SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

JAMES DAWSON,

Plaintiff,

- v -

ADAM LEITMAN BAILEY P.C. et al.,

Defendants.

INDEX NO. 152112/2017

MOTION DATE 2/5/18

MOTION SEQ. NO. 001

The following papers, numbered 8–23, were read on this motion to dismiss.

Notice of Motion—Affirmation in Support—Exhibit A—Affidavit of Service—Memorandum of Law in Support—Affidavit of Service—RJI	**Nos. 8–14**
Affirmation in Opposition (pro se, non-attorney, not notarized)—Memorandum of Law in Opposition—Exhibits A–D	**Nos. 15–21**
Memorandum of Law in Reply—Affidavit of Service	**Nos. 22–23**

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

Motion by Defendants Adam Leitman Bailey P.C., Adam Leitman Bailey, Esq. ("Bailey"), John M. Desiderio, Esq. ("Desiderio"), and Vladimir Mironenko, Esq. ("Mironenko") pursuant to CPLR 3211 (a) (7) to dismiss the verified complaint of pro se Plaintiff James Dawson ("Dawson") is granted. The Court dismissed the first, third, and fourth causes of action in the complaint at oral argument on January 29, 2018, the full transcript of which is incorporated herein by reference, for the reasons set forth below. Also at oral argument, the Court reserved its decision on Defendants' motion with respect to the second cause of action, which is for defamation. For the reasons set forth below, the second cause of action is also dismissed. The Court, in its discretion, grants Plaintiff leave to replead as to his defamation cause of action in the manner described herein.

BACKGROUND

Dawson commenced the instant action on March 3, 2017, by e-filing a summons and verified complaint. (Spiegel affirmation, exhibit A [Complaint].) Dawson alleges that he resided from August 29, 2015, to August 28, 2016, in a

building located at 100 Maiden Lane, New York, New York 10038 and owned by non-party Lalezarian Properties LLC ("Lalezarian"). Dawson further alleges that Desiderio emailed Bailey and Dawson on September 7, 2016, attaching a letter from Bailey to Dawson dated September 7, 2016. Dawson further alleges that the letter accused Dawson of creating and owning "lalezarianfraud.com" (specifically, the letter states that "Lalezarian has reason to believe . . . that [Dawson is] the creator and owner") and using the website to disseminate false and defamatory statements. (Complaint ¶ 11.) The letter then allegedly demanded that Dawson take the website down and stated that legal action would commence against Dawson if this was not done.

Dawson alleges that the allegations in the September 7, 2016 letter are "materially false" and unsubstantiated (*Id.* ¶ 12.)

On September 13, 2016, Bailey and Dawson allegedly communicated by phone and by text message. In the text message, sent from Bailey to Dawson, Bailey allegedly stated:

> "I am the attorney for the Lalezarian Organization. We are filing a lawsuit suing you for millions of dollars you have caused a result [sic] of your defamatory website. If you have taken down this website please let me know immediately so we can afford [sic] costly litigation. We are also in contact with the location [sic] police station and have a copy of the complaint your ex-girlfriend filed against you and we will be using all means necessary to protect our clients. . . . Adam Leitman Bailey[.]"

(*Id.* ¶ 17.) Dawson alleges that the "statements of fact" in this message are "materially false." (*Id.* ¶ 18.) Dawson further alleges that he has never been subject to any litigation brought by Lalezarian, to any informal or formal police inquiry, or to any civil or domestic complaint or restraining order. Dawson further alleges that Bailey abused his professional status in that he made these allegations knowing them to be false.

Dawson alleges that he denied Bailey's allegations in a subsequent September 13, 2016 phone call, which Dawson states he recorded. On that same phone call, Bailey allegedly stated, among other things, that "[Dawson's] ex girlfriend [sic] backs up that it was [him] and says that [he does] this kind of stuff all the time" and that "[Dawson's] ex-girlfriend is cooperating." (*Id.* ¶ 27.)

The Complaint further states that, on September 27, 2016, Dawson, Bailey, Desiderio, and Mironenko allegedly received an email from an unnamed non-lawyer associate at Adam Leitman Bailey P.C. containing a letter from Bailey as an attachment. The September 27, 2016 letter was allegedly "addressed to WordPress.com, Internet Domain Services Bs Corp., and Whois Privacy with Plaintiff as a recipient." (*Id.* ¶ 38.)[1] Dawson alleges that the September 27, 2016 letter accused Dawson of creating and owning lalezarianfraud.com (specifically, the letter states that "Lalezarian has reason to believe James Dawson, the person who occupied Apartment 1005, at 100 Maiden Lane, until August 28, 2016, is the creator and owner") and using the website to disseminate false and defamatory statements. (*Id.* ¶ 39.) The letter then allegedly demanded the takedown of the website and stated that legal action would commence against Dawson if this were not done.

Dawson alleges that "[t]he allegations made in the [September 27, 2016 letter] . . . are materially false." (*Id.* ¶ 40.) Dawson further alleges that Bailey did not receive any correspondence back from Internet Domain Services Bs Corp., Wordpress.com, or Whois Privacy Corp." Dawson further alleges that Bailey has not taken legal action against these entities.

On December 5, 2016, Dawson allegedly spoke with Desiderio and Bailey over the phone on a call which Dawson states he himself recorded. Dawson alleges that he "asked for a letter 'absolving him of all unwarranted and baseless claims' in exchange for not pursuing litigation for Bailey's abusive conduct." (*Id.* ¶ 46.) Dawson further alleges that Bailey responded that "[t]he claims are real but they just haven't been prosecuted yet" and that Dawson could "[d]o whatever proceedings [he] like[d]." (*Id.* ¶ 47.)

Dawson states that, on December 9, 2016, he himself emailed Desiderio and copied all of Adam Leitman Bailey P.C.'s attorneys.[2] Dawson alleges that he included a URL in his email which pointed to a download of his recording of the September 13, 2016 phone call. Dawson further alleges that he included a screenshot of the September 13, 2016 text message in the email as an attachment.

[1] A copy of this letter appears to be annexed to the complaint.
[2] A copy of this email appears to be annexed to the complaint.

DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201–02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703–704 [2d Dept 2008].) "It is axiomatic that, on a motion brought pursuant to CPLR 3211, our analysis of a plaintiff's claims is limited to the four corners of the pleading." (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 133 Ad3d 96, 105 [1st Dept 2015], *aff'd* —NE3d—, 2017 NY Slip Op 08622 [2017].) "'The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" (*Sigmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994].) "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." (*Kamen v Berkeley Co-op. Towers Section II Corp.*, 98 AD3d 1086, 1086 [2d Dept 2012], citing *Hartman v Morganstern*, 28 AD3d 423, 424 [2d Dept 2006]).

Both Dawson and counsel for Defendants appeared for oral argument on the instant motion on January 29, 2018. Dawson appeared pro se and was sworn in. The Court noted on the record that Dawson's opposition papers submitted with the instant motion were either non-attorney 'affirmations' which were not notarized or, in the case of an "emergency 'affirmation,'" which also was not notarized, and which was e-filed on the morning of January 29, 2018, just before the oral argument.

Dawson asserts four causes of action in the Complaint. The Court dismissed the first, third, and fourth causes of action as against Defendants per its decision on the record at the oral argument for the reasons set forth below.

The **first cause of action**, alleging violations under Judiciary Law § 487, fails to state a cause of action because Defendants did not commence any litigation. Judiciary Law § 487 states that:

> "An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

Here, any alleged deceptive conduct by Defendants did not occur during a pending proceeding in which Dawson was a party. (*See Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669, 669 [1st Dept 2012], citing *Stanski v Ezersky*, 228 AD2d 311, 313 [1st Dept 1996].) As such, the first cause of action fails to state a cause of action and is dismissed.

The **third cause of action**, alleging malpractice, is not applicable because there is no privity or near-privity between Dawson and Defendants. "New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of its client. Thus, absent an attorney-client relationship, a cause of action for legal malpractice cannot be stated." (*Federal Ins. Co. v North American Specialty Ins. Co.*, 47 AD3d 52, 59 [1st Dept 2007].) Here, Dawson and Defendants were not in an attorney-client relationship, and no such relationship is alleged, nor can one be gleaned from the Complaint. As such, the third cause of action fails to state a cause of action and is dismissed.

The **fourth cause of action**, alleging intentional infliction of emotional distress, is duplicative of Dawson's second cause of action, for defamation. (*See Matthaus v Hadjedj*, 148 AD3d 425, 425 [1st Dept 2017].) Even assuming for the sake of argument that Dawson alleges emotional distress caused by something other than Defendants' alleged defamation (as discussed more fully below), Dawson still has no cause of action for intentional infliction of emotional distress.

New York courts have adopted the Second Restatement of Torts' formulation of intentional infliction of emotional distress as subjecting to liability "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." (Restatement [Second] of Torts § 46 [1] [1965]; *see Howell v New York Post Co., Inc.*, 81 NY2d 115, 121 [1993].) "The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional

distress." (*Howell*, 81 NY2d at 121.) Critically, "[t]he first element—outrageous conduct—serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine." (*Id.*)

"The requirements for demonstrating intentional infliction of emotional distress are 'rigorous, and difficult to satisfy.'" (*Rossetti v Ambulatory Surgery Center of Brooklyn, LLC*, 125 AD3d 548, 549 [1st Dept 2015], quoting *Howell*, 81 NY2d at 121.) "Indeed, of the intentional infliction of emotional distress claims considered by [the Court of Appeals], every one has failed because the alleged conduct was not sufficiently outrageous. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Howell*, 81 NY2d at 122.)

