Khandalavala v Artsindia.com, LLC
2014 NY Slip Op 30939(U)
April 8, 2014
Supreme Court, New York County
Docket Number: 652450/13
Judge: Melvin L. Schweitzer

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

RUSTOM KHANDALAVALA, SUBHAS KHARA, ARVIND RAGHUNATHAN, and SOUMYO SARKAR, both individually and derivatively on behalf of ARTS INDIA FUND TWO, LLC,	Index No.: 652450/13
Plaintiffs,	DECISION AND ORDER
-against-	Motion Sequence Nos. 004 and 005
ARTSINDIA.COM, LLC, PRAJIT K. DUTTA, ANDREW SHEA, and ARTS INDIA FUND TWO, LLC, as Nominal Defendant,	
Defendants.	

MELVIN L. SCHWEITZER, J.:

This action arises out of the parties' participation in an art investment fund, which lasted seven years and resulted in significant losses for all the investors. Plaintiffs, members in nominal defendant Arts India Fund Two, LLC (the Fund), have sued defendants, the Managing Member of the Fund and its managing partner and fund administrator, on behalf of the Fund for, among other claims, breach of contract, fraudulent misrepresentation, and breach of fiduciary duties. Defendants have counterclaimed for defamation, malicious prosecution, abuse of process, tortious interference, breach of contract, and prima facie tort.

Plaintiffs now move (seq. # 004), pursuant to CPLR 3211 (a) (1) and (7), to dismiss the counterclaims, based on documentary evidence and for failure to state a cause of action. Plaintiffs also move (seq. # 005) to strike certain paragraphs of the counterclaims as scandalous and prejudicial and because they assert information about settlement negotiations between the

parties in this case. The motions (seq. ## 004 and 005) are consolidated for purposes of their resolution.

By separate motion (seq. # 008), defendants also moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) and (7). The background and relevant facts and allegations of the amended complaint were set out in the decision on defendants' motion to dismiss, decided by the court on this same date, and the parties' familiarity with the facts therein is assumed.

Discussion

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . 'the benefit of every possible favorable inference.'" *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005), quoting *Leon v Martinez*, 84 NY2d 83, 87 (1994); *see* CPLR 3026; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002) quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 (2001). The court is not required, however, to accept as true "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence.'" *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999)(citation omitted), *affd* 94 NY2d 659 (2000); *see JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 (1st Dept 2009). "[C]onclusory averments of wrongdoing are insufficient to sustain a complaint unless

supported by allegations of ultimate facts." *Vanscoy v Namic USA Corp.*, 234 AD2d 680, 681-682 (3d Dept 1996) (internal quotation marks and citation omitted); *see Scarfone v Village of Ossining*, 23 AD3d 540, 541 (2d Dept 2005).

When evidentiary material is considered, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one. *See Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 (1st Dept 2007). Dismissal under CPLR 3211 (a) (1) may be granted "'where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 (2005), quoting *Held v Kaufman*, 91 NY2d 425, 430-431 (1998); *see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 (2007); *Leon*, 84 NY2d at 88.

Defamation

Defamation, whether in the form of libel or slander, generally is defined as the making of a false statement which "tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him [or her] in the minds of a substantial number of the community." *Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1076 (1997) (internal quotation marks and citation omitted); *see Geraci v Probst*, 15 NY3d 336, 345 (2010); *Foster v Churchill*, 87 NY2d 744, 751 (1996). "The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999); *see O'Neill v New York Univ.*, 97 AD3d 199, 212 (1st Dept 2012); *Salvatore v Kumar*, 45 AD3d 560, 563 (2d Dept 2007). Defamation per se

includes statements "that tend to injure another in his or her trade, business or profession" and requires no allegation of special damages. *Liberman v Gelstein*, 80 NY2d 429, 435 (1992); *see Geraci*, 15 NY3d at 344.

CPLR 3016 (a) requires that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint." "The complaint also must allege the time, place and manner of the false statement and specify to whom it was made." *Dillon*, 261 AD2d at 38 (citations omitted); *see Khan v Reade*, 7 AD3d 311, 312 (1st Dept 2004). With respect to the pleading requirements, "only the words alleged in the complaint as constituting the libel may be considered by the court as the actionable language" and plaintiffs are "bound by the alleged defamatory words contained in the four corners of the complaint." *Penn Warranty Corp. v DiGiovanni*, 10 Misc 3d 998, 1001-1002 (Sup Ct, NY County 2005).

