

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

ALYSSA MERCANTE.,

Plaintiff,

v.

JEFF MR. TARZIA,

Defendant.

Case No.: 1:24-cv-08471

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT**

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INTRODUCTION

In this defamation case—all five counts are for defamation, regardless of how styled—plaintiff, a New York resident, alleges that defendant, who lives and works in California, said things—a lot of things—about the defendant on the Internet that offended her and made her lose her job. The Complaint alleges that these comments constituted bias-based harassment; tortious interference with contract; intentional infliction of emotional distress; and a new tort called “stochastic terrorism.” The gravamen of the Complaint, however, is that defendant called plaintiff (i) a former sex worker, and (ii) a whore, and that this constituted defamation.

Plaintiff’s problem, however, is that she has—as shown below—repeatedly, publicly and unapologetically **described herself** online as a (i) a former sex worker and (ii) a whore and urged followers not to deem either of these occupations or epithets as demeaning or negative. This posture and attitude may or may not be a problem for plaintiff with respect to how she lives her life and how she influences others to live theirs—but for her complaint of defamation, these self-descriptions are a problem indeed.

STATEMENT OF FACTS

The plaintiff in this action is Alyssa Mercante, who writes about videogames. The defendant is Jeff Tarzia, who operates social media channels that focus on videogames under the name “SmashJT.” The Complaint outlines a supposed harassment campaign by Mr. Tarzia, a social media influencer, against Mercante, a former senior editor at Kotaku, a website that reports on news and developments in the world of video gaming and an active social media figure in her own right. Mr. Tarzia is alleged to have targeted Mercante as part of a campaign against perceived “woke” bias in video game journalism. According to the Complaint, Tarzia is so influential that

his actions alone caused Mercante’s resignation from Kotaku, resulting in significant personal and professional harm.

The Complaint begins by providing context on the original “Gamergate” controversy from 2014 and sets the stage for its own ideological bent by characterizing all critics of Kotaku’s journalistic practices as “right-wing.” Mr. Tarzia created and uploaded YouTube content consisting of his reporting on a new controversy in 2024 that came to be known as “Gamergate 2.0” involving a company called Sweet Baby Inc., which the Complaint suggests Mr. Tarzia wrongfully used to grow his online following, largely by attacking Mercante—a significant figure in the original Gamergate and a brash, militant and frequently obscene voice in the online culture wars—as well as Kotaku.

The Complaint describes Mr. Tarzia’s coverage of Mercante, and her role in “Gamergate 2.0,” as harassment, alleging that he made false statements about her personal life, repeatedly invocation of her name and image without consent, and called for his followers to target her with their own online opprobrium. The complaint contains no allegation of any threat of physical harm to Mercante by Mr. Tarzia or anyone else.

The Complaint lists five causes of action: (i) Defamation and defamation per se for alleged false statements about Mercante; (2) bias-related violence or intimidation under New York law; (3) intentional infliction of emotional distress; (4) tortious interference with Mercante’s employment contract; and (5) a proposed new tort of “stochastic terrorism” or, alternatively, deployment of the prima facie tort rubric based on Mr. Tarzia bothering and mocking Mercante online. The complaint alleges Mercante suffered damages including loss of employment, income, and professional opportunities; damage to her personal and professional reputation; and severe emotional distress.

LEGAL ARGUMENT

I. LEGAL STANDARDS

A. Fed. R. Civ. P. 12(b)(2)—Jurisdiction

A plaintiff has the burden of proving personal jurisdiction by a preponderance of the evidence but need only allege facts constituting a prima facie showing of personal jurisdiction to survive a Rule 12(b)(2) motion. The plaintiff may not, however, “rely on conclusory non-fact-specific jurisdictional allegations to overcome a motion to dismiss.” *Tannerite Sports, LLC v. NBCUniversal Media LLC*, 135 F. Supp. 3d 219, 228 (S.D.N.Y. 2015), *aff’d sub nom. Tannerite Sports, LLC v. NBCUniversal News Grp., a division of NBCUniversal Media, LLC*, 864 F.3d 236 (2d Cir. 2017).

B. Fed. R. Civ. P. 12(b)(6)—Failure to State a Claim

To survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). “Because a defamation suit ‘may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself,’ courts should, where possible, resolve defamation actions at the pleading stage.” *Adelson v. Harris*, 973 F. Supp. 2d 467, 481 (S.D.N.Y. 2013). Also, under New York’s anti-SLAPP law, an action such as this one, “based upon . . . the exercise of the constitutional right of free speech in connection with an issue of public interest,” NYCRL § 76-a(2), is subject to dismissal unless the complaint establishes a “substantial basis” for the action pursuant to NYCPLR § 3211(g)(1). Under that provision, where a defense is founded upon documentary evidence, dismissal appropriate “where the documentary evidence presented conclusively establishes a defense to the plaintiff’s claims as a matter of law.” *Dixon v 105 W.*

75th St. LLC, 148 AD3d 623, 626-27 (App. Div. 1st Dept 2017)([internal citations omitted]; *Dykstra v. St. Martin's Press LLC*, Slip Op 31813(U), ¶ 8 (Sup. Ct. NY Cty. 2020).

Finally, in defamation actions, under New York law courts may consider documentary evidence to establish context relevant to affirmative defenses or for context. *Id.*, quoting *Greenberg v Spitzer*, 155 AD3d 27 (App. Div. 2d Dept 2017).

II. THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANT AND SHOULD DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(2).

This Court has no jurisdiction over defendant. The Complaint alleges that plaintiff is a resident of the State of New York and that defendant resides in California (Compl. ¶¶ 27-28; 30-31), but alleges jurisdiction on the ground that defendant “has directed his activities towards the State of New York via his ‘#EndKotaku’ campaign via his Twitter, website, and YouTube videos, all of which are accessible in the State of New York and targeted at the people of the State of New York, sufficient to show that he has maintained such minimum contacts with the State of New York as not to offend traditional notions of fair play substantial justice.” (¶ 32). It is well established law that such allegations—which, as in this instance, allege conduct sounding in defamation—fall far short of satisfying New York’s longarm jurisdiction statute.

Subject matter jurisdiction here is alleged to be based on diversity under 28 U.S.C. § 1332. (¶ 29). And, as is well known, in a diversity action personal jurisdiction of a federal court over a non-resident defendant is governed by the law of the state in which the court sits and by the limits of due process. *See, Prince v. Intercept*, 634 F. Supp. 3d 114, 128–29 (S.D.N.Y. 2022). The Court, consequently, first looks to New York’s jurisdictional statute, NYCPLR § 302(a) to ascertain whether that statute provides for long-arm jurisdiction under the facts alleged and then determines whether such exercise would comport with due process. *Id.*

Courts routinely recognize that “placing allegedly defamatory content on the internet and making it accessible to the public does not constitute the transaction of business in New York, even when it is likely that the material will be read by New Yorkers.” *Kingstown Cap. Mgmt. L.P. v. CPI Prop. Grp., S.A.*, 205 A.D.3d 467, 467 (2022). Here the Complaint’s jurisdiction allegations track NYCPLR § 302(a)(3)(ii), which provides that “a court may exercise personal jurisdiction over any non-domiciliary ..., who commits a tortious act without the state causing injury to person or property within the state, **except as to a cause of action for defamation of character arising from the act**, (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce” (emphasis added.) The CPLR, in other words, explicitly exempts defamation claims from the operation of New York’s long-arm jurisdiction—and notwithstanding the tag-along causes of action in the Complaint, this is essentially a defamation action. See, e.g., *Reich v. Lopez*, 38 F. Supp. 3d 436, 458 (S.D.N.Y. 2014), *aff’d*, 858 F.3d 55 (2d Cir. 2017) (“Although Plaintiffs’ claims include, in addition to defamation, tortious interference with prospective economic advantage, trade libel, and injurious falsehood, all of these causes of action sound in defamation”).

Plaintiff, therefore, cannot as a matter of law establish jurisdiction over Mr. Tarzia because “[t]here is no basis to exercise ‘long-arm’ jurisdiction over . . . nondomiciliary defendants . . . under CPLR 302(a)(2) or (3) where, as here, the only tort alleged to have been committed, defamation of character, cannot form the basis for long-arm jurisdiction under the specific language of the statute.” *Pontarelli v. Shapero*, 231 A.D.2d 407, 410 (1st Dept. 1996).

Plaintiff’s “targeted at New York” allegation is unavailing. As this Court explained in *Trachtenberg v. Failedmessiah.com*, 43 F. Supp. 3d 198 (E.D.N.Y. 2014), while the Due Process Clause might allow the State of New York the power to allow its courts to exercise “impact-” or

“effects-only” jurisdiction, it has chosen not to do so; NYCPLR § 302(a)(1)’s transaction requirement sets a decidedly stricter test for defamation cases.” *Id.* at 203. The same is true, of course, for NYCPLR § 302(a)(3), to which the defamation carve-out applies, except that instead of using the word “transaction,” it provides in subsection (i) for essentially the same thing—that a defendant “regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state.” This is not alleged; the Complaint does not describe either goods or services rendered in New York by Mr. Tarzia.

Alternatively, however, the statute provides under subsection (ii) that personal jurisdiction may exist if the defendant “expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.” No such formulations are alleged in the “Jurisdiction and Venue” section of the Complaint (¶ 32), however. The closest plaintiff comes to doing so is in ¶ 33, in which she alleges—as part of attempting to plead the jurisdictional minimum—as follows:

The amount in controversy in this case is more than \$75,000.00, because Jeff Mr. Tarzia’s commercial enterprise is built off of, and dedicated to, the disparaging, harassing, intimidating, and stalking of Alyssa Mercante. His income has exceeded \$75,000.00 in calendar year of 2024 alone, and at least \$75,000.00 of that is directly based upon factually false statements made by Mr. Tarzia about Alyssa Mercante. Additionally, the harms to Mercante because of the mob Mr. Tarzia has incited and the related harassment all far exceed \$75,000.00 in damages.

Reading the Complaint in the most plaintiff-friendly manner possible, these allegations may be taken as approaching some formulation that might satisfy § 302(a)(3)(ii), because it alleges that Mr. Tarzia’s conduct, besides being “directed” at a New York resident (¶ 32), resulted in “consequences” and “substantial revenue.” It seems, in other words, that the “substantial revenue” alleged here is essentially nothing other than the revenue allegedly generated by Mr. Tarzia’s

online statements about the plaintiff—a matter regarding which plaintiff cannot plausibly claim to be know, much less quantify, and which she has no reasonable basis for guessing about.

Plaintiff’s jurisdictional allegations fail for these reasons, and the Court should dismiss this case for lack of personal jurisdiction over the defendant.

III. THE COMPLAINT FAILS TO STATE A PLAUSIBLE CLAIM FOR ANY CAUSE OF ACTION FOR DEFAMATION AND SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6).

The Complaint includes many allegations concerning political and social “culture war” topics. It also contains a great deal of political rhetoric and polemic, the inclusion of which is hard to justify.¹ Focusing, however, on the factual allegations against Mr. Tarzia, it is clear that the claims against him are legally deficient. The operative allegations here are ¶¶ 181 and 182 of the Complaint, which allege that defendant (i) referred to plaintiff as a “whore” and that (ii) she herself claimed to have once been a “sex worker” who performed sex acts “for money.” To meet her burden under New York law, her allegations must plausibly allege not only that the description of plaintiff regarding sex work as well as the exchange of sexual favors for money were false, but that defendant knew they were false, or was recklessly indifferent regarding their falsity, when he made them.

Plaintiff is unquestionably a public figure and thus bears the burden of plausibly alleging all required elements of defamation including actual malice. “Conclusory allegations that the statements were ‘false’ are insufficient to survive a motion to dismiss because a plaintiff is required ‘to plead facts that, if proven, would allow a reasonable person to consider the statement false.’” *Id.* Here the Complaint seeks relief for both *per quod* and *per se* defamation, but the allegedly false

¹ Examples include, “Mercante wrote an article debunking a right-wing myth” (¶ 60); “The reaction from reactionaries was predictable” (¶ 61).

statements—separate and apart from the many obvious expressions of opinion cited in the Complaint—appear to be the same as those alleged to be actionable as *per se* defamation.

Under New York law, mere insults are nonactionable. *Lanasa v. Stiene*, No. 24-1325, 2025 U.S. App. LEXIS 6775, at *8 (2d Cir. Mar. 24, 2025). And “courts have emphasized the generally informal and unedited nature of” communications in Internet forums, which “leads readers [to] give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts.” *Ganske v. Mensch*, 480 F. Supp. 3d 542, 553 (S.D.N.Y. 2020) (cleaned up). All the allegations of the Complaint must be considered in its context, and will not be actionable if that context indicates that the comments are nothing more than hyperbole or epithet. *Saunders v. Taylor*, NY Slip Op 51743(U), ¶ 5, 6 Misc. 3d 1015(A), 1015A (Sup. Ct. NY Co. 2003). See also, *Rapaport v. Barstool Sports Inc.*, No. 22-2080-cv, 2024 U.S. App. LEXIS 556, at *8 (2d Cir. Jan. 9, 2024) (statement that plaintiff was a “stalker, or has committed domestic abuse” were non-actionable opinions considering the immediate and the broader context in which each challenged statement was delivered).

A whore, of course, is “a woman who has multiple sexual partners” or is “sexually promiscuous.”² Similarly, a sex worker is “a person whose work involves sex acts *especially* : a person who engages in sexual intercourse in exchange for pay.”³ These are insults. And while courts have—in very different factual contexts—found the use of these terms as epithets to be defamatory, others have questioned whether the use of terms “‘bitch,’ ‘slut’ and ‘whore’ can be normally understood to impute unchastity to plaintiff in this day and age when such terms are used generically.” *Saunders, id.* That question must be considered here because, as shown below,

² Merriam-Webster online dictionary, “Whore,” found at <https://www.merriam-webster.com/dictionary/whore>.

³ *Id.*, “Sex worker” found at <https://www.merriam-webster.com/dictionary/sex%20worker>.

plaintiff's **own online content** establishes that, as a matter of law, she cannot establish that characterizing her as a “whore” would damage to her reputation.

The first exemplary post, reproduced as Figure 1 below, is dated December 21, 2023, and is now only available on the Internet Archive or “Wayback Machine.”⁴ Presumably plaintiff deleted it, and many others reproduced here, because it can no longer be found at its original URL on the X website.⁵



Figure 1

In Figure (1), plaintiff states, “I’m just gonna go back to sex work because at least when I get f*cked a lot I’ll get paid well for it.” It appears that plaintiff is suggesting that, for some reason she believes she is “getting f*cked,” i.e., abused or being taken advantage of.⁶ See, Figure (1). By playing on this dual meaning of the phrase, plaintiff makes it clear that she is not a sex worker at present, but merely the victim of some kind of abuse. She makes this point, however, by making

⁴ Found at, <https://archive.is/mqxac> (last visited March 16, 2025).

⁵ Visiting the URL that Archive Today indicates is the original link, https://twitter.com/lyssa_merc/status/1737844720871838166 brings up a message stating, “Hmm...this page doesn’t exist. Try searching for something else.”

⁶ See, Urban Dictionary, “Getting F*cked,” found at <http://getting-fucked.urbanup.com/3404630> (entry created October 14, 2008), providing three definitions, the first two being “To have sexual intercourse” and “To be take advantage of, betray, or cheat; victimize.”

a play on words by stating that she may as well “**go back to sex work**” and “at least . . . get paid well for it.”

The premise of the post, therefore, is that plaintiff **was formerly a sex worker**—a claim that was not necessary to make the play on words; plaintiff could have just as easily have said, “I’m just gonna go into sex work because at least when I get f*cked a lot I’ll get paid well for it” and achieved the same effect. It is hard to imagine any reason plaintiff would have chosen to write about “going back to sex work” if she did not mean it was something she had done before.

In another post, plaintiff answers the question, as shown in Figure (2) below, of how she got “into the gaming industry,” by stating, “I sucked d*ck”—that is, she exchanged sex for economic benefit.⁷



Figure 2

Below are two more relevant posts. In Figure (3) plaintiff describes sex work as “just another—very lucrative—way of making money” and characterizes anyone who looks down on it as a misogynist. It is difficult

⁷ This post cannot be located anywhere online anymore.



Figure 3

In Figure (4) below, plaintiff brags of having worked as a “cam girl,”⁸ and implies that from her point of view, that is the sort of sex work appropriate for celebration on “International Whores Day.”⁹ It is reasonable to read the post in Figure 4 as a statement that plaintiff considers herself a member of the international fraternity she was celebrating on June 2, 2023.



Figure 4

⁸ “[A] woman who poses for a webcam especially as a form of paid adult entertainment.” Merriam-Webster online dictionary, “camgirl,” found at <https://www.merriam-webster.com/dictionary/camgirl>.

⁹ This post cannot be located on X anymore, but can be found at https://web.archive.org/web/20230603021807/https://twitter.com/alyssa_merc.

Given the indisputable nature of these admissions, or seeming admissions, by plaintiff, it is well within the Court's discretion to consider them even on a motion to dismiss under Rule 12(b)(6). See, *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 346 (S.D.N.Y. 1998) (court took judicial notice of "indisputable facts" of gangster's criminal history to hold that his reputation was so "badly tarnished" that even if depiction of his involvement in violent acts was otherwise defamatory, he could not sustain a defamation cause of action as a matter of law). These Twitter / X posts "are not offered for the truth of [their] contents, but solely for the purpose of establishing the context in which the allegedly defamatory statement was made—an inquiry that bears directly on whether the statement is actionable as a matter of law." *Greenberg v Spitzer*, *supra*, 155 AD3d at 45.

Here the context is, of course, plaintiff's own reputation with respect to chastity. And considering the above, plaintiff cannot claim to have been defamed by being accused of unchastity; plaintiff has rendered herself "libel-proof" with respect to chastity through her own voluntary, public descriptions of herself and her moral standards. That is exactly what a libel-proof-plaintiff is: one who is barred from asserting a claim for defamation because his "reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject." *Guccione v Hustler Mag., Inc.*, 800 F2d 298, 303 (2d Cir 1986), *cert. denied*, 479 U.S. 1091 (1987) (plaintiff was "libel-proof" as to adultery because widely published articles were probative of the plaintiff's notoriety for adultery"). As a matter of law, plaintiff cannot claim to have been damaged because defendant described her as something she has publicly not only claimed she is, but who has "owned" that

identity in so a militant fashion. See Figure (5) below (plaintiff describes herself in her X profile as a “feminist whore” and “slut”).¹⁰



Figure 5

Alternatively, the Court can take plaintiff at her word and conclude that she is not chaste, but is what she has said she is. And truth, of course, “is an absolute, unqualified defense to a civil defamation action and ‘substantial truth’ suffices to defeat a charge of libel.” *Henry v. Fox News Network LLC*, 629 F. Supp. 3d 136, 146 (S.D.N.Y. 2022).

In the context of plaintiff’s statements, those of defendant are readily perceptible as tasteless but non-actionable polemic. Alternatively, as discussed above, plaintiff made herself libel-proof on the subject of chastity. It is also possible that plaintiff said what she meant and meant what she said; defendant spoke the truth and cannot be liable for defamation. Finally,

¹⁰ This post on X was evidently deleted. It is available, however, at https://web.archive.org/web/20240517052410/https://x.com/alyssa_merc?mx=2.

even if defendant's descriptions of her conduct was itself mere *kulturkampf* rhetoric and could somehow be shown to be empirically false, plaintiff's comments appeared to be true – and were thus not made with actual malice.

For any of these reasons or some combination of them, plaintiff's defamation claim should be dismissed.

IV. THE COMPLAINT FAILS TO STATE A CLAIM UNDER NEW YORK CIVIL RIGHTS LAW § 79-n FOR HARRASSMENT BASED ON PLAINTIFF'S GENDER PRESENTATION AND SEXUAL ORIENTATION.

The Second Count of the Complaint seeks relief under New York Civil Rights Law § 79-n, which states, “Any person who intentionally selects a person or property for harm or causes damage to the property of another or causes physical injury or death to another, or subjects a person to conduct that would constitute harassment under section 240.25 of the penal law.” (§ 196.) The latter provision makes it unlawful to harass a person “by engaging in a course of conduct that has reasonably put her in fear of physical injury.” (§ 194.) The Complaint alleges that defendant “intentionally selected” plaintiff for harassment, as that term is used in NYCRL § 79-n, because of her “gender presentation and sexual orientation.” (§§ 193, 195.) This allegation is pleaded on information and belief, and indeed no specific comment or action by defendant is cited in the Complaint in support of this “selection” allegation. This claim is meritless.

As a threshold matter, there are legitimate constitutional questions about New York's hate crime laws. See, e.g., Brian S. MacNamara, “Commentary: New York's Hate Crimes Act Of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation,” 66 *Alb. L. Rev.* 519, 534 (2003). But the Court need not reach that issue, because the Complaint alleges no

violence or other conduct by defendant that could reasonably have put plaintiff in reasonable fear of imminent harm, as required by the statute. “‘Harm’ against a person, in this context, requires an act of violence or intimidation,” and where, as here, a plaintiff “alleges verbal harassment, but no threats, intimidation, or violence,” she “has not stated a claim” under NYCRL § 79-n. *Le v. Triza Elec. Corp.*, No. 19-cv-5134 (ARR) (PK), 2020 U.S. Dist. LEXIS 45300, at *7-8 (E.D.N.Y. Mar. 16, 2020). See also, *Karam v. Cty. of Rensselaer*, No. 1:13-cv-01018 (MAD/DJS), 2016 U.S. Dist. LEXIS 368, at *55 (N.D.N.Y. Jan. 4, 2016) (“The legislative history of § 79-n clearly states that ‘this new remedy applies only to “bias-related violence or intimidation”’”). Nor does the Complaint include any alleged facts that could plausibly support its conclusory allegation that defendant “intentionally selected” plaintiff for harassment, as that term is used in NYCRL § 79-n, because of her “gender presentation and sexual orientation.” These claims should also be dismissed.

V. THE COMPLAINT FAILS TO STATE A CLAIM FOR EMOTIONAL DISTRESS, TORTIOUS INTERFERENCE OR PRIMA FACIE TORT.

The Complaint piles on three causes of action that are merely defamation claims dressed up as other torts: intentional infliction of emotional distress, tortious interference with contract, and prima facie tort. But “New York courts treat harm stemming from injury to reputation as sounding in defamation, and do not recognize separate torts as additional causes of action.” *Morrison v. Nat’l Broad. Co.*, 19 N.Y.2d 453, 227 (N.Y. 1967), *quoted in, Goldman v. Barrett*, 733 F. App’x 568, 570 (2d Cir. 2018). See also, *Reich, supra*, 38 F. Supp. 3d at 458.

The cases are legion applying this to emotional distress and prima facie tort claim. See, e.g., *Rall v. Hellman*, 284 A.D.2d 113, 115 (App. Div. 1st Dept. 2001) “it would be improper to permit plaintiff to evade the pleading prerequisites of a libel cause of action by simply

recasting his claim as one for intentional infliction of emotional distress”); *Bacon v. Nygard*, NY Slip Op 05028, ¶ 1, 140 A.D.3d 577, 578 (App. Div. 1st Dept. 2016) (“The intentional infliction of emotional distress and prima facie tort claims are duplicative since the underlying allegations fall within the ambit of the defamation causes of action”); citing, *Fleischer v NYP Holdings, Inc.*, 104 AD3d 536, 538-539 (1st Dept 2013), *lv denied*, 21 NY3d 858, 992 (2013). The emotional distress claim also fails because it fails to allege specific special damages that arose from the alleged emotional harm. *Lanasa v. Stiene*, No. 24-1325, 2025 U.S. App. LEXIS 6775, at *13 (2d Cir. Mar. 24, 2025) (emotional distress claims that do not plead the specific amount of expenses arising from treatment for emotional distress fail as a matter of law).

The same applies to tortious interference claims that merely duplicate defamation claims. “[W]here ‘[t]he factual allegations underlying [the prima facie tort] cause of action relate to the dissemination of allegedly defamatory materials,’ that cause of action ‘must fail.’” *Lanasa, supra*, 2025 U.S. App. LEXIS 6775, at *12, quoting, *Butler v. Delaware Otsego Corp.*, 203 A.D.2d 783 (3rd Dep’t 1994). Nor does the Complaint adequately allege that

VI. DEFENDANT IS ENTITLED TO ATTORNEYS’ FEES UNDER NYCRL § 70-a.

This action qualifies as an “action involving public petition and participation” because it is based upon defendant’s “exercise of the constitutional right of free speech in connection with an issue of public interest” under New York’s anti-SLAPP law, NYCRL § 76-a(1)(a)(2). Defendant, therefore, is entitled to an award of attorneys’ fees, which is mandatory under the statute: “costs and attorney’s fees **shall be recovered** upon a demonstration . . . that [an action involving public petition and participation] . . . was commenced or continued without a substantial basis in fact and law.” NYCRL § 70-a(1)(a) (emphasis added).

The “substantial basis” standard was designed to set a heightened pleading standard “to make it easier for defendants in SLAPP suits to win motions to dismiss.” *Yeshiva Chofetz Chaim Radin, Inc. v. Vill. of New Hempstead*, 98 F. Supp. 2d 347, 359 (S.D.N.Y. 2000). Accordingly, where (as here) a complaint fails to state a claim under the more lenient federal pleading standards of Rule 8 and Rule 12(b)(6), it follows that the action was necessarily commenced without a “substantial basis in fact and law” under the heightened New York standard, and the substantive standard for fees under § 70-a is triggered. Decisions in this district declining to apply section 70-a on the ground that its “standard conflicts” with Rule 12, *see, e.g., Coritsidis v. Khai Bnei Torah of Mount Ivy*, No. 22-cv-10502 (CS), 2024 WL 37122, at *6 (S.D.N.Y. Jan. 3, 2024), confuse two distinct issues. Although New York’s pleading standards do not displace Fed. R. Civ. 12(b)(6), the substantive right to fees provided by § 70-a(1) is a matter of New York substantive law and should be applied by a federal court sitting in diversity. *Bobulinski v. Tarlov*, No. 24-CV-2349 (JPO), 2024 WL 4893277 at *13 (S.D.N.Y. Nov. 26, 2024).

New York courts have also established that § 70-a commands that attorneys’ fees should be awarded on a successful pre-answer motion to dismiss without any need for filing a separate claim or action for attorneys’ fees. *See, e.g., Golan v. Daily News*, 214 A.D.3d 558, 559 (1st Dep’t 2023); *Aristocratic Plastic Surgery v. Silva*, 206 A.D.3d 26, 32 (1st Dep’t 2022); *Islay v Garde*, No. 160699/2018, 2024 WL 763923, at *5 (N.Y. Sup. Ct. Feb. 13, 2024). The Southern District is in accord. *Bobulinski, supra*, 2024 WL 4893277 at *13. Indeed, requiring a separate action would defeat the “Legislature’s clear intent” to create a vehicle allowing defendants to “expeditiously halt SLAPP claims and recover attorneys’ fees and costs without the burden of . . . protracted litigation.” *Islay*, 2024 WL 763923, at *6. Defendant has shown that this

action was commenced “without a substantial basis” and has a substantive right under New York law to an award of fees on this motion; no additional litigation is or should be necessary.

CONCLUSION

For all the foregoing reasons, the Complaint against Jeff Tarzia should be dismissed with prejudice.



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