SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
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RAIMONDA JARUSAUSKAITE,

Plaintiff

-against-

ALMOD DIAMONDS, LTD., MORRIS GAD, MARK SEGALL, LIOR YAHALOMI, HENRY FAYNE, DENNIS SUSKIND, and DAVID FRANKEL,

Defendants

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Index No. 154732/2019

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Plaintiff sues to recover damages for a hostile work environment, emotional distress, defamation, and other torts by her employer, defendant Almod Diamonds, Ltd.; one of its owners, defendant Gad, whom plaintiff refers to as both its Chief Operating Officer and its CEO; and members of its Board of Directors, defendants Segall, Yahalomi, Fayne, Suskind, and Frankel. Plaintiff alleges that Almod Diamonds and Gad intentionally harassed and threatened her so that she would quit her job at the Almod Diamonds store in Playa del Carmen, Mexico, and that the Board of Directors ignored the harassment and threats and failed to intervene on her behalf.

I. THE COMPLAINT

Plaintiff claims that Almod Diamonds is the corporate alter ego of Gad, who uses the corporation's funds for his personal interests and financial gain. In 2008, plaintiff was hired to be the general manager for the Almod Diamonds store in Playa del Carmen.

Defendants' alleged tortious conduct began in the spring of 2016, in Almod Diamonds' New York office, when Gad displayed a photograph of two nude women, one of whom he claimed was plaintiff, so as to shame and degrade her. In an e-mail dated January 9, 2017, to members of the management team in the United States and Mexico, Gad claimed that plaintiff was losing money for the corporation and had stolen from the Playa del Carmen store's construction budget, even though she actually had saved $120,000 from the construction budget.

Plaintiff alleges that in February 2017, after the Playa del Carmen store opened, Gad authorized unannounced audits of the store, and, after two surprise inspections uncovered no impropriety, he began re-hiring former discharged Almod Diamonds employees as "Brand Managers" to prevent the Playa del Carmen store from becoming profitable. Plaintiff further alleges that Gad interfered with her management of the store by controlling the Brand Managers' daily schedules, allowing the Brand Managers

to miss shifts without reporting their unexcused absences as required by Mexican labor law, and causing shortages in staff coverage of the store as well as the violations of law.

On August 24, 2017, armed robbers entered the Almod Diamonds Playa del Carmen store, destroyed its jewelry showcases, and stole its merchandise. Plaintiff alleges that on October 31, 2017, Gad, using corporate funds, retained a law firm in Playa del Carmen to fabricate a reason to terminate her employment. In November 2017, the law firm submitted a report implying, based on her irregular behavior after the store's robbery, that she had orchestrated the robbery. Around the same time, Gad sent her threatening messages, which she forwarded to other Almod Diamonds personnel requesting their protection, including Almod Diamonds' head of security, its Playa del Carmen security director, its regional director, its general counsel, and Albert Gad and Donna Gad Hecht, Morris Gad's siblings who co-owned the corporation with their brother.

Plaintiff alleges that on January 2, 2018, when the Playa del Carmen store was in the process of permanently closing, the Brand Managers, following Morris Gad's instructions, staged a public protest because she would not let them work. This protest received media coverage, leading to social media posts

threatening plaintiff and her family. In response, plaintiff again requested protection from Almod Diamonds' general counsel. On or about January 12, 2018, Gad filed criminal charges against plaintiff for the robbery of the Almod Diamonds Playa del Carmen store. Plaintiff spent more than $30,000 defending herself against the criminal charges. As a condition to reimbursing plaintiff for her legal expenses, Albert Gad's attorney asked plaintiff to release Albert Gad and any entity in which he held an ownership or controlling interest, which included Almod Diamonds, from any liability. Plaintiff claims that she has incurred more than $60,000 in attorneys' fees and expenses to date because she refused to sign the release, and the criminal charge that Morris Gad filed against plaintiff in Mexico remains pending.

On February 13, 2018, Gad disseminated an e-mail to a dozen unidentified Almod Diamonds personnel, claiming that plaintiff ran away from the police rather than assisting in the police's investigation of the Almod Diamonds store's robbery. In response to escalating threats and lack of assistance from Almod Diamonds, plaintiff filed a complaint with the Mexican police against Gad, documenting his harassment of her. Plaintiff subsequently filed a second complaint with the Mexican police against Gad for his threats against her.

Plaintiff continued to request assistance from Almod Diamonds personnel, including its Human Resources Department, to no avail. On May 8, 2018, plaintiff e-mailed Almod Diamonds' general counsel, its regional director for Mexico, and Albert Gad and Donna Gad Hecht to request information about the pending criminal charge against her, but received no answer.

In January 2019, plaintiff and her attorney traveled to New York to complain directly to the Board of Directors about Morris Gad's actions. The Board of Directors hired an independent law firm to investigate his actions and prepare a report for the Board's review, but then refused to accept the completed report to avoid liability.

II. STANDARDS APPLICABLE TO DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

In determining defendants' motions to dismiss the complaint under C.P.L.R. § 3211(a)(7), the court must accept plaintiff's factual allegations as true, liberally construe them, and draw all reasonable inferences in her favor. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015). The court will not give such

consideration, however, to allegations that consist of only bare legal conclusions, Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); David v. Hack, 97 A.D.3d 437, 438 (1st Dep't 2012), with which the complaint here is replete, or to its allegations of claims that are not legally cognizable. Instead, the court accepts as true only plaintiff's allegations of facts that set forth the elements of legally cognizable claims and from them draws all reasonable inferences in her favor. Dismissal is warranted if the complaint fails to allege facts that fit within any cognizable legal theory. Faison v. Lewis, 25 N.Y.3d 220, 224 (2015); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227; Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007).

In determining a motion to dismiss claims based on expiration of the applicable statute of limitations under C.P.L.R. § 3211(a)(5), the court similarly accepts plaintiff's factual allegations draws all reasonable inferences in her favor. Norddeutsche Landesbank Girozentrale v. Tilton, 149 A.D.3d 152, 158 (1st Dep't 2017); Benn v. Benn, 82 A.D.3d 548, 548 (1st Dep't 2011). Defendants bear the initial burden to establish, based on the complaint's allegations, when plaintiff's claim accrued and that the time to sue has expired. MTGLQ Invs., LP v. Wozencraft, 172 A.D.3d 644, 644-45 (1st Dep't 2019); Norddeutsche Landesbank

Girozentrale v. Tilton, 149 A.D.3d at 158; Lebedev v. Blavatnik, 144 A.D.3d 24, 28 (1st Dep't 2016). The burden then shifts to plaintiff to raise a factual issue whether the claim is timely or the statute of limitations is tolled or inapplicable. MTGLQ Invs., LP v. Wozencraft, 172 A.D.3d at 644-45; Norddeutsche Landesbank Girozentrale v. Tilton, 149 A.D.3d at 158.

III. DEFENDANT BOARD OF DIRECTORS' MOTION

Against the Board of Directors defendants, plaintiff claims a hostile work environment, intentional infliction of emotional distress, failure to oversee and monitor Almod Diamonds' operations, and a prima facie tort. Although the Board of Directors move to dismiss the complaint against them based on lack of subject matter jurisdiction as well as failure to state a claim, C.P.L.R. § 3211(a)(2) and (7), the lack of subject matter jurisdiction is superfluous.

A. HOSTILE WORK ENVIRONMENT

The Board of Directors insist that they may not be held liable for a hostile work environment because they joined Almod Diamonds in July 2018, five months after the last alleged harassment or threat to plaintiff. While this precise contention relies on facts outside the complaint, Aff. of David J. Eiseman, ¶ 3, the complaint does allege that Gad family members settled a lawsuit "in mid-2018," Eisman Aff. A ¶ 292, that required Almod

Diamonds to establish a Board of Directors with five members independent of the Gad family, id. ¶ 295, who are the Board of Directors defendants here. Id. ¶¶ 35-39. Plaintiff does not allege a hostile work environment after the Board of Directors joined the corporation in mid-2018, which is fatal to her claim. Santiago-Mendez v. City of New York, 136 A.D.3d 428, 429 (1st Dep't 2016).

To sustain a hostile work environment claim against officers of a corporate employer under the New York State Human Rights Law or New York City Human Rights Law, plaintiff must show that they created, encouraged, approved, condoned, or acquiesced in an objectively hostile or abusive workplace environment, which altered the conditions of her employment. N.Y. Exec. Law § 296(1); N.Y.C. Admin. Code § 8-107(1)(a) and (13)(b)(1); Zakrzewska v. New School, 14 N.Y.3d 469, 480-81 (2010); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 310-11 (2004); Doe v. Bloomberg L.P., 178 A.D.3d 44, 45, 48 (1st Dep't 2019); Clayton v. Best Buy Co., Inc., 48 A.D.3d 277, 277 (1st Dep't 2008). Plaintiff fails to allege the specific elemental facts that the Board of Directors actively encouraged, approved, or participated or was personally involved in the conduct that created the hostile workplace environment based on her gender or how Gad's gender based, hostile conduct otherwise was

attributable to the Board of Directors. Doe v. Bloomberg L.P., 178 A.D.3d at 49-50. See Mejia v. T.N. 888 Eighth Ave. LLC Co., 169 A.D.3d 613, 614 (1st Dep't 2019); Arifi v. Central Moving & Stor. Co., Inc., 147 A.D.3d 551, 551 (1st Dep't 2017); Santiago-Mendez v. City of New York, 136 A.D.3d at 429; Llanos v. City of New York, 129 A.D.3d 620, 620 (1st Dep't 2015).

Plaintiff does allege that the Board of Directors received reports from Almod Diamonds' accountant and a law firm after the Board took office in July 2018, and in January 2019 she complained to the Board of Directors about Gad's prior hostile conduct. Yet she alleges neither any ongoing hostile conduct by him after February 2018, nor any workplace environment or conditions of her employment that were affected after her store closed in January 2018. Thus, while she might claim that the Board of Directors condoned or acquiesced in Gad's prior conduct by not intervening and taking corrective action, by July 2018 there was no workplace environment nor conditions of employment in which to intervene or to correct. See Clayton v. Best Buy Co., Inc., 48 A.D.3d at 277. Plaintiff does not allege that, as a result of the Board of Directors' inaction in the latter part of 2018 or in 2019, Gad's hostile conduct continued. Therefore the Board of Directors may not be held responsible for such conduct.

B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To sustain a claim of intentional infliction of emotional distress against the Board of Directors, plaintiff must show that (1) they engaged in extreme and outrageous conduct, (2) with intent to cause or in disregard of a substantial probability that the conduct would cause severe emotional distress, (3) a causal connection between their conduct and plaintiff's injury, and (4) severe emotional distress. Chanko v. American Broadcasting Cos. Inc., 27 N.Y.3d 46, 56 (2016); Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993). To plead extreme and outrageous conduct, plaintiff must show that the Board of Directors' conduct was "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 11 N.Y.3d 15, 23 (2008); Howell v. New York Post Co., 81 N.Y.2d at 122; Trujillo v. Transperfect Global, Inc., 164 A.D.3d 1161, 1162 (1st Dep't 2018); Schottenstein v. Silverman, 128 A.D.3d 591, 592 (1st Dep't 2015).

Plaintiff does not allege that the Board of Directors engaged in the extreme or outrageous conduct necessary to support her claim of intentional infliction of emotional distress. Even accepting as true plaintiff's allegations that the Board of Directors failed to intervene, such passivity does not meet the

high bar of indecent, intolerable, and uncivilized conduct to sustain a claim for intentional infliction of emotional distress. Chanko v. American Broadcasting Cos. Inc., 27 N.Y.3d at 56; Trujillo v. Transperfect Global, Inc., 164 A.D.3d at 1162; Schottenstein v. Silverman, 128 A.D.3d at 592. Therefore plaintiff's claim for intentional infliction of emotional distress against the Board of Directors also fails.

C. FAILURE TO OVERSEE AND MONITOR OPERATIONS

A claim that the Board of Directors failed to discharge their fiduciary obligations to oversee and monitor Almod Diamonds' operations belongs to the corporation and its shareholders. Mule v. Sillerman, 180 A.D.3d 600, 600-601 (1st Dep't 2020); Deckter v. Andreotti, 170 A.D.3d 486, 487 (1st Dep't 2019); Asbestos Workers Phila. Pension Fund v. Bell, 137 A.D.3d 680, 681, 684 (1st Dep't 2016); Wandel v. Dimon, 135 A.D.3d 515, 515-16 (1st Dep't 2016). Since plaintiff does not allege that she is or ever was a shareholder of Almod Diamonds, she may not maintain such a claim. Castellotti v. Free, 136 A.D.3d 198, 209 (1st Dep't 2016); Lichtenstein v. Willkie Farr & Gallagher LLP, 120 A.D.3d 1095, 1097 (1st Dep't 2014).

If plaintiff's claim of failure to oversee and monitor operations is construed as negligent supervision of Almod Diamonds' officers or employees, unlike her claims for

intentional conduct, the New York Workers' Compensation Law precludes a negligence claim against the Board of Directors for the injuries plaintiff alleges in the course of her employment. N.Y. Workers' Comp. Law §§ 11, 29(6); Martinez v. Canteen Vending Servs. Roux Fine Dining Chartwheel, 18 A.D.3d 274, 275 (1st Dep't 2005); Conde v. Yeshiva Univ., 16 A.D.3d 185, 186 (1st Dep't 2005). Workers' Compensation Law §§ 11 and 29(6) bar such a claim because Workers' Compensation is the exclusive remedy for injuries sustained during her employment. Isabella v. Hallock, 22 N.Y.3d 788, 793 (2014); Weiner v. City of New York, 19 N.Y.3d 852, 854 (2012); Fung v. Japan Airlines Co., Ltd., 9 N.Y.3d 351, 357 (2007); Macchirole v. Giamboi, 97 N.Y.2d 147, 150 (2001).

D. *PRIMA FACIE* TORT

The elements of a prima facie tort are (1) intentional infliction of harm, (2) causing special damages, (3) without justification or excuse, (4) by otherwise lawful acts. Posner v. Lewis, 18 N.Y.3d 566, 570 n.1 (2012); Freihofer v. Hearst Corp., 65 N.Y.2d 135, 142-43 (1985); Curiano v. Suozzi, 63 N.Y.2d 113, 117 (1984); Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332 (1983). To establish special damages caused by the Board of Directors' tortious conduct, plaintiff must plead a "specific and measurable loss." Freihofer v. Hearst Corp., 65 N.Y.2d at 143. See Britt v. City of New York, 151 A.D.3d 606,

607 (1st Dep't 2017); Matthaus v. Hadjedj, 148 A.D.3d 425, 426 (1st Dep't 2017); Wigdor v. SoulCycle, LLC, 139 A.D.3d 613, 614 (1st Dep't 2016); Phillips v. New York Daily News, 111 A.D.3d 420, 421 (1st Dep't 2013).

Although plaintiff claims she incurred more than $60,000 in attorneys' fees and expenses to defend herself against Almod Diamonds' and Gad's fabricated criminal charges, she alleges that she incurred these damages before Gad's libelous e-mail dated February 13, 2018, that she ran away instead of assisting the police in the investigation of the store's robbery. This email in turn was at least five months before the Board of Directors joined Almod Diamonds. Although plaintiff also claims ongoing attorneys' fees and expenses, she neither attributes them to the Board of Directors' acts or omissions, nor identifies or itemizes them as required for special damages to support a prima facie tort. Britt v. City of New York, 151 A.D.3d at 607; Matthaus v. Hadjedj, 148 A.D.3d at 426; Wigdor v. SoulCycle, LLC, 139 A.D.3d at 614; Phillips v. New York Daily News, 111 A.D.3d at 421. Plaintiff's claim that she has suffered a "specific and measurable" loss amounts to nothing more than a conclusory allegation that does not satisfy the specificity required for special damages.

Moreover, in determining whether defendants' alleged injurious acts satisfy the elements of a prima facie tort, disinterested malevolence must be the sole motivation for those acts. Posner v. Lewis, 18 N.Y.3d at 570 n.1; Curiano v. Suozzi, 63 N.Y.2d at 117; Burns Jackson Miller & Spitzer v. Lindner, 59 N.Y.2d at 333. By simply alleging that the Board of Directors intentionally inflicted harm without excuse or justification, plaintiff fails to demonstrate that the requisite disinterested malevolence was their sole motivation. Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303-304 (1983); Britt v. City of New York, 151 A.D.3d at 607; Wigdor v. SoulCycle, LLC, 139 A.D.3d at 614; Sullivan v. MERS, Inc., 139 A.D.3d 419, 420 (1st Dep't 2016).

In fact, the complaint's allegations contradict such a motivation. Britt v. City of New York, 151 A.D.3d at 607; AREP Fifty-Seventh, LLC v. PMGP Assoc., L.P., 115 A.D.3d 402, 403 (1st Dep't 2014); Princes Point, LLC v. AKRF Eng'g, P.C., 94 A.D.3d 588, 589 (1st Dep't 2012). Instead, the complaint alleges that the Board of Directors failed to take any action against Gad "because they are making too much money off of Almod," and "they hope to make multiples more." Aff. of David J. Eiseman Ex. A (Compl.) ¶ 19. "The Board of directors, due to . . . cowardice and greed, are knowing participants and enablers of the scheme"

to blame plaintiff for the armed robbery of the store. Id. ¶ 20. Enabling Gad's "mania toward Raimonda" "is a cowardly act by the Board defendants . . . who are simply too enthralled with the money they're making to cause a stir." The complaint points out that, while the Directors are not Gad family members, a Gad sibling did appoint each of the Directors. These specific allegations of the Board of Directors' motivations--profit, greed, self-interest, and cowardice--negate any conclusory allegation that disinterested malevolence was the sole motivation for their conduct.

IV. DEFENDANTS ALMOD DIAMONDS' AND GAD'S MOTION

Defendants Almod Diamonds and Gad move to dismiss the complaint against them based on an inconvenient forum, C.P.L.R. § 327(a), and pendency of another action, C.P.L.R. § 3211(a)(4), as well as failure to state a claim. C.P.L.R. § 3211(a)(7). These defendants also maintain that the court lacks subject matter jurisdiction over plaintiff's hostile work environment claim, C.P.L.R. § 3211(a)(2), and that the applicable statute of limitations bars plaintiff's intentional tort claims. C.P.L.R. § 3211(a)(5).

A. C.P.L.R. §§ 327(a) AND 3211(a)(4)

Defendants Almod Diamonds and Gad fail to show that the prior pending criminal actions, Gad's charges against plaintiff

and her charges against Gad, on which these defendants rely as bases to dismiss or stay this action, include any of plaintiff's claims here. Even were the court impermissibly to draw inferences in defendants' favor, it is impossible to conceive how either a defendant or a complainant in a criminal prosecution might herself prosecute claims for a hostile work environment, emotional distress, defamation, or a prima facie tort. Those prior criminal prosecutions thus do not preclude plaintiff from litigating her claims here. C.P.L.R. § 3211(a)(4); Natixis Funding Corp. v. GenOn Mid-Atl., LLC, 181 A.D.3d 481, 484 (1st Dep't 2020); Sprecher v. Thibodeau, 148 A.D.3d 654, 656 (1st Dep't 2017); Wimbledon Fin. Master Fund, Ltd. v. Bergstein, 147 A.d.3d 644, 645 (1st Dep't 2017); Reliance Ins. Co. v. American Elec. Power Co., 224 A.D.2d 235, 235 (1st Dep't 1996). Even more definitively, because the prior criminal actions are in Mexico, C.P.L.R. § 3211(a)(4), which relates only to actions in "any state or the United States," does not apply.

Almod Diamonds and Gad further maintain that the doctrine of forum non conveniens warrants dismissal of plaintiff's action, but fail to meet the heavy burden of establishing that New York is an inconvenient forum and there is no substantial nexus between this action and New York. C.P.L.R. § 327(a); Fekah v. Baker Hughes, Inc., 176 A.D.3d 527, 529 (1st Dep't 2020); Bacon

v. Nygard, 160 A.D.3d 565, 566 (1st Dep't 2018); Pacific Alliance Asia Opportunity Fund L.P. v. Kwok Ho Wan, 160 A.D.3d 452, 453 (1st Dep't 2018); Swaney v. Academy Bus Tours of N.Y., Inc., 158 A.D.3d 437, 438 (1st Dep't 2018). The relevant factors include (1) the burden this action imposes on the New York court, (2) the potential hardship to defendants in defending the action here, (3) the unavailability of an alternate forum in which plaintiff may sue, (4) whether the parties are nonresidents, and (5) whether the transactions from which the claims arise occurred primarily in a foreign jurisdiction. Fekah v. Baker Hughes, Inc., 176 A.D.3d at 529; Bacon v. Nygard, 160 A.D.3d at 566; Swaney v. Academy Bus Tours of N.Y., Inc., 158 A.D.3d at 438. The court also may consider the location of potential witnesses and documentary evidence and the potential applicability of foreign law. Fekah v. Baker Hughes, Inc., 176 A.D.3d at 529.

Defendants emphasize that plaintiff is a resident of Mexico, but gloss over her allegations that defendant directed all the tortious conduct of which she complains from New York. The first, second, and fifth factors all militate in favor of New York as the convenient forum. First, defendants do not demonstrate any burden on the New York court, as plaintiff's claims invoke New York law, and defendants rely on it to support their motion. Lobo v. Gatehouse Partners, LLC, 169 A.D.3d 555,

556 (1st Dep't 2019); Bacon v. Nygard, 160 A.D.3d at 566. Nor do defendants demonstrate any hardship to them, as they maintain their principal physical location in New York. Lobo v. Gatehouse Partners, LLC, 169 A.D.3d at 556; Bacon v. Nygard, 160 A.D.3d at 566; Pacific Alliance Asia Opportunity Fund L.P. v. Kwok Ho Wan, 160 A.D.3d at 453; Swaney v. Academy Bus Tours of N.Y., Inc., 158 A.D.3d at 438-39. Regarding the fifth factor, while plaintiff experienced the effects of defendants' alleged tortious conduct in Mexico, as set forth above, she alleges that defendants caused these effects from New York. Gad's direction of subordinates' actions, parade around the New York office with a photograph in which he claimed that plaintiff appeared nude, and hostile and defamatory messages sent from New York all further establish that New York is a convenient forum. Lobo v. Gatehouse Partners, LLC, 169 A.D.3d at 556; Bacon v. Nygard, 160 A.D.3d at 566; Pacific Alliance Asia Opportunity Fund L.P. v. Kwok Ho Wan, 160 A.D.3d at 453; Swaney v. Academy Bus Tours of N.Y., Inc., 158 A.D.3d at 438-39.

A court in Mexico might serve as an alternative forum, but not a more suitable one. Plaintiff's claims derive from New York law. Plaintiff is a resident of Mexico, but defendants acknowledge that the store in Playa del Carmen where she suffered the effects of their actions has closed, plaintiff is willing and

able to travel to New York, and witnesses and other relevant evidence are available here. Fekah v. Baker Hughes, Inc., 176 A.D.3d at 529; Pacific Alliance Asia Opportunity Fund L.P. v. Kwok Ho Wan, 160 A.D.3d at 453; Swaney v. Academy Bus Tours of N.Y., Inc., 158 A.D.3d at 439; Lerner v. Friends of Mayanot Inst., Inc., 126 A.D.3d 431, 432 (1st Dep't 2015).

In sum, defendants offer no compelling reason why plaintiff's claims may not be effectively litigated in a New York forum. Therefore the court denies Almod Diamonds' and Gad's motion to dismiss the claims against these defendants based on an inconvenient forum contrary to the interest of substantial justice. C.P.L.R. § 327(a); XL Specialty Ins. Co. v. AR Capital, 181 A.D.3d 546, 546-47 (1st Dep't 2020); Lobo v. Gatehouse Partners, LLC, 169 A.D.3d at 556; Bacon v. Nygard, 160 A.D.3d at 566; Swaney v. Academy Bus Tours of N.Y., Inc., 158 A.D.3d at 438-39.

B. C.P.L.R. § 3211(a)(5) AND (7)

1. Libel

Plaintiff claims that Gad published two libelous statements. The first is Gad's e-mail dated January 9, 2017, that plaintiff was losing money for the corporation, even though she saved $120,000.00 in construction costs: "Raimonda right now all she's doing is losing money." Aff. of Elior D. Shiloh Ex. A (Compl.) ¶

91. The second is Gad's e-mail dated February 13, 2018, remarking again that plaintiff managed the only store that lost money and adding that plaintiff ran away instead of assisting the police in the investigation of the store's robbery: "The only store that we allow to lose money is Playa del carmen, formally manged [sic] by Raimonda **until she ran away from the police**." Id. ¶ 259 (emphasis in original). Because plaintiff filed her Summons with Notice May 8, 2019, the one year statute of limitations bars both plaintiff's libel claims. C.P.L.R. § 215(3); Offor v. Mercy Med. Ctr., 171 A.D.3d 502, 502-503 (1st Dep't 2019); Schwartz v. Chan, 162 A.D.3d 408, 409 (1st Dep't 2018); Smulyan v. New York Liquidation Bar, 158 A.D.3d 456, 457 (1st Dep't 2018); Sprecher v. Thibodeau, 148 A.D.3d at 655.

2. Slander

In support of her claim for slander, plaintiff alleges that in the spring of 2016, approximately three years before she filed her Summons with Notice May 8, 2019, Gad walked around the Almod Diamonds' office in New York showing a photograph that depicted a nude woman and insisting that it depicted plaintiff. Thus the one year statute of limitations similarly bars plaintiff's slander claim.

3. Injurious Falsehood

The one year statute of limitations likewise bars plaintiff's claim for injurious falsehood, since the last false or disparaging statement plaintiff attributes to Gad occurred February 13, 2018, almost 15 months before she commenced this action. C.P.L.R. § 215(3). Similarly to her claim for a prima facie tort, plaintiff also fails to allege injury to a legally protected property interest or other special damages as required to support an injurious falsehood claim. Weiss v. Lowenberg, 95 A.D.3d 405, 407 (1st Dep't 2012); Pitcock v. Kasowitz, Benson, Torres & Friedman LLP, 74 A.D.3d 613, 615 (1st Dep't 2010); BCRE 230 Riverside LLC v. Fuchs, 59 A.D.3d 282, 283-84 (1st Dep't 2009); Rosenberg v. Home Box Off., Inc., 33 A.D.3d 550, 550 (1st Dep't 2006).

4. *Prima Facie* Tort

A prima facie tort is also subject to a one year statute of limitations. Bohn v. 176 W. 87th St. Owners Corp., 106 A.D.3d 598, 599 (1st Dep't 2013); Casa de Meadows Inc. (Caymen Is.) v. Zamen, 76 A.D.3d 917, 921 (1st Dep't 2010); Russek v. Dag Media Inc., 47 A.D.3d 457, 458 (1st Dep't 2008); Havell v. Islam, 292 A.D.2d 210, 210 (1st Dep't 2002). Plaintiff alleges the following harms after May 8, 2018.

First, Almod Diamonds superiors failed to respond to her inquiry July 24, 2018, whether she needed to leave Mexico because of the danger that Gad's accusations posed to her. A Human Resources manager then responded when she complained in December 2018 that Gad had harassed and threatened her in telephone conversations, text messages, and emails, forcing her to leave Playa del Carmen due to the danger his threats posed, that personnel who knew of his actions remained silent, and that she deserved answers after her devoted service to the corporation. The response explained the absence of a response to her earlier inquiry: "You don't see any responses from your colleagues because they are mindful of making any comments. Sorry about that." Shiloh Aff. Ex. A (Compl.) ¶ 318. Finally, after a law firm reported uncontradicted evidence of Gad's wrongdoing toward plaintiff, and she complained to the Board of Directors in person in January 2019, the Board ignored her complaints and took no corrective action against Gad nor measures to protect her.

These harms are not directly due to Gad's conduct, but are due to Almod Diamonds' inaction when confronted with his conduct. The complaint's allegations that Almod Diamonds superiors failed to respond to plaintiff because they sought to avoid conflict with Gad negates any conclusory allegation that disinterested malevolence was the sole motivation for Almod Diamonds' inaction.

Britt v. City of New York, 151 A.D.3d at 607; AREP Fifty-Seventh, LLC v. PMGP Assoc., L.P., 115 A.D.3d at 403; Princes Point, LLC v. AKRF Eng'g, P.C., 94 A.D.3d at 589. The last incident in January 2019 implicates only the Board of Directors' inaction, addressed above in connection with their motion. Finally, and similarly to her failed prima facie tort claim against the Board of Directors, plaintiff's conclusory allegation that she has suffered a specific and measurable loss neither itemizes nor identifies her special damages from any of these three incidents with the requisite specificity. Britt v. City of New York, 151 A.D.3d at 607; Matthaus v. Hadjedj, 148 A.D.3d at 426; Wigdor v. SoulCycle, LLC, 139 A.D.3d at 614; Phillips v. New York Daily News, 111 A.D.3d at 421.

5. Hostile Work Environment

Plaintiff's claim that Gad repeatedly subjected her to a campaign of deprecatory and vulgar name-calling, insults, and other offensive remarks related to her gender, constituting verbal forms of sexual harassment, allege a hostile work environment under the New York State and City Human Rights Laws. N.Y. Exec. Law § 296(1); N.Y.C. Admin. Code § 8-107(a)(1); Bateman v. Montefiore Med. Ctr., ___ A.D.3d ___, 2020 WL 2561570, at *1 (1st Dep't May 21, 2020); Petit v. Department of Educ. Of the City of N.Y., 177 A.D.3d 402, 403 (1st Dep't 2019); Gordon v.

Bayrock Sapir. Org. LLC, 161 A.D.3d 480, 481 (1st Dep't 2018); Anderson v. Edmiston & Co., Inc., 131 A.D.3d 416, 417 (1st Dep't 2015). Plaintiff demonstrates that the hostile work environment was related to her gender by alleging not only that Gad repeatedly called her a "whore" and "bitch," but also that he was driven by a fixation on her as an attractive woman and by jealousy of his brother's romantic relationship with her. Plaintiff's frequent complaints of Gad's pervasive menacing conduct, using Almod Diamonds' resources, that its superiors acknowledged, but to which they failed to respond, implicate Almod Diamonds as well as Gad. Boliak v. Reilly, 161 A.D.3d 625, 626 (1st Dep't 2018); Gordon v. Bayrock Sapir. Org. LLC, 161 A.D.3d at 481; Cole v. Sears, Roebuck & Co., 120 A.D.3d 1159, 1160 (1st Dep't 2014); McRedmond v. Sutton Place Rest. & Bar, Inc., 95 A.D.3d 671, 673 (1st Dep't 2012).

Most if not all of the pervasive menacing conduct and deprecatory and vulgar name-calling, insults, and other offensive remarks emanated from Gad in New York; impacted not only plaintiff in Mexico, but also her co-employees in New York; disparaged plaintiff among her co-employees in New York; and humiliated her when she traveled to New York to address the hostility. Plaintiff directed her repeated complaints about the hostile work environment to Almod Diamonds' co-owners, general

counsel, Human Resources Department, and Board of Directors, all in New York. These combined impacts of defendants' conduct in New York confer its subject matter jurisdiction over plaintiff's hostile work environment claim. Surely the New York State Legislature and the New York City Council did not intend that a New York City employer would escape liability for creating a pervasive hostile work environment that extended from New York City beyond its boundaries, simply by targeting an employee who reported to the New York City employer but was assigned duties beyond its boundaries. See Griffin v. Sirva, Inc., 29 N.Y.3d 174, 188 (2017); Hoffman v. Parade Publs., 15 N.Y.3d 285, 290-91 (2010); Benham v. eCommission Solutions, LLC, 118 A.D.3d 605, 606 (1st Dep't 2014); Hardwick v. Auriemma, 116 A.D.3d 465, 466-67 (1st Dep't 2014).

Finally, Almod Diamonds and Gad insist that Diusvi Diamonds, S.A., de C.V., not Almod Diamonds, Ltd., was plaintiff's employer, relying on ¶¶ 267, 268, and 281 of her complaint. Only § 268, however, reciting plaintiff's communication to Almod Diamonds' Human Resources Department, may be interpreted as referring to Diusvi Diamonds as her employer: "if I don't leave the company (Diusvi Diamonds) he will invent false stories against me . . . ." Paragraph 267, reciting plaintiff's complaint to the police of Gad's harassment, merely refers to Gad

"who had much power over the employees of DIUSVI." Paragraph 281, reciting plaintiff's demand for answers from Almod Diamonds superiors, merely asks: "What was done from Diusvi side to protect me . . . ." Plaintiff acknowledges that Diusvi Diamonds is Almod Diamonds' "shell company." Shiloh Aff. Ex A (Compl.) ¶ 133. This explanation, coupled with her complaint's repeated references to her as Almod Diamonds' employee, id. ¶¶ 1, 17, or Gad's manager, id. ¶ 142, hired by Almod Diamonds, id. ¶¶ 76, which had the power to fire her, id. ¶¶ 2, 16, 23, 145, 154, 183, 212, 289, raise the overwhelming inference that Almod Diamonds was her employer.

6. Intentional Infliction of Emotional Distress

To the extent that plaintiff's claim for intentional infliction of emotional distress against Almod Diamonds and Gad relies on evidentiary facts that satisfy the elements of the claim, it relies on the same factual allegations and seeks the same damages as her hostile work environment claim. Therefore the court dismisses her emotional distress claim against these defendants as duplicative. Mira v. Harder (Evans), 177 A.D.3d 426, 427 (1st Dep't 2019).

V. CONCLUSION

In sum, the court grants the motion by defendants Segall, Yahalomi, Fayne, Suskind, and Frankel to dismiss the complaint

against them. C.P.L.R. § 3211(a)(7). The court denies the motion by defendants Almod Diamonds, Ltd., and Gad to dismiss plaintiff's hostile work environment claim, but grants their motion to dismiss the remainder of plaintiff's claims. C.P.L.R. § 3211(a)(5) and (7).

Defendants Almod Diamonds, Ltd., and Gad shall answer the complaint's remaining claim within 10 days after service of this order with notice of entry. C.P.L.R. § 3211(f). These defendants and plaintiff shall convene for a Preliminary Conference July 23, 2020, at 3:00 p.m., via telephone, to be arranged by the court.

This decision constitutes the court's order. The Clerk shall enter a judgment dismissing the complaint against defendants Segall, Yahalomi, Fayne, Suskind, and Frankel and dismissing all claims against defendants Almod Diamonds, Ltd., and Gad except the complaint's claim for a hostile work environment. C.P.L.R. § 3211(a)(5) and (7).

DATED: June 26, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS J.S.C.