"[E]xpressions of an opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.'" *Steinhilber v Alphonse*, 68 NY2d 283, 286 (1986), quoting *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 380 (1977), *cert denied* 434 US 969 (1977); *see Mann v Abel*, 10 NY3d 271, 276 (2008). "Whether a particular statement constitutes an opinion or an objective fact is a question of law." *Id.*

Further, even if a statement is defamatory, it also may be protected by an absolute or qualified privilege. *See Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 (2007); *Liberman*, 80 NY2d at 437; *Toker v Pollak*, 44 NY2d 211, 218 (1978). "The absolute privilege generally is reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings." *Rosenberg*, 8 NY3d at 365; *see 600 W. 115th St. Corp. v Von Gutfield*, 80 NY2d 130, 135-136 (1992); *Park Knoll Assocs. v*

Schmidt, 59 NY2d 205, 209 (1983). Courts have long held "that a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation." *Lacher v Engel*, 33 AD3d 10, 13 (1st Dept 2006), citing *Youmans v Smith*, 153 NY 214, 219 (1897); *see Rosenberg*, 8 NY3d at 365; *see Pomerance v McTiernan*, 51 AD3d 526, 528 (1st Dept 2008); *Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 170-171 (1st Dept 2007); *Lacher*, 33 AD3d at 14. "Whether a statement is 'at all pertinent to the litigation' is determined by an 'extremely liberal' test . . . [and] any doubts are to be resolved in favor of pertinence." *Sexter & Warmflash, P.C.*, 38 AD3d at 173; *see Casa de Meadows, Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 919-920 (1st Dept 2010). "The privilege extends to judge, jurors, counsel, witnesses, and, as relevant here, the parties to the proceeding." *Sexter & Warmflash, P.C.*, 38 AD3d at 171.

Defendants allege that plaintiffs defamed defendants "in conversations with some of the Fund's other investors and others," in which "they accused the Defendants of illegal conduct." Counterclaim, ¶ 13. They also allege that, in July 2013, Sarkar asked Gautam Patwa, a non-party Merrill Lynch wealth advisor, to call Dipthi Mathur, one of the investors in the Fund, and Patwa told Mathur that "his friends had been 'screwed' by the Managing Member," and warned her that "the Managing Member has been 'screwing its investors over.'" *Id.* Defendants further allege that Khandalavala "told people that Dutta has 'much to lose' since he has been a professor at Columbia University" (*id.*, ¶ 30), and that in an email that Khandalavala forwarded to Dutta on June 14, 2013, he stated that "[i]t takes talent to lose this much money ... Madoff was talented." *Id.*, ¶ 31. In addition, defendants assert that plaintiffs made defamatory statements in the

complaint and have published those statements by distributing the complaint to other members of the Fund, and "upon information and belief," to other unknown third parties. *Id.*, ¶ 15.[1]

These allegations, including only three specific alleged defamatory statements, even if true, either fail to meet the pleading requirements, are opinions or hyberbole or are protected by the judicial proceedings privilege. The allegations that plaintiffs stated to other investors that defendants have engaged in illegal conduct (*id.*, ¶ 13) and have otherwise "made like defamatory statements to other third parties" (*id.*, ¶ 14) fail to allege "the particular words complained of" and do not set forth "the time, place and manner of the false statement" or "specify to whom it was made." *See Alanthus Corp. v Travelers Ins. Co.*, 92 AD2d 830, 831 (1st Dept 1983) (vague and conclusory allegations that defendant falsely stated in the business community at large that plaintiff failed to perform its duties does not meet 3016 [a] requirements); *Lexow & Jenkins, P.C. v Hertz Commercial Leasing Corp.*, 122 AD2d 25, 26-27 (2d Dept 1986) (allegation that party "engaged in a vicious course of action which has denigrated" corporation's "professional and technical expertise" fails to set forth particular words).

The alleged statement that a non-party reportedly made to a Fund investor that defendants had "screwed" plaintiffs, even if it could be attributed to Sarkar (*but see BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 [1st Dept 2009] [reliance on third party's paraphrasing of allegedly false statement made allegations insufficiently particular]), constitutes opinion or "[l]oose, figurative or hyperbolic statements, [which] even if deprecating . . . are not actionable."

