Dennis v Napoli
2015 NY Slip Op 31540(U)
August 12, 2015
Supreme Court, New York County
Docket Number: 153857/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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VANESSA DENNIS,

Plaintiff,

Index No. 153857/2014

-against-

DECISION/ORDER

MARIE NAPOLI, nee MARIE KAISER, PAUL J. NAPOLI, NAPOLI BERN RIPKA SHKOLNIK, LLP and JOHN DOES 1-5,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

HON. CYNTHIA KERN, J.S.C.
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1,2,3
Affidavits in Opposition.....	4,5,6
Replying Affidavits.....	7,8,9
Exhibits.....	10

Plaintiff commenced the instant action asserting claims for, *inter alia*, defamation, intentional infliction of emotional distress and prima facie tort based on an alleged two-year campaign by defendant Marie Napoli to harass and ruin plaintiff's personal and professional life after she discovered that plaintiff and her husband were having an affair. She now brings an application, by order to show cause, for a preliminary injunction enjoining defendants from continuing to harass her, defame her and trying to cause her present employer to terminate her. Defendant Napoli Bern Ripka Shkolnik, LLP (hereinafter "Napoli Bern" or "the Firm") also

moves by notice of motion for an Order pursuant to CPLR § 3211 dismissing plaintiff's complaint as asserted against it in its entirety. Additionally, defendant Paul J. Napoli ("Paul"), as a partner in the Firm and in his individual capacity and with his wife, defendant Marie Napoli ("Marie"), have moved for an Order (1) pursuant to CPLR § 3211 dismissing all claims asserted against Paul and plaintiff's claims for defamation and prima facie tort asserted against Marie; and (2) pursuant to CPLR § 3024(b) striking certain allegations contained in plaintiff's complaint on the ground that the subject allegations are scandalous, prejudicial and are irrelevant to plaintiff's claims. These motions are hereby consolidated for disposition purposes and are resolved to the extent described below.

The relevant facts are as follows. In February 2011, plaintiff began working as an attorney at Napoli Bern in New York City. Thereafter, according to the complaint, plaintiff engaged in an 18 month long affair with Paul Napoli, a partner at Napoli Bern, which ended when Paul's wife, Marie Napoli, discovered the affair in April of 2013. Plaintiff was subsequently fired from the Firm pursuant to a letter agreement (the "Letter Agreement") and relocated to Houston, Texas where she currently resides and works.

The complaint alleges that since discovering the affair Marie has launched a campaign to ruin plaintiff's personal and professional life. Specifically, the complaint alleges that Marie has sent numerous letters, emails, texts and Facebook messages to plaintiff's family, friends, employers and future employers defaming plaintiff as well as posting vicious and insulting comments on plaintiff's Facebook pictures. For instance, the complaint alleges that within a month of plaintiff arriving at her new job in Houston, Marie sent several identical letters to the wives and family members of the partners at her current employer, wherein she, among other

things, referred to plaintiff as a "sexual predator" and "sex addict," suggesting that she has had multiple affairs and warning the recipients that they should not let their husbands near plaintiff. Further, the complaint alleges that similar statements were directly sent via LinkedIn emails to every person associated with plaintiff's current employer on that service and to a former paralegal at Napoli Bern. Additionally, the complaint alleges that on January 25, 2014, Marie posted derogatory comments under photos on plaintiff's Facebook page. For example, one photo depicted plaintiff with six of her classmates from the Trial Lawyers College. Marie commented on the photo, "Vanessa is a slut." Another photo depicted plaintiff with twelve of her classmates at the Trial Lawyers College and three of plaintiff's professors. Marie commented on that photo, "Vanessa was fired from her job at Napoli Bern for being a slut!"

On or about April 22, 2014, plaintiff commenced this action by service of a summons with notice. Thereafter, a copy of the draft complaint for this action got filed as an exhibit in another action between Paul and his co-managing partner, Marc Bern. After the filing, the New York Post ran a story about the pending Firm partnership dispute that also mentioned the instant action drawing from the allegations in the draft complaint. When asked to comment on the story, Paul told the New York Post that he supported his wife's actions "100 percent," adding that he saw nothing wrong "with confronting a person that there was an affair with." Paul was further quoted as saying: "Everything my wife said in any email whether it sounds terrible or not was all true and was all factually correct." Thereafter, the complaint alleges that Paul sent an email addressed to his "Friends," which included members of the mass tort bar, which plaintiff is a member of, and to vendors who work with those lawyers. The email stated, in pertinent part, as follows:

> Today's New York Post wrote an article against our family. As usual, the Post captured only part of the story and twisted the claims to make tabloid news. Dennis' complaint is the definition of extortion–used by her in an unsuccessful effort to line her pockets with an exorbitant monetary settlement.

Plaintiff further alleges that these statements were picked up by the New York Post and other media outlets.

