Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

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ELENA PATSIOURAS, *individually*, and ELENA PATSIOURAS, as a shareholder of LNR GROUP LLC,

Plaintiff(s),

-against-

NICK KOKLANOS a/k/a NICO KOKLANOS and FRESH FOODS IDEAS LLC.

Defendant(s).

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Index No.: 715044/2018

Motion Date: April 23, 2019

Motion Cal. No.: 13

Motion Seq. No.: 2

The following papers numbered 1-6 read on this motion by plaintiffs for an Order (1): dismissing defendants' counterclaims pursuant to CPLR §3211(a)(7) on the ground that defendants failed to plead cognizable claims against plaintiff Patsiouras and (2) awarding plaintiff Patsiouras reasonable attorneys' fees and costs pursuant to CPLR §8303-a and 22 NYCRR 130-1.1, based on the blatant frivolity of the counterclaims.

	PAPERS NUMBERED
Notice of Motion - Affid.-Exhibits.....	1- 4
Answering Affidavits - Exhibits	5
Reply Affidavits - Exhibits	6

Upon the foregoing papers it is ordered that this motion by plaintiffs is determined as follows:

Initially, the Court notes that plaintiffs' motion fails to annex a copy of the complaint nor makes reference to any e-filed complaint. Thus, the Court is unable to fully comprehend or give a recitation of the gravamen of plaintiffs' allegations in this action from the record before the Court. Additionally, although the Notice of Motion to Dismiss states that plaintiffs are moving pursuant to CPLR §3211(a)(7), and the "INTRODUCTION" paragraph of plaintiffs' Memorandum of Law in Support states that plaintiff seeks to dismiss defendants' First and Second Counterclaims pursuant to CPLR §3211(a)(7), plaintiffs' Memorandum also asserts arguments for dismissal based on documentary evidence (CPLR §3211(a)(1)), and for dismissal of defendants' Third, Fourth, and Fifth counterclaims. However, since defendants opposed each branch of plaintiffs' motion without objection, the discrepancies in plaintiffs' motion shall be disregarded for the purposes of this decision.

Defendants served and filed an Amended Verified Answer, Affirmative Defenses, and Counterclaims dated February 6, 2019, asserting counterclaims sounding in breach of contract (First), detrimental reliance (Second), intentional interference in business relations (Third), loss of prospective economic advantage (Fourth), and defamation (Fifth).

On a motion to dismiss pursuant to CPLR §3211(a)(7), the pleadings are afforded a liberal construction and the Court accepts facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone,* 50 NY2d 481; *Rovello v. Orofino Realty Co.,* 40 NY2d 633 [1976]; *A.O. Fox Memorial Hospital v. American Tobacco, Inc.,* 302 AD2d 413; *Hornstein v. Wolf,* 109 AD2d 129). Thus, on a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211, the criterion is whether the plaintiff has a cause of action, not whether he has stated one *(Leon v. Martinez,* 84 NY2d 83 [1994]; *Guggenheimer v. Ginzburg,* 43 NY2d 268 [1977]). "Whether the complaint will later survive a motion for summary judgment, or whether the [party] 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" *(Litvinoff v. Wright,* 150 AD3d 714 [2017]).

The branch of plaintiff's motion to dismiss the First counterclaim is denied. The elements of a cause of action sounding in breach of contract are: (1) the existence of a contract between the plaintiff and defendant; (2) consideration; (3) performance by plaintiff thereunder; (4) a breach by defendant and (5) damages to plaintiff as a result of defendant's breach (*Liberty Equity Restoration Corp. v. Park,* 160 AD3d 628 [2018]; *Canzona v. Atanasio,* 118 AD3d 837 [2014]; *J.P. Morgan Chase v. J.H. Electric of New York, Inc.,* 69 AD3d 802 [2010]). Plaintiff contends that defendants failed to allege all of the elements of a claim for breach of contract, specifically the first and third elements. Contrary to plaintiff's contention, defendants adequately alleged the requisite elements for breach of contract.

Plaintiff further argues that the First counterclaim must be dismissed pursuant to CPLR §3211(a)(1), upon the ground that the parties' Agreement provided that a membership certificate could only be issued once payment was made, as reflected in the Minutes of Special Meeting of the Board held on April 11, 2016, and that plaintiff issued checks totaling the required $175,000 contribution. However, the parties' Agreement is not annexed to plaintiff's motion nor part of the record before the Court, and the motion does not appear to contain the complete Minutes of Special Meeting of the Board. Furthermore, the copies of the checks annexed to the moving papers which plaintiff claims evidences full payment of the required $175,000, include a check in the amount of $51,500 from "Elena Philippou". However it is unclear from the motion who Elena Philippou is or what her connection is, if any, to this matter. Thus, the documentary evidence relied on by plaintiff fails to resolve all factual issues as a matter of law and conclusively dispose of defendants' First counterclaim (*Martin v. New York Hospital and Medical Center of Queens,* 34 AD3d 650 [2006]; *M. Fund, Inc. v. Carter,* 31 AD3d 620 [2006]; *Trade Source, Inc. v. Westchester Wood Works,*

Inc., 290 AD2d 437 [2002]).

