Barbato v Giacin
2019 NY Slip Op 33407(U)
November 14, 2019
Supreme Court, New York County
Docket Number: 159808/2017
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 17

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KRISTIN BARBATO,

Plaintiff,

Index No. 159808/2017

-against-

DECISION/ORDER

JAMES GIACIN and MELINDA (MINDY) BERRY GIACIN,

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff commenced this action seeking damages for libel per se, prima facie tort, and intentional infliction of emotional distress. Defendants make this pre-answer motion to dismiss the complaint on the ground that New York lacks jurisdiction over them, and that plaintiff fails to state a cause of action.

Factual and Procedural Background[1]

On June 15, 2015, plaintiff was introduced to defendant James Giacin ("James") at the New York Athletic Club ("NYAC") by a mutual friend. James told plaintiff that he was in New York on business, where he kept a residence for that purpose, and that he worked in finance. At the time of their initial meeting, James was not wearing a wedding ring, told plaintiff he was divorced and that he had four children. Plaintiff and James made plans to go out to dinner the next week.

At dinner, James admitted that he was not divorced and that he had a wife and four

[1] All the facts presented herein are taken from the complaint and accepted as true (see CPLR 3211; *Children's Magical Garden, Inc. v Norfolk St. Dev., LLC*, 164 AD3d 73 [1st Dept 2018]).

children, but that he was in a terrible marriage and in the process of getting a divorce. Plaintiff then informed James that she was not interested in pursuing a relationship with him because he had lied, and he was married.

In the following days in New York, James pursued plaintiff and repeatedly sought her out at the NYAC bar, begging her to talk to him and asking her to go out with him. He asked her, "What if I wasn't married? Would you date me then?" On one occasion, James chased her down the street screaming her name while she got into a cab. Plaintiff rebuffed all his advances. Thereafter, James emailed, called and texted plaintiff constantly with many of the same questions.

On July 1, 2015, James wrote to plaintiff saying that his wife found the texts. James then told his wife that plaintiff was stalking him. Thereafter, defendant Melinda Berry Giacin ("Melinda") began harassing plaintiff; calling and emailing her, and posting on her social media accounts.

On October 29, 2015, Melinda emailed plaintiff calling her an immoral coward. In November 2015, Melinda wrote on her Instagram account that she was going to come to New York to surprise plaintiff. On January 31, 2016 and February 11, 2016, James emailed plaintiff saying, among other things, "this is the last time you'll ever hear from me."

In February and March 2016, James and Melinda continuously emailed plaintiff and ridiculed her on her social media accounts.

On April 30, 2016, Melinda wrote to plaintiff:

> "[Y]ou will always be the ugly, fat, big nose loser that you are .. . You get exactly what you deserve and that is to be a lonely ugly bitch for the rest of your life . . . I have a lot of friends at the NYAC and they tell me your every move . . . I guess Jim forgot to tell you that I have also been going there for 15 years, Kristin,

> some day very soon we will meet face to face so please take long [sic] look in the mirror at what a desperate insecure person you are."

On May 11, 2016, Melinda threatened to inform the CEO of the company in which plaintiff worked that plaintiff slept with married men. On June 21, 2016, Melinda told plaintiff that she would be spending more time in New York for the purpose of meeting plaintiff. From July 2016 through November 2016, Melinda continued to harass and stalk plaintiff.

On November 1, 2016, James sent plaintiff an email which stated, "Do all your ugly dresses look the same or is your wardrobe so limited that you wear the same dress to all boxing events . . . same ugly dress, same ugly jewelry."

On November 22, 2016, Melinda told plaintiff that she was an "ugly bitch" and she would see her next week, and that plaintiff should be "ready."

On November 22, 2016, Melinda posted a picture of plaintiff on Instagram with the hashtags "#adulterers #sleepswithmarriedmen #homewreckers #shesahomewrecker" and posted "Messing with married men will get you in trouble Kristin!"