Based on the above allegations, plaintiff has commenced the instant action asserting claims for defamation; intentional, reckless and negligent infliction of emotional distress; negligent hiring; trespass; and prima facie tort. Specifically, plaintiff's complaint asserts the following ten "Counts" against defendants: (1) defamation against all defendants; (2) defamation against Paul; (3) defamation against Paul; (4) defamation against all defendants; (5) intentional infliction of emotional distress against all defendants; (6) reckless infliction of emotional distress against Paul and the Firm; (7) negligent infliction of emotional distress against Paul and the Firm; (8) negligent hiring and supervision against Paul and the Firm; (9) trespass against Marie ; (10) and prima facie tort against all defendants. Plaintiff has also annexed a proposed amended complaint to her opposition papers, which she alleges corrects a pleading issue defendants identified concerning the claim for negligent hiring and supervision and eliminates the number gap for the causes of action that was present in the original complaint. Otherwise, the proposed amended complaint is substantially the same as the current complaint.

The court first turns to the defendants' various motions to dismiss. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164

A.D.2d 809 (1st Dept. 1990). Indeed, "[w]here a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). Additionally, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995).

In the present case, as an initial matter, Paul and Marie's motion to dismiss this action and compel arbitration is denied. Paul and Marie contend that pursuant to plaintiff's employment agreement with the Firm, plaintiff must arbitrate the claims asserted in this action. However, this contention is without merit for two reasons. First, neither Paul nor Marie are a party to the employment agreement. Rather, the employment agreement is between plaintiff and the Firm only. Thus, Paul and Marie do not have standing to enforce the employment agreement's arbitration provision. Second, even if they did have standing, the subject arbitration provision would not bar the instant action. The employment agreement provided only that plaintiff agreed to arbitrate "[a]ny and all disputes arising from or under this Agreement or breach thereof including termination and/or discrimination." The claims asserted in this action do not arise from or under the employment agreement or a breach thereof. Rather, plaintiff's claims in this action arise from and out of a personal affair plaintiff had with Paul and the resulting conduct of Paul's wife after she discovered the affair. Simply put, just because plaintiff was working at Napoli Bern at the time Marie discovered the affair does not automatically transform plaintiff's claims into ones arising from her employment agreement.

Accordingly, the subject arbitration provision is inapplicable.

Further, the defendants' motions to dismiss this action on the ground that plaintiff's claims are barred by the release plaintiff signed when she left the Firm are also denied. The defendants contend that the release contained in the Letter Agreement terminating plaintiff's employment at the Firm bars the current action. The release states as follows:

> In consideration for above, you knowingly and voluntarily agree to forever release, acquit and discharge the law firm and all its subsidiaries, affiliates, divisions and its and their employees, officers, directors and shareholders and its and their predecessors, successors and assigns from and against all claims, actions and causes of action (collectively, the "claims"), of ever kind, nature and description, which exist as of the date you sign this Letter Agreement, arising out of or related to your employment.

Contrary to defendants' contentions, the above language does not bar the instant action as a matter of law as plaintiff's claims do not arise out of or relate to plaintiff's employment. As this court found above, plaintiff's claims arise out of and relate to a personal affair between plaintiff and Paul and Marie's subsequent actions after she learned of the affair. While plaintiff was employed by the Firm at the time of the affair and shortly after it was discovered by Marie, these facts are simply insufficient to find that this action arises out of or relates to plaintiff's employment. Thus, the release is also inapplicable to the instant action.

Additionally, Marie's motion for an order dismissing plaintiff's prima facie tort claim against her for failure to state a cause of action is denied. The elements of prima facie tort are (1) the intentional infliction of harm; (2) which results in special damages; (3) without any excuse or justification; (4) by an act or series of acts which would otherwise be lawful. *Curiano v. Suozzi*, 63 N.Y.2d 113, 117 (1984). "[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act." *Burns Jackson Miller*

Summit & Spritzer v. Lidner, 59 N.Y.2d 314, 333 (1983). As Justice Holmes put it, there is no recovery in prima facie tort unless defendant acts from "disinterested malevolence," by which is meant "that the genesis which will make a lawful act unlawful must be a malicious one unmixed with another and exclusively directed to injury and damage of another." *Id.* (internal citations omitted).

Here, the complaint sufficiently states a claim for prima facie tort against Marie. The complaint alleges that Marie published the alleged defamatory statements "with the specific intent and desire to injure [plaintiff] by fraud and deceit" and that Marie's "course of conduct in doing so was motivated by spite and malevolence, and has no legal justification." Further, the complaint alleges that as a result of Marie's actions, plaintiff has required medical treatment and had to move to Texas resulting in damages in the amount of no less than $6,000. These allegations, when taken in the context of the entire complaint which contains allegations of a two year course of conduct by Marie to harass, injure and defame plaintiff, is sufficient to state a cause of action for prima facie tort against Marie.

Additionally, Marie's motion for an order dismissing plaintiff's defamation claims against her for failure to state a cause of action is denied. Marie contends that plaintiff's defamation claim as asserted against her must be dismissed as the complaint fails to comport with the heightened pleading requirements of CPLR § 3016(a), which requires the plaintiff to allege the specific nature of any alleged defamatory statement, including the time, place and manner of the purported defamation. *See Buffolino v. Long Is. Sav. Bank*, 126 A.D.2d 508, 510 (2nd Dept 1987). Specifically, Marie argues that plaintiff's complaint fails to state a claim for defamation as plaintiff fails to identify each alleged defamatory statement made by Marie under the

defamation claim subheadings in the complaint. However, such contention is without merit. While the court recognizes that plaintiff's defamation claim against Marie is not the most artfully plead, the complaint clearly contains sufficient allegations of Marie's various alleged defamatory communications to third-parties and to whom and when they were made. The fact that these allegations are contained in the opening "background" section of the complaint as opposed to the portion of the complaint devoted to the defamation causes of action is immaterial. Such artful pleading is simply not required to withstand a motion to dismiss. Rather, the inquiry is simply "'whether [the complaint] states in some recognizable form any cause of action known to our law.'" *Foley*, 21 A.D.2d at 64-65 (quoting *Dulberg*, 1 N.Y.2d at 56).

However, Paul's motion for an order dismissing plaintiff's defamation claim against him based on the statements he made to the New York Post in November 2014 is granted for failure to state a cause of action as said statements are not actionable. Plaintiff alleges that after this lawsuit was filed, Paul made defamatory statements to the New York Post in response to the publication of the allegations contained in the draft complaint plaintiff had prepared in this litigation and which had been disseminated to the media. The entirety of the comments attributed to Paul by the New York Post are as follows:

> The Napolis, who were briefly estranged, are now together, and Paul Napoli told the Post he supported his wife's actions "100 percent," adding he saw nothing wrong "with confronting a person that there was an affair with." Paul Napoli further stated "[e]verything my wife said in any email whether it sounds terrible or not was all true and was all factually correct," he said from a Manhattan hospital room, where he is recovering from a bone-marrow transplant.

Defamation arises from "the making of a false statement which tends 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 their friendly intercourse in society.'" *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999) (quoting *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996)). It is a legal question for the court to determine in the first instance whether particular words are defamatory. *Aronson v. Wiersma,* 65 N.Y.2d 592, 593 (1985). The "words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." *Id.* at 594; s*ee also Golub v. Enquirer,* 89 N.Y.2d 1074 (1997). "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable." *Dillon,* 261 A.D.2d at 38.

In the present case, Paul's statements to the New York Post are not actionable as they are not defamatory. Paul's statements, as quoted above, do not expose plaintiff to public contempt, nor do they induce an evil opinion of plaintiff in the minds of right-thinking persons. Rather, Paul's statements concern only his feelings about his wife's actions. Although Marie's statements and communications may impugn plaintiff's character opening Marie up to a suit for defamation, Paul's statements that he agreed with such actions does not support a separate action for defamation against Paul. Simply put, there is nothing defamatory about saying you agree with your wife.

Additionally, to the extent plaintiff alleges that by stating to the New York Post that his wife's statements concerning plaintiff are "all true" and "all factually correct," Paul republished Marie's libels as his own, such contention is without merit. These statements are not a republishing of any of Marie's statements. Indeed, Paul does not republish any statement made

by Marie. Rather, Paul only indicated that he supported his wife and that the statements she made were true. Such support, without actually re-stating the defamatory statements, does not constitute a republication.

Further, to the extent plaintiff alleges a claim for defamation against Paul based on statements he made to the New York Post that have not yet been published, such claim must be dismissed as a matter of law. Defamation arises from the making of a false statement "published without privilege or authorization to a third-party." *Frechtman v. Gutterman*, 115 A.D.3d 102 (1st Dept 2014). As such, a defamation claim does not lie for unpublished statements as a matter of law.

Additionally, Paul's motion for an order dismissing plaintiff's defamation claim against him based on his statements accusing plaintiff of the crime of extortion is granted for failure to state a cause of action as such statements constitute nonactionable opinion. Plaintiff alleges that in November 2014, Paul published defamatory statements accusing plaintiff of the crime of extortion. Specifically, the complaint alleges that after the November 2014 New York Post article, Paul published a statement further attacking and defaming plaintiff. The complaint alleges that the statement was published in an e-mail blast addressed to Paul's "Friends" that went to members of the plaintiff's mass tort bar and was also published by the New York Post and other media publications. The statement, in pertinent part, is as follows:

> Today's New York Post wrote an article against our family. As usual, the Post captured only part of the story and twisted the claims to make tabloid news. Dennis' complaint is the definition of extortion-used by her in an unsuccessful effort to line her pockets with an exorbitant monetary settlement.

Under New York law, "[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for

defamation." *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). In determining whether a statement is an opinion as opposed to a fact, a question of law for the court, the following factors are to be considered: "(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 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." *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995) (internal quotation marks and citations omitted). The proper inquiry is "'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.'" *Id.* (quoting *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 254 (1991)).

Here, given the context in which Paul's statement was made, a reasonable reader would have believed that Paul's assertion that plaintiff's lawsuit was brought to extort money was an opinion and not an assertion of fact. Considering the context of the email, a reasonable reader would have believed that Paul's statement that plaintiff's "complaint is the definition of extortion" was conveying Paul's opinion as to the merits of plaintiff's lawsuit and her motivation, rather than an assertion of fact that the lawsuit was an actual attempt to commit extortion. Indeed, by referencing the New York Post article, the readers were presumably aware of the extremely hostile relationship between plaintiff and Paul and would approach Paul's statements regarding plaintiff with skepticism and with the expectation that his statements conveyed his personal feelings about plaintiff, rather then an objective fact about plaintiff. *See Pecile v. Titan Capital Group*, LLC, 96 A.D.3d 543, 544 (1st Dept 2012) (finding that "the use of the term

'shakedown' did not 'convey the specificity'" that would suggest that defendants were seriously accusing the plaintiff of committing extortion); *Melius v. Glacken*, 94 A.D.3d 959, 959-961 (2nd Dept 2012) ("calling the plaintiff an "extortionist" who is seeking "to extort money" was conveying the defendant's opinion as to the merits of the plaintiff's suit and was not a factual accusation of criminal conduct").

Further, to the extent plaintiff contends that the statement is actionable as a "mixed statement" of opinion and fact, such contention is without merit. It is true that a statement of opinion that implies that it is based upon undisclosed facts that are unknown to those reading or hearing it, is considered a "mixed opinion" and is actionable. *Sandals Resorts Intl. Ltd. v. Google, Inc.*, 86 A.D.3d 32, 40 (1st Dept 2011). Here, however, Paul's statement is not an actionable "mixed opinion" as he provides a full recitation of the facts on which it is based and his statement does not imply the existence of undisclosed underlying facts. Indeed, Paul directly references both the New York Post article and plaintiff's complaint in his statement.

Additionally, Paul's motion for an order dismissing plaintiff's defamation claim against him based on any communications he had with Marie regarding plaintiff is granted as any such claim must fail as a matter of law. Plaintiff alleges that Paul published to Marie defamatory material concerning plaintiff that Marie republished to others. However, under New York law, "a communication from one spouse to another may not be deemed a publication." *Lawler v. Meritt*, 182 Misc. 648 (N.Y. Sup. Ct. 1944), aff'd 269 App.Div. 662 (1945); *see also Medcalf v. Walsh*, 938 F. Supp. 2d 478, 485 (S.D.N.Y. 2013) ("For the purpose of establishing a claim of defamation under New York law, all communications between spouses, on any subject, are absolutely privileged based on the spouses' status as a married couple."); *Dyer v. MacDougall*,

93 F. Supp. 484 (D.C.N.Y. 1950) ("[a] communication from husband and wife in the absence of a third person is not publication, and is not actionable as slander, whatever the motive may be, and though the statement may be false."); Restatement (Second) of Torts § 192 ("A husband or a wife is absolutely privileged to publish to the other spouse defamatory matter concerning a third person."). Thus, as Paul and Marie are spouses and the communications between them do not constitute publication, a required element of defamation, plaintiff's defamation claim against Paul based on his communications to Marie must fail as a matter of law.

To the extent plaintiff argues that her defamation claim against Paul for his communications to Marie concerning plaintiff is proper as Marie repeated these communications to third parties, such contention is without merit. Plaintiff contends that any spousal privilege that may have existed between Paul and Marie was waived by Marie's repeated publications to third parties of defamatory material concerning plaintiff that she said her husband had told her. In support of this contention, plaintiff relies upon *Matter of Vanderbilt (Rosner-Hickey)*, 57 N.Y.2d 66, 74 (1982), and *People v. Weeks*, 15 A.D.3d 845, 846 (4th Dept 2005), which discuss when the evidentiary spousal privilege is waived. However, plaintiff's argument and citation to these cases is misplaced as, unlike in those cases, the issue here is not whether Paul can invoke the evidentiary privilege for marital communications. Rather, the issue is whether Paul's communications to Marie constitute a "publishing" for the purposes of a defamation claim. Thus, plaintiff's argument in this regard and the subsequent cases she relied upon are inapposite. Indeed, that a spouse may repeat the statement to a third party does not, as a matter of law, create a cause of action for defamation against the original speaking spouse.

Additionally, Paul and the Firm's motions for an order dismissing plaintiff's claim for

negligent hiring and supervision is granted on the ground that neither the complaint nor the proposed amended complaint state a claim under either of these theories of liability. At a minimum, in order to state a claim for negligent hiring and supervision, plaintiff must first identify the employee defendants negligently hired or supervised and that employee's wrongful conduct that caused injury to plaintiff. Here, the only Napoli Bern employee specifically identified by plaintiff is Fred Kaiser, Marie Napoli's brother and head of Napoli Bern's technology department. However, plaintiff fails to allege any wrongful conduct by Fred Kaiser, separate and apart from anything he was instructed to do by Paul, that caused her injury. Both the complaint and proposed amended complaint allege that Paul admitted that he had authorized and instructed Fred Kaiser to allow Marie access to plaintiff's work e-mail accounts. Thus, plaintiff cannot maintain a claim against either the Firm or Paul, as a partner in the Firm, on a negligent hiring and supervision theory of liability based on Fred Kaiser's actions as any action taken by Fred Kaiser was at the direction of Paul, such that any claim would have to be against Paul directly. Indeed, as will be discussed below, plaintiff's allegations under this cause of action seem to more properly fit into a claim against Paul for aiding and abetting Marie's tortious conduct.

