SHORT FORM ORDER **ORIGINAL**

INDEX No. 612744/2017
CAL. No. 201902104OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2/27/20 (001 & 002)
MOTION DATE 3/19/20 (003 & 004)
ADJ. DATE 7/23/20
Mot. Seq. # 001 - MG
002 - MG
003 - MG
004 - MG; CASEDISP

----------X

DENISE MAHONEY,

Plaintiff,

- against -

TERRY MAYOWSKI, MELISSA TEEHAN and WILLIAM WEIGELT,

Defendants.

----------X

YOUNG & YOUNG, LLP
Attorney for Plaintiff
863 Islip Avenue
Central Islip, New York 11722

JACOB R. FLEITMAN, P.C.
Attorney for Defendants Mayowski and Teehan
2061 Deer Park Avenue
Deer Park, New York 11729

PETER SVERD, ESQ.
Attorney for Defendant/Third-Party Plaintiff Weigett
225 Broadway, Suite 613
New York, New York 10007

----------X

WILLIAM WEIGELT,

Third-Party Plaintiff,

- against -

TRACY MALONE,

Third-Party Defendant.

----------X

YOUNG & YOUNG, LLP
Attorney for Third-Party Defendant
Tracy Malone
863 Islip Avenue
Central Islip, New York 11722

Upon the following papers read on this e-filed motion for dismissal/summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant/third-party plaintiff William Weigelt dated February 5, 2020, by defendants Terry Mayowski and Melissa Teehan, dated February 6, 2020, by plaintiff Denise Mahoney, dated February 20, 2020, and by third-party defendant Tracy Malone, dated February 20, 2020 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff Denise Mahoney, dated March 18, 2020 ; Replying Affidavits and supporting papers by defendant/third-party plaintiff William Weigelt dated July 22, 2020, by defendants Terry Mayowski and Melissa Teehan, dated July 22, 2020, ; Other Memoranda of Law ; it is

ORDERED that the motion (#001) by defendant/third-party plaintiff William Weigelt, the motion (#002) by defendants Terry Mayowski and Melissa Teehan, the motion (#003) by plaintiff Denise Mahoney, and the motion (#004) by third-party defendant Tracy Malone are consolidated for the purposes of this determination; and it is further;

ORDERED that the motion by defendant/third-party plaintiff William Weigelt for dismissal of the complaint against him is granted; and it is

ORDERED that the motion by defendants Terry Mayowski and Melissa Teehan for dismissal of the complaint against them is granted; and it is

ORDERED that the motion by plaintiff Denise Mahoney for dismissal of the counterclaims against her is granted; and it is

ORDERED that the motion by third-party defendant Tracy Malone for dismissal of the third-party complaint against her is granted.

This action arose out of a verbal altercation that occurred between plaintiff Denise Mahoney and her neighbors on August 28, 2016. The altercation allegedly began after defendant Terry Mayowski looked through the window of his home and spotted Mahoney standing in her front yard across the street waiving her finger and shouting obscenities at him. After observing Mahoney, Mayowski walked into his front yard to confront her. Defendant Melissa Teehan, Mayowski's girlfriend, joined Mayowski shortly after she overheard the shouting and began arguing with Mahoney. As the ensuing verbal confrontation ensued, Mahoney allegedly threatened to assault the couple. Teehan, allegedly feeling threatened, returned into her home and called the police. Teehan and Mayowski made a statement to the police after they arrived and Mahoney allegedly was arrested and charged with harassment. Teehan also obtained an ex-parte order of protection against Mahoney, causing the police to take possession of her firearm. The Suffolk County District Attorney's Office initiated a criminal action against Mahoney, and a hearing was held on May 5, 2017. In addition to Mayowski and Teehan, defendant/third-party plaintiff William Weigelt, another of Mahoney's neighbors, appeared and testified against her. During an adjournment of the trial, Weigelt, having learned that a video of the altercation existed, returned to the Suffolk County District Attorney's Office where he revealed that some of his previous testimony was untruthful or inaccurate. As a result, the Suffolk County District Attorney's Office moved to dismiss the criminal complaint against Mahoney and the order of protection against her was vacated. Following dismissal of the complaint, Mahoney commenced the instant action asserting causes of action against defendants based on false arrest, malicious prosecution, defamation, the infliction of emotional distress, and abuse of legal process. The defendants joined issue denying Mahoney's claims and asserting

affirmative defenses. However, Weigelt, whose answer recites protracted acrimonious relations between himself, Mahoney, and her wife, Tracy Malone, asserted counterclaims against Mahoney for infliction of emotional distress, abuse of process, and defamation. Weigelt also impleaded Tracy Malone, asserting defamation and the intentional and negligent infliction of emotion distress against her. In response, Tracy Malone joined the third-party action denying all of Weigelt's claims. The note of issue was filed on October 25, 2019.

Weigelt now moves, pursuant to CPLR 3211 (a) (7) and 3212, for dismissal of the complaint against him. Weigelt asserts that the false arrest and malicious prosecution claims against him fail as a matter of law, as he played no role in instigating the action against plaintiff, he was merely one of three testifying witnesses, the action was not terminated in Mahoney's favor, and probable cause existed for her prosecution. Weigelt argues that the defamation claims against him must likewise be dismissed, because with the exception of his testimony at trial, Mahoney failed to sufficiently allege time, manner, and persons to whom Weigelt made defamatory statements against her. Weigelt also requests dismissal of the claims against him for intentional and negligent infliction of emotional distress on the basis he did not engage in either extreme or outrageous conduct toward Mahoney, and that his conduct at trial was not the proximate cause of any physical or emotional injury to her. Teehan and Mayowski seek dismissal of Mahoney's claims on similar bases, arguing, inter alia, that they merely furnished information to the responding police officers who utilized their own judgment in determining that probable cause existed for the arrest of Mahoney, that the alleged defamatory statements were truthful and made during trial, and that they did not engage in any conduct so outrageous that it was either injurious to Mahoney's physical or emotional well being.

Mahoney and Malone, by way of separate motions, move for dismissal of the counterclaims and third-party claims against them. Mahoney contends that she did not engage in any extreme outrageous conduct, that her conduct did not cause Weigelt economic or emotional injury, and that the complaints and notices she made concerning Weigelt's behavior as a neighbor, or the conditions at his residence, were made for legitimate purposes. Mahoney asserts that the statements and letters she published concerning Weigelt's behavior as a neighbor are protected by truth, qualified privilege, and did not involve allegation of crimes so serious that they rise to the level of defamation per se. Malone makes similar arguments in support of her motion to dismiss the third-party complaint against her.

On a motion pursuant to CPLR 3211 (a) (7), the court must afford the pleading a liberal construction, accept all the facts pleaded in the complaint as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see* ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Hynes v Griebel,*** 300 AD2d 628, 754 NYS2d 293 [2d Dept 2002]; ***Glassman v Zoref***, 291 AD2d 430, 737 NYS2d 537 [2d Dept 2001]). The criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (*see* ***Vorel v NBA Props.,*** 285 AD2d 641, 728 NYS2d 397 [2d Dept 2001]). In contrast, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The failure to make such showing requires a denial of the motion,

regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]).