The Court, having reviewed every alleged communication quoted within and annexed to Dawson's Complaint, finds that the Complaint does not adequately allege extreme and outrageous conduct. (*See Kerzhner v G4S Government Solutions, Inc.*, 138 AD3d 564, 564 [1st Dept 2016]; *Suarez v Bakalchuk*, 66 AD3d 419, 419 [1st Dept 2009].) "A person may recover only where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation. . . . Mere threats, annoyance or other petty oppressions, no matter how upsetting, are insufficient to constitute the tort of intentional infliction of emotional distress." (*Owen v Leventritt*, 174 AD2d 471, 472 [1st Dept 1991], *lv denied* 79 NY2d 751 [1991].) As such, the fourth cause of action fails to state a cause of action and is dismissed.

Having dismissed the first, third, and fourth causes of action, the Court will now address Dawson's **second cause of action**, for defamation.

As the Appellate Division, First Department, has stated,

> "[d]efamation is 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. To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence

> on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."

(*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 91 [1st Dept 2015] [internal citations omitted].) More recently, Judge Kapnick of the Appellate Division, First Department, stated in a dissent that

> "[t]he elements of defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judge by, at a minimum, a negligence standard, . . . causing special harm or constituting defamation per se. When a qualified privilege applies, the statements are protected unless made with malice, meaning either spite or ill will or reckless disregard of whether they were false []."

(*Stega v New York Downtown Hosp.*, 148 AD3d 21, 36 [1st Dept. 2017].)

A writing that is read by one person other than the defamed, when not authorized by the defamed, satisfies the publication element. (*See Torati v Hodak*, 147 AD3d 502, 504 [1st Dept 2017]; *Barber v Daly*, 185 AD2d 567, 568 [3d Dept 1992]; *Ostrowe v Lee*, 256 NY 36 [1931].) In Dawson's Complaint, only the September 27, 2016 letter is alleged to have been sent to a third party by Defendants.[3] Other communications in the Complaint were either not alleged to have been sent to parties other than Defendants or were sent by Dawson himself.

Defamation must be pled with sufficient particularity to withstand a motion to dismiss. Pursuant to CPLR 3016 (a), "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." Further, "the particular words complained of must be pleaded specifically." (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 132 AD3d 82, 92 n 1 [1st Dept 2015].) "To satisfy the falsity element of a defamation claim, plaintiff must allege that the complained of statement is substantially false." (*Franklin*, 135 AD3d at 94.)

In his Complaint, Dawson quotes from the September 27, 2016 letter and annexes a copy thereto. He then refers to the "allegations" made in the letter being

[3] The question of whether it was received by a third party is not relevant for the current analysis. The Court notes that "[a] defamatory writing is not published if it is read by no one but the one defamed. Published, it is, however, as soon as read by any one else." (*Ostrowe*, 256 NY at 38.)

"materially false" but does not refer to any specific statement. At oral argument, when asked to identify the defamatory statement, Dawson indicated that the complained-of statement was that "Lalezarian has reason to believe [Dawson] . . . is the creator and owner of . . . lalezarianfraud.com and [] is using said domain name and website to disseminate [] false and defamatory statements." (Spiegel affirmation, exhibit A, ¶ 39; *see* tr, at 77, lines 12–26.) Regardless, Dawson's Complaint does not indicate this statement with any specificity—as being a defamatory statement or otherwise. The statement must be indicated with specificity. As the Appellate Division, First Department, has stated,

> [i]n evaluating whether a cause of action for defamation is successfully pleaded, [t]he 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.

(*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].)

It is not possible for this Court to evaluate particular words in the September 27, 2016 letter because Dawson has failed in the Complaint to point to a specific statement or statements therein which he alleges are false. Rather, Dawson states in his Complaint that the "allegations" in the letter are "materially false." The first element of defamation is a false statement. The Complaint does not point to any one specific statement which is allegedly false. As such, the second cause of action for defamation fails to state a cause of action insofar as it fails to conform to the heightened pleading requirements associated with a cause of action for defamation in this state.

The Court need not reach the sufficiency of Dawson's pleading of the other elements of defamation in its analysis.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendants Adam Leitman Bailey P.C., Adam Leitman Bailey, Esq., John M. Desiderio, Esq., and Vladimir Mironenko, Esq. pursuant to CPLR 3211 (a) (7) to dismiss the verified complaint of Plaintiff pro se James Dawson is granted; and it is further

ORDERED that the first, third, and fourth causes of action in the verified complaint are dismissed, with prejudice; and it is further

ORDERED that the second cause of action in the verified complaint is dismissed, with leave to replead, to the extent that Plaintiff may serve an amended verified complaint so as to replead the second cause of action within 20 days of service on Plaintiff of a copy of this order with notice of entry; and it is further

ORDERED that Defendants serve a copy of this order with notice of entry on Plaintiff within 10 days of entry; and it is further

ORDERED that, in the event that Plaintiff fails to serve and file an amended verified complaint in conformity herewith within such time, leave to replead shall be deemed revoked, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by Defendants' counsel attesting to such noncompliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to Defendants as taxed by the Clerk.

The foregoing constitutes the decision and order of the Court.

Dated: February 7, 2018
New York, New York

J.S.C.
HON. ROBERT D. KALISH

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE