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

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STEVEN D. SLADKUS,

Plaintiff,

-against-

MELANIE ENGLESE a/k/a MELANIE SISSKIND,

Defendant.

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Index No. 151712/2016

Hon. Lucy Billings, J.S.C.
Part 46

Motion Seq. No. 1

**REPLY MEMORANDUM OF LAW
OF DEFENDANT MELANIE ENGLESE
IN FURTHER SUPPORT OF HER MOTION TO DISMISS
AND IN OPPOSITION TO PLAINTIFF'S MOTION
TO AMEND THE COMPLAINT**

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Defendant Melanie Englese ("Englese" or "Defendant"), by her attorneys, Herzfeld & Rubin, P.C., respectfully submits this reply memorandum of law in further support of her motion to dismiss the Complaint in this action pursuant to CPLR 3211(a)(1) and (a)(7), and in opposition to plaintiff's motion to amend the complaint. For the reasons set forth in Defendant's papers in support of her motion to dismiss, and for the further reasons set forth herein, Defendant's motion should be granted in its entirety, together with costs, including reasonable attorneys' fees.

INTRODUCTION

Plaintiff's opposition to Englese's motion to dismiss only confirms that Plaintiff cannot state a cause of action against Englese, and the complaint should therefore be dismissed. In her moving papers, Englese demonstrated that Plaintiff's defamation claims were legally deficient for at least four separate reasons: (i) Plaintiff failed to allege defamatory words *in haec verba* or otherwise with the requisite specificity under CPLR 3016; (ii) the alleged defamatory statements are non-actionable opinion and not susceptible to defamatory meaning; (iii) the alleged defamatory statements are *absolutely* privileged under New York's "fair report" statute and the First Amendment; (iv) the alleged defamatory statements are privileged, under long settled New York law, as a statement by a party to a legal proceeding that is "pertinent" thereto. Englese further demonstrated that Plaintiff had also failed to plead the essential elements of his causes of action for *prima facie* tort and tortious interference, and that those claims are duplicative his deficient defamation claims.

In his opposition, Plaintiff makes no effort to provide the full and complete statement allegedly made by Englese, as Plaintiff is required to do under CPLR 3016, and instead stands by his editorializing and self-serving characterizations of the alleged defamatory words. Further,

Plaintiff makes no effort to identify, as he must, the details of any other purported defamatory statements allegedly made by Englese, including the time, place and other circumstances in which these alleged statements were made. Plaintiff further fails to explain how any of the alleged defamatory statements, which are plainly subjective, loose and hyperbolic - are capable of being proven false or otherwise susceptible of defamatory meaning. Even assuming that the complaint is sufficient under CPLR 3016 and that the alleged statements are not constitutionally protected opinion, and that the alleged statements are susceptible of defamatory meaning, Plaintiff still fails to overcome Englese's showing that all of her alleged statements are protected by long-settled privileges under New York law. Plaintiff's strategy in response is to ignore the law.[1]

Plaintiff's opposition – like his complaint - is nothing but an angry missive directed to Englese in retaliation for the malpractice action she filed against him and his former firm. Plaintiff's opposition only confirms that his lawsuit is an abuse of the Court, has no legal merit and is a transparent attempt to raise Englese's expenses in order to obtain unfair tactical advantage in the legal malpractice case. Plaintiff's frivolous and abusive conduct, respectfully, should not be countenanced by the Court.

For the reasons set forth in Englese's initial moving papers, and for the additional reasons set forth below, Englese respectfully requests that the Court dismiss the complaint in its entirety with prejudice and award Englese costs including reasonable attorney fees.

[1] Plaintiff, at the outset of his opposition, trumpets that Englese has "conceded" various factual allegations in the complaint. As any seasoned litigator like Sladkus should know, the court is *required* to assume the truth of the factual allegations in the complaint for the purposes of a motion to dismiss. Nothing is "conceded." Defendant is not required– nor even permitted, to dispute the allegations, except where documentary evidence utterly refutes Plaintiff's allegations, as here. Nor is Defendant required or permitted to assert affirmative defenses on a motion to dismiss, as Plaintiff seems to suggest.

I.
The Complaint Fails to Satisfy the Particularity Requirements of CPLR 3016

In her motion papers, Englese showed that (i) Plaintiff had failed to plead his defamation claim with the requisite particularity under CPLR 3016 and that (ii) Plaintiff could not, in any event, base a defamation claim on supposed other alleged incidents or a so-called "campaign" of defamatory "tirades" without specifying, the time, place and manner of each such alleged defamatory statements, as well as the exact words uttered. (Br. at 9-11). [2]

As to the latter point, Plaintiff offers no response and the point is therefore conceded. (Opp. at 4-7). Plaintiff does not, because he cannot, furnish any details of a single alleged defamatory statement other than a single alleged conversation in the elevator bank between Englese and Mr. Suk, the expert architect hired in the condominium litigation. Plaintiff reverts to his repeated unsubstantiated suggestions of multiple so-called "tirades," and his ironic accusations of "playing games," (Opp. 7) which do not rescue his deficient allegations. Plaintiff cannot state a claim based on alleged defamatory statements that are not particularized in the complaint, including the particular words used, as well as the time, place and the person to whom the words were allegedly spoken. This is further confirmed by the *Glazier* case relied on by Plaintiff. *See Glazier v. Harris*, 99 A.D.3d 403, 404 (1st Dep't 2012) (dismissing defamation claim where plaintiff failed to specify particular words used.)

Plaintiff, in any event, fails to allege any defamatory statement with the particularity required by CPLR 3016. As shown in Englese's opening papers, rather than attempt to comply with the requirements of CPLR 3016, Plaintiff instead chose to reframe, to paraphrase and to selectively quote, in a disjointed and transparently self-serving manner, the statements allegedly

[2] Englese's Memorandum of Law in Support of her Motion to Dismiss is cited herein as "Br. at __." Plaintiff's opposition brief is cited as "Opp.at __."

made by Englese to the expert architect Suk. As shown in Englese's moving papers, this editorializing is impermissible, regardless of whether plaintiff uses "quotation marks." (Opp. at 5-6). The cases cited by Plaintiff are not helpful to him –each states the law but does not furnish enough information apply to this case. The *Glazier* court, for example, found some of the allegations sufficient to satisfy CPLR 3016 in *that* case (and others insufficient), but the decision does not quote the pleading or otherwise provide a sufficient basis for comparison to *this* case.[3]

In an attempt somehow to bolster his deficient allegations, Plaintiff submits an affidavit in which he purports to "verify" the alleged defamatory words. (Sladkus Aff. ¶ 5). But, Plaintiff admits he was not present during the alleged conversation between Englese and Mr. Suk so cannot testify on personal knowledge as to the words spoken. His "sworn testimony" adds nothing of substance to the otherwise deficient allegations. Moreover, while Plaintiff makes a motion to replead, presumably to cure his deficient pleading, Plaintiff fails, as he must under CPLR 3025(b), to submit a proposed amended complaint which might somehow cure the defect. CPLR 3025(b) ("Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or addition to be made to the pleading."). Plaintiff cross-motion to amend should be denied on that basis alone.

II.
The Allegedly Defamatory Statements are Nonactionable "Pure Opinion"

As shown by Englese in her moving papers, all the alleged defamatory statements are quintessential nonactionable opinion. Moreover, as previously shown, to the extent the words

[3] It is unclear why Plaintiff argues that he has alleged the element of "of and concerning" with requisite particularity. (Opp. at 6). While it is true that a plaintiff must plead and prove that an alleged defamation is "of and concerning" a plaintiff to sustain a cause of action for defamation, Englese has not moved to dismiss on the grounds that Plaintiff has failed to allege "of and concerning."

are not "pure opinion," they are loose, figurative and/or hyperbolic, and not otherwise susceptible of defamatory meaning. (Br. at 11-15).

In response, Plaintiff asserts that the alleged statements are not opinion, but makes no effort to show how the allegedly defamatory statements are capable of being proven true or false, such that they can be called facts rather than opinion. All of the alleged defamatory statements here are incapable of being proven true or false, and are therefore classic opinion. To illustrate, plaintiff naturally believes he that he is not a "shitty lawyer" but what proof will he use to establish that fact? What proof will Plaintiff adduce to establish that Englese did not lose "a ton of money?"

Plaintiff cites to the *Rossi* case but that case is entirely inapposite, and the comparison is bordering on nonsensical. *See Rossi v. Attansio*, 48 A.D.3d 1025 (3d Dep't 2008). In *Rossi* the court was called upon to determine whether allegations of *criminal conduct* were merely hyperbolic or whether they could be construed by an objective listener as a statement of fact. The court, in that case, determined that "accusation of criminal conduct may be considered nonactionable rhetorical hyperbole only when no reasonable person would believe that the speaker was accusing the subject of an actual criminal offense or when the circumstances and general tenor of the remarks negate the impression of a factual assertion." *Id.* at 1027. Here, in contrast, there is no allegation whatsoever that Englese accused Plaintiff of any criminal conduct. The alleged defamatory statements go only Englese's alleged statements about the quality of Sladkus' representation (or lack thereof) and the outcome of the litigation with which Englese plainly was not satisfied. Additionally, unlike here, the alleged criminal accusations in *Rossi* were capable of being proven true or false.

Because the alleged defamatory statements are constitutionally protected, nonactionable opinion, the court need not reach the question of whether the alleged defamatory statements may be "libel per se" or "libel per quod," as Plaintiff confusingly argues. (Opp. at 11). The arcane distinction between *libel per se* and *libel per quod* goes only to whether a Plaintiff must plead and prove "special damages." Plaintiff is apparently addressing an argument that Defendant did not make on this motion to dismiss which is beside the point in any event. Opinion does not lose its constitutional protection merely because the statement at issue might reflect poorly on a person's trade or business. *See Penn Warranty Corp.*, 10 Misc. 3d at 1003-1004 ("courts have been loathe to stifle someone's criticism of goods or services."). Indeed, Plaintiff's proposed ill-founded construction of New York libel law would render all expressions of opinion actionable when they are directed at a trade or business. This is the opposite of New York law and would likely violate both the New York and United States constitutions. *Id.*

Plaintiff just ignores the litany of squarely applicable cases cited by Englese showing why Plaintiff's statement are non-actionable opinion or hyperbole, or otherwise not capable of defamatory meaning. (Br. at 14). *See Khandalavala v Artsindia.com, LLC*, 2014 N.Y. Misc. LEXIS 1676, 9-10 (N.Y. Sup. Ct. Apr. 8, 2014) (alleged statement that defendants had "screwed" plaintiffs constitutes nonactionable opinion or hyperbole); *see also Epstein v. Board of Trustees*, 152 A.D.2d 534, 535 (2d Dep't 1989) (complaints by students that plaintiff had "taken advantage of" them and that accused plaintiff of "lying, deceiving, making false promises, not advising, ill advising, misleading, poor treatment of students, poor teaching abilities" were all nonactionable opinion); *Frechtman v Gutterman*, 115 A.D.3d 102, 106 (1st Dep't 2014) (words such as "misconduct" and "malpractice," in context, amount to the opinions and beliefs of dissatisfied clients about their attorney's work); *Penn Warranty Corp.* 10 Misc 3d at 1001-1002

(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); *Farrow*, 51 A.D. 3d at 627 (communication amounting to subjective characterization of plaintiff's behavior and an evaluation of her job performance were nonactionable expression of opinion).

Since Plaintiff does not, and cannot, seriously dispute that the alleged defamatory statements are either non-actionable opinion or not susceptible of defamatory meaning, the Complaint should be dismissed in its entirety with prejudice and without leave to amend.

III.
The Alleged Statements are Absolutely Privileged

In her moving papers, Englese demonstrated that, to the extent any of the allegedly defamatory statements were not protected expressions of opinion, they were nevertheless absolutely privileged under two distinct legal privileges: The statutory absolute privilege afforded by Section 74 of New York Civil Rights Law ("Section 74") (Br. at 16-18), and the common law absolute privilege protecting statements by a litigant that are pertinent to a legal proceeding (Br. at 18-20). In response, Plaintiff ignores the law, muddies the two privileges and, in so doing, completely fails to provide any basis to overcome them. The Court need not decide whether the alleged statements are privileged if the Court determines that the alleged defamatory statements are non-actionable opinion or otherwise not susceptible of defamatory meaning.

A. Absolute Privilege under Section 74 of New York Civil Rights Law

In her moving papers, Englese demonstrated that the allegedly defamatory statement was absolutely privileged under Section 74. (Br. at 16-18). Plaintiff makes several arguments in response, each of which has no merit.

First, Plaintiff attempts to argue that Section 74 may not be asserted on a motion to

dismiss (Opp. at 13). Contrary to plaintiff's argument, whether a statement is privileged under Section 74 presents a threshold question of law for the court to determine at the pleadings stage, and courts, accordingly, routinely grant motions to dismiss defamation cases on the pleadings under Section 74 or common law privileges. *See, e.g. Credit Agricole Corporate & Inv. Bank N.Y. Branch v. BDC Fin., L.L.C.*, 114 A.D.3d 552, 553 (1st Dep't 2014); *Russian Am. Found., Inc. v Daily News, L.P.*, 109 A.D.3d 410, 413 (1st Dep't 2013); *GS Plasticos Limitada v Veritas*, 84 A.D.3d 518 (1st Dep't 2011); *Bouchard v Daily Gazette Co.*, 136 A.D.3d 1233 (3d Dep't 2016); *Palmieri v. Thomas*, 29 A.D.3d 658, 659 (2d Dep't 2006); *Rakofsky v. Washington Post*, 39 Misc. 3d 1226(A), 1226A (N.Y. Sup. Ct. 2013).

Second, Plaintiff seemingly attempts to argue that, because Englese was a litigant and not a news reporter, or was allegedly motivated by improper purposes, her statements lose their privilege under Section 74. (Opp. 13). That is simply not the law. Section 74, by its terms, protects all "fair and true" accounts of an official proceeding regardless of the status of the speaker, and regardless of the motive or purpose for which the account was made. *E.g. See GS Plasticos Limitada*, 84 A.D.3d at 518 (a party's letter to non-party was immunized under Section 74 because it reflected substance of party's own complaint); *Lacher v. Engel*, 33 A.D.3d 10, 17 (1st Dep't 2006) (comments by attorney describing malpractice claims against plaintiff were privileged under Section 74); *Greenberg v. Spitzer*, 44 Misc. 3d 1202(A), 1202A (Sup. Ct. Putnam Co. 2014) (disparaging statements made in television broadcast by NY attorney general were privileged pursuant to Civil Rights Law §74, to the extent they constituted a substantially fair and accurate report of judicial proceedings). Moreover, since the privilege afforded by Section 74 is *absolute*, it cannot be lost even by showing malice or by "abuse," as Plaintiff incorrectly asserts. (Opp. at 14.) *See Glendora v. Gannett Suburban Newspapers*, 201 A.D. 2d

620, 620 (2d Dep't 1994); *see also Saleh v. New York Post*, 78 A.D. 3d 1149, 1151 (2d Dep't 2010).

Plaintiff also seems to argue that Englese's alleged account of the legal proceeding was not a "fair and true" account of the proceeding. (Opp. at 14-15). However, as fully set forth in Englese's motion papers, Englese commenced her malpractice action against Sladkus prior to making the alleged defamatory statements, and the contents of the malpractice complaint against Sladkus reflect what Englese was alleged to have said to Suk. As shown in Englese's initial moving papers, one need only compare the contents of the malpractice complaint to the allegedly defamatory statement made to Suk to see that each of the statements allegedly spoken by Englese is substantially, if not precisely, reflected in the allegations of the Complaint in the Malpractice Action. (Br. at 17). *See GS Plasticos Limitada*, 84 A.D.3d at 518 (dismissing counterclaim against plaintiff for defamation where statements by plaintiff contained in an allegedly defamatory letter regarding "deficient practices, sheer lack of competence or other behavior" reflected the substance of complaint against defendants.) To the extent Sladkus disputes the truth of the underlying allegations in the Malpractice complaint itself (Opp. at 15) that is irrelevant under Section 74 which immunizes any statement that fairly characterizing the content of the court pleading.

Moreover, since the Section 74 of New York Civil Rights Law precludes any "civil action" based on a privileged statement, all of Plaintiffs' causes of action herein are precluded, including his claims for *prima facie* tort and interference with prospective business advantage. N.Y. Civ. Rights L. § 74. *See, e.g,, Misek-Falkoff v. Am. Lawyer Media, Inc.*, 300 A.D.2d 215, 216 (1st Dep't 2002) (Section 74 bars all of plaintiffs' claims, including for tortious interference).

B. Absolute Privilege for Statement Made in Connection With Legal Proceedings under New York Common Law

In her initial motion papers, Englese showed that all of her alleged comments to William Suk are also absolutely privileged under New York common law because Englese is, indisputably, a party to both the Condominium Litigation and the Malpractice Action and her alleged defamatory statement was made in connection those legal proceedings, and was "pertinent" thereto. (Br. at 18-20).

In his opposition, Plaintiff nowhere disputes that Mr. Suk, an architect, was hired by Sladkus as an expert in the Englese's Condominium Litigation. Thus, despite Plaintiff's repeated mischaracterization of Mr. Suk as "disinterested third party," he was a legitimate participant in the legal proceeding involving Englese. That is, in fact, how Mr. Suk knew Englese and Sladkus in common. (Compl. ¶28, Sladkus Aff. ¶5).

Thus, the only question remaining (if any) is whether the alleged statement was "pertinent" to a legal proceeding. As shown in Englese's moving papers (Br. at 19), the test for "pertinence" is extremely liberal - a statement is pertinent to a legal proceeding if it "possibly or plausibly relevant or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability" to the proceeding. *Grasso v. Mathew*, 164 A.D.2d 476, 479 (3d Dep't 1991). Here, as shown in Englese's initial moving papers. the statements allegedly made by Englese to Suk relate solely to the Condominium Litigation (as well as the Malpractice Action) including statements as to Sladkus' performance and advice as Englese's counsel in connection with the Condominium Litigation, the terms of the settlement of that litigation, and the negotiation that take place during a mediation of that litigation. Since the alleged statements are "pertinent" to two legal proceedings – one of which Suk was indisputably a participant, the alleged statements are absolutely privileged.

Because the alleged defamatory statements are absolutely privileged under Section 74 and under the common law, and cannot be the predicate for any civil action, the Complaint should be dismissed in its entirety, with prejudice and without leave to amend.

IV.
Plaintiff Fails to State a Claim for Prima Facie Tort

In her moving papers, Englese showed that Plaintiff failed to allege the essential elements of a separate claim for *prima facie* tort. (Br. at 21-25). In particular, Englese showed that Plaintiff did not, as he must to sustain a claim for *prima facie* tort plead "special damages." (Br. at 24-25). Special Damages is an essential *element* of a claim for *prima facie* tort and must be plead with particularity. *See Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985) ("A critical element of the cause of action [for prima facie tort] is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages"); *Emergency Enclosures, Inc. v. National Fire Adj Co., Inc.*, 68 A.D.3d 1658, 1660 (4th Dep't 2009); *Rakofsky*, 39 Misc. 3d at 1226A.

To plead special damages, a Plaintiff must itemize "specific business lost" and, "where the loss of customers or associates is claimed, such customers or associates must be named." *Henkin v. News Syndicate Co., Inc.*, 27 Misc. 2d 987, 988 (Sup. Ct. N.Y. County 1960) (*citing Drug Research Corp. v. Curtis Pub. Co.*, 7 N.Y.2d 435, 440-441 (1960)); *See also Phillips v. New York Daily News*, 111 A.D.3d 420, 421 (1st Dep't 2013) (rounded figures without specific itemization of losses is not sufficient to allege element of special damages); *Vigoda v. DCA Productions Plus Inc.*, 293 A.D.2d 265, 266 (1st Dep't 2003) (dismissing prima facie tort claim where plaintiff sets forth damages in round numbers).

Applying these standards, plaintiff's conclusory and general allegation of "loss of business opportunities" and "lost profits," (Compl. ¶ 41) without itemizing a single loss nor

identifying the alleged lost business, associates or clients, is manifestly insufficient to plead the requisite special damages. In fact, in his affidavit, Plaintiff concedes admits he is *unable* to allege special damages. (See Sladkus Aff. ¶ 10). This admission is fatal to his *prima facie* tort claim. *See Phillips,* 111 A.D.3d at 421. Since Plaintiff has not plead with specificity the precise amount of such damages, it is irrelevant whether Defendant's alleged conduct could theoretically support a claim for damages or whether Plaintiff hopes to one day establish damages through discovery (Opp. at 20, Sladkus Aff. ¶10). The cases cited by Plaintiff with respect to his request for discovery on damages are not cases involving deficient pleading of special damages for a *prima facie* tort, and are therefore entirely inapposite.[4] (Opp. at 20-21). Without a particularized allegation of special damages in the complaint to sustain his claim for *prima facie* tort in the first place, plaintiff does not, and cannot, allege the essential elements of *prima facie* tort and is not entitled to discovery. Moreover, in his motion to amend, Plaintiff does not even propose to itemize his alleged special damages in an amended complaint, because he cannot do so. (Sladkus Aff. ¶ 10). The Complaint therefore fails to state a claim for *prima facie* tort.

V.
Plaintiff Fails to State a Claim for Tortious Interference with Prospective Economic Advantage

Similarly, Plaintiff's fails to state a claim for tortious interference with prospective economic advantage because Plaintiff failed to specify "some particular, existing business relationship through which plaintiff would have done business but for the allegedly tortious

[4] Plaintiff incorrectly cites Justice Billings's decision in *Monogram Credit Card Bank of Georgia v. Morris*, 2002 N.Y. Misc. LEXIS 1320, 3-4 (N.Y. Civ. Ct. May 10, 2002) for the proposition that Plaintiff should get discovery on special damages for his *prima facie* tort claim. (Opp. at 20-21). The issue in that case had nothing to do with special damages or *prima facie* tort but, rather, whether defendant should be granted discovery so that he could satisfy the pleading requirements of CPLR 3016(a) for defamation counterclaims. Notably, in that case, Justice Billings held that the counterclaim *failed* to satisfy the special pleading requirements for a defamation action (as the court should also hold here), *denied* defendant's request for discovery, and dismissed the counterclaims albeit without prejudice as to certain claims.

behavior." *Kramer v. Pollock-Krasner Foundation*, 890 F. Supp. 250, 258 (S.D.N.Y. 1995) (granting motion to dismiss where complaint referred only generally to potential contracts); *see also Rondeau v Houston*, 118 A.D.3d 638, 639 (1st Dep't 2014) ("As for his claim of tortious interference with prospective business advantage, plaintiff failed to allege any specific business relationship he was prevented from entering into by reason of the purported tortious interference or that defendants acted with the sole purpose of harming him or employed wrongful means"). In his affidavit, Plaintiff admits he is unable to specify any business opportunity lost, as he must to state a cause of action for tortious interference with prospective economic advantage. (Sladkus Aff. ¶ 10). The Complaint therefore fails to state a claim for tortious interference with prospective economic advantage, and should be dismissed.

VI.

All of Plaintiffs Torts Claims Should be Dismissed Because They are Derivative of His Deficient Defamation Claims and Plaintiff Does Not Plead Facts to Show Malice

In her moving papers, Englese showed that Plaintiff's claims for *prima facie* tort and tortious interference with prospective economic advantage should be dismissed for the further reason that they are based on the same alleged defamatory statement as Plaintiff's deficient defamation claim and fail for the same reasons. (Br. at 21-22).

First, as noted, the alleged statements upon which all claims are based, are absolutely protected by Section 74 of New York Civil Rights Law. Therefore, all of Plaintiffs claims in this action are precluded and should be dismissed. N.Y. Civ. Rights L. § 74; *See Misek-Falkoff,* 300 A.D.2d at 216.

Moreover, as previously shown in her moving papers. Plaintiff may not recast his deficient defamation claims as some other tort to try to circumvent privileges and other limitations on defamation claims. *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985) (no

claim for *prima facie* tort based on publication of news article which was not actionable as defamation); *Sermidi v. Battistotti*, 273 A.D.2d 66, 67 (1st Dep't 2000) (leave to replead properly denied where all of the dismissed causes of action arose out of the same objectionable broadcast and thus there is no reason to suppose that any of them can be supported with good grounds); *Snyder v. Sony Music Entertainment, Inc.*, 684 N.Y.S.2d 235, 239 (1st Dep't 1999) (dismissing claim for tortious interference with prospective advantage based on deficient claim for defamation); *Entertainment Partners Group v. Davis*, 603 N.Y.S.2d 439 (1st Dep't 1993) (claims for tortious interference dismissed as duplicative where "injury to reputation" was basis for claims and defamation claim was precluded by statute of limitations); *Pitcock v Kasowitz, Benson, Torres & Friedman, LLP*, 27 Misc. 3d 1238(A), 910 N.Y.S.2d 765, 2010 N.Y. Misc. LEXIS 2400, at * 17 (Sup. Ct. N.Y. County May 28, 2010) (dismissing tortious interference with prospective advantage based on same disparaging statements as deficient defamation claim); *Deutsche Bank Securities Inc. v Kong*, 2008 N.Y. Misc. LEXIS 8880, 11-12 (N.Y. Sup. Ct. 2008) (claims for tortious interference with business relations and prima facie tort are based on the same allegations as, and are therefore duplicative of, the defamation claim); *see also Anyanwu v. Columbia Broad. Sys, Inc.*, 887 F. Supp. 690, 693 (S.D.N.Y. 1995) ("When additional tort claims are aimed at controlling the same speech that is the basis of a libel claim, courts should not entertain the additional claims under less stringent standards."). All of the claims in the Complaint are derivate and duplicative of Plaintiff's deficient defamation claim and are inactionable for the same reasons.

Furthermore, and as shown in Englese's moving papers, the Complaint fails to state claims for either *prima facie* tort or tortious interference with prospective economic advantage for the additional reason that Plaintiff cannot allege facts that would tend to establish a requisite

common element of either cause of action, namely, that Plaintiff was motivated *solely* to injure Plaintiff or "disinterested malevolence." Plaintiff claims he sufficiently alleged intent but he does not, and cannot, dispute that Englese had duly commenced a civil action against Plaintiff for *inter alia* legal malpractice and fraud, in which she seeks money damages and disgorgement of fees, and that the action was commenced prior to the alleged defamatory statements, and that Englese was, therefore, motivated (partially if not entirely) by her own economic, self-interest in prosecuting her legal claims against Sladkus. Moreover, since Plaintiff must admit that Mr. Suk was a participant in the Condominium Litigation, Plaintiff cannot dispute that Englese was also motivated, in part, by her desire to communicate, to a person involved in the underlying condominium litigation, of her dissatisfaction with services provided by Sladkus and the outcome of that case. *See Phillips*, 58 A.D.3d at 528. ("The allegations in the amended complaint clearly establish that plaintiff had a fee dispute with defendant, and that defendant was advancing her own self-interest in urging a third party, described in the complaint as an 'occasional associate' of defendant, not to conduct business with plaintiff until the fee dispute was resolved."); *Hyman v. Schwartz*, 127 A.D.3d 1281, 1284 (3d Dep't 2015) ("Even accepting as true the allegation that plaintiff's commencement of the action was intended to inflict harm upon Schwartz, it cannot be said that plaintiff was solely motivated by malevolence."); *see also Carvel Corp. v. Noonan*, 3 N.Y. 3d 182, 190 (2004) (alleged interference intended to advance one's own interests is not acting solely to harm plaintiff). The Complaint therefore fails to state a claim for *prima facie* tort and tortious interference with prospective advantage.

VII.
Plaintiff Does Not State a Claim for Punitive Damages

In her moving papers, Englese showed that Plaintiff's claim for punitive damages were not supported by factual allegations that, if true, would warrant such damages. (Br. at 26-27). In

response, Plaintiff cites cases showing that punitive damages could be available under certain egregious circumstances, but makes no effort to show how punitive damages could conceivably be appropriate in *this* case. All of Plaintiff's hyperbole aside, the facts alleged in this complaint amount to nothing but an alleged single "elevator" conversation between two common acquaintances of Plaintiff, in which the Defendant, in response to an inquiry, allegedly expressed dissatisfaction with the services provided by the Plaintiff, and the outcome of the litigation which they were all involved, and allegedly expressed those opinions using some hyperbolic language. Plaintiff does not allege any actual injuries, and does not, because he cannot, even allege that Mr. Suk thinks any less of Mr. Sladkus, let alone stopped conducting business with him. In short, the Complaint is a "tempest in teapot," and, if not outright frivolous and sanctionable, does not come close to establishing the degree of culpability required by the Constitution or otherwise to recover punitive damages in a defamation case.

CONCLUSION

For these reasons, the Court should respectfully grant Defendant's motion to dismiss and dismiss the Complaint in its entirety with prejudice and without leave to amend, together with costs, plus award to defendant her reasonable attorney's fees, and such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 23, 2016

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