Further, to the extent plaintiff more broadly alleges that Paul, and through him the Firm, were negligent in failing to prevent Napoli Bern's employees from giving Marie access to records and data maintained by Napoli Bern; and providing any assistance to Marie in setting up and using fictitious, deceptive and fraudulent electronic accounts, these allegations are insufficient to state a claim for negligent hiring and supervision as plaintiff does not identify the employees who allegedly provided such assistance to Marie. Thus, plaintiff's claim for

negligent hiring and supervision must be dismissed.

Additionally, plaintiff's claims for reckless and negligent infliction of emotional distress against Paul and the Firm are also dismissed on the ground that they fail to state a cause of action. A cause of action for either reckless or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants that "has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993); *see also Sheila C. Povish*, 11 A.D.3d 120, 130 (1st Dept 2004). Here, the only allegations supporting plaintiff's reckless and negligent infliction of emotional distress claims against Paul and the Firm is that Paul, and through him the Firm, (1) defamed and denigrated plaintiff to Marie; (2) provided Marie with access to data concerning plaintiff maintained by Napoli Bern; (3) provided Marie with access to his work email account and his Facebook account; and (4) failed to prevent Marie from using Napoli Bern resources and personnel to injure plaintiff by arranging to open and use fictitious, fraudulent and deceptive electronic accounts. Even accepting these allegations as true, they are not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Id.* As a result, plaintiff has failed to state a valid claim for reckless or negligent infliction of emotional distress against either Paul or the Firm.

The court now turns to plaintiff's remaining claims against Paul and the Firm for defamation, intentional infliction of emotional distress and prima facie tort. Although plaintiff states these claims directly against Paul and the Firm, a close reading of the complaint reveals that these claims as asserted against Paul and the Firm, other than the defamation claims against

Paul as discussed above, are based solely on a theory of concerted action liability. Specifically, plaintiff alleges that Paul and the Firm aided, abetted and conspired with Marie in her tortious course of conduct that is the basis for plaintiff's claims of defamation, intentional infliction of emotional distress and prima facie tort against Marie. Thus, on the present motions, the issue for the court is whether the complaint states a claim against Paul or the Firm for conspiracy or aiding and abetting the tort claims against Marie for defamation, intentional infliction of emotional distress and prima facie tort.

"Concerted action liability rests upon the principle that all 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." *Bichier v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580 (1982) (internal quotations and citations omitted). "Conspiracy and aiding and abetting are varieties of concerted-action liability: conspiracy requires an agreement to commit a tortious act, aiding and abetting requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer." *Pittman by Pittman v. Grayson*, 149 F.3d 111, 122-133 (2nd Cir. 1998); *see also Wilson v. DiCaprio*, 278 A.D.2d 25, 26 (1st Dept 2000).

Here, as an initial matter, plaintiff's complaint fails to state a cause of action against either Paul or the Firm for conspiracy to commit defamation, prima facie tort, or intentional, infliction of emotional distress as it fails to allege any agreement between the defendants to commit the alleged tortious acts. Although the complaint alleges that Paul and the Firm "conspired" with Marie in her attack on plaintiff, it is devoid of any factual allegation that there was an actual agreement between them to defame or intentionally inflict emotional distress

against plaintiff. Thus, the complaint fails to state a claim for conspiracy against Paul or the Firm.

Further, plaintiff's claims against the Firm for defamation, intentional infliction of emotional distress and prima facie tort premised on an aiding and abetting theory of liability must also be dismissed for failure to state a cause of action. Here, the complaint is devoid of any but the most conclusory allegations that the Firm gave substantial assistance or encouragement to Marie to commit her alleged tortious acts that are the basis for plaintiff's direct claims of defamation, intentional infliction of emotional distress and prima facie tort against Marie. Indeed, the only allegations linking the Firm to Marie's actions is that Paul was acting on behalf of Napoli Bern when he allowed Marie to use firm resources to further her harassing campaign against plaintiff. However, as a matter of law, the Firm cannot be held liable for these alleged actions taken by Paul as any acts by Paul were not part of his job and would not have served the Firm's interests. On the contrary, Paul's actions, if committed, were done for purely personal motives and were an obvious departure from the normal duties of a partner at a law firm.

However, plaintiff's complaint does state a cause of action against Paul for defamation, intentional infliction of emotional distress and prima facie tort based on an aiding and abetting theory of liability. The complaint alleges that Paul (1) instructed and authorized Fred Kaiser to allow Marie access to plaintiff's email account; (2) allowed Marie access to plaintiff's personnel file; (3) provided Marie with the defamatory statements concerning plaintiff that she then republished to third parties; and (4) gave Marie access to his personal Napoli Bern email account and Facebook account. The complaint further alleges that these actions were taken with

knowledge of and to further Marie's tortious acts that form the basis for plaintiff's claims of defamation, intentional infliction of emotional distress and prima facie tort against Marie. Taken together, these allegations are sufficient to allege that Paul gave "substantial assistance or encouragement" to Marie. *See Pittman*, 149 F.3d at 122-133. As such, Paul's motion to dismiss plaintiff's claims for defamation, intentional infliction of emotional distress and prima facie tort asserted against him based on an aiding and abetting theory of liability is denied.

Finally, the remaining portion of defendants' motions for an order dismissing plaintiff's claim for punitive damages is denied. Plaintiff has sufficiently sought punitive damages in her complaint and it is inappropriate on a motion to dismiss for the court to determine whether such damages are warranted under the circumstances.

The court now turns to Paul and Marie's motion to strike the alleged prejudicial allegations from the complaint. Pursuant to CPLR § 3024(b), "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." "In reviewing a motion pursuant to CPLR § 3024(b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." *Soumayah v. Minnelli*, 41 A.D.3d 390, 392 (1st Dept 2007); *see also* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C:3024:4, at 323 ("In general, we may conclude that 'unnecessarily' means 'irrelevant.' We should test this by the rules of evidence and draw the rule accordingly. Generally speaking, if the item would be admissible at the trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CPLR 3024(b)").

In the present case, Paul and Marie's motion to strike is denied as the alleged scandalous

and prejudicial allegations were not unnecessarily inserted in the complaint but are relevant to plaintiff's claims of defamation and intentional infliction of emotional distress. Paul and Marie seek to strike all allegations relating to Paul's other alleged affairs and how he allegedly pursued plaintiff. This relief must be denied as, contrary to Paul and Marie's contentions, these allegations are relevant to plaintiff's claims. As an initial matter, the extent to which Paul initiated the affair with plaintiff's is directly relevant to plaintiff's defamation claim against Marie. Marie made several assertions to various third parties that plaintiff was a sexual "predator" who relentlessly pursued her husband who she characterized as a "happily married man." Marie does not deny that she made these statements but has indicated that her main defense in this action will be to try to establish the "truth" of the alleged defamatory statements. Thus, plaintiff's allegations pertaining to how Paul pursued her are directly relevant to Marie's defense in this action. Additionally, the extent to which Paul had prior affairs and Marie's knowledge of those affairs is directly related to plaintiff's claim for intentional infliction of emotional distress. An intentional infliction of emotional distress claim can only stand "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Howell,* 81 N.Y.2d at 122. Clearly, Marie's knowledge of her husband's prior affairs would be relevant to a jury determining whether Marie's conduct in this action rose to such a level. Accordingly, Paul and Marie's motion to strike is denied.

Finally, the court turns to plaintiff's order to show cause seeking a preliminary injunction. Plaintiff seeks a preliminary injunction enjoining and restraining the defendants from: (1) harassing, defaming, denigrating, threatening, or attempting to injure plaintiff in any way,

including by attempting to cause plaintiff emotional distress; (2) making any efforts to cause plaintiff's present employer to terminate her employment, or to interfere with plaintiff's present employment relationship in any way; (3) communicating with plaintiff's present employer, or any person or entity who or which is, as applicable, a member of, employed by, or affiliated with plaintiff's employer, or a spouse or relative of any of the foregoing persons; and (4) if plaintiff's employment status changes while this action is pending, from interfering in any way with plaintiff's efforts to find new employment, or if she does find new employment, from interfering in any way with such new employment relationship. Further, plaintiff also seeks an order enjoining defendants from: (1) communicating an any manner, including, without limitation, by U.S. mail, courier service, facsimile, e-mail, social media, text message, electronic post of any kind, by telephone or verbally in any manner, concerning plaintiff or the action at bar, with: (a) any person or entity who or which is a member or employee or is affiliated with plaintiff's present employer; and (b) any person or entity who or which is a party, or is counsel to any party or witness, in any action or proceeding in which plaintiff's present employer is counsel of record; (c) any person or entity who or which is or may be a non-party witness in this action; and (d) any spouse or relative of any of the foregoing persons or entities; and (e) any person or entity for the purpose of defaming, denigrating, threatening, harassing, or attempting to injure plaintiff in any way, including by attempting to cause plaintiff emotional distress; and/or (2) from disclosing or transmitting any documents that concern plaintiff under defendants' possession, custody, or control that pertain, or could reasonably pertain pursuant to the scope of disclosure permitted in the CPLR, to the issues in this action, to any person or entity, other than attorneys or experts engaged by defendants, or as may later be designated in a "so ordered" stipulation and order of

confidentiality entered into in connection with disclosure in this action, without prior approval of this court.

CPLR § 6301 provides that a

> preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

To be entitled to a preliminary injunction, the movant must show a likelihood of success on the merits, irreparable injury absent the injunction and that the equities balance in the movant's favor. *Aetna Insurance Co. v. Capasso,* 75 N.Y.2d 860 (1990). The decision to grant a preliminary injunction is committed to the sound discretion of the court. *See Doe v. Axelrod*, 73 N.Y.2d 748 (1988).

Further, cases such as the instant one, in which the plaintiff seeks to enjoin a defendant's expressions and speech, are governed by additional rules as they implicate a defendant's First Amendment rights. The court's analysis must begin with the "confrontation between the constitutional guarantee of freedom of speech and its restraint in the face of an offensive intrusion as part of coercive action upon a captive audience in a private dispute." *Trojan Elec. & Mach. Co., Inc. v. Heusinger*, 162 A.D.2d 859 (3rd Dept 1990). It is well established that "[a]ny prior restraint on expression comes to [the] Court with a 'heavy presumption' against its constitutional validity." *Organization for Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968)). As such, prior restraints are not permissible where they are sought merely to enjoin the

publication of libel. *Rosenberg Diamond Development Corp. v. Appel*, 290 A.D.2d 239, 239 (1st Dept 2002). However, "not all injunctions which may incidentally affect expression are impermissible prior restraint." *Lambert v. Williams*, 218 A.D.2d 618 (1st Dept 1995). Rather, distinctions are drawn between constitutionally protected speech and speech which is merely an instrument of and incidental to wrongful conduct. *See Bingham v. Struve*, 184 A.D.2d 85, 89 (1st Dept 1992). Thus, an injunction will lie to restrain libel when the publication is "part and parcel of a course of conduct deliberately carried on to further a fraudulent or unlawful purpose." *See Ansonia Assoc. Ltd. Partnership v. Ansonia Tenants' Coalition*, 253 A.D.2d 706 (1st Dept 1998); *Trojan Elec. & Mach. Co., Inc. v. Heusinger*, 162 A.D.2d 859 (3rd Dept 1990). Further, an injunction will lie when restraint becomes essential to the preservation of a recognized privacy, business or property right. *See Ansonia Assoc. Ltd. Partnership*, 253 A.D.2d at 706; *Lambert*, 218 A.D.2d at 621; *Bingham,* 184 A.D.2d at 89; *Rose v. Levine*, 37 A.D.3d 691 (2nd Dept 2007); *Trojan Elec. & Mach. Co.,* 162 A.D.2d at 860.

For example, in applying the above principles, the court in *Bingham* granted a preliminary injunction enjoining the defendant from sending letters and making telephone calls to the plaintiff's family and friends claiming that plaintiff had raped her thirty-six years ago and from further picketing outside plaintiff's apartment wearing a sandwich board with similar allegations of rape. In granting a preliminary injunction enjoining defendant from these activities, the court concluded that "the potential harm caused by defendant's continued communications and the picketing of plaintiffs' home is irreparable, as it is capable of injuring plaintiff husband's standing and reputation in all aspects of his personal and professional life, and of inflicting serious psychological and emotional damage to both plaintiffs." *Bingham*, 184

A.D.2d at 89-90. Further, the court found that "the degree of harm to be caused to plaintiffs if the conduct continues unabated far exceeds any which may be caused to defendant if her picketing and other communications are enjoined pending trial." *Id.* at 90.

In the present case, in considering the above principles, the court finds that no preliminary injunction shall lie against either the Firm or Paul as plaintiff has failed to demonstrate a likelihood of success on the merits against the Firm or that irreparable harm will be sustained absent the granting of a preliminary injunction against Paul. As an initial matter, no injunction shall lie against the Firm as this court has already found that plaintiff's complaint fails to state a cause of action against the Firm. Moreover, no injunction shall lie against Paul as the only viable claims remaining against Paul are for aiding and abetting Marie's conduct. As such, plaintiff has failed to establish that Paul is about to do something on his own to directly harm plaintiff warranting an injunction against him.

As to Marie, plaintiff has established that she should be granted a narrowly tailored preliminary injunction enjoining only offensive communication that does not constitute protected free speech. Initially, plaintiff has demonstrated a likelihood of success on the merits against Marie. Plaintiff has established a prima facie claim of libel against Marie since the offending statements alleged in the complaint tend to injure plaintiff's reputation and good name, and otherwise "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [her] in the minds of right-thinking persons, and to deprive [her] of their friendly intercourse in society.'" *Dillon*, 261 A.D.2d at 38. In the various letters, texts and Facebook messages written by Marie, she continuously refers to plaintiff as a "sex addict," "predator" and "slut" and asserts that plaintiff had multiple affairs and engaged in lewd conduct with her

husband by showing him pornography and discussing her masturbation habits with him.

Further, plaintiff has established that she will suffer irreparable harm if Marie is allowed to continue to engage in offensive conduct that is not constitutionally protected speech. As the court specifically noted in *Bingham*, the harm caused by continuing offensive communication is irreparable when "it is capable of injuring [plaintiff's] standing and reputation in all aspects of [her] personal and professional life, and of inflicting serious psychological and emotional damage to [plaintiff]." *Bingham*, 184 A.D.2d at 89-90. Here, Marie continues to send offensive unsolicited communications to the wives of the managing partners at plaintiff's current firm. These communications refer to plaintiff as a "slut" and "sexual predator" and claim that plaintiff is a self-admitted "sex addict" who was molested by her father. Moreover, Marie has posted derogatory comments under photos on plaintiff's Facebook page. These pictures depict plaintiff with her classmates at the Trial Lawyers College and three of her professors. Several of these people are also tagged in the photos and, thus, Marie's comments can be seen by these classmates and professors and anyone they are "friends" with on Facebook. In her comments, Marie again refers to plaintiff as a "slut" and claims that plaintiff was fired from the Firm for being a "slut." As these communications are specifically directed at plaintiff's colleagues, it is clear that if they are continued they are capable of injuring plaintiff's standing and reputation in her professional life. Indeed, in her affidavit submitted in support of this motion, plaintiff has attested to the fact that she was told by her current employer that her job was "in imminent jeopardy" due to Marie's communication with the managing partners' spouses and relatives and her co-workers, colleagues and their families. Accordingly, plaintiff has demonstrated irreparable injury.

Moreover, the equities balance in plaintiff's favor. There is little to no harm to Marie in being enjoined from further sending unsolicited communications to plaintiff's current employer, including the managing partners' wives, or from being enjoined from posting derogatory comments to plaintiff's Facebook pictures. Indeed, defendants cannot identify one harm that Marie would face in being enjoined from such conduct. However, plaintiff could face extreme harm to both her personal and professional reputation and her current employment if such communications continue.

Further, the fact that Marie's offensive conduct has not ceased since plaintiff filed this action further supports the need for a preliminary injunction restraining Marie. Marie was served with the summons with notice in this action on May 22, 2014. Thereafter, on June 29, 2014 and July 1, 2014, Marie sent messages to the Facebook accounts of at least three of plaintiff's friends. In these messages, Marie again accused plaintiff of sexually pursing her husband and stating that plaintiff was a "self admitted sex addict." The messages further accused plaintiff of having multiple affairs, including that plaintiff was forced to leave her prior job in Rhode Island for having an affair with her prior boss. Further, plaintiff attests that on December 19, 2014, she was called into a meeting at her law firm by one of the managing partners. At this meeting, she was informed that the previous week a letter was received at the residence of one of the partners. The envelope was addressed to the partner's wife and did not have a return address. The envelope contained what appeared to be emails between plaintiff and one of the partners at her current firm that had been sent while plaintiff was employed at Napoli Bern between February 2011 and May 2013. Plaintiff attests that she believed that Marie sent these emails in an attempt to cause her current employer to terminate her employment. At the

meeting, plaintiff further attests that she was informed that her job was now in imminent jeopardy due to these repeated communications to her employer's spouses. This continued conduct further demonstrates the irreparable harm plaintiff may face absent an injunction and the necessity of such an injunction pending trial in this matter.

However, as the court noted above, plaintiff is only entitled to an injunction enjoining communication that is part and parcel of a course of conduct deliberately carried on to further a fraudulent or unlawful purpose. Enjoining any further speech would be an impermissible prior restraint on speech. Thus, plaintiff is not entitled to the full preliminary injunction requested. Rather, the court finds that the appropriate scope of a preliminary injunction against Marie is as follows: Marie, or anyone acting on her behalf, is enjoined from: (1) sending unsolicited written or verbal communications concerning plaintiff to plaintiff's current employer, including but not limited to her current employer's partners and employees and their respective spouses or immediate family members; (2) posting any derogatory or degrading statements to plaintiff's Facebook pictures, or to any picture plaintiff may be tagged in, or otherwise posting such comments to plaintiff's public Facebook profile or other social media sites, including, but not limited to, LinkedIn; and/or (3) sending unsolicited Facebook or LinkedIn messages concerning plaintiff to plaintiff's contacts on those sites.

The court finds that the above injunction is narrowly tailored and does not constitute an impermissible prior restraint on free speech. As an initial matter, such injunction only enjoins communications concerning plaintiff, a private individual. Further, the injunction is limited to restraining only conduct that directly interferes with plaintiff's privacy right to be free from mental disturbance and harassment.

Accordingly, based on the foregoing, it is hereby

ORDERED that the Firm's motion to dismiss plaintiff's complaint as against it on the ground that it fails to state a cause of action is granted; and it is further

ORDERED and ADJUDGED that this action is dismissed as to the Firm; and it is further

ORDERED that Paul and Marie's motion to compel arbitration is denied; and it is further

ORDERED that Paul and Marie's motion to strike is denied; and it is further

ORDERED that Paul's motion to dismiss plaintiff's claims against him is granted except for plaintiff's claims for defamation, prima facie tort, and intentional infliction of emotional distress asserted against Paul based on an aiding and abetting theory of liability; and it is further

ORDERED that Marie's motion to dismiss plaintiff's defamation and prima facie tort claims asserted against her for failure to state a cause of action is denied; and it is further

ORDERED that plaintiff is to file an amended complaint that comports with this decision/order within thirty days of its entry; and it is further

ORDERED that plaintiff's motion for a preliminary injunction is granted to the extent described herein; and it is further

ORDERED that Marie, her agents, servants, and all other persons acting under the supervision and/or direction of Marie, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of Marie or otherwise, any of the following acts:

1) sending unsolicited written or verbal communications concerning plaintiff to the plaintiff's current employer, including but not limited to her current employer's partners and employees and their respective spouses or immediate family members;

2) posting any derogatory or degrading statements to plaintiff's Facebook pictures, or to any picture plaintiff may be tagged in, or otherwise posting such comments to plaintiff's public Facebook profile or other social media sites, including, but not limited to, LinkedIn; and/or

3) sending unsolicited Facebook or LinkedIn messages concerning plaintiff to plaintiff's contacts on those sites.

This constitutes the decision and order of this court.

Dated: 8/12/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.