In late 2016 or early 2017, NYPD Detective Richard Dixon filed a misdemeanor accusatory instrument against James, charging him with Penal Law § 240.30(2), aggravated harassment in the second degree and Penal Law § 240.26(3) harassment in the second degree.

On November 26, 2016, Detective Dixon called James. During the call, James begged Detective Dixon not to arrest him, and promised that he would stop sending plaintiff unwanted messages and that she would never hear from him again.

On January 19, 2017, plaintiff obtained a Family Court order of protection against James. The order of protection prohibited any third-party contact on behalf of James. The order of

protection was issued on consent of James, who appeared in Family Court.

On March 22, 2017, plaintiff obtained a Criminal Court order of protection against James, again on consent, which also prohibited third party contact. The criminal order of protection was scheduled to expire on March 21, 2019. The criminal order of protection was issued after James voluntarily plead guilty to a violation of Penal Law § 240.20, disorderly conduct.

Nevertheless, Melinda continued to harass plaintiff. On June 25, 2017, Melinda posted on Instagram:

> "What kind of woman quotes the Bible on Instagram and just days later admits to having an intimate relationship with a man she knew had a wife and 4 children at home waiting for him to return from NYC? What kind of woman shows up at a married man's hotel after 10:30 p.m.? Kristin Barbato did so what kind of woman is she? She obviously doesn't care about family."

On August 12, 2017, Melinda posted on Instagram "Why are you hanging out with Kristin Barbaro [sic]? You know she hooks up with married men at the NYCA, right??" Melinda then direct-messaged plaintiff's business partner with a similar message.

On September 3, 2017, Melinda posted on Instagram "Eww is Kristin still trying to hook up with married men at the NYAC?"

On October 3, 2017, Melinda posted on Instagram "Kristin Barbato tells a married father of 4 she wants to have an affair and then is angry when people fine [sic] out. Is her lack of morals [sic] why she is twice divorced?"

On November 3, 2017, plaintiff commenced this action against James and Melinda alleging a cause of action for libel per se, prima facie tort, intentional infliction of emotional distress, and seeks a permanent injunction preventing James and Melinda from threatening and

harassing her and precluding them from contacting any of her friends or colleagues. Plaintiff alleges that due to James and Melinda's conduct, on November 22, 2016, she was fired from her job at the New York Power Authority costing her at least $100,000, and on June 25, 2017, she was fired from her job at Edison Energy costing her at least $100,000. Plaintiff also seeks a direction from the court that James and Melinda's children and ten closest friends be instructed in writing that plaintiff did not have a sexual relationship with James, and that they are not permitted to contact her or use her name on any social media.

James and Melinda make this pre-answer motion to dismiss on the ground that New York does not have jurisdiction over them, and that plaintiff failed to state a cause of action for libel per se, intentional infliction of emotional distress, and prima facie tort. James and Melinda also argue that plaintiff's claims are time-barred and that no cause of action for a permanent injunction exists in New York.

James and Melinda, residents of Missouri, claim that New York does not have jurisdiction over them because they do not transact business in New York. Further, all of Melinda's acts occurred from the keyboard of her computer in Missouri. James and Melinda argue that plaintiff fails to state a claim for libel per se because she has not alleged her claims with particularity. They also argue that allegations of adultery are not defamation per se as a matter of law, and in any event, plaintiff has not alleged special damages. Further, with respect to James, they argue that James merely told his wife he had an affair with plaintiff, and that alone fails as a matter of law because there is no interspousal defamation.

James and Melinda argue that plaintiff's action for intentional infliction of emotional distress must also be dismissed because it is merely a restatement of her defamation claim.

Further, plaintiff alleges that the conduct asserted in the complaint is neither extreme or outrageous, nor does it transcend the boundaries of decency. James and Melinda argue that the actions alleged are "the garden-variety case of a man with something of a mid-life crisis . . . coupled with a wife's warning a perceived competitor to stay away from her husband" (mem of law at 19). James and Melinda argue that there was no intent to cause plaintiff emotional distress, rather the intent was to protect the marriage.

James and Melinda further contend that plaintiff fails to allege a cause of action for prima facie tort as it is duplicative of her other claims.

James and Melinda argue that all of plaintiff's claims attributed to James occurred in 2015 and 2016 with the last act occurring on February 11, 2016. However, this action was not commenced until November 2017, thus any act occurring before November 2016 is time-barred.

Finally, James and Melinda argue that New York does not recognize a cause of action for a permanent injunction.

In opposition, plaintiff argues that James is subject to the jurisdiction of New York as a matter of law because he has already voluntarily submitted to the jurisdiction of the New York family and criminal courts based on the same actions alleged in the complaint. Further, by his own admission, James routinely transacts business in New York. Plaintiff argues that Melinda is also subject to the jurisdiction of New York since she is a co-conspirator with James in their conspiracy to harass her. Moreover, it is clear that Melinda's posting on Instagram, and calling and emailing plaintiff and private messaging plaintiff's business partner were all done with the intent to harm plaintiff in New York.

Plaintiff also argues that she has sufficiently pled an action for libel per se since James

and Melinda posted on her Instagram account which was published to more than seventy of plaintiff's followers including her friends and business associates. Further, plaintiff claims that it is well settled law that accusing someone of adultery is libel per se, and therefore, her libel per se action does not require an allegation of special damages.

Plaintiff argues that she has properly alleged a cause of action for intentional infliction of emotional distress because James and Melinda's bullying and abuse spanned two years. Further, she sufficiently alleged a cause of action for prima face tort, and in any event, is permitted to plead in the alternative at this stage of litigation.

Plaintiff argues that her claims are not time-barred because CPLR 215(8) allows her one year after the termination of a criminal action to bring an action based upon the acts in the criminal action.

Discussion

"On a motion to dismiss for failure to state a cause of action, '[w]e accept the facts as alleged in the complaint as true, accord plaintiff [] the benefit of every.possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Wilson v Dantas*, 29 NY3d 1051, 1056–57 [2017] quoting *Leon v Martinez*, 84 N.Y.2d 83, 87–88 [1994]).

Jurisdiction

James and Melinda argue that, as domiciliaries of Missouri, New York lacks personal jurisdiction over them. With respect to James, their arguments are without merit. CPLR § 302 (a) (2) requires a non-resident domiciliary to have purposely committed a tortious act while he or she—or his or her agent—is physically present in New York State, except for a cause of action

for defamation (*see Bensusan Restaurant Corp. v King*, 126 F3d 25, 28-9 [2d Cir 1997]). An "articulable nexus" must also exist between the act and the claim asserted (*McGowan v Smith*, 52 NY2d 268, 272 [1981]).[2]

Plaintiff has alleged that in New York, from on or about June 15, 2015 to sometime thereafter, James sought out plaintiff at the NYAC continually asking her why she would not date him. She also alleges that he chased her down the street while she was getting into a cab yelling her name. She further alleges that, while in New York, James repeatedly called and emailed her. Plaintiff claims that this continuing pattern harassing and stalking behavior continued while James was in Missouri. Further, it is undisputed that on January 19, 2017, James submitted to the jurisdiction of the New York Family Court and consented to an order of protection against him. Likewise, on March 22, 2017, James submitted to the jurisdiction of the New York Criminal Court, and consented to an order of protection against him, which was to be in full force and effect until March 22, 2019. James also voluntarily plead guilty to a violation of Penal Law § 240.20. There can be no dispute that the acts which form the basis upon which James consented to the jurisdiction of the courts of New York are the same acts upon which plaintiff relies for the claims in her complaint. Indeed, in his affidavit, James states that he agreed to the terms of the orders of protection and pled guilty to a violation of the penal law, to end the New York litigation. Accordingly, James has consented to the jurisdiction of New York (*see National Equip. Rental, Ltd. v Szukhent*, 375 US 311, 316 [1964] [a defendant can consent to jurisdiction]).

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[2] There is an issue based on the allegation in the complaint that James maintains an residence in New York, as to whether it is necessary to invoke jurisdiction over non-domiciliaries under CPLR 302(a) in the first instance.

With respect to Melinda, all the acts attributed to her occurred in Missouri. There are no allegations that Melinda was ever actually present in New York during the time of the alleged harassment of plaintiff, although plaintiff alleges that Melinda routinely threatened to come to New York to confront her. Nevertheless, plaintiff argues that there is jurisdiction over Melinda pursuant to CPLR 302(a)(2), which grants New York jurisdiction over non domiciliaries if they commit tortious acts within New York, except for a cause of action sounding in defamation (*see* CPLR 302 [a][2]). The issue here is whether Melinda, sitting at her computer in Missouri, can commit a tortious act in New York by calling, emailing, and posting on social media, thereby injuring plaintiff in New York.

The decision in *Davidoff v Davidoff*, (12 Misc3d 1162 [A], 2006 NY Slip Op 51002[U] [Sup Ct NY County 2006]) is instructive. In *Davidoff*, plaintiff's aunt and uncle, who reside in Florida, accessed plaintiff's business internet website, deleted plaintiff's files on the business website, and then placed their own picture of plaintiff on the website with the words "Pig of the Year," and "I'm going to eat everything in site" next to the that picture. Plaintiff commenced an action against his aunt and uncle seeking damages for, among other things, defamation, intentional infliction of emotional distress, and intentional interference with a business. Defendants moved to dismiss the complaint on the ground that New York lacked jurisdiction over them since they lived in Florida and had no contacts with New York. In analyzing the issue of jurisdiction, the *Davidoff* court found that defendants' actual presence was not a necessary prerequisite to jurisdiction in New York, noting that, depending on the nature of the tort, a tortious act can occur in New York while a defendant is physically present outside of New York. Nevertheless, under the facts in *Davidoff*, the court found that the tortious acts of defendants

occurred in Florida, where defendants were located when they accessed the plaintiff's website hosting service and typed the offensive material on to plaintiff's website. Thus, the court found that, among other things, New York did not have jurisdiction over defendants. Applying the analysis in *Davidoff*, New York does not have jurisdiction over Melinda under CPLR 302(a) (2) because Melinda's tortious acts occurred in Missouri where she made calls to plaintiff and sat at her computer writing emails to plaintiff, and posting on plaintiff's social media accounts.

Plaintiff argues further, that even if Melinda is not subject to the jurisdiction of New York pursuant to CPLR 302 (a)(2), she is subject to New York jurisdiction as co-conspirator with James in their conspiracy to harass her. Under the co-conspirator doctrine, "under certain circumstances a person may be subjected to jurisdiction under CPLR 302 (a)(2) on the theory that his co-conspirator is carrying out activities in New York pursuant to the conspiracy" (*Socialist Workers Party v Attorney General of the United States*, 375 F Supp 318, 321 [SDNY 1974]). To establish jurisdiction on this basis, plaintiff must make a prima facie factual showing of conspiracy (*see Merkel Assoc., Inc. v Bellofram Corp.*, 437 F Supp 612, 617 [WDNY 1977]). The requisite relationship between a defendant and its New York co-conspirator is established by a showing that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted 'at the direction or under the control,' or 'at the request of or on behalf of' the out-of-state defendant" (*Chrysler Capital Corp. v Century Power Corp.*, 778 F Supp 1260, 1268-69 [SDNY 1991] quoting *Dixon v Mack*, 507 F Supp 345, 350 [SDNY 1980]).

The plaintiff must come forward with specific facts that connect defendant to specific

acts in New York, and that defendant is part of the conspiracy. Here, plaintiff claims that after Melinda discovered James's texts and emails to her, James and Melinda conspired to harass her, and all of these acts are the direct result of James's tortious conduct in New York.

Plaintiff relies on *Dixon v Mack*, (507 F Supp 345 [SDNY 1980]), to support her co-conspirator theory. In *Dixon*, plaintiff, formerly a member of the Unification Church was kidnapped in New York and taken to a location in Pennsylvania for "deprogramming." While in Pennsylvania, plaintiff's kidnappers contacted defendant William Rick ("Rick"), a psychiatrist, who agreed to meet with plaintiff and work with the kidnappers in "deprogramming" plaintiff. One week later, plaintiff escaped and returned to New York. Plaintiff commenced an action against his kidnappers and Rick for, among other things, deprivation of his civil rights. Rick moved to dismiss the complaint against him, since he was a resident of Pennsylvania and had no contact with New York. In denying Rick's motion to dismiss, the court stated that in agreeing to "deprogram" plaintiff with the knowledge of plaintiff's abduction, Rick joined the kidnappers' conspiracy and was subject to same jurisdiction as his co-conspirators. The court stated that, "[b]y joining the conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New York, Rick 'purposely (availed himself) of the privilege of conducting activities within the forum state,'" (*id.* at 352 quoting *Hanson v Denckla*, 357 US 235, 253 [1958]).

Here, plaintiff has alleged sufficient facts to support her claim that James and Melinda conspired to harass her. The complaint alleges that James and Melinda "embarked – even enlisting the assistance of their daughter Sydney – on a vicious conspiracy, devoid of the consideration that there was a human being receiving their vitriol, to harass, defame, destroy

(both personally, emotionally and professionally) and otherwise intentionally to make [p]laintiff's life as miserable as they could" (complaint, ¶ 5). Furthermore, the complaint alleges that James and Melinda worked as a "husband and wife team" (*id.* at ¶ 1). Plaintiff asserts that James harassed her in person while at the NYAC and called and emailed her while he was in New York. Upon James' return to Missouri, he continued to contact her via email and text, and when Melinda discovered the texts, she joined James' pursuit of plaintiff. Melinda contacted plaintiff via email and social media at the same time James was texting and emailing plaintiff.

Therefore, at this juncture of the litigation, there are at the very least inferences that James and Melinda acted together to commit the subject tortious acts. Plaintiff has sufficiently alleged that James is subject to the jurisdiction of New York and that Melinda, with knowledge of James's tortious acts in New York, joined James as his co-conspirator in continuing to harass plaintiff. Further, Melinda benefitted from the conspiracy, as she herself claims that she was harassing a person she viewed as a threat to her marriage. Thus, plaintiff has sufficiently alleged that James and Melinda conspired to harass her in New York, thereby demonstrating that Melinda purposely availed herself of the privilege of conducting activities in New York (*see Gudaitis v. Adomonis*, 643 F Supp 383 [EDNY 1986] [Plaintiff's allegations that three of his acquaintances, one of whom had no contact with New York, had conspired to induce him to travel to Lithuania and marry their niece (for the undisclosed purpose of getting her a green card), and then persuaded her to live with them in Massachusetts, is sufficient to establish a prima facie showing of conspiracy]; *Chiosie v Chiosie*, 104 AD2d 962 [2d Dept 1984][summary judgment dismissing complaint for lack of jurisdiction denied where plaintiff alleged that a New Jersey defendant permitted the use of her car for the abduction of plaintiff's children, and later

withheld information about the children's whereabouts]). Accordingly, New York has jurisdiction over both James and Melinda under a co-conspirator theory.

Further, plaintiff has set forth sufficient factual allegations to raise an issue of fact regarding whether New York has jurisdiction over Melinda pursuant to CPLR 302 (a)(3). CPLR 302 (a)(3) permits New York jurisdiction over a non-domiciliary who commits a tortious act outside of New York that causes injury in New York, except for a cause of action of defamation of character, if plaintiff can also demonstrate that defendant either: (1) transacts business in New York, or (2) derives substantial revenue from interstate or international commerce (*see* CPLR 302 [a] [3]). Notably, the claims sued upon do not need to relate to defendant's involvement in interstate or international commerce (*see* Siegel, NY Prac § 88 at 194 [6th ed 2018]). Although plaintiff bears the burden of proof as the party seeking to assert jurisdiction, that burden "does not entail making a prima facie showing of personal jurisdiction; rather, plaintiff need only demonstrate that it made a 'sufficient start' to warrant further discovery" (*Bunkoff Gen. Contrs. v State Auto. Mut. Ins. Co.*, 296 AD2d 699, 700 [3d Dept 2002], quoting *Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]). The issue of whether long-arm jurisdiction exists often presents complex questions; "[d]iscovery is, therefore, desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits" (*Peterson*, 33 NY2d at 467).

Here, while the complaint makes no allegation that Melinda transacts business in New York or derives substantial income from interstate or international commerce, in opposition to this motion, plaintiff submits a copy of a LinkedIn page for Melinda's Limited Liability Company, Strategic Technologies Group, LLC. The LinkedIn page indicates that Melinda has

substantial experience in working with "international markets," and has "experience in the Global marketplace leading teams and directing strategies in Europe, Asia, and South America" (*see* Moody affirmation, exhibit D). Further, in her affidavit in reply, Melinda acknowledges that in 2014 she earned income from interstate and/or international commerce, however, the amount was minimal and she has not earned any such income from interstate and/or international commerce since. Furthermore, the complaint alleges that James maintained an apartment in New York and that Melinda has been visiting the NYAC for many years, which creates an inference that both James and Melinda stayed at their residence in New York to transact business.

Based upon the LinkedIn page, Melinda's affidavit and the allegation in the complaint that James maintained an apartment in New York, plaintiff has provided a "sufficient start" to warrant further discovery as to whether plaintiff may assert jurisdiction over Melinda pursuant to CPLR 302 (a) (3), thus requiring denial of this motion to dismiss on lack of jurisdiction grounds (*see Archer-Vail v LHV Precast Inc.*, 168 AD3d 1257 [3d Dept 2019].[3]

Libel Per Se – First Cause of Action

James and Melinda argue that plaintiff's first cause of action sounding in libel per se must be dismissed because she failed to plead the libel with particularity, that allegations of adultery are not libelous, and that James could not have defamed plaintiff when he told Melinda, his spouse, that he had had an affair with plaintiff.

To state a cause of action alleging defamation, a plaintiff must allege that the defendant published a false statement, without privilege or authorization, to a third party, constituting fault

[3] Although James denied the allegation that he maintained a residence in New York in his Affidavit, for purposes of this pre-answer motion pursuant to CPLR 3211, the allegation in the complaint to the contrary is sufficient to survive dismissal.

as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se (*see Rosner v Amazon.com*, 132 AD3d 835 [2d Dept 2015]; *lv appeal den*, 26 NY3d 917 [2016]). "A defamation plaintiff must plead special damages unless the defamation falls into any one of four per se categories: (1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a "loathsome disease"; and (4) statements that impute unchastity to a woman" (*Nolan v State of New York*, 158 AD3d 186, 195 [1st Dept 2018]; *see Liberman v Gelstein*, 80 NY2d 429, 435 [1992]; *Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept. 1996]; *lv appeal den* 89 NY2d 805 [1996]). Any written article is "actionable without alleging special damages if it 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" (*Sydney v MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211–212 [1926]; *see Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977]; *rearg den* 42 NY2d 1015 [1977]; *cert den* 434 US 969 [1977]).

On a motion to dismiss a claim for libel on the ground that the offending statement is not defamatory, the court must determine "whether the contested statements are reasonably susceptible of a defamatory connotation" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]; *see James v Gannett Co.*, 40 NY2d 415, 419 [1976]; *rearg den* 40 NY2d 990 [1976]). The court must also read the alleged defamatory words against the background of their issuance, giving due consideration to the circumstances underlying the publication of the communication in which the words appeared (*James*, 40 NY2d at 420). A communication that states or implies that a person is promiscuous is defamatory (*James*, 40 NY2d at 419; *see Leser v Penido*, 62

AD3d 510 [1st Dept 2009]; *Rejent v Liberation Publs.*, 197 AD2d 240 [1st Dept 1994]). Contrary to James and Melinda's contentions, published written statements accusing a person of adultery are considered libel per se (*see Donati v Queens Ledger Newspaper Grou*p, 240 AD2d 696 [2d Dept 1997]).

Here, plaintiff has alleged, at specific times and places, instances in which Melinda wrote statements that claimed that plaintiff slept with married men, and that she was a homewrecker. These statements are sufficiently particularized to support a claim for libel per se. Moreover since Melinda published these libelous statements by posting them on plaintiff's social media accounts, and allegedly sending such statements to plaintiff's business partner, plaintiff has sufficiently alleged a cause of action of liber per se against Melinda (*see Dennis v Napoli*, 2015 NY Slip Op 31540 [U], 2015 WL 4885340 [Sup Ct, NY County 2015] [Allegations that defendant sent numerous letters, emails, texts and Facebook messages to plaintiff's family, friends, employers and future employers defaming plaintiff by calling her a slut and sex addict, as well as posting vicious and insulting comments on plaintiff's Facebook were sufficient to allege cause of action for defamation], *affd* 148 AD3d 446 [1st Dept 2017]). However, the statute of limitations for actions to recover damages for libel must be commenced within a one-year period from the accrual of the cause of action (*see* CPLR 215[3]) and therefore any claims regarding libelous statements made by Melinda prior to November 3, 2016, a year prior to the commencement of this action, are dismissed.

With respect to James, the first cause of action must be dismissed. The complaint fails to allege any libelous statements made by James, and even if it did, there is no allegation that James published any libelous statements about plaintiff. Notably, the complaint only alleges that James

continually emailed and texted plaintiff, and that he told his wife that he had an affair with plaintiff. Statements made by James to plaintiff, in the absence of third parties cannot be the basis for a defamation claim (*see generally Rosner,* 132 AD3d at 836 [defamatory statements must be published to a third party]). Moreover, any statements James made to Melinda about plaintiff cannot form the basis for a libel action since, under New York law, "a communication from one spouse to another may not be deemed a publication" (*Lawler v Merritt*, 182 Misc 648 [Sup Ct, NY County 1944], *affd* 269 App Div 662 [1st Dept 1945]; *see also Medcalf v Walsh*, 938 F Supp2d 478, 485 [SDNY 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 [EDNY 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."]; *Dennis v Napoli*, 2015 NY Slip Op 31540 [U] *6, 2015 WL 4885340 [Sup Ct NY County 2015]["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"]). Thus, since James and Melinda are spouses, and the communications between them do not constitute publication, plaintiff's defamation claim against James fails as a matter of law.

Prima Facie Tort – Second Cause of Action

Prima facie tort affords a remedy for "'the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful'" (*ATI, Inc. v Ruder & Finn*, 42 NY2d 454, 458 [1977]; *see also Wehringer v Helmsley-Spear*, Inc., 59 NY2d 688 [1983]). The requisite elements of a cause of action for 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 (*see Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 [1983]; *Curiano v Suozzi*, 63 NY2d 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*, 59 NY2d at 333). There is no recovery in prima facie tort unless defendant acts from "disinterested malevolence," which means "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]). Further, a critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages (*see Curiano*, 63 NY2d at 117).

Here, the complaint sufficiently states a claim for prima facie tort against James and Melinda. The complaint alleges that James and Melinda maintained a systematic and intentional course of harassment against plaintiff. Particularly, James continually called and emailed plaintiff, with the specific intent to harm and humiliate her, until he was required to stop by two orders of protection. Further, Melinda also called and emailed her, and published defamatory statements with the specific intent and desire to injure plaintiff. Plaintiff also alleges that James and Melinda's course of conduct was solely motivated by spite and malevolence, and had no legal justification. Further, the complaint alleges that as a result of James and Melinda's actions, plaintiff lost two jobs costing her at least $200,000. These allegations, when taken in the context of the entire complaint which contains allegations of a two-year course of conduct by James and Melinda to harass, injure and defame plaintiff, motivated by malice, is sufficient to state a cause

of action for prima facie tort against James and Melinda (*see Dennis v Napoli*, 2015 NY Slip Op 31540 [U] *3, 2015 WL 4885340 [Sup Ct NY County 2015][defendant "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; complaint alleging that defendant published said defamatory statements with "the specific intent and desire to injure [plaintiff] by fraud and deceit" and alleging that such conduct was "motivated by spite and malevolence" was sufficient to state a cause of action for prima facie tort in the context of a two year course of conduct to "harass, injure and defame plaintiff"]) .**Intentional Infliction of Emotional Distress – Third Cause of Action**

This 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. The 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 (*see Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Generally, courts have focused on the outrageousness element, the one most susceptible to determination as a matter of law (*id.* at 121-22). For a claim of intentional infliction of emotional distress, a plaintiff "must allege more than conduct that causes inconvenience or embarrassment, even if such conduct continues for a protracted period of time" (*Doin v Dame*, 82 AD3d 1338, 1340 [3d Dept 2011]; *Eves v Ray*, 42 AD3d 481, 483 [2d Dept 2007]["[P]laintiff, in attempt to intimidate the defendant during his legal representation of the plaintiff's former wife in a custody proceeding, threatened the defendant both physically and financially, and stalked him. Moreover,

the plaintiff continued to engage in this conduct despite the fact that the defendant had obtained a temporary order of protection and was pursuing a harassment charge against the plaintiff"]).

Here, plaintiff has sufficiently set forth a claim for intentional infliction of emotional distress by alleging that Melinda and James continually harassed her from June 2015 to November 2017, in-person (James), through emails and phone calls (James and Melinda), and on social media (Melinda), calling her names, threatening to come to New York to confront her, and asserting on social media that she slept with married men and was a homewrecker.

Preliminary Injunction – Fourth Cause of Action

A preliminary injunction is a form of equitable relief and not a cause of action (*see Adams v Washington Group, LLC*, 11 Misc.3d 1083[A] [Sup Ct Kings County 2006] *affd as mod* 42 AD3d 475 [2d Dept 2007]). Accordingly, the fourth cause of action must be dismissed.

Statute of Limitations

James and Melinda argue that, with respect to the prima facie tort and intentional infliction of emotional distress actions, any of the acts attributed to them in the complaint that occurred between June 2015 and November 3, 2016, are time barred, since the statute of limitations for those torts is one year from the commencement of the action, November 3, 2017. This argument is without merit.

In the complaint, plaintiff has alleged that through a continuous course of conduct from June 2015 through November 2017, James and Melinda have intentionally harassed, humiliated, and intimidated her causing damages. Therefore, her intentional infliction of emotional distress and prima facie tort claims are not barred by the one-year statute of limitations (CPLR 215), and instead are governed by the continuing tort doctrine, permitting 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 (*see Shannon v MTA Metro-N. R.R.*, 269 AD2d 218 [1st Dept 2000]; *Ain v Glazer*, 257 AD2d 422 [1st Dept 1999]; *Drury v Tucker*, 210 AD2d 891 [4th Dept 1994]).

Conclusion

Accordingly, it is

ORDERED that defendants' motion to dismiss the first cause of action is granted to the extent of dismissing all claims of libel per se against James and those claims of libel per se against Melinda which occurred prior to November 3, 2016; and it is further

ORDERED that defendants' motion to dismiss the fourth cause of action for a preliminary injunction is granted; and it further

ORDERED that defendants' motion is denied in all other respects; and its further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

DATED: November 14, 2019

ENTER:

HON. SHLOMO S. HAGLER, J.S.C.