SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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CATALINA (KATHY) RUIZ,

Plaintiff,

- v -

ROE LAOPHERMSOOK,

Defendant.

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INDEX NO. 157136/2019

MOTION DATE 06/13/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 75, 77, 78, 79, 80, 81, 86

were read on this motion to/for DISMISSAL.

In this intentional tort action, defendant moves, pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing the complaint.

I. Factual and Procedural Background

Plaintiff, an advertising professional, commenced this action in July 2019 after defendant allegedly published "false and defamatory content" about her on the social media website LinkedIn (NYSCEF Doc No. 1). In full, defendant's allegedly defamatory post (the subject post) stated:

> "Came across a freelancer's portfolio that falsely took credit for a ton of big campaign work from my team at Hudson Rouge and claimed it as her own. I've asked her to take it down and received a condescending email in return. Now there's a password. At best, she did banners (thank you). At worst, she's bamboozling future employers and colleagues. Do I put her on blast? Or do I put her on blast? What should I do, Kathy Ruiz? thesoundofideas.com"

(Doc No. 22).

In her complaint, plaintiff asserted five causes of action: (1) libel, (2) tortious interference with contract,[1] (3) intentional infliction of emotional distress, (4) negligent infliction of emotional distress, and (5) injunctive relief (Doc No. 1). Defendant moved to dismiss the action prior to answering (Doc Nos. 19-21), which was granted on default by decision and order of November 17, 2020 (Doc No. 25). In September 2021, after plaintiff began representing herself, she moved to vacate the November 2020 order, arguing that vacatur was necessary due to improper service and her "extraordinary circumstances" (Doc Nos. 30-31). By decision and order of January 12, 2022, her motion was denied.

After acquiring new representation, plaintiff appealed the January 2022 order (Doc No. 49). In December 2022, the First Department reversed the January 2022 order after finding that plaintiff "demonstrated a reasonable excuse for her failure to oppose the motion through her affidavit detailing the hardships she faced" and established that she possessed a potentially meritorious claim (*Ruiz v Laophermsook*, 211 AD3d 496, 496 [1st Dept 2022]) (Doc No. 54). The First Department vacated her default and remanded the matter to this Court "to permit plaintiff to oppose the motion to dismiss on the merits" (*id.*) (Doc No. 54).

Defendant's motion to dismiss the complaint was restored for decision (Doc No. 75), and plaintiff subsequently opposed the motion (Doc No. 77).[2]

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[1] Although plaintiff identified her cause of action as one for tortious interference with contract (Doc No. 22), she later mentioned "existing and potential customers/employers" and alleged that defendant "substantially interfered with current and prospective contractual relationships" with her clients. Therefore, it appears that she asserted claims for both tortious interference with contract and tortious interference with prospective economic advantage. Although those claims involve similar torts, they have different elements (*see Carvel Corp. v Noonan*, 3 NY3d 182, 189 [2004]). Thus, her claim will be analyzed as to both torts.

[2] In her opposition papers, plaintiff sought leave to replead her other four causes of action if her libel claim is dismissed. However, her request must be denied because it was made "without a formal motion and without submission of an amended complaint" (*Gerffet Co., Inc. v Fratelli Bonella, SRL*, 49 Misc3d 1208[A], *8 [Sup Ct, Nassau County 2015] [denying request for leave to replead because plaintiffs made request "in a footnote in their memorandum of law in opposition to . . . motion"]).

II. Legal Analysis and Conclusions

A Dismissal of Plaintiff's First Cause of Action for Libel

Defendant contends that plaintiff's libel claim must be dismissed because the subject post is incapable of a defamatory meaning, and, therefore, it was not "of and concerning" plaintiff. He also contends that the subject post is protected by the common interest privilege, and that he had a social and moral duty to make such a statement given that he and plaintiff both worked in the advertising industry. Lastly, he asserts that the subject post constitutes nonactionable opinion, because it was pure opinion consisting of allegations rather than facts.

Plaintiff argues in opposition that the common interest privilege is inapplicable here because she and defendant are competitors, and the subject post was made to give defendant a competitive advantage. She also argues that her libel claim cannot be dismissed because the First Department concluded that she had a valid libel claim, which is now purportedly the law of the case.

Plaintiff's law of the case contention, however, is unavailing. "[L]aw of the case applies only when the same question is at issue in the same case" (*Gerschel v Christensen*, 2015 NY Slip Op 32373[U], *2 [Sup Ct, NY County 2015], *aff'd* 143 AD3d 555 [1st Dept 2016]), and when "the procedural posture and evidentiary burdens of the litigants" are not "markedly different" (*Feinberg v Boros*, 99 AD3d 219, 224 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]). Here, the procedural posture and evidentiary burden between the instant motion to dismiss and the prior motion to vacate the default judgment are different, therefore, the doctrine does not apply (*see Matter of Part 60 RMBS Put-Back Litig.*, 155 AD3d 482, 483 [1st Dept 2017] [finding law of the case doctrine inapplicable because motion to dismiss and motion for commissions had different procedural posture and evidentiary burden]).

With respect to defamation, it is well established that a plaintiff asserting a claim for defamation "must show that the matter published is of and concerning them" by "plead[ing] and prov[ing] that the statement referred to them and that a person hearing or reading the statement reasonably could have interpreted it as such. This burden is not a light one, and the question of whether an allegedly defamatory statement could reasonably be interpreted to be of and concerning a particular plaintiff is a question of law for the courts to decide" (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86-87 [2016] [internal quotation marks and citations omitted]; *see Springer v Viking Press*, 60 NY2d 916, 916 [1983]).

Here, even accepting the allegations in plaintiff's complaint as true and giving her the benefit of every possible favorable inference (*see Goshen v Mutual Life Ins Co. of N.Y.*, 98 NY2d 314, 326 [2002]), she has not demonstrated that a reasonable reader under the circumstances would understand that the subject post was referring to her specifically (*see Three Amigos SJL Rest., Inc.*, 28 NY3d at 87 [concluding news broadcast asserting club used by organized crime could not have reasonably been understood to mean plaintiffs, who did not work for club directly, were members of organized crime]; *Matter of Soames v 2LS Consulting Eng'g, D.P.C.*, 187 AD3d 490, 492 [1st Dept 2020] [finding social media post not of and concerning plaintiff because he could not show that post could be understood to be about him]).

Although plaintiff was identified by name in the subject post, it was not immediately apparent that she was the freelancer mentioned by defendant. Defendant only stated that he became aware of "a freelancer," and never explained that plaintiff was that freelancer or that the website linked in the subject post was plaintiff's website. A reader was required to take an additional step beyond simply reading the subject post to understand that plaintiff was the freelancer mentioned. Further, the manner in which plaintiff's name appeared in the subject post

made it seem like defendant was genuinely asking her a question and seeking her advice, and the rhetorical questions posed did not imply that plaintiff was the freelancer being discussed.

Therefore, she has not demonstrated that defendant's allegedly defamatory statement was "of and concerning" her, and her libel claim must be dismissed (*see Matter of Soames*, 187 AD3d at 492 [dismissing defamation claim because plaintiff failed to demonstrate that social media post was "of and concerning" him]).

To the extent that defendant contends that his allegedly defamatory statements were shielded by one of the recognized exceptions, his contentions are unavailing. Although the common interest privilege exception protects statements "made by one person to another upon a subject in which both have an interest" (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]), there must be some underlying "public or private duty, legal or moral," justifying such statements (*Stega v New York Downtown Hosp.*, 31 NY3d 661, 670 [2018]). Defendant has provided no authority for the proposition that he, as a member of an industry as massive as the advertising industry, has an interest in common with other members of such a large industry or a duty of any kind that protects allegedly defamatory statements (*cf. Stukuls v State of New York*, 42 NY2d 272, 280-281 [1977] [holding members of university faculty tenure committee protected by common interest privilege because committee was a "small, and perhaps sophisticated, committee of five people, in each of whom a corresponding interest, or duty, resided," and not "a large or disinterested audience"]). In any event, plaintiff's complaint sufficiently alleged that the subject post was made with the requisite malice to overcome that privilege (*see Gardner v Virtuoso Ltd*, 204 AD3d 514, 515 [1st Dept 2022] [denying dismissal of defamation claim where common interest privilege existed because plaintiff sufficiently alleged defendant made posting with malice]).

The nonactionable opinion exception also does not shield the subject post. "[A]n opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, is a mixed opinion and is actionable" (*Davis v Boeheim*, 24 NY3d 262, 269 [2014] [internal quotation marks, ellipsis, and citations omitted]). However, such mixed opinions may be protected where a reasonable reader would understand that an allegedly defamatory statement was "an allegation to be investigated, rather than . . . a fact" (*Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 42 [1st Dept 2011]; *see Brian v Richardson*, 87 NY2d 46, 53 [1995]). Viewing the context of the subject post and the surrounding circumstances, the subject post did not make such allegations, but rather asserted as fact that a freelancer falsely took credit for work defendant produced previously. It did not "set out the basis for [defendant's] personal opinion, leaving it to the readers to evaluate it for themselves" (*Brian*, 87 NY2d at 53-54 [holding opinion editorial article not defamatory because contextual background demonstrated statements were "mere claims" for readers to investigate individually (internal quotation marks omitted)]).

B. Dismissal of the Second Cause of Action in Tortious Interference with Contract

i. Plaintiff's Claim of Tortious Interference with Contract

Viewing plaintiff's claim as one for tortious interference with a current contractual relationship, defendant contends that the claim must be dismissed because plaintiff failed to allege that a valid contract existed and that, but for defendant's conduct, such contract would not have been breached. Plaintiff does not address defendant's contentions.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413,

424 [1996] [citations omitted]; *see EVEMeta, LLC v Siemens Convergence Creators Corp.*, 173 AD3d 551, 551-552 [1st Dept 2019]).

Here, plaintiff failed to identify the contracts that were interfered with. In her complaint she only made vague assertions that "there [wa]s no dispute about the existence of business relationships" with her clients, which is insufficient (*see RSSM CPA LLP v Bell*, 162 AD3d 554, 555 [1st Dept 2018] [dismissing tortious interference with contract claim because plaintiff did not identify specific contracts interfered with in his complaint]; *Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013] [affirming dismissal of tortious interference claim because plaintiff "failed to identify any term of the agreements that was breached"]). She also failed to allege that defendant intentionally procured a breach of any contract, or that his conduct was the "but for" cause of any alleged breach, only stating that he was "aware of the business/professional relationships" between plaintiff and third parties and "substantially interfered" with them (*see Meer Enters., LLC v Kocak*, 173 AD3d 629, 630 [1st Dept 2019] [dismissing tortious interference claim because plaintiff failed to allege intentional breach of contract and but for causation]; *Weiss v Lowenberg*, 95 AD3d 405, 407 [1st Dept 2012] [similar]).

Therefore, plaintiff's claim for tortious interference with contract must be dismissed (*see Reeves v Associated Newspapers, Ltd.*, 217 AD3d 550, 551-552 [1st Dept 2023] [dismissing tortious interference with contract claim because plaintiff failed to allege all requisite elements]).

ii. Plaintiff's Claim of Tortious Interference with Prospective Economic Advantage

Viewing plaintiff's claim as one for tortious interference with prospective economic advantage, defendant argues that the claim must be dismissed because plaintiff failed to allege that defendant engaged in any wrongful means. Defendant also argues that dismissal is warranted

because the tortious interference claim is duplicative of the defamation claim. Plaintiff does not address defendant's contentions.

Unlike tortious interference with contract, a plaintiff alleging a claim for tortious interference with prospective economic advantage "must show more culpable conduct on the part of the defendant" (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]), i.e., he or she "must demonstrate that the defendant's interference with its prospective business relations was accomplished by wrongful means or that [the] defendant acted for the sole purpose of harming [him or her]" (*Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1st Dept 1999] [internal quotation marks omitted]; *see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). However, a plaintiff must also still identify a particular prospective relationship and explain how the defendant's conduct interfered with it (*see Matter of Soames*, 187 AD3d at 491).

In her complaint, plaintiff failed to specify which entities she would have done business with had defendant not made the subject post. She only made generalized allegations that the subject post was seen by "potential employers and recruiters" and that she would "be missing [out] on additional employment opportunities" (Doc No. 22). Those allegations are purely speculative and lack the specificity necessary to sustain a claim of tortious interference with prospective economic advantage (*see id.* [affirming dismissal of tortious interference claim because it "lacked specificity and was speculative"]). With respect to wrongful means, plaintiff's only evidence of such conduct is the alleged defamatory statement by defendant. However, since it has been determined that no defamation occurred, and plaintiff submitted no other evidence of tortious conduct, she failed to demonstrate that she met the wrongful means requirement (*see Snyder*, 252

AD2d at 300 [finding plaintiff failed to allege wrongful means because only evidence provided was allegedly slanderous statement which Court determined was not slanderous]).

Therefore, even viewing plaintiff's claim as one for tortious interference with prospective economic advantage, it must be dismissed because she failed to allege sufficiently culpable conduct and to specify entities with which she would have done business (*see Inspirit Dev. & Constr., LLC v GMF 157 LP*, 203 AD3d 430, 432 [1st Dept 2022] [affirming dismissal of tortious interference claim where plaintiff "neither alleged sufficiently culpable conduct directed at . . . third parties nor specified any entities with which it would have done business" (citations omitted)]).

C. Dismissal of Plaintiff's Third Cause of Action for Intentional Infliction of Emotional Distress

Defendant contends that plaintiff's intentional infliction of emotional distress (IIED) claim must be dismissed because a derogatory social media post does not amount to extreme and outrageous conduct. Plaintiff does not address defendant's contention.

It is well established that there are four elements of a cause of action for IIED: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; *accord Brown v New York Design Ctr., Inc.*, 215 AD3d 1, 6 [1st Dept 2023]). With respect to extreme and outrageous conduct, the standard "is strict, rigorous[,] and difficult to satisfy" (*Scollar v City of New York*, 160 AD3d 140, 146 [1st Dept 2018] [internal quotations and citations omitted]). The conduct alleged "must consist of more than mere insults, indignities[,] and annoyances" (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004], *lv dismissed* 2 NY3d 793 [2004]), it must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of

decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983] [internal quotation marks and citations omitted]; *accord Seymour v Hovnanian*, 211 AD3d 549, 557 [1st Dept 2022] [finding defendant's conduct during housing renovation not extreme and outrageous, "although most people would likely consider the alleged conduct deplorable"]).

Here, defendant's alleged extreme and outrageous conduct was a lone social media post in which plaintiff contends that defendant stated that plaintiff "falsely took credit for" defendant's work and "claimed it as her own" (Doc No. 22). Such conduct is common in online forums and does not amount to atrocious or intolerable behavior in modern society (*see Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999] [finding use of epithet during exit interview not sufficiently extreme and outrageous]). Further, "it is long settled that publication of a single, purportedly false or defamatory article regarding a person does not constitute extreme and outrageous conduct as a matter of law" (*Bement v N.Y.P. Holdings*, 307 AD2d 86, 92 [1st Dept 2003] [finding defendant's publication of one article not extreme and outrageous conduct]; *see Reeves v. Associated Newspapers, Ltd.*, 217 AD3d at 551-552 [similar]). Therefore, plaintiff's IIED claim must be dismissed (*see Schnur v Balestriere*, 208 AD3d 1117, 1118 [1st Dept 2022] [dismissing IIED claim after plaintiff failed to sufficiently allege extreme and outrageous conduct]; *Parker v Trustees of the Spence Sch., Inc.*, 205 AD3d 459, 460 [1st Dept 2022] [similar]).

D. Dismissal of Plaintiff's Fourth Cause of Action for Negligent Infliction of Emotional Distress

Defendant contends, among other things, that plaintiff's negligent infliction of emotional distress (NIED) claim must be dismissed because he did not owe a duty of care to plaintiff. Plaintiff does not address defendant's contention.

A cause of action for negligent infliction of emotional distress must be premised on a breach of a duty of care resulting directly in either physical or emotional harm (*see Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6 [2008]). However, when emotional harm is alleged, "the mental injury must be a direct, rather than a consequential, result of the breach and the claim must possess some guarantee of genuineness" (*Brown*, 215 AD3d at 9 [internal quotation marks and citations omitted]).

In her complaint, plaintiff failed to allege that defendant owed her a duty of care; she only alleged that defendant's "supremely unreasonable" conduct caused her to suffer emotional distress (Doc No. 22). Therefore, her NIED claim must be dismissed (*see Murphy v Kozlowska*, 217 AD3d 455, 456 [1st Dept 2023] [affirming dismissal of NIED claim after finding plaintiff failed to allege defendants owed duty of care]; *Silverman v Park Towers Tenants Corp.*, 206 AD3d 417, 418 [1st Dept 2022] [similar]).

E. Dismissal of Plaintiff's Fifth Cause of Action for Injunctive Relief

Given that all of plaintiff's other causes of action are dismissed, there are no underlying substantive claims upon which to attach plaintiff's claim for injunctive relief, and it must be dismissed (*Offor v Mercy Med. Ctr.*, 171 AD3d 502, 504 [1st Dept 2019] [dismissing plaintiff's injunctive relief claim after dismissing all of her substantive claims]).

Accordingly, it is hereby:

ORDERED that defendant Roe Laophermsook's motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that counsel for defendant Roe Laophermsook shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

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9/8/2023
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER		SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT		REFERENCE	