The branch of the motion to dismiss defendants' Second counterclaim is granted.

Under New York law, detrimental reliance is an element of equitable and promissory estoppel; there is no independent cause of action for detrimental reliance (*Homola v. Jewelers Mutual Insurance Company*, 2017 NY Slip Op 31536(U); *Paxi, LLC v. Shiseido Americas Corporation*, 636 F. Supp. 2d 275 [SD NY 2009]).

The branch of the motion to dismiss the Third counterclaim is granted. The elements of a claim for tortious interference with a prospective contract or business relationship are: (1) defendants' knowledge of plaintiff's business opportunity with another party; (2) defendant's intentional interference with that opportunity; (3) defendant's use of wrongful means or sole purpose of inflicting harm; (4) a showing that the contract or prospective business relationship would have been entered into but for defendant's interference and (5) resulting damages (*M.J. & K. Co. v. Matthew Bender & Co.*, 220 AD2d 488 [1995]; *Benintani v. Fraser*, 2013 NY Slip Op 30566(U)). To assert a claim for tortious interference with business relationship, a plaintiff is required to show that the defendant used "wrongful means" (*Jabbour v. Albany Medical Center*, 237 AD2d 787 [1997]). "Wrongful means" include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract (*Jabbour v. Albany Medical Center*, 237 AD2d 787 [1997]). Plaintiff is also required to specifically allege that defendant had knowledge of the prospective contract or business relationship, and defendant's interference must be specified in the allegations set forth in the complaint, "as must the defendants' knowledge and the interference" (*Burns Jackson Miller Summit & Spitzer v. Linder*, 88 AD2d 50 [1982]). Conclusory allegations without factual support are insufficient to state a cause of action for tortious interference with a business relationship (*Benintani v. Fraser*, 2013 NY Slip Op 30566(U); *Burns Jackson Miller Summit & Spitzer v. Linder*, 88 AD2d 50 [1982]; *Nero v. Fiore*, 165 AD3d 823 [2018]).

Here, the Third counterclaim fails to adequately state a cause of action for tortious interference with business relationship. Defendant failed to allege that plaintiff's conduct intentionally induced a breach of a specific contract or business relationship between defendant and a third-party, or that plaintiff otherwise rendered performance of a contract impossible (*Goldman v. Citicore* I, LLC, 149 AD3d 1042 [2017]). Furthermore, where, as here, the alleged harm is injury to defendant's reputation, the cause of action is one for defamation, not tortious interference with prospective contract or business relationship (*Benintani v. Fraser*, 2013 NY Slip Op 30566(U)).

The branch of the motion to dismiss the Fourth counterclaim is granted. There is no

cause of action for loss of prospective economic advantage. If defendant was attempting to assert a counterclaim sounding in wrongful/tortious interference with prospective economic advantage, it is well settled that in order to establish this tort, the party asserting the claim must demonstrate that the alleged interference used unlawful or improper means, or that the interference by lawful means constituted the infliction of harm done without excuse or justification (*Bogdan v Peeksill Community Hospital,* 211 AD2d 692 [1995]). Defendant failed to adequately plead this counterclaim.

The branch of the motion to dismiss the Fifth counterclaim for defamation is granted. The elements of a cause of action sounding in defamation are that a false statement about a party was published to a third party, without privilege or authorization *(Diorio v. Ossining Union Free School District,* 96 AD3d 710 [2012]; *Franco Belli Plumbing & Heating & Sons, Inc. v. Dimino,* 164 AD3d 1309 [2018]), and it must either cause special harm or constitute defamation per se *(Franco Belli Plumbing & Heating & Sons, Inc. v. Dimino,* 164 AD3d 1309 [2018]) or must either cause special harm or constitute defamation per se *Franco Belli Plumbing & Heating & Sons, Inc. v. Dimino,* 164 AD3d 1309 [2018]). Generally, a party alleging slander must plead and prove that he or she has sustained special damages, that is, "the loss of something having economic or pecuniary value", unless the alleged defamatory statement falls into one of the exceptions to the rule which constitute slander *per se* (*G.L. v. Markowitz,* 101 AD3d 821 [2012]; *Rufeh v. Schwartz, 50 AD3d 1002 [2008]).* The established exceptions, or slander *per se*, consist of statements (a) charging the plaintiff with a serious crime; (b) that tend to injure another in his or her trade, business or profession; (c) that plaintiff has a loathsome disease; or (d) imputing unchastity to a woman *(Liberman v. Gelstein, 80 NY2d 429 [1992]).* Here, defendant failed to allege any special damages or that the alleged defamation constituted slander *per se*.

The branch of plaintiff's motion for sanctions is denied. The record does not demonstrate that defendant engaged in any conduct that was frivolous within the meaning of 22 NYCRR 130-1.1 (*Burns v. Palazola*, 22 AD3d 779 [2005]; *Ortega v. Bisogno & Meyerson*, 2 AD3d 607 [2003]; *Del Ponte v. 1910-12 Ave. U Realty Corp.*, 7 AD3d 562 [2004]).

Dated: OCT 31 2019

MARGUERITE A. GRAYS
J.S.C.

FILED
NOV - 4 2019
COUNTY CLERK
QUEENS COUNTY