[1]Although the Counterclaim also alleges that, in June 2013, Khandalavala wrote in a letter to Dutta that "If through discovery, your conduct rises to the level of criminal activity, we will refer this matter to the District Attorney's Office," thereby threatening to damage the reputation of Dutta and Arts India (Counterclaim, ¶¶ 11-2), defendants do not argue on this motion that that statement supports their defamation claim.

Dillon, 261 AD2d at 38; *see Kaye v Trump*, 58 AD3d 579, 580 (1st Dept 2009); *Rand v New York Times Co.*, 75 AD2d 417, 422 (1st Dept 1980) (statement that business manager "screwed" his client "is not more than rhetorical hyperbole"); *Sandler v Marconi Circuit Tech. Corp.*, 814 F Supp 263, 268 (EDNY 1983) (statement that plaintiff "screwed up the company" is nonactionable opinion); *see also Steinhilber*, 68 NY2d at 294-295 (statement that candidate for union post was a "scab" and "a known failure" not actionable); *Chalpin v Amordian Press*, 128 AD2d 81, 84 (1st Dept 1987) (describing plaintiff as "unbelievably unscrupulous character," even if defamatory, is "the sort of subjective moral evaluation" that is opinion); *Penn Warranty Corp. v DiGiovanni*, 10 Misc 3d 998, 1001-1002 (Sup Ct, NY County 2005) (statements by disgruntled consumer that plaintiff is a "crooked company," has "been ripping off its contract holders," has committed "fraud," are opinion about quality of company's services); *Wadsworth v Beaudet*, 267 AD2d 727, 729 (3d Dept 1999) (allegation defendants "have told and are continuing to tell various customers . . . plaintiff has stolen money from them" does not set out defamatory words).

Turning to defendants' claim that the complaint itself is defamatory, the Counterclaim does not identify what statements in the complaint are allegedly defamatory. However, even were the court to consider the more specific allegations set forth in defendants' opposition to this motion (*see* Memorandum in Opposition to Plaintiffs' Motion, at 8), those allegations are pertinent to plaintiffs' causes of action for breach of contract, fraud, and breach of fiduciary duty, and are, therefore, absolutely privileged. Moreover, this privilege applies even if the complaint is dismissed. *See Lacher*, 33 AD3d at 14.

Nor have defendants plausibly alleged that this is a "sham" litigation. Although defendants assert that plaintiffs have made false statements and that the action was commenced maliciously and with the goal of allowing plaintiffs "to publish the false defamatory accusations in the complaint to third persons," the allegations of the Counterclaim are conclusory; no facts are alleged to establish that the action was filed for the sole purpose of publicizing defamatory statements about defendants. *See Capsolas v Pasta Resources, Inc.*, 2013 WL 4830949, *3, 2013 US Dist LEXIS 28508, *8 (SD NY 2013); *see also Casa de Meadows, Inc. (Cayman Is.)*, 76 AD3d at 920; *cf Williams v Williams*, 23 NY2d 592 (1969) (fair reporting privilege under Civil Rights Law § 74 does not apply when pleading exists solely as a vehicle for publicizing false allegations). By defendants' own allegations, plaintiffs in this litigation are seeking, at least in part, "to extract for themselves a higher return than would be realized by the other Fund investors." Counterclaim, ¶ 6.

Malicious Prosecution / Abuse of Process

"The gravamen of a civil malicious prosecution cause of action is the wrongful initiation, procurement or continuation of a legal proceeding. To succeed on a claim for malicious prosecution, a plaintiff must show that the defendant initiated a proceeding that terminated in favor of the plaintiff, an *entire* lack of probable cause in the prior proceeding, malice, and special injury." *Perryman v Village of Saranac Lake*, 41 AD3d 1080, 1081 (3d Dept 2007) (internal quotation marks and citations omitted) (emphasis in original); *see Engel v CBS, Inc.*, 93 NY2d 195, 204 (1999); *Colon v New York*, 60 NY2d 78, 82 (1983); *Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 (1st Dept 2005).

Here, defendants cannot establish a termination in their favor or an entire lack of probable cause in the pending action. "Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe [defendant liable]." *Colon v New York*, 60 NY2d 78, 82 (1983). *Colon v New York*, 60 NY2d 78, 82 (1983); *see Perryman*, 41 AD3d at 1081. "'[W]hen the underlying action is civil in nature the want of probable cause must be patent.'" *Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 755 (3d Dept 2005), *quoting Butler v Ratner*, 210 AD2d 691, 693 (3d Dept 1994); *see Perryman*, 41 AD3d at 1081. "A party may act with probable cause even though mistaken" *(Colon*, 60 NY2d at 82), and probable cause may be found even when an action is ultimately unsuccessful. *I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 207 (1st Dept 2005).

