

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of July, 2015.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

-----X

OCEANA HOLDINGS CORP.,

Plaintiff,

- against -

Index No. 507975/2014

MARAT NOVIKOV, OLGA NOVIKOVA, ANDREY
NOVIKOV, TOMER YUZARY, ANNA POLONSKA,
RHINO BLADES, INC., "JOHN DOES" AND "MARY
ROES" 1-10,

Defendants.

-----X

The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

Opposing Affidavits (Affirmations)_____

Reply Affidavits (Affirmations)_____

_____ Affidavit (Affirmation)_____

Memoranda of Law_____

Papers Numbered

19-24

37-39

42-44

25, 40

In this action by plaintiff Oceana Holdings Corp. (Oceana) against defendants Marat Novikov (Marat), Olga Novikova (Olga), Andrey Novikov (Andrey), Tomer Yuzary (Tomer), Anna Polonska (Polonska), Rhino Blades, Inc. (Rhino Blades), and "John Does" and "Mary Roes" 1-10 (individuals whose identities are unknown who allegedly participated

with the named defendants in disrupting Oceana's business) (collectively, defendants), Marat, Olga, and Andrey (collectively, the Novikov defendants) move, under motion sequence number one, for an order: (1) pursuant to CPLR 3024 (b), striking allegedly scandalous and prejudicial material from Oceana's complaint and removing such allegedly offensive pleading from the court file, (2) pursuant to CPLR 3211 (a) (7), dismissing the first, second, third, fourth, sixth, and seventh causes of action of Oceana's complaint as against them based upon the ground that they fail to state a cause of action, or, in the alternative, (3) dismissing Oceana's third and fourth causes of action for defamation and its fifth cause of action for injurious falsehood based upon the claimed ground that Oceana has no standing to sue for allegedly defamatory and/or injurious statements made regarding the owners of Oceana, as opposed to regarding Oceana itself, or, in the alternative, (4) dismissing Oceana's defamation claims contained in its third, fourth, and fifth causes of action, pursuant to CPLR 3016 (a), on the claimed basis that Oceana has failed to properly indicate the specific defamatory language allegedly used by them, and (5) granting them leave to seek their reasonable counsel fees and expenses pursuant to 22 NYCRR 130-1.1.

BACKGROUND

Oceana is a domestic corporation, which was incorporated on March 15, 1994. Oceana owns and manages real property located at 1035 Brighton Beach Avenue, in Brooklyn, New York (the building), which is also its principal place of business. The property where the building is located is presently zoned for mixed residential and

commercial use, and it is used for retail and commercial purposes. It contains a number of retail stores, a supermarket, a catering hall, a concert hall, and office space.

Oceana has no shareholders' agreement. It is undisputed that the Bronstein family, through the Scorpio Family Trust and the Oceana Trust, operates Oceana, and owns 80% of its outstanding shares. Aron Bronstein (Aron) and Diana Bronstein (Diana) (collectively, the Bronsteins) are officers of Oceana. Marat is a minority shareholder of Oceana and he owns 20% of its shares. Olga is Marat's adult daughter, and Andrey is Marat's adult son. Neither Olga nor Andrey have ever owned any shares of Oceana or served on its board of directors.

Oceana claims that Marat has "a deep seated hatred" for the Bronsteins. Oceana has attempted to purchase Marat's minority interest in it, but Marat has refused to sell to Oceana. There has been previous litigation involving Marat and Oceana, consisting of three lawsuits. The first action was brought by Marat against Oceana and others regarding Marat's alienation of his stock interest in Oceana, and a motion by Marat was granted in that action to the extent that it enjoined the defendants therein from adopting any resolution that would unlawfully restrict the alienation of his stock and interest in Oceana (*Marat v Bronstein*, Sup Ct, Kings County, index No. 128/1999) (the 1999 action). In the second action, which was commenced in 2009, JAS Family Trust B, which was then a 10% shareholder in Oceana, and Marat sought to recover unpaid profit distributions from Oceana, alleging that it had ceased paying the distributions attributable to the shares held by JAS Family Trust B, notwithstanding that it continued to pay the other shareholders, and JAS Family Trust B and

Marat also asserted causes of action alleging mismanagement, including waste, negligence, fraud, self-dealing, and conversion, and sought an accounting (*JAS Family Trust v Oceana Holding Corp*, 2012 WL 10020157 [Sup Ct, Kings County 2012]) (the 2009 action). In the 2009 action, the Supreme Court, Kings County, dismissed all of the cause of actions asserted by Marat and JAS Family Trust, including Marat's cause of action for an accounting which sought the inspection of Oceana's corporate books and records in connection with that action, and that dismissal was affirmed by the Appellate Division, Second Department (*JAS Family Trust v Oceana Holding Corp.*, 109 AD3d 639 [2d Dept 2013]). The most recent litigation involved a petition by Marat to examine Oceana's books and records pursuant to Business Corporation Law § 624 (*Novikov v Oceana Holdings Corp.*, Sup Ct, Kings County, index No., 506282/2013) (the 2013 action). By a decision and order dated November 3, 2014 in the 2013 action, the court directed Oceana to produce certain documents created between the beginning of 2010 to the present, including leases on the property entered into by Oceana.

Tomer has never owned any shares of Oceana or served on its board of directors, nor has he ever leased space in the building. Oceana alleges that Tomer's connection to it is through Polonska, who, it claims, is Tomer's mistress. Polonska owns and operates a store called Desert Rose Tanning Salon Inc. f/k/a Caffeine, Inc. a/k/a Grocery Emporium Inc. (Grocery Emporium), which leases space in the building. Rhino Blades is a corporation which distributes and sells diamond-cut blades of various types, and it is owned by Tomer and his wife, Angella Yuzary (Angella). Oceana alleges that Tomer occupies the basement

space of the building and uses it to run Rhino Blades' day-to-day business. Oceana claims that neither Tomer nor Rhino Blades, Polonska, Angella, or Grocery Emporium have a valid lease for this basement space or otherwise pays rent for its use, and that this occupation of the basement space is, therefore, illegal.

According to Oceana, beginning in or about September 2013, Marat participated in a "multifaceted scheme" to interfere with and disrupt its business and wrest control of it from the Bronsteins. Oceana claims that because Marat does not speak English, he enlisted the assistance of his adult children, Andrey and Olga, to speak for him.

Oceana claims that in or around September 2013, Olga and Marat were introduced to Polonska through a mutual acquaintance, who advised Olga that Polonska had "dirt" on the Bronsteins that would "put Aron and Diana in their places." This information allegedly consisted of Oceana's confidential corporate documents taken by Tomer and Polonska from Aron's office. According to Oceana, Polonska had first tried to sell these documents to the mutual acquaintance, who had been aligned with Marat in the previous litigation against Oceana, but he declined.

Oceana alleges that Polonska and Tomer met with Marat and/or Olga, acting on Marat's behalf, and that during these meetings, the Novikov defendants, Polonska, and Tomer agreed to collaborate in a scheme against it and the Bronsteins. Oceana further alleges that Marat requested, and Polonska and Tomer initially provided Marat, with various records relating to Grocery Emporium's relationship with it and the Bronsteins. Oceana

claims that in November 2013, Tomer approached Aron and threatened him that unless Polonska was "bought out" of her lease for Grocery Emporium for \$350,000, certain documents that they had obtained from Aron's office would be provided to Marat in his litigation against it, but Aron rejected this demand. On December 16, 2013, Marat filed some or all of the documents procured by Tomer as attachments to an affidavit filed by Marat against Oceana in the 2013 action

Oceana alleges that defendants approached tenants with respect to disrupting its business, and those that refused to cooperate with them were threatened and intimidated. With respect to this allegation, Oceana asserts that in November 2013, Olga contacted Alon Maman (Maman), the owner of International Quality Fruit, Inc. (International Fruit), a tenant of Oceana, and indicated that she represented a partner of Oceana (presumably, Marat) and that she directed him to provide her with copies of International Fruit's lease, as well as any other paperwork that Aron had sent to Maman over the years, and that this was followed by telephone calls from Olga and Andry. Oceana alleges that when Maman refused, Olga threatened him with legal action, including the issuance of subpoenas for International Fruit's business records. Oceana further alleges that Tomer and Polonska also separately approached Maman, and told him that if he joined forces with them and Marat, they could "kick the officers out," and then his tenancy would "be much easier," and that they also requested Maman's paperwork, but he refused to give it to them.

Oceana additionally alleges that in an effort to disrupt its business, Marat, Tomer, and Polonska have loitered in or around the building. Specifically, Oceana asserts that Marat drives his automobile up and down Brighton Beach Avenue and Brighton 11th Street, where the building is located, on an almost daily basis from 11:00 A.M. and ending at around 6:00 P.M., and that Tomer and Polonska have strategically positioned themselves around the building's perimeter and inside the building virtually around the clock. Oceana further asserts that defendants have made false statements to Oceana's current tenants and shareholders and to New York State and City governmental agencies in order to disrupt its business.

Oceana also asserts that CBC Consulting Inc. (CBC), which leases the portion of the building dedicated to live theater space, had been in negotiations with it from June to August 2013 in connection with leasing an additional 3,000 to 5,000 square feet of space in the building (the museum space) that had, prior to these negotiations, been rented on a month-to-month basis by several tenants, in order to use this space to open a museum dedicated to Russian Jewish culture and heritage (the museum project). Oceana states that it terminated the tenancies of the prior tenants of the museum space, and CBC reached an agreement with it concerning lease terms, which included CBC's agreement to renovate the museum space and to lease it for a 25-year term at a monthly rent of \$7,000, beginning on September 1, 2013. Oceana asserts that it would have earned \$5,000,000 in rent revenue from this lease, and in addition, the museum project would have changed the building's zoning classification

from mixed commercial and residential use to community space, and that this change in zoning classification would have provided it with airspace rights that would have permitted either the development of 81,000 additional square feet of space in the building or the rental or sale of the airspace to a third party who wished to have a continued unobstructed view of the ocean.

Oceana alleges that on April 4, 2014, Tomer met with Edward Shnayder (Shnayder), one of CBC's partners, to discuss whether CBC was interested in taking over Grocery Emporium's lease to provide CBC with even more space in the building and asked him for an astonishing \$500,000, and informed him that "pretty soon there is going to be a new manager in Oceana and the price of the store will go up." Oceana further alleges that at that time, Tomer informed Shnayder that "Aron was stealing money from Oceana," that Aron was a "f*****," and that "Aron robbed [him] in connection with a venture in which they had, at one time, been involved together." Oceana asserts that Shnayder declined Tomer's offer, but it claims that on April 7, 2014, three days after he did so, one of the defendants called 911, claiming there was a fire when there was none.

Oceana alleges that Tomer knew that Shnayder was also a principal of TEGS Management, LLC (TEGS), which owns Gourmanoff, the anchor tenant that occupies the ground floor of the building and which was in the process of improving its space to accommodate a large Russian supermarket. Oceana claims that between October 2013 and July 2014, Tomer, using this knowledge, along with others, who were acting on behalf of

their alleged conspiracy, acted to interfere with Shnayder's build-out of the Gourmanoff space, by placing more than 60 telephone calls to 311 to create an avalanche of construction related complaints pertaining to TEGS's improvement of the Gourmanoff space which involved minor infractions. Oceana additionally claims that Tomer made complaints regarding leaks in the basement below Grocery Emporium, which he had been occupying without leasing, and then denied a plumber access to investigate the leak by installing unauthorized locks to the door leading to the basement. Oceana asserts that due to the barrage of complaints, inspections from the New York City Department of Buildings and the Fire Department of the City of New York repeatedly visited the construction site, disrupting the progress on the Gourmanoff build-out project, and thereby causing unnecessary and atypical delays in that build-out project.

Oceana alleges that due to these disruptions, CBC reconsidered its decision to go forward with the museum project, and that Shnayder advised Aron that the reason that CBC was disinclined to proceed with the museum project was due to the inordinate and atypical interruptions that he had experienced in connection with the build-out of the Gourmanoff space. As of August 1, 2014, CBS ceased making the \$7,000 monthly rental payments for the museum space that it had made for almost one year. Oceana claims that in addition to losing its lucrative deal with CBS, it has suffered additional losses because it has experienced difficulties in re-leasing the office space vacated by CBC. It asserts that prospective tenants are disinterested in renting this space because they claim that everyone on Brighton Beach

Avenue knows that leasing from it is more trouble than it is worth. It alleges that a local travel agency refused to rent this space, indicating that "no one will rent space there" because "it's a grave."

On August 29, 2014, Oceana filed this action against defendants. Oceana's complaint asserts seven causes of action. These causes of action consist of a first cause of action for tortious interference with contract, a second cause of action for tortious interference with prospective economic advantage, a third cause of action for defamation, a fourth cause of action for defamation, a fifth cause of action for injurious falsehood, a sixth cause of action for trespass to land, and a seventh cause of action for conversion.

DISCUSSION

Oceana's first cause of action for tortious interference with contract asserts that Marat, Olga, Andrey, Tomer, Polonska, and others whose identities are not yet known engaged in a conspiracy to disrupt its business. Oceana alleges, in this cause of action, that it and CBC entered into an agreement on the September 1, 2013, whereby CBC was to lease a substantial amount of space to create a Russian Jewish heritage museum in the building, that defendants had actual knowledge of this agreement, and that they, acting with malice, conspired to and, in fact, took actions calculated to interfere with this agreement. It further alleges that defendants' efforts caused atypical delays in the build-out of Gourmanoff, and that, as a result, CBC discontinued the museum project, causing it to sustain damages.

The elements of a claim for tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procurement of the third party's breach of that contract without justification; (4) actual breach of the contract; and (5) resulting damages (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

Here, Oceana alleges the existence of a lease agreement between it and CBC, that defendants had actual knowledge of this agreement, and that Marat, Olga, Andrey, Tomer, Polonska, and others whose identities are not yet known, took actions calculated to interfere with CBC's agreement with it, and that this resulted in damages due to CBC's discontinuance of the museum project. However, "[w]here there has been no breach of an existing contract, but only interference with prospective contract rights," a cause of action for tortious interference with contract will not lie (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]; see also *Lama Holding Co.*, 88 NY2d at 424).

While Oceana alleges that CBC discontinued the museum project due to the delays in the build-out of Gourmanoff, it does not allege that this was in breach of an executed lease agreement. Rather, it appears from the allegations that CBC leased the museum space on a month-to-month basis and that its discontinuance of the museum project was not actually in breach of any agreement with Oceana. Thus, since Oceana has not alleged the actual breach of a contract, which is a required element of a cause of action for tortious interference with

contract, this cause of action must be dismissed (*see* CPLR 3211 [a] [7]). However, in the event that there was, in fact, an actual breach of an agreement between Oceana and CBC, Oceana is granted leave to replead this cause of action in order to allege the requisite allegation of an actual breach of such agreement.

Oceana's second cause of action for tortious interference with prospective economic advantage alleges that in the period between June 2013 and August 2015, it and CBC engaged in detailed discussions about leasing the museum space, and that defendants had actual knowledge of CBC's plans. Oceana further alleges, in this cause of action, that defendants, acting with malice and with the sole purpose of inflicting harm, conspired to and, in fact, took wrongful actions calculated to disrupt CBC's agreement with it. It alleges that defendants' efforts were successful in causing atypical delay in the build-out of Gourmanoff, causing CBC to discontinue the museum project, resulting in damages to it.

"To establish a claim for tortious interference with prospective economic advantage, a plaintiff 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 the plaintiff" (*Caprer v Nussbaum*, 36 AD3d 176, 204 [2d Dept 2006] [internal quotation marks and citation omitted]; *see also Carvel Corp. v Noonan*, 3 NY3d 182, 190-191 [2004]). "As a general rule, such wrongful conduct must amount to a crime or an independent tort" (*Smith v Meridian Tech., Inc.*, 86 AD3d 557, 560 [2d Dept 2011]). "'Wrongful means' include physical violence, fraud or misrepresentation, civil suits and

criminal prosecutions, and some degrees of economic pressure” (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]; see also *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 477 [2d Dept 2009]). Tortious interference with prospective economic relations requires an additional showing that the plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct (see *Long Is. Univ. v Grucci For Congress, Inc.*, 10 AD3d 412, 413 [2d Dept 2004]).

Here, Oceana has alleged that defendants had actual knowledge of CBC's plans to lease additional space from it, and that they acted with wrongful means by: (1) leveling defamatory statements against Oceana and its officers, (2) deluging the 311 system with more than 60 meritless or de minimus complaints over a nine-month period in order to induce City building inspectors and other municipal officials to the building and to disrupt the build-out of Gourmanoff in violation of Penal Law § 240.50 (falsely reporting an incident in the third degree), (3) misusing the 911 system to report a fire at the building when there was none in violation of Penal Law § 240.50 and § 240.55 (falsely reporting an incident in the second degree), and (4) loitering in or around the building in violation of Penal Law § 240.26 (harassment in the second degree). Thus, Oceana has sufficiently alleged the use of wrongful means. Oceana has also alleged that defendants acted for the sole purpose of harming it. In addition, Oceana has alleged that CBC would have entered into the lease but for defendants' wrongful conduct.

The Novikov defendants contend that this cause of action does not allege that they engaged in wrongful activities directed toward CBC, but that only Tomer and Polonska engaged in these wrongful actions. This contention, however, is belied by the allegations of Oceana's complaint, which asserts that Marat loitered around the building and that all of the defendants were involved in making the 311 calls. Thus, this cause of action, liberally construed, alleges a viable claim for tortious interference with prospective economic relations. Dismissal of Oceana's second cause of action must, therefore, be denied.

Oceana's third cause of action for defamation alleges that in or around September 2013, Polonska contacted Yury Beyn, who was a former shareholder of it, and later contacted Svetlana Beyn, his daughter, and told them that "Aron and Diana were doing illegal things at Oceana," and that "Aron and Diana were stealing from Oceana." It further alleges that Polonska was negligent and acted with actual malice and reckless disregard to the truth in connection with publishing these statements.

Oceana, however, fails to allege any defamatory statement made by the Novikov defendants. It also fails to allege that the Novikov defendants directed Polonska to make these alleged defamatory statements or otherwise directly tie them to the publishing of these defamatory statements.

While Oceana does not dispute that the Novikov defendants did not utter the alleged defamatory statements, it maintains that they should nonetheless be held liable because they conspired with Polonska to defame it. However, New York does not recognize the

independent tort of conspiracy (see *Dickinson v Igoni*, 76 AD3d 943, 945 [2d Dept 2010]; *Chiaramonte v Boxer*, 122 AD2d 13, 13 [2d Dept 1986]). Thus, Oceana's mere "allegation of a civil conspiracy, without more, does not in and of itself give rise to a cause of action" (*Cuker Indus. v Crow Constr. Co.*, 6 AD2d 415, 417 [1st Dept 1958]). "The actionable wrong lies in the commission of a tortious act, or a legal one by wrongful means, but never upon the agreement to commit the prohibited act standing alone" (*Hickey v Travelers Ins. Co.*, 158 AD2d 112, 118 [2d Dept 1980], quoting *Cuker Indus.*, 6 AD2d at 417).

It is true that while an independent cause of action for civil conspiracy is not recognized in New York, "a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme" (*Blanco v Polanco*, 116 AD3d 892, 896 [2d Dept 2014], quoting *Litras v Litras*, 254 AD2d 395, 396 [2d Dept 1998]). "The allegation of conspiracy carries no greater burden, but also no less, than to assert adequately common action for a common purpose by common agreement or understanding among a group, from which common responsibility derives" (*Blanco*, 116 AD3d at 896, quoting *Faulkner v City of Yonkers*, 105 AD3d 899, 900-901 [2d Dept 2013] [internal quotation marks and citations omitted]). Therefore, "[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action

in furtherance of the agreement”” (*Blanco*, 116 AD3d at 896, quoting *Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2012]).

Here, Oceana has failed to allege any specific overt acts on the part of the Novikov defendants which sufficiently allege participation by them in making the alleged defamatory statements (*see Perez*, 97 AD3d at 560). Oceana cannot simply impute the alleged defamatory statements made by Polonska to them without any specific allegation that they participated in making these statements. Oceana’s bare allegations of conspiracy to defame do not constitute a viable cause of action (*see Dobies v Brefka*, 263 AD2d 721, 722 [3d Dept 1999]; *Rivera v Greenberg*, 243 AD2d 697, 698 [2d Dept 1997]; *Fisher v Bristol Myers*, 224 AD2d 657, 658 [2d Dept 1996]; *Pravda v County of Saratoga*, 224 AD2d 764, 766 [3d Dept 1996], *lv denied* 88 NY2d 809 [1996]; *McGill v Parker*, 179 AD2d 98, 105 [1st Dept 1992]).

Furthermore, it is noted that in order for Oceana to sustain a defamation claim, the alleged defamatory statements must be “of and concerning” it (*see Carlucci v Poughkeepsie Newspapers*, 57 NY2d 883, 885 [1982]; *Afftex, Ltd. v General Elec. Co.*, 161 AD2d 855, 856 [3d Dept 1990]). Here, the alleged defamatory statements concern Aron and Diana, rather than Oceana itself. It has been held that “defamatory statements published about a corporate officer or employee may not be defamatory as to the corporation unless the corporation is specifically named, or the words are such that they discredit the way by which its business is conducted” (*Three Amigos SJJ Rest., Inc. v CBS News, Inc.*, 2013 NY Slip Op 31081[U] [Sup Ct, NY County 2013]). While Oceana is specifically named, these statements

allege that Oceana was the victim of Aron and Diana's conduct, rather than that Oceana was engaging in illegal activity.

In any event, due to the failure of Oceana to allege any defamatory statements made by the Novikov defendants, Oceana's third cause of action fails to state a viable cause of action against the Novikov defendants. Consequently, it must be dismissed as against them (*see* CPLR 3211 [a] [7]).

Oceana's fourth cause of action for defamation alleges that Tomer informed Shnayder that its officers were not trustworthy by specifically stating that "Aron was stealing from Oceana," that Aron "is a f*****," and that "Aron robbed [him] in connection with a venture in which they had, at one time, been involved together." It alleges that Tomer was negligent and acted with actual malice and reckless disregard to the truth in connection with publishing these statements. For the same reasons discussed above with respect to Oceana's third cause of action, this cause of action fails to state a viable cause of action against the Novikov defendants and must be dismissed/^{as to them}(*see* CPLR 3211 [a] [7]).

Oceana's fifth cause of action for injurious falsehood alleges that defendants made false and misleading statements concerning Aron and Diana as part of an overarching plan to create maximum disruption to its ongoing business. It further alleges that in so doing, defendants acted maliciously with the intent to harm it and with a reckless disregard of the consequences of their efforts. It seeks damages resulting from Shnayder's decision to discontinue the museum project.

“An injurious falsehood is a statement that injures a person by leading other persons into action that is detrimental, as opposed to a statement that injures a party's reputation, which would fall under the torts of libel or slander” (*Fulton Quality Foods LLC v Arcon Const. Group Inc.*, 2014 WL 2861565, 2014 NY Slip Op 31618[U], *2 [Sup Ct, NY County 2014]). “The elements of a cause of action for injurious falsehood are (1) a false and misleading statement harmful to the interests of another, (2) uttered or published maliciously and with intent to harm another, or done recklessly and without regard to its consequences, and (3) a reasonably prudent person would or should anticipate that damage to another would naturally flow therefrom” (*id.*). “Furthermore, a cause of action for injurious falsehood exists ‘when one publishes false and disparaging statements about another's property under circumstances which would lead a reasonable person to anticipate that damage might flow therefrom’” (*id.*, quoting *Cunningham v Hagedorn*, 72 AD2d 702, 704 [1st Dept 1979], citing *Lampert v Edelman*, 24 AD2d 562, 562 [1st Dept 1965]).

“A claim for injurious falsehood must set forth the particular words which caused the alleged injury” (*Riddell Sports Inc. v Brooks*, 872 F Supp 73, 79 [SD NY 1995]; *Alexander & Alexander of N.Y. v Fritzen*, 114 AD2d 814, 817 [1st Dept 1985], *affd* 68 NY2d 968 [1986]). In addition, in order to state a claim of injurious falsehood, a plaintiff is required to plead with specificity that it suffered special damages as a result of the false and disparaging statements (*see Rail v Hellman*, 284 AD2d 113, 114 [1st Dept 2001]; *DiSanto*

v Forsyth, 258 AD2d 497, 498 [2d Dept 1999]; *Nyack Hosp. v Empire Blue Cross & Blue Shield*, 253 AD2d 743, 744 [2d Dept 1998]).

Here, Oceana has completely failed to allege any specific false and misleading statements uttered by the Novikov defendants that constituted an injurious falsehood as is required in order to state a cause of action for injurious falsehood (*see Al Raschid v. News Syndicate Co.*, 265 NY 1, 4-5 [1934]; *Alexander & Alexander of N.Y.*, 114 AD2d at 817; *Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co.*, 7 AD2d 441, 446 [1st Dept 1959]). Furthermore, no special damages have been alleged, as is required (*see Alexander*, 114 AD2d at 817; *Penn-Ohio Steel Corp.*, 7 AD2d at 445). Moreover, Oceana alleges that the false and misleading statements made concern Aron and Diana, as opposed to it (*see CPLR 3211 [a] [3]*).

Consequently, dismissal of Oceana's fifth cause of action is mandated for failure to comply with pleading requirements and for failure to state a cause of action, as presently alleged (*see CPLR 3016 [a]*), without prejudice to its repleading this cause of action in order to cure the above deficiencies.

Oceana, in its sixth cause of action for trespass to land, alleges that Tomer and Rhino Blades are using and occupying space in the basement of the building, and that Tomer has installed unauthorized locks on the doors to the basement. Oceana further alleges that Tomer, Polonska, Angella, Rhino Blades, and Grocery Emporium do not have a lease for the basement space nor do they otherwise pay rent to use and occupy this space. Oceana asserts

that Tomer and Rhino Blades' use and occupation of the basement space is intentional and that they are using and occupying this space without any right, authority, or permission to do so.

It is well established that "[t]respass is an intentional entry onto the land of another without justification or permission" (*Woodhull v Town of Riverhead*, 46 AD3d 802, 804 [2d Dept 2007], *lv denied* 10 NY3d 708 [2008]; *see also Long Is. Gynecological Servs. v Murphy*, 298 AD2d 504, 504 [2d Dept 2002]; *Golonka v Plaza at Latham*, 270 AD2d 667, 669 [3d Dept 2000]). While physical entry by the trespasser upon another's land is not necessary, the trespasser must have at least caused or directed another person to trespass onto the plaintiff's property (*see Spellburg v South Bay Realty, LLC*, 49 AD3d 1001, 1002 [3d Dept 2008]; *Snapper Realty, LLC v Duane Reade*, 33 AD3d 609, 609 [2d Dept 2006]; *Golonka v Plaza at Latham*, 270 AD2d 667, 669 [3d Dept 2000]; *Axtell v Kurey*, 222 AD2d 804, 805 [3d Dept 1995], *lv denied* 88 NY2d 802 [1996]).

As contended by the Novikov defendants, this cause of action is devoid of any allegations that they ever entered the basement space or placed locks on its doors, and it makes no mention of any specific wrongful conduct allegedly committed by them with respect to such trespassing. Rather, this claim solely concerns the alleged actions of Tomer and Rhino Blades.

Oceana, in opposing the dismissal of this cause of action, contends that they have asserted that the Novikov defendants were part of a conspiracy with Tomer and Rhino Blades

and that this is sufficient to sustain this cause of action. Oceana, however, merely alleges, in this cause of action, that Tomer's continuous unlawful presence in the basement of the building facilitates his ability to further the goals of the alleged conspiracy between him and the Novikov defendants. It fails to allege that the Novikov defendants ever entered the basement space or caused or directed Tomer or Rhino Blades to trespass onto this property. As such, it fails to state a viable cause of action, and must be dismissed (*see* CPLR 3211 [a] [7]).

Oceana's seventh cause of action for conversion alleges that Tomer and Polonska took its confidential corporate documents from Aron's office with the intention of selling the material to individuals who were involved in litigation against it. Oceana further alleges, in this cause of action, that it had a possessory right and interest in these documents and that Tomer and Polonska exercised dominion over the documents in derogation of its rights. It also alleges that Marat and Olga exercised dominion over the documents in derogation of its rights by purchasing these documents from Tomer and Polonska.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; *see also Pappas v Tzolis*, 20 NY3d 228, 234 [2012], *rearg denied* 20 NY3d 1075 [2013]). Here, Oceana's seventh cause of action alleges only that Tomer and Polonska took its documents and that Marat and Olga purchased these documents from them.

There is no allegation as against Andrey, and no allegation that Marat or Olga removed these documents from Oceana's possession. Furthermore, in the 2013 action, the court, in its November 3, 2014 decision and order, held that Marat, who is a 20% shareholder of Oceana, was entitled to an inspection of these documents. Thus, no cognizable claim of conversion has been stated against the Novikov defendants, and this cause of action must be dismissed (*see* CPLR 3211 [a] [7]).

The Novikov defendants, in their motion, additionally seek to strike various portions of Oceana's complaint (i.e., paragraphs 7, 8, 9, 13, 35, 36, 41, and 42), pursuant to CPLR 3024 (b), as scandalous and prejudicial to them. CPLR 3024 (b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." "In reviewing a motion pursuant to CPLR 3024 (b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007], *appeal withdrawn* 9 NY3d 989, [2007]; *see also Irving v Four Seasons Nursing & Rehabilitation Ctr.*, 121 AD3d 1046, 1048 [2d Dept 2014]; *New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391, 391 [1st Dept 2005]; *Bristol Harbour Assoc. v Home Ins. Co.*, 244 AD2d 885, 886 [4th Dept 1997]; *Wegman v Dairylea Coop.*, 50 AD2d 108, 111 [4th Dept 1975], *lv dismissed* 38 NY2d 918 [1976]). "Matters that are unnecessary to the viability of the cause of action and would cause undue prejudice to the defendants should be stricken from the pleading" (*Soumayah*, 41 AD3d at 392; *see also Kinzer v Bederman*, 59 AD3d 496, 497 [2d Dept 2009]; *Matter of*

Plaza at Patterson, LLC v Clover Lake Holdings, Inc., 51 AD3d 931, 932 [2d Dept 2008]; *Aronis v TLC Vision Ctrs., Inc.*, 49 AD3d 576, 578 [2d Dept 2008]; *Van Caloen v Poglinco*, 214 AD2d 555, 557 [2d Dept 1995]; *JC Mfg. v NPI Elec.*, 178 AD2d 505, 506 [2d Dept 1991]).

Here, paragraph 7 of Oceana's complaint alleges that Marat was "ousted . . . from his position at the [confectionary] factory because of his unlawful acquisition of the factory and questionable business practices." Furthermore, Oceana alleges, in this paragraph, that "Marat cannot return to Belarus without facing arrest by the authorities." In paragraph 8 of Oceana's complaint, Oceana refers to pending litigation involving Marat's confectionary business in the United States, i.e., Desly International Corp., which is wholly unrelated to Oceana. Oceana alleges, in paragraph 9 of its complaint, that "Marat runs his business in the United States using similar strong-armed business tactics to those he apparently used in Belarus." It also refers to an unrelated lawsuit that does not involve Oceana. Paragraph 13 of Oceana's complaint alleges that a mutual acquaintance of Marat and the Bronsteins heard Marat say that he would like to see Aron dead, and that if ever Aron visited Russia, he (i.e., Marat) would pay to have Aron killed."

The collateral matters alleged in these paragraphs are wholly unrelated to the instant litigation and are completely irrelevant and unnecessary to the viability of any of Oceana's claims. As such, these allegations should be stricken from the Oceana's complaint as scandalous and prejudicial to the Novikov defendants (*see Kinzer*, 59 AD3d at 497; *Matter*

of Plaza at Patterson, LLC, 51 AD3d at 932 ; *Aronis*, 49 AD3d at 578; *Soumayah*, 41 AD3d at 392; *Van Caloen*, 214 AD2d at 557; *JC Mfg.*, 178 AD2d at 506). In the event that the stricken allegations become relevant at trial, their admissibility should be determined at that time in light of the posture of the case at that juncture (*see Soumayah*, 41 AD3d at 393; *Van Caloen*, 214 AD2d at 557).

As to the other allegations of Oceana's complaint which the Novikov defendants contend are scandalous and prejudicial, paragraph 35 alleges that "Marat branched out beyond serial court filings, participating in a multifaceted scheme to interfere with Oceana's business and wrest control of Oceana from the Bronsteins." Paragraph 36 of Oceana's complaint alleges that Marat and his children acted "[i]n furtherance of this corporate coup d'etat," and that "[t]he Novikovs began their recruiting efforts with the hopes of disrupting Oceana's business and bringing Oceana to its knees." These allegations are relevant to Oceana's still viable second cause of action for tortious interference with prospective economic advantage since they pertain to the issue of whether the Novikov defendants acted for the sole purpose of harming Oceana and whether their alleged interference with Oceana's prospective business relations with CBC was accomplished by wrongful means.

While the Novikov defendants argue that the term "coup d'etat" is scandalous because it paints them as violent individuals, the court does not find that the term "corporate coup d'etat," as used in paragraph 36 and in the context of Oceana's complaint, connotes that they planned to take over Oceana by violent means. Thus, the court denies the Novikov

defendants' motion insofar as it seeks to strike the allegations of paragraphs 35 and 36 as scandalous and prejudicial (*see Irving*, 121 AD3d at 1048; *New York City Health & Hosps. Corp.*, 22 AD3d at 391; *Bristol Harbour Assoc.*, 244 AD2d at 886; *Wegman*, 50 AD2d at 111)..

As to paragraph 41 of Oceana's complaint, which alleges that the documents provided by Polonka and Tomer "left Marat yearning for more 'dirt'" on the Bronsteins, and paragraph 42 of Oceana's complaint, which alleges that "Marat received that for which he yearned." The Novikov defendants argue that there is no relationship between whether Marat wanted any "dirt" on the Bronsteins and Oceana's claims in this lawsuit. The court, however, finds that these allegations are relevant to Oceana's conversion claim against Tomer and Polonska. Thus, the striking of these allegations from Oceana's complaint must be denied (*see Irving*, 121 AD3d at 1048; *New York City Health & Hosps. Corp.*, 22 AD3d at 391; *Bristol Harbour Assoc.*, 244 AD2d at 886; *Wegman*, 50 AD2d at 111).

The Novikov defendants, in their motion, additionally seek to recover their attorneys' fees and expenses pursuant to 22 NYCRR 130-1.1 on the basis that Oceana has engaged in frivolous conduct. Pursuant to 22 NYCRR 130-1.1, the court, in its discretion, may award a party to an action "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." "Frivolous conduct" under this section includes conduct that "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another."

The Novikov defendants contend that Oceana's inclusion of the scandalous and prejudicial allegations discussed above constitute frivolous conduct on the basis that it was intended to harass and embarrass them. The court, however, does not find that Oceana's assertion of these allegations in its complaint constitutes "frivolous conduct" as contemplated by 22 NYCRR 130-1.1 so as to warrant an award of counsel fees to the Novikov defendants. Such relief must, therefore, be denied.


CONCLUSION

Accordingly, the Novikov defendants' motion is granted to the extent that: (1) the scandalous and prejudicial allegations contained in paragraphs 7, 8, 9, and 13 of Oceana's complaint are stricken, and (2) Oceana's first, third, fourth, fifth, sixth, and seventh causes of action as against them are dismissed. The Novikov defendants' motion is denied insofar as it seeks: (1) to strike paragraphs 35, 36, 41, and 42 of Oceana's complaint as scandalous and prejudicial, (2) an award of counsel fees and expenses, and (3) dismissal of Oceana's second cause of action as against them. Oceana is granted leave to replead its first and fifth causes of action as against the Novikov defendants within 30 days after service upon it of a copy of this decision and order with notice of entry thereon. As to Oceana's third, fourth, sixth, and seventh causes of action, Oceana has not established that it possesses a viable

claim which would constitute a basis for granting its request for leave to replead these causes of action.

This constitutes the decision and order of the court.

ENTER,

A handwritten signature in black ink, appearing to be 'CD', written over the printed name.

J. S. C.

HON. CAROLYN E. DEMAREST