COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR PRIMA FACIE TORT, ELEMENTS EXPLAINED (FOURTH DEPT)

The Fourth Department, reversing Supreme Court, determined the complaint did not state a cause of action for prima facie tort:

> "Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful" … . "The requisite elements of a cause of action for prima facie tort are (1) 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" … .
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> Here, the prima facie tort cause of action cannot stand because, although the complaint alleged that defendant "acted maliciously" and "with disinterested malice," it did not allege that defendant's "sole motivation was disinterested malevolence' " … . In addition, the complaint failed to allege special damages as required … . Finally, the complaint is not "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR 3013 …). "[A] cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations" … . Here, the complaint is devoid of relevant facts, including the time period at issue, the number of forms that defendant requested plaintiff to resubmit, and the number of claims involved. Greater Buffalo Acc. & Injury Chiropractic, P.C. v Geico Cas. Co., 2019 NY Slip Op 06349, Fourth Dept 8-22-19

COMPLAINT DID NOT STATE CAUSES OF ACTION FOR BREACH OF CONTRACT, NEGLIGENT HIRING AND SUPERVISION OR PRIMA FACIE TORT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff, the assignee of no-fault benefits, did not state valid causes of action against the insurer for breach of contract, negligent hiring and supervision, and prima facie tort. The claims were paid by the defendant and plaintiff alleged flaws and delays in the processing of the claims:

> The amended complaint, however, failed to identify the specific insurance contracts that plaintiff had performed services under or the contract provisions that defendant allegedly breached. Inasmuch as bare legal conclusions without factual support are insufficient to withstand a motion to dismiss, we conclude that the amended complaint fails to state a cause of action for breach of contract. …
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> Although "[a]n employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act"… , the amended complaint failed to allege that the acts of defendant's employees were committed independent of defendant's instruction or outside the scope of employment … . …
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> "There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the sole motivation for [the] defendant['s] otherwise lawful act" … . Here, the amended complaint alleged that defendant acted in "bad faith" and intentionally caused harm to plaintiff by requesting verifications and examinations under oath. Those conclusory allegations, however, failed to state that defendant had " a malicious [motive] unmixed with any other and exclusively directed to [the] injury and damage of [plaintiff]' " … . Furthermore, it is "[a] critical element of [a prima facie tort] cause of action . . . that plaintiff suffered specific and measurable loss" … . Medical Care of W. N.Y. v Allstate Ins. Co., 2019 NY Slip Op 06243, Fourth Dept 8-22-19

NEGLIGENT HIRING AND SUPERVISION AND PRIMA FACIE TORT CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED, NO ALLEGATION EMPLOYEES WERE ACTING OUTSIDE THE SCOPE OF EMPLOYMENT, NO ALLEGATION MALICE WAS DEFENDANT'S SOLE MOTIVATION (FOURTH DEPT).

The Fourth Department determined plaintiff's negligent hiring and supervision and prima facie tort causes of action should have been dismissed. The lawsuit alleged defendant insurer failed to pay claims for medical care submitted by plaintiff:

> "An employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" … . Here, plaintiff's cause of action for negligent hiring, supervision or retention is based on the factual

allegations that defendant's employees denied or delayed the payment of claims to plaintiff and sent repetitive verification demands, and that defendant was aware of what its employees were doing and continued to employ them. Plaintiff, however, failed to allege that those acts were committed outside the scope of the employees' employment. Plaintiff also failed to allege how the employees' alleged acts of denying claims and sending verification demands constituted acts of negligence. ...

"There can be no recovery [for prima facie tort] unless a disinterested malevolence' to injure [the] plaintiff constitutes the sole motivation for defendant['s] otherwise lawful act" ... . Here, plaintiff alleged that defendant acted in "bad faith" and intended harm by repeatedly sending plaintiff duplicitous requests for verification forms to be completed. Those conclusory statements in the amended complaint, however, fail to allege "a malicious [act] unmixed with any other and exclusively directed to [the] injury and damage of another" ... . Furthermore, it is "[a] critical element of the cause of action . . . that plaintiff suffered specific and measurable loss" ... , which "must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts" ... , but the injuries alleged by plaintiff are "couched in broad and conclusory terms" ... , and do not constitute "specific and measurable loss" stated with particularity ... . Walden Bailey Chiropractic, P.C. v Geico Cas. Co., 2019 NY Slip Op 05267, Fourth Dept 6-28-19

Rare Example of Sufficiently Pled Cause of Action for Prima Facie Tort—Elements of Tortious Interference with a Contract Outlined

The Second Department determined plaintiff had stated a cause of action for prima facie tort and tortious interference with a contract. The complaint alleged the defendant set up websites and organized public protests accusing plaintiff of child abuse and had communicated with plaintiff's employer, causing plaintiff to be terminated without cause. The decision is noteworthy because it demonstrates the extreme nature of allegations deemed sufficient to support a prima facie tort cause of action. With respect to the tortious interference with contract cause of action, the court explained:

> The elements of tortious interference with a contract are: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" ... . The amended complaint sufficiently sets forth a cause of action based on tortious interference with a contract, alleging, in pertinent part, that [defendant's] intentional interference with the subject employment contract rendered performance impossible. Hersh v Cohen, 2015 NY Slip Op 06888, 2nd Dept 9-23-15

Elements of Intentional Infliction of Emotional Distress and Prima Facie Tort Described

In finding the counterclaims for intentional infliction of emotional distress and prima facie tort were properly dismissed, the Third Department described the elements of those causes of action:

> ...[W]ith respect to the counterclaim for intentional infliction of emotional distress [,] ... [defendant] was required to plead "extreme and outrageous conduct, the intentional or reckless nature of such conduct, a causal relationship between the conduct and the resulting injury, and severe emotional distress" ... . Notably, the alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . and [be] utterly intolerable in a civilized community" ... . Here, [defendant] alleged that, during the course of their professional relationship, plaintiff sent unwanted gifts and letters, engaged in suggestive conversations and made threats of future conduct toward him. Even reading the allegations liberally and accepting them as true, we find that the alleged conduct, while undeniably inappropriate, did not rise to the level of being "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" ... .
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> As for [defendant's] counterclaim for prima facie tort, there can be no recovery under this theory "unless malevolence is the sole motive for [plaintiff's] otherwise lawful act or, in [other words], unless [plaintiff] acts from disinterested malevolence" ... . Stated another way, the act "must be a malicious one unmixed with any other and exclusively directed to injury and damage of another" ... . Hyman v Schwartz, 2015 NY Slip Op 02819, 3rd Dept 4-2-15

Elements of Prima Facie Tort Explained—Disinterested Malevolence Not Demonstrated

The Third Department, in finding the allegations insufficient to make out the cause of action, explained the elements of prima facie tort:

> "To sufficiently allege a cause of action for prima facie tort . . . a plaintiff must plead the intentional infliction of harm without justification or excuse, which results in special damages, by one or more acts which would otherwise be lawful" … . Moreover, "there is no recovery in prima facie tort unless malevolence is the sole motive for the defendant's otherwise lawful act" … . The act "must be a malicious one unmixed with any other and exclusively directed to injury and damage of another" … . Even egregious conduct by an attorney during the course of representing a client that aids to some degree the attorney's client or the attorney's practice generally will not satisfy the disinterested malevolence requirement of a prima facie tort, because such conduct is not motivated solely to harm the defendant … .
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> … While plaintiffs' pleadings are liberally interpreted in the context of a CPLR 3211 (a) (7) motion, such liberal standard "will not save allegations that consist of bare legal conclusions or factual claims that are flatly contradicted by documentary evidence or are inherently incredible" Wiggins & Kopko LLP v Masson, 517155, 3rd Dept 4-3-14

"At Will" Clause in Employment Contract Precluded Action Based Upon Promissory Estoppel, Fraud and Negligent Representation/Criteria for Tortious Interference With Contract and Prima Facie Tort Not Met

The Third Department affirmed the dismissal of a complaint brought by a doctor against the hospital where he was employed and the doctor who supervised him. The plaintiff was hired pursuant to an agreement which included an "at will" clause allowing termination without cause upon 60 days notice. Plaintiff was terminated upon 90 days notice. Plaintiff sued the hospital for promissory estoppel, fraud, and negligent representation. Plaintiff sued his supervisor [Hussain] for tortious interference with contract and prima facie tort:

> Plaintiff's claims against the hospital all required a showing that, among other things, he reasonably relied on any alleged promises or misrepresentations made to him by the hospital … . In this regard, we note that "[w]here, as here, 'a plaintiff is offered only at-will employment, he or she will generally be unable to establish reasonable reliance on a prospective employer's representations'" … . * * * Inasmuch as any oral assurances made by the hospital as to the security of plaintiff's position could not have altered the at-will nature of the employment contract, the hospital established its prima facie entitlement to judgment as a matter of law dismissing the claims against it, shifting the burden to plaintiff "'to establish the existence of material issues of fact which require a trial of the action'"… . * * *
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> … [A] claim of tortious interference with contract requires (1) the existence of a valid contract between a plaintiff and a third party, (2) a defendant's knowledge of such contract, (3) the intentional inducement of a breach of that contract, and (4) damages … . Significantly, as the contract here was terminable at will, plaintiff was also required to "show that [Hussain] employed wrongful means, such as fraud, misrepresentation or threats[,] to effect the termination of employment"… .No such showing was made here. * * *
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> "[Prima facie tort] requires a showing of an intentional infliction of harm, without excuse or justification, by an act or series of acts that would otherwise be lawful . . . and that malevolence was the sole motivating factor" … . Considering plaintiff's acknowledgment that Hussain prevented him from examining patients as a result of complaints made by patients who wanted to be treated by Hussain and not plaintiff, plaintiff could not establishthat Hussain's actions were motivated solely by "disinterested malevolence"… . Hobler v Hussain…, 516381, 3rd Dept 11-7-13