SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MICHAEL WEISS,

Index No.: 160202/2013

Plaintiff,

Motion Seq. No. 003

-against-

JACOB NOLAN and PAMELA BUCHBINDER,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action arising from a 2012 vicious attack of a Manhattan psychiatrist in his West side home-office, defendant Pamela Buchbinder ("Buchbinder") moves to dismiss the first, second, third, and fourth causes of action of the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action and pursuant to CPLR 3211(a)(5) as time-barred under CPLR 215(3). Buchbinder also moves to strike the demand for punitive damages and attorneys' fees pursuant to CPLR 3211(a)(7), and seeks for attorneys' fees and expenses pursuant to CPLR 8303-a and 22 NYCRR 130 1.1.[1]

Factual Background

Plaintiff Michael Weiss ("plaintiff") and his ex-girlfriend Buchbinder, also a psychiatrist, are the estranged parents of a five-year old boy. Defendant Jacob Nolan ("Nolan") is Buchbinder's first cousin, who, while residing with her in 2012, took care of the son, and held himself out as the son's "godfather." Nolan was also under Buchbinder's psychiatric care.

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[1] Plaintiff filed the amended complaint in February 2014 in response to Buchbinder's previous January 2, 2014 motion to dismiss the original complaint. The motion was withdrawn per stipulation, and this instant motion directed at the amended complaint ensued.

The factual background is taken from the amended complaint.

It is alleged that after years in Family Court, in 2012, the plaintiff and Buchbinder reached a custody, visitation, and child support agreement, under which plaintiff is required to maintain a $1.5 million life insurance policy naming their son as a beneficiary. In October or November 2012, at Buchbinder's insistence, plaintiff changed his life insurance policy to allow Buchbinder to control the life insurance proceeds in the event of his death.

Plaintiff claims that during this period, Buchbinder disparaged, slandered, and defamed him, by telling Nolan that plaintiff sexually abused their son, refused to pay child support, and physically abused Buchbinder in the past. In November 2012, Buchbinder told Nolan that plaintiff refused to complete financial aid papers that were needed to pay for the son to attend preschool.

As a result, Buchbinder and Nolan devised a plan for Nolan to attack and murder plaintiff. Buchbinder provided Nolan with information of where plaintiff lived and worked, how to gain entry to those places, and how to bypass security. As shown on a local store video captured after the incident, Buchbinder and Nolan purchased one of the weapons shortly before the attack.

On November 12, 2012, Nolan, with Buchbinder's assistance, managed to elude security at plaintiff's place of business, and attacked plaintiff in his office with a sledgehammer and kitchen knife. After being stabbed at least eight times, plaintiff managed to wrestle the knife from Nolan. Nolan called Buchbinder and told her that the murderous scheme went awry. Plaintiff was then taken to and treated at the same hospital the police took Nolan after his arrest

at the scene.[2] At the hospital, plaintiff saw Buchbinder attempting to speak to Nolan.

Consequently, plaintiff sues Buchbinder for assault (first cause of action), battery (second cause of action), slander and defamation (third cause of action), intentional infliction of emotional distress ("IIED") (fourth cause of action), medical malpractice (fifth cause of action), and negligence (sixth cause of action),[3] and seeks damages, including punitive damages, costs, and disbursements for same.[4]

In support of dismissal, Buchbinder argues that the assault claim fails because there is no claim that she engaged in any physical conduct that placed plaintiff in imminent apprehension of physical contact. Buchbinder was not present when Nolan attacked plaintiff, and no theory permits an assault claim under such circumstances. Nor is there any claim that the attack was committed by her. For the same reasons, the battery claim fails, as there is no legal theory that permits such a claim against a person who did not have bodily contact with the plaintiff.

Further, the complaint fails to demonstrate that the assault and battery claims, which occurred "in or about 2012," accrued within one-year before this action was commenced on November 4, 2013. Therefore, by failing to specify the date on which Buchbinder's participatory act occurred, these claims are time-barred.

Additionally, plaintiff failed to state with any specificity the dates when each alleged defamatory statement was made, and the setting and context of such statements, to support her slander and defamation claims as required under CPLR 3016(a). Also, the alleged statements

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[2] According to plaintiff, Nolan was found with a hand-drawn map of plaintiff's apartment/home office and later charged with, *inter alia*, attempted murder, burglary, assault.

[3] The medical malpractice and negligence claims are not subjects of the motion.

[4] Plaintiff also sues Nolan for assault, battery, IIED distress, and negligence.

constitute subjective, personal opinion, and thus, are not actionable. Further, there are no facts supporting the conclusion that his damages were proximately caused by the alleged defamation. General reputational harm is insufficient. And, the slander/defamation claim is also time-barred, since the alleged statements were made before November 4, 2012, which is more than one year before this action was commenced.

Plaintiff's IIED claim also fails because such a claim cannot be maintained as an independent claim where the conduct alleged in support thereof is also alleged to support other traditional tort claims, such as assault, battery and defamation. There are no factual allegations of a "longstanding campaign of deliberate, systematic and malicious harassment" or "pattern of harassment" to support an IIED claim. This claim is also barred by the one-year statute of limitations, as there are no allegations of tortious conduct occurring within one-year preceding the commencement of this action.

Buchbinder also argues that the punitive damage claim is not an independent claim, and therefore, must be dismissed given that the substantive claims against her fail. In any event, there is no allegation that the tortious conduct was "part of a pattern of similar conduct directed at the public generally." Since the alleged conduct was aimed at the plaintiff only, there is no legal basis to support the punitive damage claim.

Further, the claim for attorneys' fees fails because there is no agreement, statute or court rule to support such a claim, and there is no sustainable substantive claim to which an attorneys' fees claim can attach. Instead, plaintiff should be sanctioned for his bad faith and frivolous conduct in first bringing defective aiding and abetting tort claims in the original complaint, and now bringing deficient claims against Buchbinder. Plaintiff's actions required Buchbinder make

multiple motions to dismiss.

In opposition, plaintiff argues that the theory of concerted action provides for joint and several liability on the part of all defendants having an understanding "to participate in a common plan or design to commit a tortious act" and the amended complaint sufficiently alleges that Buchbinder acted in concert with Nolan in providing him information on how to attack plaintiff and in purchasing, with cash, the sledgehammer used to attack him. As such, the claims for assault and battery against Buchbinder must stand. Nor are these claims time-barred since the original Complaint was filed on November 4, 2013 and it is alleged that Buchbinder acted in concert with Nolan's attack on November 12, 2012.

The slander/defamation claim is sufficiently particularized and timely by identifying the specific statements that Buchbinder made in her apartment to Nolan. Such statements constitute slander *per se*, and thus plaintiff need not allege special damages. A defendant need only be provided with the approximate dates that the slanderous statements were uttered, and additional details regarding the defamatory statements can be demanded by a request for bill of particulars. And, statements made after November 4, 2012 clearly fall within the one-year statute of limitations.

Further, plaintiff argues that the amended complaint alleges outrageous conduct on behalf of Buchbinder that is separate and apart from the other alleged causes of action to support an IIED claim. Buchbinder lied to Nolan in the course of her psychiatric treatment to him in order to encourage Nolan to attack and murder plaintiff. Buchbinder'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." The IIED claim is not

duplicative of the other claims, which are based on the physical attack on plaintiff and defamatory statements that Buchbinder made about him. The broader IIED claim is based on the fact that Buchbinder used her professional skills and license to manipulate her cousin Nolan to attack plaintiff. Buchbinder's conduct was even more outrageous because plaintiff is the father of her son and she stood to control $1.5 million in insurance money if plaintiff was killed. And, CPLR § 3014 provides that "causes of action may be stated alternatively or hypothetically," and they may be "stated regardless of consistency." Nor is this claim time-barred; under the continuing tort doctrine, the IIED claim is timely because the medical treatment and manipulation of codefendant Nolan, the slander *per se,* which culminated in the November 12, 2012 attack on plaintiff, occurred within one year of the commencement of this action.

Further, the punitive damage claim is supported by the outrageous, malicious and deliberate conduct alleged. New York law allows a plaintiff to recover punitive damages in connection with intentional torts, and caselaw supports an award for attorneys' fees as part of a punitive damages award.

In reply, Buchbinder adds that plaintiff has not alleged a civil conspiracy claim, and abandoned her aiding and abetting claims by filing the amended complaint omitting such claims. Plaintiff failed to allege any conduct on Buchbinder's part that constitutes unlawful or tortious conduct to support her concerted action theory. Purchasing a sledgehammer and drawing a diagram of plaintiff's home office are lawful in nature.

Also, there is no allegation as to when or where the alleged defamatory statements were made, and no causal connection between the statements allegedly made and the claimed damages. And, it is clear that no statements were made after November 4, 2012 within the one-

year period prior to the commencement of this action.

Additionally, plaintiff alleged no facts unique to the her IIED claim.

Nor is there any claim of conduct aimed at the public to support plaintiff's punitive damage claim. The absence of merit to the abandoned claims and having to defend against involuntary dismissed claims herein warrant sanctions and attorneys' fees in Buchbinder's favor.

Discussion

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is deciding "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" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]).

The standard on such a motion is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205, 660 N.Y.S.2d 726 [1st Dept 1997] (on a motion to dismiss for failure to state a cause of action, the court must accept factual allegations as true)). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, *supra*) and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory"

(*Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, *supra; Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]).

Assault and Battery

The assault and battery claims as asserted against Buchbinder are alleged under a theory of concerted action. This theory "provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in 'a common plan or design to commit a tortious act'" (*Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 294, 591 N.E.2d 222 [1992] *citing Hymowitz v. Lilly & Co.*, 73 N.Y.2d 487, 506, 541 N.Y.S.2d 941, 539 N.E.2d 1069 [quoting Prosser and Keeton, Torts § 46, at 323 (5th ed.)). "Concerted action liability rests upon the principle that '[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, *or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit*, are equally liable with him'" (*Herman v. Wesgate*, 94 A.D.2d 938, 464 N.Y.S.2d 315 [4th Dept 1983] *citing* Prosser, Torts [4th ed], § 46, at p 292; see, also, Restatement, Torts 2d, § 876) (emphasis added)).

Here, the amended complaint alleges that Buchbinder "devised a plan with defendant Nolan to attack and injure, or kill, plaintiff." (¶ 18). In furtherance of that plan, Buchbinder allegedly provided Nolan with information regarding the location and the means of entry and egress to plaintiff's residence and place of business. (¶ 19). Buchbinder allegedly told Nolan how to circumvent the security in plaintiff's building, and assisted Nolan in obtaining the weapons that were used to attack plaintiff. (¶¶ 19-20). The day before the attack, Buchbinder was seen on videotape at a local store in Manhattan purchasing the sledgehammer that Nolan

used to strike plaintiff (¶ 21). Buchbinder also allegedly "urged, initiated, instigated, solicited, importuned, encouraged and otherwise caused or contributed to" the attack on plaintiff (¶ 22) and motivated Nolan to avenge Buchbinder for plaintiff's failure to pay child support, assist with financial aid, sexually abusing the son, and physically abusing Buchbinder.

The Court finds that the amended complaint adequately alleges that Buchbinder acted in concert with Nolan in planning and devising the attack against plaintiff. This is not an instance where a defendant is sought to be held liable for merely inciting an attack (*cf. Fariello v. City of New York Bd. of Educ.*, 199 A.D.2d 461, 606 N.Y.S.2d 20 [2d Dept 1993] (dismissing assault and battery claims against girlfriend of assailant, where there was no evidence that she committed any overt act in furtherance of the assault, or that she acted in concert with her boyfriend in planning the assault or asked her boyfriend to commit the assault against plaintiff); *Steinberg v. Goldstein*, 27 A.D.2d 955, 279 N.Y.S.2d 240 [1st Dept 1967] (dismissing assault claim against a wife where there was no claim that she "knew that an assault was planned or was to take place" and no allegation that her husband/assailant went out with the intent and purpose of searching for plaintiff to assault him. Absent such allegations there can be no inference that [she] knew of any such intention; and, consequently, she may not be charged with aiding or abetting [her husband] or acting in concert with him")).

That Buchbinder did not physically attack plaintiff herself is inconsequential under the theory of concerted action (*Herman v. Wesgate*, 94 A.D.2d 938, 464 N.Y.S.2d 315 [4th Dept 1983] (where the conduct of the defendants alleged to be tortious "is the pushing or throwing of guests, against their will, from the barge into the water. Liability of an individual defendant will not depend upon whether he actually propelled plaintiff into the water; participation in the

concerted activity is equivalent to participation in the accident resulting in the injury")). And, the cases cited by Buchbinder are factually distinguishable and inapposite, as the theory of concerted action was not at issue therein (*cf. Hassan v. Marriott Corp.*, 243 A.D.2d 406, 663 N.Y.S.2d 558 [1st Dept 1997]; *Marilyn S. v. Independent Group Home Living Program, Inc.*, 73 A.D.3d 892, 903 N.Y.S.2d 403 [2d Dept 2010]).

And, although the Court of Appeals has held that "each defendant charged with acting in concert [must] have acted tortiously" (*Rastelli, supra citing* Prosser and Keeton, op. cit., at 324), such holding was made in the context of assessing conduct in the form of lobbying activities by various automobile tire rim manufacturers. The Court held, that not only was there an absence of an agreement or common scheme to commit a tort, but that there was a failure of plaintiff to "provide any evidence that the rim manufacturers' lobbying activities were tortious." This court opines that since the theory of concerted action rests on the principle that one may be liable for lending assistance to the wrongdoer, or actively taking part in the wrongdoing, Buchbinder's alleged purchase of a sledgehammer in furtherance of the assault is sufficient to state a claim under the concerted action theory.

And, the assault and battery claims, which accrued on the date of the attack on November 12, 2012, were timely filed within the uncontested one-year statute of limitations period applicable to such claims (*McElveen v. Police Dept. of the City of New York*, 70 A.D.2d 858, 418 N.Y.S.2d 49 [1st Dept 1979] (assault claim "accrues on the date of the assault"); *Plaza v. Estate v. Wisser*, 211 A.D.2d 111, 118, 626 N.Y.S.2d 446 [1st Dept1995] ("plaintiff was required to commence a cause of action for battery within one year of the date of the non-consensual physical contact")).

Therefore, dismissal of the assault and battery claims for failure to state a cause of action and for untimeliness is denied.

Slander and Defamation

The elements of a defamation claim 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 (*Frechtman v. Gutterman*, 115 A.D.3d 102, 979 N.Y.S.2d 58 [1st Dept 2014]; *Dillon v. City of New York*, 261 A.D.2d 34, 704 N.Y.S.2d 1 [1st Dept 1999] *citing* Restatement of Torts, Second § 558). Defamation *per se* refers to statements: (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman (*see Liberman v. Gelstein*, 80 N.Y.2d 429, 373 N.E.2d 1215 [1992]).

Further, CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made (*Dillon citing Arsenault v. Forquer*, 197 A.D.2d 554, 602 N.Y.S.2d 653 [2d Dept 1993]; *Vardi v. Mutual Life Insurance Co. of New York*, 136 A.D.2d 453, 523 N.Y.S.2d 95).

Plaintiff alleges that Buchbinder "repeatedly told Nolan that plaintiff sexually abused his young son, refused to pay child support and was physically abusive to Buchbinder during the time that Buchbinder and plaintiff resided together." Assuming as true the claim that Buchbinder made such statements, such accusations, even if said in the aftermath of the parties' custody battle, are damaging to plaintiff's occupation as a licensed psychiatrist. And, the allegation that

Buchbinder told Nolan that plaintiff committed two serious crimes, sexual abuse of a minor and assault adequately states a slander and defamation *per se* claim (*see Rossignol v. Silvernail*, 185 A.D.2d 497, 586 N.Y.S.2d 343 [3d Dept 1992] (that plaintiff, pharmacist, was "labeled a child abuser--one of the most loathsome labels in society" was sufficient to hold defendants liable for slander *per se*). Since Buchbinder's statements fall within the category of slander/defamation *per se*, "the law presumes that damages will result" and plaintiff need not allege or prove damages (*Arts4All, Ltd. v. Hancock*, 5 A.D.3d 106, 773 N.Y.S.2d 348 [1st Dept 2004]).

Plaintiff's reliance on *Galasso v. Saltzman* (42 A.D.3d 310, 839 N.Y.S.2d 731 [1st Dept 2007]) for the proposition that the alleged statements are mere hyperbole and opinion lack merit. The alleged defamatory statements by Buchbinder herein pale in comparison to the statement in *Galasso* made by a subdivision resident during a heated debate that a co-resident was a "criminal" for trespassing by removing trees and a fence in the common area of a subdivision community. Further, the amended complaint is sufficiently particular pursuant to CPLR § 3016(a) as plaintiff has identified the specific statements that Buchbinder made to Nolan in her Manhattan apartment "after" November 4, 2012 in connection with the assault on November 12th.

Nor are the slander and defamation claims time-barred. It is uncontested that the applicable statute of limitations for such claims is one year (CPLR § 215(3)), and the original complaint was filed on November 4, 2013. Plaintiff alleges that Buchbinder's defamatory statements were made "after November 4, 2012." (¶ 15). Any statements made after November 4, 2012 clearly fall within the one-year statute of limitations.

Therefore, dismissal of the slander and defamation claim for failure to state a cause of

action and for untimeliness is denied.

Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are (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 the injury; and (iv) severe emotional distress (*Graupner v. Roth*, 293 A.D.2d 408, 742 N.Y.S.2d 208 [1st Dept 2002] *citing Howell v. New York Post Co.*, 81 NY2d 115, 121 [1993]). The conduct complained of must 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" (*Fischer v. Maloney*, 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991 [1978]).

Here, it is alleged that as part of her treatment, Buchbinder told Nolan lies about plaintiff and claimed that he sexually abused their son and battered her (¶¶ 16, 24, 62). Buchbinder also allegedly encouraged Nolan to attack and murder plaintiff during her treatment of him (¶ 62). Such conduct, if true, 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." The alleged false accusations are extremely outrageous under the circumstances (*see 164 Mulberry St. Corp. v. Columbia Univ.*, 4 A.D.3d 49, 771 N.Y.S.2d 16 [2004] (falsely accusing various restaurants of causing his wife's food poisoning in order to elicit their responses sufficient to support an IIED claim)). Although claims of intentional infliction of emotional distress typically involve allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff (*Seltzer v. Bayer*, 272 A.D.2d 263,709 N.Y.S.2d 21 [1st Dept 2000]; *see, e.g., Shannon v MTA Metro-North R. R.*, 269 A.D.2d

218, 219, 704 N.Y.S.2d 208 [1st Dept 2000] ["a pattern of harassment, intimidation, humiliation and abuse, causing him unjustified demotions, suspensions, lost pay and psychological and emotional harm over a period of years"]; *Warner v Druckier*, 266 A.D.2d 2, 3, 697 N.Y.S.2d 610 [1st Dept 1999] ["through various specified acts, deliberately, systematically and maliciously harassed him over a period of years so as to injure him in his capacity as a tenant"]), the outrageous nature of the alleged conduct, in and of itself, may be sufficient to support an IIED claim in the absence of any allegation of a longstanding campaign of conduct (*see e.g. Harvey v Cramer*, 235 A.D.2d 315, 653 N.Y.S.2d 3 [1st Dept 1997] (where decedent doctor "advised not only plaintiff of his HIV status but also plaintiff's long-term partner, and that the decedent provided free medical care to the partner in exchange for sexual favors, is sufficient to raise an issue of fact as to whether the misdiagnosis was intentional, as alleged. *If intentional, it would satisfy the outrageousness requirement"* of an IIED claim]).

And, an IIED claim may survive a motion to dismiss based on untimeliness where plaintiff sufficiently sets forth a continuing course of tortious conduct extending into the one-year period immediately preceding commencement of his action (*Ain v. Glazer,* 257 A.D.2d 422, 683 N.Y.S.2d 241 [1st Dept 1999]). Here, the IIED claim is not barred by the one-year Statute of Limitations (CPLR 215) as it is governed by the continuing tort doctrine, which permits the plaintiff "to rely on wrongful conduct occurring more than one year prior to commencement of the action, so long as the final actionable event occurred within one year of the suit (*Shannon v. MTA Metro-North R.R.,* 269 A.D.2d 218, 704 N.Y.S.2d 208 [1st Dept 2000]).

However, an IIED claim is subject to dismissal as duplicative, notwithstanding the rule permitting the pleading in the alternative (CPLR 3014), where its underlying allegations fall

within the ambit of other traditional tort liability such as defamation, assault, and battery claims (*Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 538, 961 N.Y.S.2d 393 [1st Dept 2013]; *Thompson v. Linares,* 2012 WL 5363523 (Trial Order) [Sup Ct, New York County], *citing Leonard v. Reinhardt,* 20 A.D.3d 510, 799 N.Y.S.2d 118 [2d Dept 2005]). Plaintiff points out, in opposition, that Buchbinder allegedly misused her position of trust as a doctor when she treated her cousin Nolan and manipulated him into attacking and trying to kill plaintiff (p. 17). The assault and battery claims are based on the physical attack on plaintiff. The slander and defamation claims are premised on the defamatory statements that Buchbinder made about plaintiff. There are no facts alleged that are unique to plaintiff's IIED claim.

The cases cited by plaintiff for the proposition that IIED claims may be pursued simultaneously with other tort based claims are factually distinguishable *(cf. Shannon v MTA Metro-N. R.R.*, 269 A.D.2d 218, 704 N.Y.S.2d 208 [1st Dept 2000] (reinstating tortious interference with contractual relations claim after sustaining IIED claim); *Warner v Druckier*, 266 A.D.2d 2, 697 N.Y.S.2d 610 [1st Dept 1999] (IIED claim permitted along with an unlawful arrest/imprisonment claim); *Harvey v Cramer*, 235 A.D.2d 315, 653 N.Y.S.2d 3 [1st Dept 1997 medical malpractice cause of action and IIED claim permitted]). Particularly, the elements of the defamation, assault and battery claims are based on the identical facts alleged in support of the extreme and outrageous conduct element under the IIED claim herein.

Therefore, dismissal of the IIED as duplicative of the remaining tort-based claims is granted.

Punitive Damages

Contrary to Buchbinder's contentions, "Punitive damages are recoverable in all actions

based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of one's rights, or other circumstances of aggregation, as a punishment of the defendant and admonition to others" (*Collins v. Willcox Inc.*, 158 Misc. 2d 54, 59, 600 N.Y.S.2d 884 [Sup. Ct., N.Y. County 1993]). Thus, a plaintiff may be entitled to punitive damages for IIED, assault, battery and defamation claims (*Green v. Fischbein Olivieri, Rozenholc & Badillo*, 119 A.D.2d 345, 351, 507 N.Y.S.2d 148 [1st Dept 1986 (plaintiff entitled to claim punitive damages in connection with his IIED claim); *Collins, supra* (declining to strike punitive damages in connection with plaintiff's claims for battery and IIED)).

It is alleged that plaintiff, a licensed psychiatrist, was subjected to contempt, ridicule and disgrace in the minds of the public and his patients, and statements accusing plaintiff of being a child molester and a batterer could have severe adverse consequences on plaintiff's psychiatric practice and his reputation in the community. Plaintiff was allegedly the subject of a vicious assault and battery, fueled by malice on the part of Nolan and his cousin, Buchbinder. The facts of the complaint, if true, adequately support an award for punitive damage and attorneys' fees.

Request for Attorneys' Fees

In light of the findings above, and the survival of s substantial portion of the claims in the Complaint, attorneys' fees for defending this action against plaintiff is unwarranted (*cf. Cecora v. De La Hoya*, 106 A.D.3d 565, 965 N.Y.S.2d 464 [1st Dept 2013] (granting request for attorneys' fees where the entire complaint was dismissed)).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Pamela Buchbinder to dismiss the first, second,

third, and fourth causes of action of the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action and pursuant to CPLR 3211(a)(5) as time-barred under CPLR 215(3), and to strike and dismiss the demand for punitive damages and attorneys' fees pursuant to CPLR 3211(a)(7), for an award of attorneys' fees and expenses pursuant to CPLR 8303-a and 22 NYCRR 130 1.1. is granted solely as to the fourth cause of action for intentional infliction of emotional distress; and it is further

ORDERED that the fourth cause of action for intentional infliction of emotional distress is severed and dismissed as to defendant Pamela Buchbinder; and it is further

ORDERED that said defendant shall serve a copy of her Answer within 20 days of entry of this order; and it is further

ORDERED that defendant shall serve a copy of this Order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 19, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD