

2020 WL 6714980 (N.Y.Sup.), 2020 N.Y. Slip Op. 33790(U) (Trial Order)
Supreme Court of New York.
New York County

****1** Alice BAHAR, Plaintiff,

v.

Abraham SANIEOFF, Charlet Sanieoff, Leor Sabetfard, Matthew Sabetfard,
Eliza Sabetfard, The Sani Group a/k/a 25 Grove Street LLC, Defendant.

No. 150328/2018.
November 16, 2020.

Decision + Order on Motion

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Present: Hon. [W. Franc Perry](#), Justice.

MOTION DATE October 29, 2020

MOTION SEQ. NO. 007 008 009

*1 The following e-filed documents, listed by NYSCEF document number (Motion 007) 91, 92, 93, 94, 95, 96, 97, 109, 110, 112, 115 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 98, 99, 111 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 101, 102, 103, 104, 105, 106, 107 were read on this motion to/for MISCELLANEOUS.

This case stems from the aftermath of an extramarital affair between Plaintiff Alice Bahar and her former business associate, Defendant Abraham Sanieoff. In motion sequence 007, Defendants Abraham Sanieoff, Charlet Sanieoff, Leor Sabetfard, Matthew Sabetfard, and Eliza Sabetfard (the “individual Defendants”) move to dismiss the fourth amended complaint as alleged against them for failure to state a claim. In motion sequence 008, Defendant 25 Grove Street LLC (“25 Grove”) “joins in” the motion to dismiss. Both motions have been fully submitted.

In motion sequence 009, the individual Defendants move for a commission to take an out-of-state deposition of Jerry Breen, an individual that Plaintiff alleges harassed her at the behest of ****2** the Defendants. Plaintiff does not oppose the motion and seeks permission to take a deposition of Mr. Breen herself. Motions 007, 008, and 009 are consolidated for disposition.

BACKGROUND

Plaintiff first met Abraham Sanieoff in May 2016 when he signed a rental agreement giving Plaintiff the exclusive right to list an apartment in the building located at 25 Grove Street, a building owned by Defendant 25 Grove Street LLC, of which Mr. Sanieoff is the principal. Plaintiff alleges that in July 2016, after showing another apartment in the building, Abraham Sanieoff induced Plaintiff into having intercourse with him.

This relationship went on until February 2017, when Abraham left a voicemail on Plaintiff's phone stating that he was ending both their personal and business relationship and that his wife, Defendant Charlet Sanieoff, "kn[ew] everything". (NYSCEF Doc No. 83 at ¶ 26.) In that same voicemail, Charlet issued an expletive-laden message to Plaintiff to stay away from Abraham. Later that day, Charlet's mother, Defendant Eliza Sabetfard, also joined in, leaving two of her own voicemails on Plaintiff's phone. This continued for quite some time, with Defendants Charlet and Eliza leaving at least 15 voicemails that included death threats and allegations that Plaintiff was being watched during all hours of the day. Plaintiff also alleges that Defendants Leor and Matthew Sabetfard followed her on several occasions, and that Defendants enlisted additional people, including Jerry Breen and an unidentified African-American male, to intimidate her as a matter of course. Lastly, Plaintiff alleges that Defendant Eliza Sabetfard repeatedly called her employer, Bond New York Properties, LLC ("Bond"), to undermine her working relationship, and that Defendant Abraham Sanieoff improperly had his former attorney send to Bond a document preservation letter.

*2 **3 Plaintiff commenced this action in January 2018 and filed her fourth amended complaint in February 2020, setting forth five claims: 1) intentional infliction of emotional distress; 2) negligent infliction of emotional distress; 3) harassment and aggravated harassment; 4) intentional interference with a contractual relationship; and 5) tortious interference with a prospective economic advantage. Defendants now move to dismiss counts 1 and 2 as against Abraham Sanieoff, Matthew Sabetfard, and Leor Sabetfard; counts 3 and 4 in their entirety; and count 5 as against Abraham Sanieoff, Charlet Sanieoff, Matthew Sabetfard, and Leor Sabetfard.

DISCUSSION

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Intentional and Negligent Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress ("IIED"), a plaintiff must allege "(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." (*Howell v New York Post, Co.*, 81 NY2d 115, 122 [1993].) Relatedly, "[t]o establish a cause of action for the negligent infliction of emotional distress, it must be shown that there was a breach of duty owed to the plaintiff which either unreasonably endangered the plaintiff's physical safety, or **4 caused the plaintiff to fear for his or her own safety." (*Livadas v First Denco Realty, Inc.*, 2020 WL 2404955, at *4 [Sup Ct, NY County 2020].)

"[I]ntentional and negligent infliction of emotional distress, both . . . require allegations that the defendant's conduct is '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 society.' " (*Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [1st Dept 2005].) "Those few claims of intentional infliction of emotional distress that have been upheld by [the First Department]

were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff.” (*Seltzer v Bayer*, 272 AD2d 263, 264--65 [1st Dept 2000].)

Defendants argue that these two claims must be dismissed as against Abraham Sanieoff, Matthew Sabetfard, and Leor Sabetfard (the “moving Defendants”) because Plaintiff fails to allege that the conduct of these Defendants was sufficiently outrageous. Specifically, Defendants note that the only specific mention of Abraham Sanieoff is when he called to end things with Plaintiff (NYSCEF Doc No. 92 at 10) and the only allegations against the Sabetfard brothers are that they followed Plaintiff on one or two occasions and observed her from afar. (*Id.* at 11.)

Plaintiff counters that the facts alleged in the complaint give rise to an inference that all Defendants conspired together to inflict emotional distress upon her and submits an affirmation in support. (NYSCEF Doc No. 110 at 13; NYSCEF Doc No. 109.) In the alternative, Plaintiff argues that the moving Defendants aided and abetted the remaining Defendants to inflict emotional distress upon her.

*3 Concerted action liability rests upon the principle that all those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with *5 him.” *Bichier v Eli Lilly & Co.*, 55 NY2d 571, 580 [1982] [internal quotations and citations omitted]. “Conspiracy and aiding and abetting are varieties of concerted-action liability: conspiracy requires an agreement to commit a tortious act, aiding and abetting requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer.” *Pittman by Pittman v Grayson*, 149 F3d 111, 122-33 [2d Cir 1998].

(*Dennis v Napoli*, 2015 WL 4885340, at *7 [Sup Ct, NY County 2015].)

Here, Plaintiff fails to state a claim for either intentional or negligent infliction of emotional distress against the moving Defendants. First, as Defendants correctly argue, one cannot conspire with or aid and abet a tortfeasor to commit a non-intentional tort, so the claim for negligent infliction of emotional distress is dismissed as against Abraham Sanieoff and the Sabetfard brothers. (*Babcock v Citigroup, Inc.*, 2005 WL 6465161 [Sup Ct, NY County 2005].)

Next, after accepting all facts in the complaint as true, the allegations against the moving Defendants do not constitute conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency[.]” (*Berrios*, 20 AD3d at 362.) There are no facts alleged against Abraham Sanieoff that indicate he conspired to inflict emotional distress upon Plaintiff, or that he aided and abetted the other Defendants in doing so. The only time he is mentioned in the complaint is when he left the initial voicemail. (NYSCEF Doc No. 83 at ¶ 26.)

Similarly, Plaintiff alleges that she was followed by: Leor Sabetfard on March 3, 2017 (*Id.* at ¶ 50); either Leor or Matthew Sabetfard on June 16, 2017 (*Id.* at ¶ 59); and both Leor and Matthew on July 27, 2017. (*Id.* at ¶ 63.) While it is understandable that Plaintiff may have been concerned for her safety, these allegations alone do not give rise to a claim for intentional infliction of emotional distress, even under Plaintiff’s new theory of conspiracy liability. The alleged participation of the Sabetfard brothers was extremely limited and does not amount to the kind of outrageous behavior envisioned to be actionable in tort.

****6 Harassment and Aggravated Harassment**

Defendants argue that there is no private right of action for harassment and aggravated harassment. Plaintiff argues that there is. (NYSCEF Doc No. 110 at 19, citing *Poulos v City of New York*, 2016 WL 224135 [SD NY 2016].)

While it is true that “conduct sufficient to invoke criminal liability for harassment may be the basis for private action. This means only that conduct in violation of Penal Law § 240.25 [“Harassment in the first degree”] might also provide the basis for civil recovery in tort; this does not mean, as plaintiff contends, that a private citizen may sue for relief under the criminal

statute.” (*Stevens v Brown*, 2012 WL 2951181 [Sup Ct, NY County 2012] [internal citation omitted].) Accordingly, the court holds that there is no private right of action for harassment or aggravated harassment and the claim is dismissed.

Intentional Interference with Contractual Relations

“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], citing *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956].) As a matter of law, a plaintiff will be unable to prevail on this claim if there is no breach of the contract by a third party. (*Marks v Smith*, 65 AD3d 911, 916 [1st Dept 2009].)

*4 Here, Plaintiff claims that Defendant Eliza Sabetfard interfered with her employment by calling Bond “approximately twenty (20) times a day in late-February to early-March 2017, with the intent to get Plaintiff fired from her job” and that the Defendants collectively “had their former counsel send to [BOND] a letter . . . written with the intent that it causes Plaintiff to be fired from **7 her job.” (NYSCEF Doc No. 83 at ¶¶ 100, 101.) However, Plaintiff also concedes that she was an at-will employee and that she resigned from her job. (*Id.* at ¶ 66.) Thus, Plaintiff is unable to prove the necessary breach of contract by Bond to establish this cause of action, and it is hereby dismissed as against all Defendants.

Tortious Interference with Prospective Economic Advantage

Relatedly, New York courts have “recognized that inducing breach of a binding agreement and interfering with a nonbinding ‘economic relation’ can both be torts, but that the elements of the two torts are not the same.” (*Carvel Corp. v Noonan*, 3 NY3d 182, 189 [2004].) “Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant.” (*NBT Bancorp Inc. v Fleet/Norstar Fin. Grp., Inc.*, 87 NY2d 614, 621 [2004].) Thus, “as a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be ‘lawful’ and thus insufficiently ‘culpable’ to create liability for interference with prospective contracts or other nonbinding economic relations.” (*Carvel Corp.*, 3 NY3d at 190.)

Here, Defendants argue that the claim should be dismissed as against Abraham Sanieoff, Charlet Sanieoff, Leor Sabetfard, and Matthew Sabetfard, because Plaintiff alleges no specific facts indicating that these Defendants committed either a crime or an independent tort. (NYSCEF Doc No. 92 at 17.) Rather, Defendants argue that the facts alleged would only give rise to a claim as against Eliza Sabetfard, as the Complaint states that it was Eliza who made the repeated phone calls to Bond. (*Id.*; NYSCEF Doc No. 83 at ¶ 47.) Additionally, Defendants argue that the letter sent by Abraham Sanieoff's former attorney does not constitute sufficiently culpable conduct.

**8 Plaintiff responds that an exception to the general rule applies where “a defendant engages in conduct ‘for the sole purpose of inflicting intentional harm’ on plaintiff” (NYSCEF Doc No. 110, quoting *Carvel Corp.*, 3 NY3d at 190) and that the court should infer that all Defendants acted in concert to cause Plaintiff harm.

The court will dismiss the claim as against Defendants Abraham Sanieoff, Charlet Sanieoff, Leor Sabetfard, and Matthew Sabetfard. Plaintiff fails to allege specific facts demonstrating the requisite culpable behavior on behalf of these Defendants. The only specific factual allegation against the Sabetfard brothers in the Complaint is that they followed her on certain occasions. (NYSCEF Doc No. 83 at ¶¶ 50, 58, 63.) This allegation does not constitute interference with Plaintiff's prospective economic advantage. Similarly, Plaintiff alleges no facts indicating that Defendant Charlet Sanieoff had anything to do with Plaintiff's eventual resignation from Bond.

Lastly, Plaintiff attempts to impose liability on Abraham Sanieoff based upon the letter sent by his former counsel to Bond, which was intended to put Bond on notice to preserve all potentially discoverable documents that might be relevant in a future

legal action. However, this letter was sent as a matter of course and does not give rise to the type of culpable conduct required to assert a claim for intentional interference with a prospective economic advantage. As such, the claim is dismissed as against all Defendants except Eliza Sanieoff.

Motion Sequence 008

*5 In motion sequence 008, Defendant 25 Grove Street joins in with the individual Defendants' motion to dismiss, arguing that all claims should be dismissed against the corporate defendant for the same reasons that they should be dismissed against Abraham Sanieoff. (NYSCEF Doc Nos. 98, 99.) Plaintiff opposes, on the grounds that discovery is needed to **9 determine whether an exclusive rental agreement for Plaintiff to show the apartments within the building was in effect at the time of her termination, as that would be relevant to a damages calculation. (NYSCEF Doc No. 111.)

In reply, 25 Grove Street argues that it was not a party to any such rental agreements, as those agreements were, as Plaintiff pointed out in her complaint, between Bond and Abraham Sanieoff. (NYSCEF Doc No. 115, citing NYSCEF Doc No. 83 at ¶ 20, n 1.)

Here, Plaintiff has failed to assert a cause of action against 25 Grove Street. The court finds no specific factual allegations against 25 Grove Street giving rise to any of the claims contained in the complaint. Especially persuasive is the fact that Plaintiff admits that 25 Grove Street was not a party to the exclusive rental agreements. For the reasons stated above, 25 Grove Street's motion to dismiss is granted.

Motion Sequence 009

Pursuant to [CPLR 3108](#), “[a] commission . . . may be issued where necessary or convenient for the taking of a deposition outside of the state.” A moving party must demonstrate that the commission is “necessary or convenient” by including “allegations that the proposed out-of-State deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or helpful.” (*In re Part 60 RMBS Put-Back Litigation*, 155 AD3d 482, 484 [1st Dept 2017].)

Here, Defendants have not demonstrated that the commission is either “necessary or convenient,” because they fail to include any allegations that they have attempted to contact Mr. Breen and asked him to appear, or that he would otherwise be unwilling to appear. (See *Bardwil v Bardwil*, 2019 WL 1593476, at *1 [Sup Ct, NY County 2019].) Nor does Plaintiff make such allegations in her submission. (NYSCEF Doc No. 105.) Further, neither party has established that **10 the deposition testimony of Mr. Breen is material and necessary to this action. Discovering whether Mr. Breen was actually hired by Defendants could be accomplished by deposing the Defendants themselves, which has not yet occurred. Thus, the motion is denied without prejudice to renew upon a showing that the commission is necessary or convenient.

CONCLUSION

Accordingly, it is hereby

ORDERED, that Defendants' motion sequence 007 is granted in its entirety, in that count 1 is dismissed as against Abraham Sanieoff, Matthew Sabetfard, and Leor Sabetfard; count 2 is dismissed as against Abraham Sanieoff, Matthew Sabetfard, and Leor Sabetfard; count 3 is dismissed as against all Defendants; count 4 is dismissed as against all Defendants; and count 5 is dismissed as against Abraham Sanieoff, Matthew Sabetfard, Leor Sabetfard, and Charlet Sanieoff, with costs and disbursements to Defendants as taxed by the Clerk of the Court, and it is further

ORDERED, that Defendant 25 Grove Street LLC's motion sequence 008 is granted in its entirety and the complaint is dismissed against it, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of the moving Defendants; and it is further

ORDERED that the action is severed and continued against the remaining Defendants; and it is further

*6 ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party 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 **11 Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; 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 Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptctmanh); and it is further

ORDERED that motion sequence 009 is denied without prejudice to renew.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

11/16/20

DATE

<<signature>>

W. FRANC PERRY, J.S.C.