

**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK**

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ROY DEN HOLLANDER,

Index No: 000854 cv 2016

Plaintiff,

-against-

DOMINICK OLIVO, and
JAIRO FRANCO,

Defendants.

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**AMENDED AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT ON THE ORIGINAL COMPLAINT AND TO DISMISS THE
FIRST AMENDED COMPLAINT**

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

ROY DEN HOLLANDER, being duly sworn, deposes and says:

1. I am the plaintiff in the above captioned action and an attorney admitted to practice in the State of New York.

Defendants Motion for Summary Judgment on the Original Complaint

2. Defendants move for summary judgment on the Original Complaint but the Original Complaint no longer legally exists because it has been superseded by the First Amended Complaint that was filed as a matter of course "within twenty days after service of a pleading responding to" the Original Complaint. CPLR 3025(a).

3. On February 18, 2016, via U.S. post, Defendants served an Answer to the Original Complaint.

4. On March 3, 2016, via U.S. post, the First Amended Complaint was served on Defendants Attorney and on March 4, 2016, the First Amended Complaint was filed in this Court—all within the twenty day time limit under CPLR 3025(a) that allows amendment of a pleading without leave of the court.

5. “It is well settled that the right of a plaintiff to amend the complaint as a matter of course . . . includes the right entirely to change the nature of the cause of action asserted.” *Mendoza v. Mendoza*, 4 Misc.2d 1060, 1061 (Sup.Ct., N.Y. County, 1947), *aff’d* 273 A.D. 877 (1st Dep’t 1948)(citing *Brown v. Leigh*, 49 N.Y. 78 (1872)).

6. As such Defendants ask for summary judgment on a non-existent complaint.

Defendants’ Motion for Dismissal of the First Amended Complaint under CPLR 3211(a)(1)

7. “Dismissal based upon documentary evidence is analogous to the harsh consequences of a summary judgment. Both motions deprive a party of its day in court.” *McClary v. Civil Serv. Employees Ass’n, Inc.*, 130 Misc. 2d 883, 889 (Sup. Ct. Steuben Cnty. 1985), *rev’d on other grounds*, 133 A.D.2d 522 (1987).

8. The Court of Appeals has held that “to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the moving party . . . must establish that the documentary evidence conclusively refutes plaintiff’s allegations.” *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 334 (2013).

9. “[T]o be considered ‘documentary’, evidence must be unambiguous and of undisputed authenticity.” *Fontanetta v. Doe*, 73 A.D.3d 78, 85-86 (2d Dep’t 2010)(citing Siegel, *Practice Commentaries*, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). The paper must be clear, reliable, accurate and truthful. Siegel, *Practice Commentaries*, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:10, 2016 Supp. at 8).

10. Affidavits that are used as a primary source of proof of defenses and proof of facts in dispute are not documentary evidence. *Fontanetta*, 73 A.D.3d at 85-86 (“[I]t is clear that affidavits . . . are not ‘documentary evidence’ within the intendment of a CPLR 3211(a)(1) motion to dismiss.”); *Williamson, Picket, Gross, Inc. v. Hirschfiled*, 92 A.D.2d 289, 290 (1st Dep’t 1983)(affidavits as a primary source of proof of a defense must be ignored since they do not qualify as documentary evidence under CPLR 3211(a)(1)). “[A]ffidavits . . . can’t be made the basis for a [CPLR 3211(a)] paragraph 1 motion.” Siegel, *N.Y. Prac.* at § 259 (5th ed.),

11. The Advisory Committee on the CPLR noted that CPLR 3211(a)(1) was meant to cover something such as a defense based on the terms of a written document. Advisory Committee, 1st Rep.Leg.Doc. (1957) No. 6(b), p. 85. That the terms of the written document alone can establish the facts. *Id.* Such is not the case here.

12. Defendants submitted printed materials that do not bare on the elements of the causes of action, are merely summaries, opinions and conclusions of Defendants or are ambiguous because they are conflicting. Further, both sides in this action have conflicting interpretations of the exhibits submitted by Defendants. Consequently, Defendants printed materials do not as a matter of law dispose of the causes of action in the First Amended Complaint.

13. Defendants submitted exhibits A to N—none of which are documentary evidence under CPLR 3211(a). Even if this Court determines that any of the papers are “documentary evidence,” dismissal under CPLR 3211(a)(1) requires that the paper conclusively establish a defense to the cause of action, which none of the exhibits severally or jointly do. Siegel, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, 2016 Supp. At 8).

14. The multiple problems with Defendants' exhibits follow:
- a. Exhibit A is the Original Complaint that has been superseded by the First Amended Complaint.
 - b. Exhibit B is the First Amended Complaint but clearly Defendants and Plaintiff disagree over the factual allegations within this Complaint. Further, while judicial records such as judgments and orders are allowed as documentary evidence, complaints are not formal judicial admissions. *See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 22.*
 - c. Exhibit C is Defendants' Answer filed in response to the Original Complaint, but that Complaint no longer exists, so Defendants' Original Answer is no longer applicable. "Where P[laintiff] amends the complaint, D[efendants] must serve an answer to it even though D[efendants] has already troubled to answer the original complaint." Siegel, *N.Y. Prac.* § 236 (5th ed.). Exhibit C also includes Defendants requests for evidence—requests are not evidence; therefore, their discovery demands are not documentary evidence.
 - d. Exhibit D, "Incident Report," is a paper whose preparer is unclear. The affidavit of Franco, Ex. E ¶ 14, asserts he prepared the report while the affidavit of Olivo, Ex. H ¶¶ 4 & 12, asserts he prepared the report. So who actually did prepare the report—unknown. The report alleges Franco's summary of the occurrence that took place on January 7, 2016. Defendants' version of the occurrence is in dispute, First Amended

Complaint ¶¶ 21 to 30. The Incident Report ludicrously alleges Franco, a 41 year-old stocky man was “concerned for his safety” from a 68 year-old 160 lb attorney.

- e. Exhibit E is an affidavit by Defendant Franco submitted to prove facts in dispute. Franco’s Affidavit conflicts with the Incident Report he admitted to preparing over (1) exactly what Defendant Franco was doing in the area when the occurrence occurred (“discussed maintenance project” versus “finishing a painting job . . . moving materials, Ex. E Franco Aff. ¶ 4); (2) over whether Franco was standing in the doorway according to the report or holding the door open, Ex. E Franco Aff. ¶ 7, so that Plaintiff could not test his pass code; (3) over whether Franco asked Plaintiff, “can you give me a minute” as stated in the report but not in his affidavit; (4) over whether Franco feared for his “safety” from a 68 year-old man as stated in the report but not in his affidavit. Franco’s Affidavit also purports facts to which he has no firsthand knowledge or evidence, for example Franco “became aware after the encounter that [Plaintiff] had gone onto other floors looking for [Franco] later in the day.” (Ex. E Franco Aff. ¶ 12). Franco did not witness Plaintiff on other floors, and that Plaintiff was on other floors for a nefarious motive is simply an invention of his mind. During the typical work day the attorneys in the roof top office would go to other floors for vacant restrooms and on the 11th and 12th floors for the snack bars. Franco’s Affidavit also fails to address the RICO predicate

acts of mail and wire fraud and conspiracy that are alleged against him.
(First Amended Complaint ¶¶ 39, 40, 43, 44).

- f. Exhibit F, an affidavit by Michelle Castaneda, is internally in conflict with itself. At ¶ 3, Castaneda swears that Epiq had a person working on the 11th floor, but at ¶ 6 she swears “Epiq did not have personnel working on the 11th floor.” Castaneda fails to state how she became aware of the occurrence (Castaneda Aff. ¶ 3) and how she allegedly knew Plaintiff was on the 11th floor—did she see him, talk to him, or did someone tell her what to say—clearly she lacked first hand knowledge (Castaneda Aff. ¶ 5). Castaneda also fails to provide any evidence that Plaintiff, assuming he was on the floor, was “looking for Franco” rather than visiting a vacant restroom or the less crowded snack area on the 11th floor. Another unfounded supposition by Defendants documents.
- g. Exhibit G, an affidavit by Ceasar Bagui provides new information on the communication of the false and misleading Incident Report to Epiq via telephone and email. (Ex. G Bagui Aff. ¶¶ 4, 5, 8). It raises questions as to the exact series of events and all the persons involved in communicating the report to Epiq. As a result of this information just now revealed by Defendants, Plaintiff has made a cross motion for leave to amend the First Amended Complaint accordingly and to add Ceasar Bagui as a defendant and include Suites Over Soho as a member of the Enterprise alleged in the First Amended Complaint ¶ 16. Bagui’s Affidavit raises numerous questions for discovery, such as who at Epiq did he inform about the

incident, what did he tell that person, how did the issue arise, whom did he interview concerning the incident, did Defendant Olivo assign Franco elsewhere, and if Olivo had no authority over employees at Select Office Suites than why would he be the one to relocate Franco. Further, Bagui never addresses why he did not talk to Plaintiff to obtain his side of the story before communicating to Epiq the Incident Report that a reasonably person would believe the result to be the firing of a senior citizen.

- h. Exhibit H, an affidavit by Defendant Dominick Olivo states that he prepared the Incident Report (Ex. H Olivo Aff. ¶¶ 4, 12), which conflicts with Defendant Franco swearing in his affidavit that Franco prepared the Report (Ex. E, Franco Affidavit ¶ 14). Defendant Olivo also fails to state who he interviewed concerning the incident, the substance of his discussion about the incident with Ceasar Bagui or anyone else in Select Office Suites management, and his involvement in forwarding the false and misleading Incident Report to Epiq. Further, Defendant Olivo never addresses why he did not talk to Plaintiff to obtain his side of the story before releasing an Incident Report that a reasonably person would believe the result to be the firing of a senior citizen.
- i. Exhibit J a CD of the incident conflicts with Defendant Franco's Affidavit in that it shows Franco brushing against Plaintiff's left arm even though Franco swore he did not touch Plaintiff (Ex. E Franco Aff. ¶ 10) and that Plaintiff is not seen as Franco swore to be "gesticulating with his arms" (Ex. E Franco Aff. ¶ 9).

- j. Exhibit K an affidavit by Jandry Regalado fails to state whether the CD was provided to Epiq or which stills were taken from the CD and provided to Epiq. The Incident Report (Ex. D) states “Photos of the person who made the remarks were given to Epiq,” but Defendants do not provide those photos, which could have been selectively chosen to hide Defendant Franco’s falsehoods and achieve Defendants’ objective of having Plaintiff fired. Further, if Defendant Olivo lacks authority over Select Office Suites employees, why did he request a copy of the surveillance tape? (Ex. K Regalado Aff. ¶ 3).
- k. Exhibit L an affidavit by Angela Olivo states that “[w]hen Ceasar Bagui became aware of [the] incident . . . he contacted Epiq,” which indicates the incident caused Bagui to contact Epiq. (Ex. L Angela Olivo Aff. ¶ 8). Bagui’s affidavit, however, states “I was on a call with Epiq about other business matter when this incident came up in conversation,” which indicates the incident was not the cause for Bagui contacting Epiq. (Ex. G Bagui Aff. ¶ 4). Clearly the two affidavits are in conflict. Angela Olivo also swears that Epiq requested a copy of the incident report (Ex. L Angela Olivo Aff. ¶ 9), but she does not have first hand knowledge of Epiq’s request unless she also communicated with Epiq in the effort to have Plaintiff fired and removed from Select Office Suites premises. Angela Olivo’s affidavit states that Select Office Suites had 26 employees in January 2016 on the books (Ex. L Angela Olivo Aff. ¶ 12) but the unauthenticated Exhibit N is from April and lists 30. Ms. Olivo, in an

attempt to cover-up Defendants' scheme to have Plaintiff fired, makes the intentionally false and absurd statement that Ceasar Bagui "would have accommodated the relocation of Epiq workers to another location." (Ex. L Angela Olivo Aff. ¶ 10). There was no other location because the only area that was available to accommodate 60 lawyers working on computers was the fire-trap on the roof of 1115 Broadway. (First Amended Compl. ¶¶ 8, 9).

1. Exhibits M and N are unauthenticated. Investigative experts say the only reliable ways to determine whether a person can legally work in the U.S. is through E-Verify or Consent Based Social Security Verification— Defendants do not use either of those systems. Exhibits M and N provided by Defendants, assuming they are accurate, cannot determine whether a person has engaged in identity theft. People can actually learn how to purchase identities from Youtube, just search "CPN Number." Further, Defendants cannot even get the alleged number of their employees correct, which raises the question as to how many employees are kept off of the books. Additionally, TeamlinkHR, according to its website, which Defendants' claim they use for screening employees, apparently does not even use the faulty screening system provided in Exhibits M & N,. (See Def. Ex. L Aff. ¶ 11).

15. Defendants' affidavit exhibits are used as the primary proof for their defenses, are riddled with inconsistencies, and anything but clear, reliable, accurate or truthful.

16. The affidavits also admit the involvement of another person, Ceasar Bagui, along with Defendants Olivo and Franco in the use of mail and wire fraud to have Plaintiff fired, which clearly interfered with Plaintiffs existing and prospective contractual relations with Epiq. (Ex. G Bagui Aff. ¶¶ 4, 5; Ex. H Dominick Olivo Aff. ¶¶ 6, 7; and Ex. L Angela Olivo Aff. ¶¶ 7-10).

17. Rather than conclusively refuting Plaintiff's allegations, the documents submitted by Defendants show the need to include another defendant, modify the chain of events and the roles played by various individuals along with raising a host of discovery questions that remain unanswered.

18. Since the documents on which Defendants base their CPLR 3211(a)(1) motion do not resolve all the factual issues but actually raise new ones, the documents do not establish as a matter of law that they conclusively and definitively dispose of Plaintiff's claims. *Weston v. Cornell Univ.*, 56 A.D.3d 1074 (3d Dep't 2008).

Defendants' Motion for Dismissal of the First Amended Complaint under CPLR 3211(a)(7)

19. It is the facts as alleged in the First Amended Complaint and every possible favorable inference from such that are considered true on a motion to dismiss—not the factual allegations of defendants in the form of affidavits. *See Leon v. Martinez*, 84 NY2d 83, 87-88 (1994).

20. Defendants affidavits in determining their motion for failure to state a claim on which relief can be granted should therefore be ignored.

Civil RICO

21. The First Amended Complaint sufficiently alleges a civil RICO cause of action.

22. Defendants wrongly assert that the predicate acts asserted against them are hiring and harboring of illegal aliens. (Def. Affrm. p. 11). That is false. The predicate acts are wire

and mail fraud and conspiracy to commit wire and mail fraud. (First Am. Compl. ¶¶ 39-45, wire fraud 18 USC § 1343, mail fraud 18 USC § 1341).

23. Wire and mail fraud occurred when Defendants created the fraudulent Incident Report and caused it to be communicated to Plaintiff's employer, Epiq, via email, telephone or mail. (First Am. Compl. ¶¶ 2, 20, 32-34, 39-45).

24. Conspiracy to commit wire and mail fraud occurred when Defendants agreed to create and transmit the fraudulent Incident Report by wire or mail. (First Am. Compl. ¶¶ 2, 20, 32-34, 39-45).

25. It is the defendants creating and causing the communication of the false and misleading Incident Report that led to Plaintiff being fired, which was the intent of Defendants. (First Am. Compl. ¶¶ 20, 33, 39, 55). If Defendants were not out to have Plaintiff fired, then they would have talked with Plaintiff in an effort to get his side of the story and resolve the situation—they did not. (First Am. Compl. ¶ 34).

26. Defendants predicate acts of wire and mail were aimed at having plaintiff removed from the premises to avoid exposure of the Enterprise operating as an illegal alien employment agency involved in concealing, harboring and hiring illegal aliens. (First Am. Compl. ¶¶ 39, 45).

27. Contrary to Defendants' assertions (Def. Affrm. p. 11), a member of the Enterprise does not have to have hiring and firing authority. He only needs to act to maintain his interest in the Enterprise and conduct and participate in its affairs. Defendants created and caused the submission of the Incident Report to protect the Enterprise.

28. Besides misconstruing the predicate acts that Defendants are accused of committing, Defendants ignore the common scheme of the Enterprise as laid out in the First

Amended Complaint at ¶¶ 12, 14, 15, 17. (Def. Affrm. p. 11). The Enterprise’s scheme is to make money by engaging in a wide range of continuing racketeering activity under 18 USC 1961(1)(F) that assists illegal aliens in gaining employment, aiding them to hide their illegal identity, shielding them from observation to prevent discovery, and hiring them.

29. In carrying out its scheme, the Enterprise engages in a pattern of racketeering activity of the “open continuing” type because it is an ongoing criminal association that acts as an illegal alien recruiting and employment agency to serve the metropolitan market for cheap illegal labor. (First Am. Compl. ¶¶ 10-17.

30. Defendants’ Affirmation p. 9 falsely states that Plaintiff refused to meet with Epiq. Epiq did not request Plaintiff to meet. Patrick Gallagher, Director of Operations, requested that Plaintiff call him, which he did and relayed his side of the story to Gallagher. Epiq HR then requested Plaintiff call to again relate the story at which point Plaintiff requested a copy of the Incident Report to which Plaintiff had a right. Epiq denied Plaintiff’s right to see the Incident Report and fired him.

31. The First Amended Complaint alleges causation of injury from Defendants’ predicate acts of wire and mail fraud. Causation for mail and wire fraud require:

- a. Causation in fact. But for Defendants’ communicating the false and misleading Incident Report, Plaintiff would not have been fired—no Incident Report and this case would not exist.
- b. Proximate cause. Defendants’ acts were a substantial factor in the sequence of causation leading to the termination—they do not have to be the sole factor, and termination was reasonably foreseen or anticipated as a natural consequence of causing the communication of the false and

misleading Incident Report. *See Standardbred Owners Ass'n v. Roosevelt Raceway Associates, L.P.*, 985 F.2d 102, 104 (2nd Cir. 1993). The First Amended Complaint alleges that the Incident Report was a substantial factor in Plaintiff being fired and that defendants intended such in order to remove him from the premises. (First Am. Compl. ¶¶ 2, 20, 21, 28, 31-33, 35, 40, 41, 42, 45-47).

Tortious Interference of contract and prospective contractual relations

32. Defendants wrongly identify tortious interference with a defamation cause of action. The defamation cause of action was eliminated by the First Amended Complaint.

33. Tortious interference is not a defamation action. The public policy behind the tort of defamation is that individuals are entitled to have their personal character as perceived by the public unimpaired by false and defamatory attacks. *Frank v. Nat'l Broad. Co.*, 119 A.D.2d 252, 256 (2nd Dept. 1986). The principal underlying tortious interference is that one who has a contract or reasonable expectancy of contract has a property right which may not be invaded maliciously or unjustifiably. *See Hardy v. Erickson*, 36 N.Y.S.2d 823, 826 (Sup.Ct. N.Y. Cnty. 1942).

34. Plaintiff's law firm had a contract with Epiq and a reasonable expectancy of future contracts with Epiq, since it had already worked for Epiq on two other occasions. Defendants' Affirmation at p. 9 falsely states the employment was at will. The employment contract specifically states that the duration was 4 weeks. (First Amended Compl. Ex. B).

35. Causation for tortious interference with contract and prospective contractual relations require causation in fact and proximate causation, which the First Amended Complaint alleges at 2, 20, 21, 28, 31-33, 35, 52-55, 62. Proximate cause does not require an allegation that

the defendant's conduct was the sole proximate cause of the alleged harm. *Havana Central NY2 LLC v. Lunney's Pub, Inc.*, 49 A.D.3d 70 (1st Dep't 2007). Additionally, whether the false words in the Incident Report are reasonably understood to have caused injury to Plaintiff's contractual and future contractual relations with Epiq is a question for the jury.

Defendants' false facts in their CPLR 3211(a)(7) motion should be ignored.

36. It is the facts as alleged in the First Amended Complaint and every possible favorable inference from such that are considered true on a motion to dismiss—not the factual allegations of defendants. *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994).

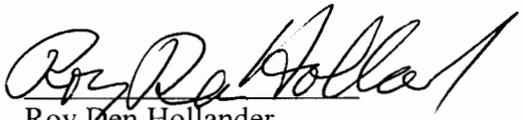
37. Defendants' Affirmation ¶ 7 falsely states access to the floors at Select Office Suites was by swipe card. It was by a Key Pad Code NOT a swipe card.

38. Defendants' Affirmation ¶ 9 falsely states plaintiff spoke to receptionist or maintenance workers. Defendants' affidavit Exhibit F fails to support such and the First Amended Complaint ¶ 32 refers only to the office manager.

39. Defendants' Affirmation p. 13 falsely states there is no written documentation as to the settlement with Epiq but a stipulation as to such was filed with the Court on Feb 16, 2016.

WHEREFORE, Defendants motion for summary judgment on the original complaint and their motion for dismissal under the CPLR 3211(a)(1) documentary evidence provision should be denied.

Sworn to before me on the
23rd day of May 2016


Roy Den Hollander


Notary Public