To establish a claim for abuse of process, a plaintiff must prove three essential elements, to wit, regularly-issued process either civil or criminal, an intent to do harm without excuse or justification, and the use of process in a perverted manner to obtain a collateral objective (*see* ***Curiano v Suozzi***, 63 NY2d 113, 480 NYS2d 466 [1984]; ***Marks v Marks***, 113 AD2d 744, 493 NYS2d 206 [2d Dept 1985]). However, where the complaint fails to allege some irregular activity in the use of judicial process for a purpose not sanctioned by law, or that the process unlawfully interfered with the plaintiff's property, an action to recover damages based upon the alleged abuse of process must fail (*see* ***Curiano v Suozzi***, *supra*; ***Williams v Williams***, 23 NY2d 592, 596, 298 NYS2d 473 [1969]; ***Mago LLC v Singh***, 47 AD3d 772, 851 NYS2d 593 [2d Dept 2008]; ***Panish v Steinberg***, 32 AD3d 383, 819 NYS2d 549 [2d Dept 2006]; ***Reisman v Kerry Lutz, P.C.***, 6 AD3d 418, 774 NYS2d 345 [2d Dept 2004]). As for the claims predicated on false arrest, "a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest" (***Leviev v Bebe Stores Inc.***, 85 AD3d 736, 736, 924 NYS2d 822 [2d Dept 2011]; *see* ***Du Chateau v Metro-North Commuter R.R. Co.***, 253 AD2d 128, 131, 688 NYS2d 12 [1st Dept 1999]). Relatedly, to make out an actionable malicious prosecution claim, a plaintiff has the heavy burden of establishing (1) the commencement or continuation of a criminal proceeding against the plaintiff, (2) the termination of that proceeding in the plaintiff's favor, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice (*see* ***Martinez v City of Schenectady***, 97 NY2d 78, 735 NYS2d 868 [2001]). It is noted that probable cause to believe that a person committed a crime is a complete defense to a claim of malicious prosecution (*see* ***Fortunato v City of New York***, 63 AD3d 880, 882 NYS2d 195 [2d Dept 2009]), and "information provided by an identified citizen accusing another individual of a specific crime is [generally] legally sufficient to provide the police with probable cause to arrest" (***People v Bero***, 139 AD2d 581, 584, 526 NYS2d 979 [2d Dept 1988]; *see* ***Wasilewicz v Monroe Police Dept.***, 3 AD3d 561, 771 NYS2d 170 [2d Dept 2004]).

The elements of a cause of action to recover damages for defamation are a false statement, published without privilege or authorization to a third-party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special damages or constitute defamation per se (*see* ***Dillon v City of New York***, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). The complaint must set forth the particular words allegedly constituting defamation, and it must also allege the time, place, and manner in which the false statements were made and by whom they were made (*see* ***Dillon v City of New York***, *supra at* 38). Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages (*see* ***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857 [1992]). Special damages consist of the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation (***Franklin v Daily Holdings, Inc.***, 135 AD3d 87, 21 NYS3d 6 [1st Dept 2015]). A plaintiff need not, however, prove special damages as a result of slander if he or she can establish that the alleged defamatory statement constituted slander per se (*see* ***Gatz v Otis Ford***, 274 AD2d 449, 711 NYS2d 467 [2d Dept 2000]). The four categories of slander per se consist of statements (1) charging plaintiff committed a serious crime; (2) that tend to injure the

plaintiff in his or her trade, business or profession; (3) that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman (***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857).

Statements which are otherwise defamatory may be subject to a qualified privilege when they are "fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his [or her] interest is concerned" (***Toker v Pollak***, 44 NY2d 211, 219, 405 NYS2d 1 [1978]). Qualified 'common interest' privilege extends to a "communication made by one person to another upon a subject in which both have an interest" (***Liberman v Gelstein***, 80 NY2d 429, 437, 590 NYS2d 857). When subject to these forms of conditional privilege, statements are protected if they were not made with malice or reckless disregard to truth or falsity (***Liberman v Gelstein***, 80 NY2d 429, 437-438, 590 NYS2d 857; *see* ***Stega v New York Downtown Hosp.***, 31 NY3d 661, 82 NYS3d 323 [2018]). In this context, malice "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will" (***Liberman v Gelstein***, 80 NY2d 429, 437, 590 NYS2d 857). In addition to qualified privilege, statements made at all stages of a judicial proceeding in communications among the parties, witnesses, counsel, and the court, are generally accorded an absolute privilege, as long as the statements may be considered in some way "pertinent" to the issues in the proceeding (*see* ***Martirano v Frost***, 25 NY2d 505, 307 NYS2d 425 [1969]; ***Front, Inc. v Khalil***, 24 NY3d 713, 718, 4 NYS3d 581 [2015]; ***Segall v Sanders***, 129 AD3d 819, 820, 11 NYS3d 235 [2d Dept 2015]). The privilege applies to statements made in or out of court, on or off the record, and regardless of the motive with which they were made (*see* ***Park Knoll Assoc. v Schmidt***, 59 NY2d 205, 464 NYS2d 424 [1983]).

"The tort of intentional infliction of emotional distress predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (***Freihofer v Hearst Corp.***, 65 NY2d 135, 143, 490 NYS2d 735[1985]). Thus, the conduct alleged "must consist of more than mere insults, indignities, and annoyances" (***Nestlerode v Federal Ins. Co.***, 66 AD2d 504, 507, 414 NYS2d 398 [4th Dept 1979]). Rather, the intentional infliction of emotional distress will be found where severe mental anguish is inflicted through a deliberate and malicious campaign of harassment (*see* ***Nader v General Motors Corp.***, 25 NY2d 560, 307 NYS2d 647 [1970]). The use of religious, ethnic or racial aspersions to denigrate a person, although deplorable, is not sufficiently egregious conduct to sustain a claim of this type (*see* ***Leibowitz v Bank Leumi Trust Co.***, 152 AD2d 169, 548 NYS2d 513 [2d Dept 1989]). A claim for the negligent infliction of emotional distress generally must be premised upon the breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety (***Sheila C. v Povich***, 11 AD3d 120, 130, 781 NYS2d 342 [1st Dept 2004]; *see* ***Jason v Krey***, 60 AD3d 735, 736, 875 NYS2d 194 [2d Dept 2009]). As it is predicated on negligent conduct, a claim for the negligent infliction of emotional distress will fail where no allegations of negligence appear in the pleadings (*see* ***Daluise v Sottile***, 40 AD3d 801, 803, 837 NYS2d 175 [2d Dept 2007], quoting ***Russo v Iacono***, 73 AD2d 913, 913, 423 NYS2d 253 [2d Dept 1980]).

Here, Weigelt established, prima facie, his entitlement to dismissal of the malicious prosecution, false arrest, and abuse of process claims against him by demonstrating that he did not instigate the criminal action against Maloney, that the action, which was administratively dismissed, did not

terminate in her favor, and that the police determined probable cause existed where, as in this case, the charge was based on a civilian complaint alleging the commission of a specific crime (*see* ***Hollender v Trump Vil. Coop., Inc.***, 58 NY2d 420, 461 NYS2d 765 [1983]; ***Wasilewicz v Monroe Police Dept.***, 3 AD3d 561, 771 NYS2d 170; ***Leviev v Bebe Stores Inc.***, 85 AD3d 736, 924 NYS2d 822; ***Fortunato v City of New York***, 63 AD3d 880, 882 NYS2d 195; ***Iorio v City of New York***, 19 AD3d 452, 798 NYS2d 437 [2d Dept 2005]). Although the complaint alleges that Weigelt participated in the criminal proceeding against Maloney out of spite, "[a] malicious motive alone . . . does not give rise to a cause of action for abuse of process" (***Curiano v Suozzi***, 63 NY2d 113, 117, 480 NYS2d 466 [1984]; *see* ***Liss v Forte***, 96 AD3d 1592, 947 NYS2d 270 [4th Dept 2012]). Weigelt further demonstrated that the complaint failed to state actionable claims against him for defamation and the infliction of emotional distress. Notably, Weigelt illustrated that the complaint failed to particularize the alleged defamatory statements or the resulting special damages to Maloney (*see* ***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857; ***Rall v Hellman***, 284 AD2d 113, 726 NYS2d 629 [1st Dept 2001]; ***Christopher Lisa Matthew Policano, Inc. v North Am. Precis Syndicate, Inc.***, 129 AD2d 488, 514 NYS2d 239 [1st Dept 1987]), and the statements made by Weigelt during the criminal proceeding are absolutely privileged (*see* ***Front, Inc. v Khalil***, 24 NY3d 713, 718, 4 NYS3d 581; ***Park Knoll Assoc. v Schmidt***, 59 NY2d 205, 464 NYS2d 424; ***Martirano v Frost***, 25 NY2d 505, 307 NYS2d 425; ***Segall v Sanders***, 129 AD3d 819, 820, 11 NYS3d 235). As to the infliction of emotional distress claims, Weigelt established that his conduct was neither negligent nor so extreme and outrageous as to warrant viable claims for the intentional or negligent infliction of emotional distress against him (*see* ***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857; ***Howell v New York Post Co.***, 81 NY2d 115, 596 NYS2d 350 [1993]; ***Park Knoll Assoc. v Schmidt***, 59 NY2d 205, 464 NYS2d 424; ***Daluise v Sottile***, 40 AD3d 801, 837 NYS2d 175; ***Dillon v City of New York***, 261 AD2d 34, 704 NYS2d 1; ***Leibowitz v Bank Leumi Trust Co.***, 152 AD2d 169, 548 NYS2d 513).