There has no final termination of this action, and notwithstanding that the court has now dismissed some claims, where, as here, there is potential merit in at least some of the causes of action, a malicious prosecution claim is not maintainable. *See Perryman*, 41 AD3d at 1082; *Black v Green Harbour Homeowners' Assn.*, Inc., 37 AD3d 1013, 1014 (3d Dept 2007); *I.G. Second Generation Partners, L.P.*, 17 AD3d at 207; *Fink*, 15 AD3d at 755.

The abuse of process claim similarly does not survive. "In its broadest sense, abuse of process may be defined as misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process." *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 400 (1975); *see Sipsas v Vaz*, 50 AD3d 878, 879 (2d Dept 2008). "Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a

collateral objective." *Curiano v Suozzi*, 63 NY2d 113, 116 (1984), citing *Board of Educ. of Farmingdale Union Free School Dist.*, 38 NY2d at 403; *see Casa de Meadows Inc. (Cayman Is.)*, 76 AD3d at 921; *Fisk Bldg. Assoc. LLC v Shimazaki II, Inc.*, 76 AD3d 468, 469 (1st Dept 2010).

"[T]he institution of a civil action by summons and complaint is not legally considered process capable of being abused." *Curiano*, 63 NY2d at 116; *see Muro-Light v Farley*, 95 AD3d 846, 847 (2d Dept 2012); *Casa de Meadows Inc. (Cayman Is.)*, 76 AD3d at 921. Therefore, to the extent defendants' abuse of process claim is based on the institution of this action, they fail to state a cause of action. Further, "'[t]he gist of the action for abuse of process lies in the improper use of process after it is issued.'" *Williams v Williams*, 23 NY2d 592, 596 (1969) (citations omitted); *see Casa de Meadows Inc. (Cayman Is.)*, 76 AD3d at 921. The issuance of a temporary restraining order, granted after a hearing, also does not support an abuse of process claim in this case. *See Bonarco, Ltd. v Crossington Overseas Ltd.*, 269 AD2d 158, 158-159 (1st Dept 2000). Defendants do not allege that after the temporary restraining order was issued, it actually was used "in a manner inconsistent with the purpose for which it was designed" (*Minasian v Lubow*, 49 AD3d 1033, 1036 [3d Dept 2008]) - that is, to maintain the status quo pending a further hearing of the court. *See Hornstein v Wolf*, 67 NY2d 721, 723 (1986); *Dixon v Roy*, 21 Misc 3d 1117(A), 2008 NY Slip Op 52086(U) (Sup Ct, NY County 2008). Rather, defendants allege that plaintiffs' motive in obtaining it was improper and malicious. "A malicious motive alone, however, does not give rise to a cause of action for abuse of process." *Curiano*, 63 NY2d at 116; *see I.G. Second Generation Partners, L.P.*, 17 AD3d at 207; *Matthews v New York City Dept. of Social Servs., Child Welfare Admin.*, 217 AD2d 413, 415 (1st Dept 1995). Defendants also fail to allege "how they were specifically harmed by it." *Dixon*, 21 Misc 3d 1117(A), *6, 2008 NY

Slip Op 52086(U). Although defendants assert that they lost $500,000 during the approximately twelve days that the temporary restraining order was in place, there are no factual allegations to support that.

Tortious Interference

Defendants' claim of tortious interference rests on allegations that plaintiffs "directly interfered with the Defendants' relationships with the other investors by making deliberately false and defamatory remarks to them or to people who knew them" (Counterclaim, ¶ 49); and that, as a result of false statements allegedly made by plaintiffs "to any participants in the [Indian and Pakistani art] market," defendants "reasonably believe they have lost prospective business." Counterclaim, ¶¶ 49, 54, 55.

"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 Inc.*, 88 NY2d 413, 424 (1996); *see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 (2007). "A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship. *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 (1st Dept 2009); *see Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 (2004); *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 (1996); *Kickertz v New York Univ.*, 110 AD3d 268, 275 (1st Dept 2013). That is, tortious

interference with "prospective economic advantage requires a showing that, through the intentional and wrongful acts of defendant, identified third parties were prevented from entering into a business relationship with plaintiff." *Penn Warranty Corp.*, 10 Misc 3d at 1006.

Defendants must allege each of the elements of these claims in nonconclusory fashion in the Counterclaim. *See Benton v Kennedy-Van Saun Mfg. & Eng'g Corp.*, 2 AD2d 27, 30 (1st Dept 1956). The Counterclaim's allegations of tortious interference, whether with an existing contract or with prospective business relations, fail to plead the elements of either claim. With respect to interference with an existing contract, defendants identify no contract, and do not allege that there was an actual breach. *See Schuckman Realty v Marine Midland Bank*, 244 AD2d 400, 401 (2d Dept 1997). The allegations of interference with prospective business relations "are devoid of a factual basis and are vague and conclusory." *R.I. Is. House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890, 895-896 (2d Dept 2008) (internal quotation marks and citations omitted). Defendants fail "to allege any specific business relationship they were prevented from entering into by reason of the purported tortious interference." *Schoettle v Taylor*, 282 AD2d 411, 411 (1st Dept 2001); *see Best Payphones, Inc. v Empire State Payphone Assn.*, 272 AD2d 139, 140 (1st Dept 2000); *see also Hirschfeld v Citibank, N.A.*, 2003 WL 26094850, 2003 NY Misc LEXIS 2050, *5, 2003 NY Slip Op 30237(U) (Sup Ct, NY County 2003).

Breach of Contract

In their fourth counterclaim, defendants allege that plaintiffs breached the Subscription Agreement, and the non-reliance and warranties provisions in particular, by commencing the instant lawsuit. Counterclaim, ¶ 59. Even assuming, without deciding, that defendants are

entitled to sue under the agreement as third-party beneficiaries, they fail to address or refute plaintiffs' argument that, absent an express convenant not to sue, there is no breach of contract. *See Collins & Aikman Prods. Co. v Serma-tech Eng'g Group*, 297 AD2d 248 (1st Dept 2002). Thus, this counterclaim is dismissed.

Prima Facie Tort

"The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 (1985), citing *Curiano*, 63 NY2d at 117; see *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 (1983). "[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or, . . . unless defendant acts from 'disinterested malevolence,' by which is meant 'that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other.'" *Burns*, 59 NY2d at 333; *see AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, __ AD3d __, 981 NYS2d 406, 408 (1st Dept 2014); *Smith v Meridian Tech., Inc.*, 86 AD3d 557, 559 (2d Dept 2010); *Epifani v Johnson*, 65 AD3d 224, 232 (2d Dept 2009). When the pleading indicates other motives, such as "profit, self-interest, [or] business advantage," there can be no claim for prima facie tort. *Squire Records, Inc. v Vanguard Recording Soc., Inc.*, 25 AD2d 190, 191-192 (1st Dept 1966), *affd* 19 NY2d 797 (1967); *see Ferrara v Leticia, Inc.*, 2012 WL 4344164, *4, 2012 US Dist LEXIS 135684, *15 (ED NY 2012).

Defendants failed to plead facts sufficient to show that "disinterested malevolence" was the sole motive "unmixed with any other," as the pleadings allege that plaintiffs also were

motivated by their financial interests. *See Princes Point, LLC v AKRF Eng'g, P.C.*, 94 AD3d 588, 589 (1st Dept 2012) (allegation of disinterested malevolence contrary to allegation of profit motive); *Meridian Capital Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. LP*, 60 AD3d 434, 434-435 (1st Dept 2009]) (same); *Project Gamma Acquisition Corp. v PPG Indus., Inc.*, 2009 WL 1764481, 2009 NY Misc LEXIS 5849, *45-46, 2009 NY Slip Op 31321(U) (Sup Ct, NY County 2009) (allegations that defendants acted to acquire business at a better price are contrary to allegation of disinterested malevolence); *see also* AREP Fifty-Seventh, LLC, 981 NYS2d at 408 (intent to delay plaintiff's construction project to create competitive advantage for defendant negates allegation of disinterested malevolence). Moreover, "New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil action" (*Curiano*, 63 NY2d at 118), and defendants "may not plead prima facie tort as an alternative to [their] malicious prosecution cause of action in order to avoid the stringent pleading requirements of that tort." *Muro-Light*, 95 AD3d at 847; *see Curiano*, 63 NY2d at 118-119.

Accordingly, it is

ORDERED that plaintiffs' motion to dismiss is granted and the counterclaims are severed and dismissed; and it further

ORDERED that, in view of the above, plaintiffs' motion to strike portions of the pleadings (seq. # 005) is denied as moot.

Dated: April 8, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER