# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. LISA S. HEADLEY** **PART** **28M**

***Justice***

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JANE DOE,

Plaintiff,

- v -

KIPP NEW YORK, INC., KIPP NYC, LLC, KIPP NYC COLLEGE PREPARATORY HIGH SCHOOL, KERRY MULLINS, JIM MANLY, NATALIE WEBB, MONICA SAMUELS

Defendant.

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**INDEX NO.** 155586/2023

**MOTION DATE** 03/07/2024

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISSAL.

Before the Court is the motion filed by defendants, KIPP New York, Inc., KIPP NYC, LLC, Kerry Mullins, Jim Manly, Natalie Webb, and Monica Samuels ("moving defendants" or collectively, "KIPP"), for an Order, pursuant to *CPLR §3211(a)(7)*, to dismiss the plaintiff's Complaint in its entirety on the grounds that the Complaint fails to state a cause of action. Plaintiff filed opposition papers, and the moving defendants filed a reply.

I. Background

On June 6, 2023, plaintiff commenced this action a year after her employment as a teacher at KIPP middle school and high school was terminated following the dissemination of a video to students depicting plaintiff in a sex act that was saved on her KIPP-issued cellular phone (the "Video"). On June 3, 2022, plaintiff alleges she became aware of the video dissemination, when students brought it to her attention that the video had just been "airdropped" to certain students at KIPP. The plaintiff maintains that the video was taken on personal time and personal property and was potentially accessed and disseminated by students and others, without her consent. The incident was reported to KIPP administrators, Monica Samuels, Kerry Mullins, and Natalie Webb ("co-defendants" or "KIPP administrators"), who investigated the incident. The KIPP administrators determined that the video either may have been disseminated from a KIPP student to whom the plaintiff loaned her phone, or as the plaintiff depicted, that a student airdropped the video to other students. On June 16, 2022, the plaintiff filed a police report regarding the unauthorized access and dissemination of said video, and then on June 24, 2022, the plaintiff was terminated from her employment.

In the Complaint, the plaintiff asserts 24 causes of actions. The defendants move to dismiss the 1st through 6th, and 8th through 14th causes of actions, where plaintiff asserts discrimination on the basis of race, color, sex, sexual orientation, religion, and crime victim/domestic violence victim survivor status, and retaliation under *New York State Human Rights Law ("NYSHRL")* and *New York City Human Rights Law ("NYCHRL")*. The defendants move to dismiss the 15th cause of action, where plaintiff asserts invasion of privacy. The defendants move to dismiss the 16th and 19th causes of action, where plaintiff asserts breach of fiduciary duty and fraudulent misrepresentation. The defendants also move to dismiss the 17th and 18th causes of action, plaintiff asserts breach of contract and negligence, respectively. In the 20th, 21st and 22nd causes of action, plaintiff asserts defamation, computer tampering and intentional infliction of emotional distress. Finally, the defendants move to dismiss the 23rd and 24th causes of actions, where the plaintiff asserts *prima facie* tort and violation of *New York State Civil Rights Law Section 52-B.*

In the instant motion, the defendants submit arguments to dismiss the above-mentioned causes of actions pursuant to *CPLR §3211(a)(7)*. "When considering a motion to dismiss for failure to state a cause of action, the pleadings should be afforded a liberal construction and the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'." *Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994), *citing*, *Seemungal v. New York State Dept. of Fin. Services*, 2023 NY Slip Op 06341 (1st Dep't Dec. 12, 2023). *CPLR §3211(a)(7)* provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action." *See, CPLR §3211(a)(7).*

II. Defendants move to dismiss plaintiff's discrimination claims in the 1st through 5th, and 8th through 13th Causes of Actions

In support of the motion to dismiss, the defendants argue that the discrimination claims asserted are "legally deficient because plaintiff fails to proffer an inference of discrimination based on any protected category, nor has plaintiff pled the requisite circumstances for individual liability to attach to defendants." Defendants argue that the plaintiff's Complaint fails to specify how defendants' actions were motivated by, or give rise to an inference of, discrimination based on race, color, sex, sexual orientation, religion, and/or crime victim/domestic violence victim survivor status discrimination. Defendants also argue that the plaintiff claims she was terminated as result of a protected characteristic, however she merely claims she is a South Asian female and practicing Hindu, who was qualified for her positions at KIPP, but the Complaint fails to plead facts evidencing any inference of discrimination or adverse employment action by defendants based upon any of her claimed protected classes. Defendants also claim that plaintiff has failed to plead with any notice or specificity, whether any of the four individually named defendants qualify as an "employer" under *NYSHRL,* nor has plaintiff pled if any of the defendants have acted with or on behalf of the employer in hiring, firing, paying, or in administering the terms, conditions, or privileges of employment per *NYCHRL.*

In opposition, the plaintiff argues, *inter alia*, that the pleading standards for claims brought under the *NYSHRL* and *NYCHRL* are "materially looser" than "the trans-substantive plausibility standard of the Federal Rules of Civil Procedure[.]" Plaintiff argues that she has pled sufficient allegations of protected status. Plaintiff alleges she is South Asian (Race), a female (Sex) of brown skin (Color), heterosexual and engaged in self-sexual – auto-erotic – activity (Sexual Orientation), of Hindu faith (Religion), and who experienced an intimate sexual video of her being disseminated without her consent. Plaintiff alleges she had an excellent performance record and that KIPP was training her for a promotion into an administration position during the 2022-2023 school year. Plaintiff argues she sufficiently pled how the circumstances of her firing give rise to an inference of discrimination because none of the decision-makers were South Asian, Hindu, or had brown skin. Plaintiff also argues that a motion to dismiss is not the place for testing facts, because all of the plaintiff's claims are taken as true.

Pursuant to *NYSHRL*, "[t]he state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants." *See, Executive Law § 290(3).*

To state a discrimination claim under the *NYSHRL*, a plaintiff had to allege: "(1) that he/she [was] a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action..., and (4) that the adverse...treatment occurred under circumstances giving rise to an inference of discrimination." *Harrington v. City of New York*, 157 A.D.3d 582, 584 (1st Dept 2018); *see also*, *Brown v. New York City Dept. of Educ.*, 2023 N.Y. Slip Op. 30106[U], 18 (N.Y. Sup Ct, New York County 2023).

Here, the Court finds that the plaintiff has stated a legally sufficient first cause of action for violation of the *New York State Human Rights Law, N.Y. Exec. Law §290 et. seq.* Race Discrimination given that the plaintiff asserts that she was a member of protected class as a South Asian, and that race was a motivating or other causally sufficient factor in defendants' actions, and that none of the decisionmakers were South Asian.

The Court finds that the plaintiff has stated a legally sufficient second cause of action for violation of the *New York State Human Rights Law, N.Y. Exec. Law §290 et. seq.* Color Discrimination given that the plaintiff asserts that she has brown skin, and that her skin color was a motivating or other causally sufficient factor in defendants' actions, and that the top decisionmakers were White.

The Court finds that the plaintiff has stated a legally sufficient third cause of action for violation of the *New York State Human Rights Law, N.Y. Exec. Law §290 et. seq.* Sex Discrimination given that she asserts that she was a member of protected class as a female, and that her sex was a motivating or other causally sufficient factor in defendants' actions, and the defendants' actions reflected bias because of the stigmatizing of female sexuality.

The Court finds that the plaintiff has stated a legally sufficient fourth cause of action for violation of *the New York State Human Rights Law, N.Y. Exec. Law §290 et. seq.* Sexual Orientation Discrimination given that she asserts that she was a member of a protected class as a heterosexual and engaged in self-sexual (auto-erotic) activity, and defendants took adverse action against plaintiff, including terminating her employment, and her lawful expression of her sexuality was a motivating or other causally sufficient factor in defendants' actions.

The Court finds that the plaintiff has stated a legally sufficient fifth cause of action for violation of the *New York State Human Rights Law, N.Y. Exec. Law §290 et. seq.* Religious Discrimination given that she asserts that she was a member of protected class as she is Hindu, and that her religion was a motivating or other causally sufficient factor in defendants' actions, and none of the decisionmakers practice Hinduism.

Pursuant to *NYCHRL*, "[i]t shall be an unlawful discriminatory practice for an employer, or an agent thereof, because of any individual's actual or perceived status as a victim of domestic violence, or as a victim of sex offenses or stalking: (1) to represent that any employment or position is not available when in fact it is available; (2) to refuse to hire or employ or to bar or to discharge from employment; or (3) to discriminate against an individual in compensation or other terms, conditions, or privileges of employment." *New York City, N.Y., Code § 8-107.1.*

In a claim for discrimination under *NYCHRL*, the plaintiff must similarly allege "(l) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was treated differently or worse than other employees, and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination." *Harrington v. City, supra* at 584.

Similarly, to the claims stated under *NYSHRL*, the Court finds that the plaintiff has stated a legally sufficient eighth cause of action for violation of the *New York City Human Rights Law, N.Y.C. §8-107 et. seq.* Race Discrimination.

The Court finds that the plaintiff has stated a legally sufficient ninth cause of action asserting a violation of the *New York City Human Rights Law, N.Y.C. §8-107 et. seq.* Color Discrimination.

The Court finds that the plaintiff has stated a legally sufficient tenth cause of action asserting a violation of the *New York City Human Rights Law, N.Y.C. §8-107 et. seq.* Sex Discrimination.

The Court finds that the plaintiff has stated a legally sufficient eleventh cause of action asserting a violation of the *New York City Human Rights Law, N.Y.C. §8-107 et. seq.* Sexual Orientation Discrimination.

The Court finds that the plaintiff has stated a legally sufficient twelfth cause of action asserting a violation of the *New York City Human Rights Law, N.Y.C. §8-107 et. seq.* Religious Discrimination.

The Court also finds that the plaintiff has stated a legally sufficient thirteenth cause of action asserting a violation of the *New York City Human Rights Law, N.Y.C. §8-107 et. seq.* Crime Victim/ Violence Victim Survivor Discrimination.

As such, the defendant's motion seeking to dismiss plaintiff's discrimination claims in the 1st through 5th, and 8th through 13th causes of actions is denied.

III. Defendant moves to dismiss plaintiff's retaliation claims in the 6th and 14th Causes of Actions

Under both the *NYSHRL* and the *NYCHRL*, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. *Executive Law § 296 (7)*; *Administrative Code § 8-107(7)*. Under the broader interpretation of the *NYCHRL*, "[t]he retaliation ... need not result in an ultimate action ... or in a materially adverse change ... [but] must be reasonably likely to deter a person from engaging in protected activity." *Administrative Code § 8-107(7)*; *see*, *Reyes v. Popular Bank,* 2021 WL 2719326 (N.Y. Sup Ct, New York County 2021).

For a plaintiff to successfully demonstrate a *prima facie* claim of retaliation under the *NYSHRL*, he/she must show that: "(1) he/she has engaged in a protected activity, (2) his/her employer was aware of such activity, (3) he/she suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action." *Harrington v. City of New York*, *supra* at 585. Under the *NYCHRL*, instead of demonstrating that he or she suffered from an adverse action, plaintiff need to "show only that the defendant took an action that disadvantaged him or her." *Id.*

In support of the motion to dismiss, the defendants argue that the retaliation claims should be dismissed because plaintiff "has not alleged any protected activity much less an adverse employment action related to such non-existent activity and has proffered no basis for individual liability to attach." Defendants argue that plaintiff has proffered no basis to support that she was a victim of retaliatory conduct and has failed to meet her burden, pursuant to both the *NYSHRL* and *NYCHRL,* because plaintiff has not alleged that she engaged in any protected activity during her employment tenure and has not alleged a causal connection between any alleged protected activity and her termination. Defendants argue that plaintiff has also failed to allege any facts showing that defendants were aware of her engagement in a non-existent protected activity and has not proffered any facts showing that the defendants retaliated against her by terminating her as a result of her alleged protected activity. Defendants also argue that merely asking for someone generally "not to discriminate or retaliate against" you does not qualify as a protected activity pursuant to the *NYSHRL* nor *NYCHRL* since "protected activity" includes lodging complaints with an employer about disparate treatment or opposing unlawful discrimination.

In opposition, plaintiff argues her retaliation claims are supported by facts, including that she engaged in protected activity by emailing defendants and telling them she had filed a police report. Plaintiff asked defendants not to retaliate or discriminate against her because of the video incident, however within a week of the e-mail request, the defendants fired her. In addition, plaintiff contends that the defendants' arguments for dismissal amount to a factual disagreement and do not treat each fact pled by plaintiff as true, as required by the standard of review on motions to dismiss. In opposition to the argument that plaintiff fails to sufficiently plead the

"employer" status of the individual Defendants Ms. Mullins, Mr. Manly, Ms. Webb, and Ms. Samuels, plaintiff asserts that "all Defendants acted in one another's interest" and "as one another's agent, such that the acts of one may be imputed to all Defendants." Plaintiff also asserts that the Complaint states that she told Defendants, in an e-mail, that she filed a police report to investigate the crime that occurred, and she asked defendants not to discriminate or retaliate against her, and this is a protected activity.

This Court finds that the plaintiff has stated a legally sufficient sixth cause of action for violation of the *New York State Human Rights Law N.Y. Exec. Law § 290 et seq.* Crime Victim/Domestic Violence Victim Survivor Discrimination, and 14th cause of action for violation of the *New York City Human Rights Law N.Y.C. Admin. Code § 8-107 et seq.* Retaliation. Here, in the Complaint, plaintiff sufficiently pled, *inter alia*, that the plaintiff was a crime victim and/or her interaction with law enforcement was a motivating or causally sufficient factor in defendants' actions, including that the "defendants directly pinned their decision to terminate [plaintiff's] employment on the intimate video, and their decision to fire her shortly followed her having contacted the NYPD." As such, the defendants' motion seeking to dismiss plaintiff's discrimination claims in the 6th and 14th causes of actions is denied.

IV. Defendant moves to dismiss the plaintiff's invasion of privacy claims in the 15th Cause of Action

With respect to plaintiff's claim for invasion of privacy, *Civil Rights Law §50* makes it a misdemeanor to use a person's photograph for advertising purposes without having first obtained written consent. *See*, *Doe v. Wilhelmina Models, Inc.*, 2024 NY Slip Op 03081 (1st Dep't June 6, 2024). "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait, picture, likeness, or voice of any living person without having first obtained the written consent of such person, or if a minor of such minor's parent or guardian, is guilty of a misdemeanor." *Civil Rights Law §50.*

Defendants argue that the plaintiff's invasion of privacy claims should be dismissed because New York State does not recognize the common-law tort based upon invasion of privacy except to the extent the alleged acts fall within *N.Y. Civ. Rights Law §§ 50 and 51*, which protects against the unauthorized appropriation of a plaintiff's name or likeness for the defendants' benefit for advertising or trade purposes. Defendants claim that plaintiff has failed to plead any facts alleging that defendants' conduct amounted to the "unauthorized use" of her name or face for commercial purposes or that defendant's "benefit" in any way from the Video dissemination. "Together, those 'statutes protect against the appropriation of a plaintiff's name or likeness for a defendant's benefit and create a cause of action in favor of any person whose name, portrait, or picture is used for advertising purposes or for trade without the plaintiff's consent'." *Fernandez v. Fernandez*, 216 A.D.3d 743, 746 (2d Dep't 2023) [internal citations omitted].

In opposition, plaintiff argues she states a claim of invasion of privacy because she alleges that the defendants accessed the video to a greater extent than necessary to perform their legitimate business purpose, without plaintiff's consent. Plaintiff alleges that the Complaint details how the defendants were engaged in the trade of running a school. Defendants used the

dissemination of the video to terminate the plaintiff, mitigate costs, and to shift blame to the plaintiff for the defendants' benefit. Further, the plaintiff alleges the extent of the use of said video was beyond a legitimate business purpose of the school investigating this matter.

Here, the plaintiff's Complaint does not state facts to support the claim that the defendants used the plaintiff's name or likeness for the defendants' benefit for advertising or trade purposes. "Without this essential element, they fail to sustain a claim under the Civil Rights Law." *See also*, *Otero v. Houston St. Owners Corp*, 2012 N.Y. Slip Op. 30440[U] (N.Y. Sup Ct, New York County 2012). Therefore, the plaintiff has failed to state the cause of action for invasion of privacy claims in the 15th cause of action, and the portion of the defendants' motion seeking to dismiss the 15th cause of action is granted.

V. Defendants move to dismiss the plaintiff's breach of fiduciary duty and fraudulent misrepresentation claims in the 16th and 19th Causes of Actions

To state a claim for breach of fiduciary duty, plaintiff must allege "the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014); *see also*, *Lopez v. Martini*, 2024 N.Y. Slip Op. 31982[U], 8 (N.Y. Sup Ct, New York County 2024).

"The elements of a cause of action for fraudulent misrepresentation are: (1) the making of a material representation by defendant; (2) the representation was false; (3) defendant knew it was false and made it with the intention of deceiving plaintiff; (4) plaintiff believed the representation to be true and justifiably acted in reliance on it, and was deceived; and (5) plaintiff was damaged thereby." *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43 (1999

Defendants argue the Complaint does not state a cause of action for breach of fiduciary duty with particularity, as required by *CPLR §3016(b)*. The Complaint does not identify the purported "required fiduciary provisions" which it seeks to enforce, nor does it otherwise plead the existence of a fiduciary duty between the parties or plead factual allegations sufficient to support an inference of a fiduciary duty. Defendants also claim that the plaintiff lacks standing to assert her fiduciary duty claim given her failure to allege a concrete injury that is not a boilerplate allegation that has been copied and pasted into nearly each cause of action. Defendants also argue, *inter alia*, that the plaintiff's fraudulent misrepresentation claim is deficient, and a claim rooted in fraud must be pleaded with the requisite particularity under *CPLR §3016(b)*.

In opposition, plaintiff argues that she states a claim of breach of fiduciary duty, and has pled that she entrusted defendants, her employers, and supervisors, with sensitive private information about the intimate video, and that the defendants had a fiduciary duty to safeguard her personal information, and to act in her best interests in protecting her from further harm and embarrassment. Plaintiff claims that the defendants' misconduct included sharing the video with several teachers and administrators who had no legitimate need to know about the video and to view the video. As to the fraudulent misrepresentation, the plaintiff claims defendants represented the purpose of their investigation into the dissemination of the video incident was to protect plaintiff but that this representation was false, and plaintiff relied on the false

representation of defendants about the nature of the investigation and ultimately participated in the investigation, including contacting law enforcement, meeting with superiors, and providing information to defendants.

Here, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and the plaintiff states a viable claim for breach of fiduciary duty and for fraudulent misrepresentation. As such, the defendants' motion to dismiss the breach of fiduciary duty claim and the fraudulent misrepresentation claim is denied.

VI. Defendants move to dismiss the plaintiff's breach of contract claim in the 17th Cause of Action

The elements of a breach of contract claim include the "existence of a contract, performance, the defendant's breach, and resulting damages." *See*, *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010); *see also*, *Rodionov v. Redfern*, 2018 N.Y. Slip Op. 30890[U], 17 (N.Y. Sup Ct, New York County 2018), *aff'd*, 2019 N.Y. Slip Op. 04328 (1st Dep't 2019). Defendants argue plaintiff has not identified any contract, has not alleged terms that were supposedly breached, and has not identified how any of the defendants allegedly breached their unidentified obligations to the plaintiff. In the Complaint, plaintiff alleges she "had an employment contract with KIPP, which provided grounds for termination for misconduct," and "the KIPP defendants breached this contract because [she] had not engaged in any misconduct." Defendants argue that plaintiff's failure to establish these most basic pleading requirements warrants the dismissal of her contract claim as a matter of law. Defendants also argue that the plaintiff failed to specifically plead the damages caused by the defendants' alleged breach. Plaintiff claims she suffered damages in the form of reputational harm, emotional distress, and loss of pay, however, defendants argue that a claim for damages for loss of reputation arising from a breach of contract is not actionable.

In opposition, plaintiff argues that she states a claim for breach of contract because she sufficiently pled that the defendants breached their contract by firing her when she had not engaged in any misconduct, and as a result she suffered specific damages in the form of emotional distress and loss of pay. Plaintiff also claims that in the Complaint she identified the breach of the contractual terms, including the "termination" and "misconduct" provisions, and such claim provides adequate notice to the defendants.

"To adequately allege a breach of contract claim, a plaintiff must plead the following elements: (1) a contract exists; (2) the plaintiff's performance in accordance with the terms; (3) the defendants' breach thereof; and (4) resulting damages." *34-06 73, LLC v. Seneca Ins. Co.*, 39 N.Y.3d 44, 52 (2022); *see also*, *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery *CPLR §3211* motion to dismiss." *See*, *Lam v. Weiss*, 219 A.D.3d 713, 195 N.Y.S.3d 488 (2d Dep't 2023). Here, this Court finds that the plaintiff has stated a claim for breach of contract as the allegations made in the "complaint are deemed true

and all reasonable inferences may be drawn in favor of the plaintiff." *Archival Inc., v. 177 Realty Corp.*, 220 A.D.3d 909, 198 NYS2d 567 (2d Dep't 2023). Therefore, the defendants' motion to dismiss the breach of contract claim must be denied.

VII. Defendants move to dismiss the plaintiff's negligence claim in the 18th Cause of Action

"The elements of a cause of action for negligence are a duty owed by the defendant to the plaintiff, a breach thereof, and injury proximately resulting therefrom." *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 (1985). Defendants argue that in order to sustain a claim for negligence against the individual defendants, plaintiff must allege a specific duty owed to her by the individual defendants Mullins, Manly, Webb, and Samuels. Defendants also argue that the plaintiff fails to state a claim for negligence against the individual defendants, nor does she differentiate between them or mention any by name within her causes of action, therefore, the negligence claim must be dismissed.

In opposition, the plaintiff alleges the defendants had four different duties, including the duty of reasonable care to (1) competently investigate the dissemination of the intimate video, (2) competently handle Ms. Doe's personal information, (3) competently establish and respect measures to stop the further dissemination of the video, and (4) conduct the investigation with transparency. Plaintiff claims she pled that the defendants breached their duty to competently investigate the dissemination of the video and take reasonable steps to stop further dissemination of the video, and she was damaged as a result of their negligent conduct. Plaintiff claims she pled that she entrusted personal information related to the video to the defendants, including to the named individual defendants. Therefore, plaintiff argues that the defendants breached their duty by needlessly sharing with the plaintiff's colleagues the knowledge of and access to the video.

"Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery *CPLR §3211* motion to dismiss." *See*, *Lam v. Weiss*, *supra.* Here, this Court finds that the plaintiff has stated a claim for negligence as the allegations made in the "complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff." *Archival Inc., v. 177 Realty Corp.*, *supra.* As such, the defendants' motion to dismiss the negligence claim is denied.

VIII. Defendants move to dismiss the plaintiff's defamation claim in the 20th Cause of Action

"A defamatory statement is one that "tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace." *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584 (2012). "To prevail in a defamation claim, a plaintiff must show '(1) a false statement that is (2) published to a third party (3) without privilege or authorization and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm'." *Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 34 (1st Dep't 2014). "In an action for libel or slander, the particular words complained of shall be set forth in the complaint, in addition to "the time, place and manner of the purported defamatory statement." *Lesesne v. Lesesne*, 133 A.D.2d 667 (2d Dep't 1987).

"Paraphrasing and other descriptions or summaries of the alleged defamatory words, without stating the words themselves is insufficient to satisfy the particularity requirement of *CPLR § 3016(a)*." *See*, *Khaski v. Brooklyn Lollipops Import Corp.*, 2018 N.Y. Slip Op. 32797[U], 2 (N.Y. Sup Ct, New York County 2018).

"Truth is an absolute defense to a cause of action based on defamation." *Silverman v. Clark*, 35 A.D.3d 1, 12 (1st Dep't 2006) [citations omitted]). "'If an allegedly defamatory statement is 'substantially true,' a claim of libel is 'legally insufficient and ... should [be] dismissed'." *Franklin v. Daily Holdings, Inc.,* 135 A.D.3d 87, 94 (1st Dep't 2015). "[A] statement is substantially true if the statement would not 'have a different effect on the mind of the reader from that which the pleaded truth would have produced'." *Id.*

Here, the defendants argue the Complaint does not comply with *CPLR §3016* since the Complaint must allege the time, place, and manner of the false statement and specify to whom it was made. Defendants contend that there are no allegations of any statements made by any defendant, let alone any defamatory statements. Therefore, this omission alone is fatal to the defamation claim against each of the defendants.

In opposition, plaintiff asserts she states a claim for defamation and sufficiently pled that the defendants published false statements including that plaintiff failed to safeguard her personal information and that the dissemination of the video was her fault. Plaintiff asserts that she pled these statements took place on the first occasion on June 24, 2023, during the in-person meeting when she was fired, however her colleagues were told these false reasons for her termination. Plaintiff asserts that these statements exposed her to public embarrassment as they related to her sexuality and professional reputation, and as a result she suffered damages to her reputation, emotional state, and finances.

Here, the Court finds the Complaint fails to state the alleged defamatory words said by either one or all the defendants with particularity, and a summary of the purported statements are insufficient. As such, the defendants' motion to dismiss the defamation claim is granted.

IX. Defendants move to dismiss the plaintiff's computer tampering claim in the 21st Cause of Action

The crime of computer tampering "involves the use of a computer or a computer service [or a computer network] as the instrumentality of a crime," conduct which may be "the most prevalent means of computer abuse." *People v. Versaggi*, 83 N.Y.2d 123, 129, 608 N.Y.S.2d 155, 158, 629 N.E.2d 1034, 1037 (1994). The crime of computer tampering is defined in four degrees. The basic offense, computer tampering is in the fourth degree, under *N.Y. Penal Law § 156.20*, which is a class A misdemeanor. A person commits that crime "when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization and he or she intentionally alters in any manner or destroys computer data or a computer program of another person." *N.Y. Penal Law § 156.20*, as amended by *L. 2006, c. 558, §3*.

Defendants argue that the cause of action for computer tampering must be dismissed because it is a criminal cause of action, not civil, therefore, it has been deficiently pled.

Defendants assert that the law that applies to computer tampering is *NYS Penal Law §156.20*, which states that "a person is guilty of computer tampering in the fourth degree when he or she uses, causes to be used, or accesses a computer, computer service, or computer network without authorization and he or she intentionally alters in any manner or destroys computer data or a computer program of another person. Computer tampering in the fourth degree is a class A misdemeanor." *See*, *NYS Penal Law §156.20.*

In opposition, the plaintiff contends that the claim for computer tampering is analogous to trespass to chattel, and the elements of the claim require pleading facts supporting an inference that defendants "intentionally, and without justification or consent, physically interfered with the use and enjoyment of [plaintiff's] personal property in plaintiff's possession, thereby causing harm to [plaintiff]." *See*, *Davidoff v. Davidoff, 12 Misc. 3d 1162* (Sup. Ct. N.Y. County 2006). In the Complaint, plaintiff contends her pleadings allege "defendants exceeded permissible access to [plaintiff's] records, including giving her phone to defendants' IT department to conduct further searches and sharing the video beyond those needed to conduct the investigation." Plaintiff asserts that she did not give consent to disseminate the video that was ultimately shared by defendants. Plaintiff contends that she may have yielded her phone to defendants, however she did not yield possession of the video that defendants chose to share more widely than necessary.

This Court finds that the cause of action for computer tampering must be dismissed as it is a criminal cause of action. In opposition, while the plaintiff argued that the cause of action is similar to trespass of chattel, the plaintiff did not allege such civil claim. However, the defendants argue that this cause of action is deficiently pled and should be dismissed. Accordingly, the defendants' motion to dismiss the computer tampering cause of action is granted.

X. Defendants move to dismiss the plaintiff's claim for Intentional Infliction of Emotional Distress in the 22nd Cause of Action

In the motion, defendants argue that the plaintiff failed to satisfy the cause of action for intentional infliction of emotional distress because she has not pled conduct which satisfy the requisite elements of the claim, including 1) extreme and outrageous conduct; 2) intent to cause or disregard of a substantial probability of causing, severe emotional distress; 3) a causal connection between the conduct and injury and 4) severe emotional distress. Defendants also argue that the intentional infliction of emotional distress cause of action is barred when the facts are essentially duplicative of other pled tort causes of action. Defendants contend that plaintiff alleges nothing more than general emotional distress purportedly as a fallout from the disseminated video, and the allegations are duplicative of the other 24 pled causes of action. Therefore, plaintiff's allegations fall short of the requirements for an intentional infliction of emotional distress claim.

In opposition, the plaintiff argues that she pled sufficient facts to state a claim for intentional infliction of emotional distress because she alleged that defendants falsely reassured her that its investigation held her best interests at heart, but never investigated or acted with

intention to protect her. Plaintiff pled that defendants shared the video of plaintiff beyond what was necessary for any investigation, including allowing her colleagues to know about and access the video. Plaintiff alleges that defendants knew their actions would result in her severe emotional distress, and nonetheless did so.

"The elements of a claim for intentional infliction of emotional distress are (i) extreme and outrageous conduct, (ii) an intent to cause—or disregard of a substantial probability of causing—severe emotional distress, (iii) a causal connection between the conduct and the injury, and (iv) the resultant severe emotional distress." *See*, *Lau v. S & M Enterprises*, 72 A.D.3d 497, 498 (1st Dep't 2010) (internal citations omitted). Here, the Court finds that the plaintiff has sufficiently pled the intentional infliction of emotional distress cause of action, and therefore the defendants' motion to dismiss the 22nd cause of action is denied.

XI. Defendants move to dismiss the plaintiff's *prima facie* tort claim in the 23rd Cause of Action

"The requisite elements for a cause of action sounding in *prima facie* tort are (1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal." *AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.,* 115 A.D.3d 402, 403 (1st Dept 2014).

Defendants argue that the plaintiff's claim for *prima facie* tort should be dismissed because the Complaint does not allege any conduct by any particular defendant, and the generalized allegations of the group of defendants are conclusory and fail to satisfy the notice pleading requirements under *CPLR §3013*. Specifically, defendants argue the conclusory allegation in paragraph 228 of the Complaint, that "defendants acted with willful or wanton negligence, recklessness, and/or a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard, justifying punitive damages is patently insufficient because there are no facts supporting the assertion" and that defendant acted "solely to harm." Defendants also argue that plaintiff's *prima facie* tort claim must be dismissed because she failed to plead special damages, and to specify the amount and itemization of the damages claimed. Defendants contend that the 23rd cause of action claim is duplicative of the other claims pled in the Complaint.

In opposition, the plaintiff argues that she has alleged a legally cognizable claim for *prima facie* tort because she pled the defendants acted knowing their conduct would harm the plaintiff; the defendants acted with "no reasonable excuse" and "utterly beyond the bounds of decency"; and the defendants' conduct caused special damages including loss of pay and emotional distress. Plaintiff also contends that she attached and incorporated a Notice of Claim as an exhibit to her complaint, which sets forth specific calculations of special damages. (*See, NYSCEF Doc. No. 1; defendants' Exhibit A ¶¶ 16 and 17; NYSCEF Doc. No 3*). Plaintiff argues she did allege special damages, and the Notice of Claim quantified and particularly identified her actual losses, and the defendants wholly overlooked this component of the Complaint. As to the defendants' duplicative claim argument, plaintiff argues that she is permitted to plead alternative causes of actions. Plaintiff also claims the defendants fail to "identify the meritorious

'duplicative' causes of actions that plaintiff has pled." Therefore, plaintiff asserts she has sufficiently alleged special damages, and the pleadings establish adequate notice to defendants of the facts in support of the *prima facie* tort claim.

Here, the Court finds that the plaintiff has stated a claim for *prima facie* tort and has alleged a legally cognizable claim which is incorporated in the Notice of Claim and in the Complaint. Accordingly, the defendants' motion to dismiss the 23rd cause of action is denied.

XII. Defendants move to dismiss the plaintiff's 24th Cause of Action for violation of New York Civil Rights Law §52-B

*New York Civil Rights Law §52-b* states:

> Any person depicted in a still or video image, regardless of whether or not the original still or video image was consensually obtained, shall have a cause of action against an individual who, for the purpose of harassing, annoying or alarming such person, disseminated, or published, or threatened to disseminate or publish, such still or video image, where such image:
>
> a. was taken when such person had a reasonable expectation that the image would remain private; and
>
> b. depicts (i) an unclothed or exposed intimate part of such person; or (ii) such person engaging in sexual conduct, as defined in subdivision ten of section 130.00 of the penal law, with another person; and
>
> c. was disseminated or published, or threatened to be disseminated or published, without the consent of such person.

*NYCRL §52-b(1)(b)(i)-(ii)*

Defendants argue that the plaintiff's Complaint fails to address the requisite element of her claim for violation of *New York Civil Rights Law §52-B*, and thus, the cause of action must be dismissed. The defendants cite to *Mira v. Harder*, 177 A.D.3d 426, 427 (1st Dep't 2019), where the trial court granted defendants' pre-answer motion to dismiss because the Complaint failed to allege that plaintiff had any personal knowledge of defendants disseminating intimate images of her on social media with the intent to harass or annoy her.

In opposition, the plaintiff argues she sufficiently pled a claim under *New York Civil Rights Law § 52-B*, given that she was depicted in an intimate video while she was in the act of masturbation; she had a reasonable expectation that this image would remain private; learned through others that several teachers and administrators with no legitimate need to know about the video, much less see the video, either knew about the video or had viewed it; and that their awareness and access could only have been achieved through the defendants' conduct. Plaintiff also alleges that the defendants disseminated the video images without her consent and permission, and beyond the scope necessary to conduct defendants' internal investigation into the matter. Plaintiff alleged the defendants had no "legitimate" purpose for disseminating the video and that their conduct was designed to cause her "harm."

In addition, the plaintiff argues that the defendants' reliance on the case, *Mira v. Harder*, *supra*, is misplaced because in *Mira*, the Court granted a motion to dismiss when the plaintiff failed to allege that the plaintiff was aware of any dissemination of intimate images. *Mira*, 177 A.D.3d at 427, however unlike in *Mira*, the plaintiff in this case pled she was aware that the images were shared beyond any "legitimate business purpose" to other teachers and administrators within the school system. Therefore, the plaintiff claims she adequately pled a cause of action under *New York Civil Rights Law § 52-B.*

Here, the Court finds that the plaintiff's Complaint alleges a legally cognizable claim for violation of *New York Civil Rights Law §52-B.* As such, the defendants' motion to dismiss the 23rd cause of action is denied.

Furthermore, the plaintiff also requests that if this Court deems any branch of the Complaint deficient, plaintiff seeks leave to replead and/or file an Amended Complaint. This Court finds that the plaintiff's request is improper as there has been no motion filed before this Court seeking to amend the Complaint, thus plaintiff's request is denied.

Accordingly, it is hereby

ORDERED that the defendants' motion to dismiss the plaintiff's Complaint and the above-mentioned causes of actions is granted in part, only as it pertains to the 15th, 20th and 21st causes of actions; and is denied as it pertains to the remaining causes of actions alleged in the Complaint; and it is further

ORDERED that the 15th (invasion of privacy), 20th (defamation) and 21st (computer tampering) causes of actions asserted in the Complaint are hereby dismissed; and it is

ORDERED that the plaintiff's request to submit an Amended Complaint is denied as the plaintiff has not made a motion before this Court; and it is further

ORDERED that the parties are directed to proceed with discovery in a good faith and an expeditious manner; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision and Order of the Court.

Lisa S. Headley (RA)

8/5/2024
DATE

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