In opposition, Mahoney failed to raise triable issues warranting denial of Weigelt's motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925). As noted above, Weigelt did not induce Maloney's arrest or instigate the criminal proceeding against her, and the statements he made during the criminal proceeding were privileged and cannot serve as the basis for the abuse of process, defamation, or infliction of emotional distress claims (*see* ***Park Knoll Assoc. v Schmidt***, 59 NY2d 205, 464 NYS2d 424; ***Weinstock v Sanders***, 144 AD3d 1019, 42 NYS3d 205 [2d Dept 2016]). Even assuming, arguendo, that the statements were untruthful and not privileged, the complaint fails to specify any alleged special damages suffered by Maloney (*see* ***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857). Furthermore, the emotional distress experienced inherent in any police arrest or detention is insufficient to sustain a claim of intentional infliction of emotional distress (*see generally* ***Wyllie v District Attorney of County of Kings***, 2 AD3d 714, 770 NYS2d 110 [2d Dept 2003]; *see also* ***Matthaus v Hadjedj***, 148 AD3d 425, 49 NYS3d 393 [1st Dept 2017][allegation that defendant made false statements to the police causing plaintiff's arrest insufficient to sustain an intentional infliction of emotional distress claim]). Therefore, the motion by defendant/third-party plaintiff William Weigelt for dismissal of the complaint against him is granted.

Teehan and Mayowski also established their entitlement to dismissal of the false arrest and malicious prosecution claims against them. Significantly, as noted above, the criminal proceeding was

not terminated in Maloney's favor, and there is no allegation that Teehan and Mayowski went beyond merely furnishing a complaint to the police who were free to exercise their own judgment in determining that probable cause existed to file criminal charges against Maloney (*see* ***Hollender v Trump Vil. Coop., Inc.***, 58 NY2d 420, 461 NYS2d 765; ***Leviev v Bebe Stores Inc.***, 85 AD3d 736, 924 NYS2d 822; ***Fortunato v City of New York***, 63 AD3d 880, 882 NYS2d 195; ***Iorio v City of New York***, 19 AD3d 452, 798 NYS2d 437; ***Wasilewicz v Monroe Police Dep't***, 3 AD3d 561, 771 NYS2d 170). Teehan and Mayowski likewise demonstrated entitlement to dismissal of the abuse of process claim against them, as the complaint fails to allege that Teehan and Mayowski sought to improperly use the criminal proceeding against Maloney after it was commenced, and their alleged malicious motive in making the complaint to the police alone, does not give rise to a cause of action for abuse of process (*see* ***Curiano v Suozzi***, 63 NY2d 113, 480 NYS2d 466; ***Liss v Forte***, 96 AD3d 1592, 947 NYS2d 270). Moreover, the complaint failed to state actionable claims against Teehan and Mayowski for defamation and the infliction of emotional distress. Notably, statements made by Teehan and Mayowski in connection with the criminal proceeding are privileged, and the emotional distress Malone allegedly experienced due to any arrest, detention, or court appearance is insufficient to sustain claims for intentional and negligent infliction of emotional distress (*see* ***Front, Inc. v Khalil***, 24 NY3d 713, 4 NYS3d 581; ***Park Knoll Assoc. v Schmidt***, 59 NY2d 205, 464 NYS2d 424; ***Martirano v Frost***, 25 NY2d 505, 307 NYS2d 425; ***Segall v Sanders***, 129 AD3d 819, 11 NYS3d 235; ***Wyllie v District Attorney of County of Kings***, 2 AD3d 714, 770 NYS2d 110).

Mahoney failed to raise triable issues warranting denial of the motion by Mayowski and Teehan (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925). "[I]nformation provided by an identified citizen accusing another individual of a specific crime is [generally] legally sufficient to provide the police with probable cause to arrest" (***People v Bero***, 139 AD2d 581, 526 NYS2d 979), and probable cause to believe that a person committed a crime is a complete defense to a claim of malicious prosecution (*see* ***Fortunato v City of New York***, 63 AD3d 880, 882 NYS2d 195). Moreover, Mahoney failed to adduce any evidence that Teehan and Mayowski sought to improperly use the criminal proceeding against her after it was commenced, and their alleged malicious motive in making the complaint to the police alone, does not give rise to a cause of action for abuse of process (*see* ***Curiano v Suozzi***, 63 NY2d 113, 480 NYS2d 466; ***Liss v Forte***, 96 AD3d 1592, 947 NYS2d 270). Further, the statements made by Teehan and Mayowski in connection with the criminal proceeding are privileged, and the emotional distress experienced due to any arrest, detention, or court appearance, is insufficient to sustain claims for intentional and negligent infliction of emotional distress (*see* ***Front, Inc. v Khalil***, 24 NY3d 713, 4 NYS3d 581; ***Park Knoll Assoc. v Schmidt***, 59 NY2d 205, 464 NYS2d 424; ***Martirano v Frost***, 25 NY2d 505, 307 NYS2d 425; ***Segall v Sanders***, 129 AD3d 819, 11 NYS3d 235). Therefore, the motion by Teehan and Mayowski for dismissal of the complaint against them is granted.

Weigelt's counterclaims against Maloney for the infliction of emotional distress, abuse of process, and defamation are equally unavailing. The allegation that Mahoney caused her tenant to file a police complaint against Weigelt is not only unsubstantiated, but the counterclaims, which focus on Mahoney's alleged malicious motives, fail to allege that the tenant's complaint to the police was for a purpose not sanctioned by law, or that it was improperly used after process was issued (***Curiano v Suozzi***, 63 NY2d 113, 480 NYS2d 466; ***Place v Ciccotelli***, 121 AD3d 1378, 995 NYS2d 348 [3d Dept

2014]; ***Liss v Forte***, 96 AD3d 1592, 947 NYS2d 270 [4th Dept 2012]; ***Minasian v Lubow***, 49 AD3d 1033, 856 NYS2d 255 [3d Dept 2008]). The same reasoning applies to the allegations concerning civil complaints Mahoney filed with the Town of Babylon about Weigelt's purported erection of an unpermitted fence, the illegal rental of a section of his home, and the direction of flood lights towards her home. Notwithstanding Mahoney's alleged malicious motivation in making the complaints, there is no proof that she utilized the process in a manner inconsistent with the purpose for which it was designed, or that the complaints were made without social excuse or justification (*see* ***Curiano v Suozzi***, 63 NY2d 113, 480 NYS2d 466; ***Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFL-CIO***, 38 NY2d 397, 380 NYS2d 635 [1975]; ***Benjamin v Assad***, 186 AD3d 549, 2020 NY Slip Op 04449 [2d Dept 2020]; ***Liss v Forte***, 96 AD3d 1592, 947 NYS2d 270).

As the complaint alleges intentional conduct on Maloney's behalf, the counterclaims contained in Weigelt's answer fails to allege an actionable claim for the negligent infliction of emotional distress (*see* ***Daluise v Sottile***, 40 AD3d 801, 837 NYS2d 175; ***Russo v Iacono***, 73 AD2d 913, 913, 423 NYS2d 253). Equally absent from those counterclaims are allegations that Mahoney engaged in conduct so extreme and outrageous as to make out a claim for the intentional infliction of emotional distress. As the conduct underlying the abuse of process claim amounts to mere insults, indignities, and annoyances, it is insufficient for the purposes of making out an intentional infliction of emotional distress claim (*see* ***Nestlerode v Federal Ins. Co.***, 66 AD2d 504, 507, 414 NYS2d 398). Weigelt's allegations regarding the letters and flyers authored by Mahoney and her wife accusing him of harming their cats and requesting that he cease harassing her also are insufficient to demonstrate that Mahoney's conduct was calculated to intentionally cause him distress or were "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" (***Murphy v American Home Prods. Corp***, 58 NY2d 298, 303, 461 NYS2d 232 [1983] [internal citation omitted]; *see* ***Howell v New York Post***, 81 NY2d 115, 122, 596 NYS2d 320 [1993]). In any event, those allegations are impermissibly duplicative of Weigelt's defamation claim (*see* ***Fischer v Maloney***, 43 NY2d 553, 402 NYS2d 991 [1978]; ***Matthaus v Hadjedj***, 148 AD3d 425, 425, 49 NYS3d 393 [1st Dept 2017]). Furthermore, even assuming, arguendo, that Mahoney's alleged placement of a shotgun shell on the "curtilage" of Weigelt's home with the name "Sam" written on it constituted extreme and outrageous conduct sufficient to state an intentional infliction of emotional distress claim, the threat was not directed to Weigelt himself. Indeed, Weigelt's allegations concerning this incident are belied by the testimony of Terry Mayowski that the name "Sam" referred to his child, and that the shotgun shell was placed in his, rather than Weigelt's, front yard.

Weigelt's defamation counterclaims are also insufficiently pled and inactionable. As the counterclaims fail to allege the publication of defamatory statements accusing Weigelt of a serious crime, impugning his profession, or asserting that he had some loathsome disease, it failed to state an actionable cause of action for slander per se (*see* ***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857). With respect to Weigelt's remaining defamation counterclaims, the letters and flyers published by Mahoney to other surrounding neighbors concerning Weigelt's alleged animal cruelty and harassment are subject to qualified privilege as they can be fairly thought of as the discharge of a public or private duty, and relate to a common interest shared by neighbors (*see* ***Stega v New York Downtown Hosp.***, 31 NY3d 661, 82 NYS3d 323; ***Liberman v Gelstein***, 80 NY2d 429, 437, 590 NYS2d 857; ***Toker v Pollak***,

44 NY2d 211, 219, 405 NYS2d 1). It is noted that the allegations of Mahoney's spite or ill will in publishing these statements are insufficient to preclude qualified privilege, and the burden is on Weigelt to prove that Mahoney published these statements with malice or reckless regard for truth (*see* ***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857; ***Stega v New York Downtown Hosp.***, 31 NY3d 661, 82 NYS3d 323). Moreover, Weigelt's defamation counterclaim failed to allege special damages with the particularity required by CPLR 3016 (*see* ***Rall v Hellman***, 284 AD2d 113, 726 NYS2d 629; ***Christopher Lisa Matthew Policano, Inc. v North Am. Precis Syndicate, Inc.***, 129 AD2d 488, 514 NYS2d 239). It is noted that round figures included in general demands for judgment lacking any attempt to itemize the alleged loss, such as those pled by Weigelt, do not state special damages with the required specificity (*see* ***Drug Research Corp. v Curtis Publ. Co.***, 7 NY2d 435, 199 NYS2d 33 [1960]; ***Franklin v Daily Holdings, Inc.***, 135 AD3d 87, 21 NYS3d 6 [1st Dept 2015] [round figure of $3,000,000 when alleging damages was insufficient to state special damages]).

Weigelt failed to raise a triable issue in opposition warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925). As noted by Weigelt, an accusation of harassment is insufficient to support claim of slander per se (*see* ***Liberman v Gelstein***, 80 NY2d 429, 590 NYS2d 857). Although the pleadings illustrate the mutual acrimonious relationship between Weigelt and Mahoney, Weigelt failed to demonstrate that Mahoney and her wife engaged in a prolonged campaign of harassment and intimidation against him. Further, many of Weigelt's intentional infliction of emotional distress claims were duplicative of his defamation claims and, are thus, separately inactionable (*see* ***Fischer v Maloney***, 43 NY2d 553, 402 NYS2d 991; ***Matthaus v Hadjedj***, 148 AD3d 425, 425, 49 NYS3d 393). The court finds the remainder of Weigelt's arguments to be without merit and insufficient to defeat Mahoney's prima facie showing. Accordingly, the motion by Denise Mahoney for dismissal of the counterclaims against her is granted.

In light of the foregoing, the court also grants the motion by Malone seeking dismissal of the third-party complaint against her. The court notes that the defamation, negligent, and intentional infliction of emotional distress causes of action contained in the third-party complaint against Malone are identical to those same causes of action asserted in the counterclaims asserted against Mahoney, and the court has already addressed the relative arguments made by the parties regarding the merit of those claims.

Dated: OCT 02 2020

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION