next, defendants' argument that the common interest privilege protects them does not provide a basis for dismissal at this juncture. The common interest privilege applies where the communication at issue "concern[s] a matter in which the party communicating had an interest and to a person with a corresponding interest." Bigman v. Dime Sav. Bank of New York, FSB, 144 AD2d 318, 319 (2d Dept 1988). Here, while defendants maintain that the email was sent to protect their clients following the receipt of complaints regarding plaintiffs' aggressive and misleading statements, these facts cannot be determined as a matter of law at this juncture. In

any event, in general, as the common interest privilege is an affirmative defense, "does not lend itself to a pre-answer motion to dismiss." Demas v. Levitsky, 291 A.D.2d 653, 657 (3d Dep't 2002), lv denied, 98 NY2d 728 (2002). The correct procedure is to plead the common interest privilege as an affirmative defense and thereafter move for summary judgment. Id.; see also, Garcia v. Puccio, 17 AD3d 199 (1st Dept 2005)(holding that it was premature to determine whether statement by a principal to a student's mother about incident involving the plaintiff teacher and student was subject to a qualified privilege); but see Ferguson v. Sherman Square Realty Corp., 30 AD3d 288 (1st Dept 2006)(dismissing complaint based on shareholders in residential cooperative's statements to other shareholders regarding former president of the cooperative when statements were protected by a qualified privilege as a matter of law, were not susceptable to defamatory meaning and were statements of opinion).

The remaining issue is whether the complaint states a claim for interference with prospective business advantage. The "tort of interference with business relations applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant." WFB Telecom., Inc. v. NYNEX Corp., 188 A.D.2d 257 (1st Dep't 1992), lv denied, 81 N.Y.2d 709 (1993). The elements of the tort of interference with prospective business relations are: (1) defendant knew of a proposed contract between plaintiff and another, (2) defendant acted intentionally to interfere with plaintiff's prospective contractual relation, and but for defendants' interference a contract would have been entered into, and (3) defendant's conduct involved wrongful means, significantly higher culpable conduct than necessary for interference with existing contracts, damaging plaintiff. See, NBT Bancorp, Inc. v. Fleet/Norstar Finance Group, 87 N.Y.2d 614 (1996); Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp., 50 N.Y.2d 183 (1980).

At issue here is whether the complaint adequately states a claim for tortious interference

with prospective business relations based on the e-mails sent by Defendants to its clients. The court finds that it does not. Even assuming *arguendo* that the allegedly defamatory e-mails satisfy the wrongful means requirement (Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d 40, 48 (1st Dep't 2009), and that the allegations that the loss of business was the result of the e-mail so that it is sufficient to satisfy the "but for" requirement, the complaint does not contain sufficient allegations from which it can be inferred that Precision knew of any proposed contract with the Plaintiffs and that it intentionally acted to prevent such proposed contracts from being entered into. See Guard-Life Corp., 50 N.Y.2d at 185 (an interference claim requires actual knowledge of the proposed contract); Burns Jackson Miller Summit & Spitzer v. Lidner, 88 A.D.2d 50, 72 (2d Dep't 1982), aff'd, 59 N.Y.2d 314 (1983) (same); Caprer v. Nussbaum, 36 A.D.3d 176, 204 (2d Dep't 2006) (holding that the denial of defendant that he knew of the proposed contract provided a prima facie basis for granting him judgment as a matter of law dismissing the claim for tortious interference with prospective business relations).

Accordingly, the second cause of action fails to state an actionable claim for tortious interference with prospective business advantage and must be dismissed.

CONCLUSION

In view of the above, it is

ORDERED that the claims asserted by plaintiff The Tax Club, Inc. are severed and dismissed; and it is further

ORDERED that, except as indicated below, the claims asserted by plaintiff Manhattan Professional Group, Inc. shall continue; and it is further

ORDERED that the motion to dismiss the Amended Complaint against defendants Zach Olson, Gary Adam Carroll, and Kale Goodman is granted; and it is further

ORDERED that the motion to dismiss the first cause of action against defendant

Precision Corporate Services is granted to the extent of dismissing that part of the claim seeking relief in connection with the email sent to individuals or entities that are not residents of New York and to the extent of finding that the above identified statements/phrases in the email are not actionable; and it is further

ORDERED that the motion to dismiss the second cause of action is granted, and the second cause of action is severed and dismissed; and it is further

ORDERED that Precision shall serve an answer to the Amended Complaint within 30 days of the date of this decision and order; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on November 17, 2011, at 9:30 am, in Part 11, room 351, 60 Centre Street, New York, NY 10007.

DATED: October 14, 2011

J.S.C.

HON. JOAN A. MADDEN
J.S.C.

FILED

OCT 25 2011

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