



Jarusauskaite v Almod Diamonds, Ltd.

2020 NY Slip Op 32114(U) (2020) | Cited 0 times | New York Supreme Court | June 26, 2020

SUPREME COURT OF STATE OF YORK COUNTY OF YORK: IAS

JARUSAUSKAITE,

ALMOD DIAMONDS, MORRIS LIOR SUSKIND,

LUCY DECISION ORDER

Officer CEO; FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019
NYSCEF DOC. NO. 30 RECEIVED NYSCEF: 07/02/2020

2 of 28 THE NEW NEW PART 46 -----x

RAIMONDA

Plaintiff

-against-

LTD., GAD, MARK SEGALL, YAHALOMI, HENRY FAYNE, DENNIS and DAVID FRANKEL,

Defendants

-----x

BILLINGS, J.S.C.: Index No. 154732/2019

AND

Plaintiff sues to recover damages for a hostile work

environment, emotional distress, defamation, and other torts by



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her employer, defendant Almod Diamonds, Ltd.; one of its owners, defendant Gad, whom plaintiff refers to as both its Chief Operating and its and members of its Board of Directors, defendants Segall, Yahalomi, Fayne, Suskind, and Frankel. Plaintiff alleges that Almod Diamonds and Gad intentionally harassed and threatened her so that she would quit her job at the Almod Diamonds store in Playa del Carmen, Mexico, and that the Board of Directors ignored the harassment and threats and failed to intervene on her behalf.

jarusauskaite620 1 [* 1] 2008,

York

United

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\$120,000

"Brand FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019
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3 of 28 I. THE COMPLAINT

Plaintiff claims that Almod Diamonds is the corporate alter ego of Gad, who uses the corporation's funds for his personal interests and financial gain. In plaintiff was hired to be the general manager for the Almod Diamonds store in Playa del



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Carmen.

Defendants' alleged tortious conduct began in the spring of 2016, in Almod Diamonds' New office, when Gad displayed a photograph of two nude women, one of whom he claimed was plaintiff, so as to shame and degrade her. In an e-mail dated January 9, 2017, to members of the management team in the and Mexico, Gad claimed that plaintiff was losing money for the corporation and had stolen from the Playa del Carmen store's construction budget, even though she actually had saved from the construction budget.

Plaintiff alleges that in February 2017, after the Playa del Carmen store opened, Gad authorized unannounced audits of the store, and, after two surprise inspections uncovered no impropriety, he began re-hiring former discharged Almod Diamonds employees as Managers" to prevent the Playa del Carmen store from becoming profitable. Plaintiff further alleges that Gad interfered with her management of the store by controlling the Brand Managers' daily schedules, allowing the Brand Managers

jarusauskaite620 2 [* 2] On

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4 of 28 to miss shifts without reporting their unexcused absences as required by Mexican labor law, and causing shortages in staff coverage of the store as well as the violations of law.

August 24, 2017, armed robbers entered the Almod Diamonds Playa del Carmen store, destroyed its jewelry showcases, and stole its merchandise. Plaintiff alleges that on 31, 2017, Gad, using corporate funds, retained a law firm in Playa del Carmen to fabricate a reason to terminate her employment. In November 2017, the law firm submitted a report implying, based on her irregular behavior after the store's robbery, that she had orchestrated the robbery. Around the same time, Gad sent her threatening messages, which she forwarded to other Almod Diamonds personnel requesting their protection, including Almod Diamonds' head of security, its Playa del Carmen security director, its regional director, its general counsel, and Albert Gad and Donna Gad Hecht, Morris Gad's siblings who co-owned the corporation with their brother .

Plaintiff alleges that on January 2, 2018, when the Playa del Carmen store was in the process of permanently closing, the Brand Managers, following Morris Gad's instructions, staged a public protest because she would not let them work. This protest



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received media coverage, leading to social media posts

jarusauskaite620 3 [* 3] On 2018,

\$30,000

\$60,000

On 2018, FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019
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5 of 28 threatening plaintiff and her family. In response, plaintiff again requested protection from Almod Diamonds' general counsel. or about January 12, Gad filed criminal charges against plaintiff for the robbery of the Almod Diamonds Playa del Carmen store. Plaintiff spent more than defending herself against the criminal charges. As a condition to reimbursing plaintiff for her legal expenses, Albert Gad's attorney asked plaintiff to release Albert Gad and any entity in which he held an ownership or controlling interest, which included Almod Diamonds, from any liability. Plaintiff claims that she has incurred more than in attorneys' fees and expenses to date because she refused to sign the release, and the criminal charge that Morris Gad filed against plaintiff in Mexico remains pending.

February 13, Gad disseminated an e-mail to a dozen



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unidentified Almod Diamonds personnel, claiming that plaintiff ran away from the police rather than assisting in the police's investigation of the Almod Diamonds store's robbery. In response to escalating threats and lack of assistance from Almod Diamonds, plaintiff filed a complaint with the Mexican police against Gad, documenting his harassment of her. Plaintiff subsequently filed a second complaint with the Mexican police against Gad for his threats against her.

jarusauskaite620 4 [* 4] On

STANDARDS TO MOTIONS TO DISMISS COMPLAINT

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6 of 28 Plaintiff continued to request assistance from Almod Diamonds personnel, including its Human Resources Department, to no avail. May 8, 2018, plaintiff e-mailed Almod Diamonds' general counsel, its regional director for Mexico, and Albert Gad and Donna Gad Hecht to request information about the pending criminal charge against her, but received no answer.

In January 2019, plaintiff and her attorney traveled to New York to complain directly to the Board of Directors about Morris



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Gad's actions. The Board of Directors hired an independent law firm to investigate his actions and prepare a report for the Board's review, but then refused to accept the completed report to avoid liability.

II. APPLICABLE DEFENDANTS' THE

In determining defendants' motions to dismiss the complaint under C.P.L.R. § 3211(a) (7), the court must accept plaintiff's factual allegations as true, liberally construe them, and draw all reasonable inferences in her favor. JF Capital Advisors. LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y. , Inc., N.Y.3d 342, 351 (2013); ABN Bank , N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015). The court will not give such jarusauskaite620 5 [* 5] Simkin

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7 of 28 consideration, however, to allegations that consist of only bare

legal conclusions, v. Blank, 19 N.Y.3d 46, 52 (2012);

David v. Hack, 97 A.D.3d 437, 438 (1st Dep't 2012), with which

the complaint here is replete, or to its allegations of claims

that are not legally cognizable. Instead, the court accepts as

true only plaintiff's allegations of facts that set forth the

elements of legally cognizable claims and from them draws all

reasonable inferences in her favor. Dismissal is warranted if

the complaint fails to allege facts that fit within any

cognizable legal theory. Faison v. Lewis, 25 N.Y.3d 224

(2015); ABN Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227;

Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 Nonnon v.

City of New York, 9 N.Y.3d 825, 827

In determining a motion to dismiss claims based on

expiration of the applicable statute of limitations under

C.P.L.R. § 321l(a) (5), the court similarly accepts plaintiff's

factual allegations draws all reasonable inferences in her favor.

Norddeutsche Landesbank Girozentrale v. Tilton, 149 A.D.3d 152,

158 (1st Dep't 2017); Benn v. Benn, 82 A.D.3d 548, 548 (1st Dep't

. Defendants bear the initial burden to establish, based on



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the complaint's allegations, when plaintiff's claim accrued and that the time to sue has expired. *Invs., v. Wozencraft*, 172 A.D.3d 644, 644-45 (1st Dep't 2019); *Norddeutsche Landesbank jarusauskaite* 620 6 [* 6] 2016).

BOARD OF DIRECTORS' MOTION

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HOSTILE WORK

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8 of 28 *Girozentrale v. Tilton*, 149 A.D.3d at 158; *Lebedev v. Blavatnik*,

144 A.D.3d 24, 28 (1st Dep't The burden then shifts to

plaintiff to raise a factual issue whether the claim is timely or

the statute of limitations is tolled or inapplicable. *MTGLQ*

Invs., LP v. Wozencraft, 172 A.D.3d at 644-45; *Norddeutsche*

Landesbank Girozentrale v. Tilton, 149 A.D.3d at 158.

III. DEFENDANT

Against the Board of Directors defendants, plaintiff claims

a hostile work environment, intentional infliction of emotional



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distress, failure to oversee and monitor Almod Diamonds' operations, and a facie tort. Although the Board of Directors move to dismiss the complaint against them based on lack of subject matter jurisdiction as well as failure to state a claim, C.P.L.R. 3211(a) (2) and (7), the lack of subject matter jurisdiction is superfluous.

A. ENVIRONMENT

The Board of Directors insist that they may not be held liable for a hostile work environment because they joined Almod Diamonds in July five months after the last alleged harassment or threat to plaintiff. this precise contention relies on facts outside the complaint, Aff. of David J. Eisman, 3, the complaint does allege that Gad family members settled a lawsuit "in mid-2018,H Eisman Aff. 292, that required Almod jarusauskaite620 7 [* 7] ,

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State

§ 8-107

Zakrzewska School, (2010);

(2004);

L.P.,



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2008). FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019
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9 of 28 Diamonds to establish a Board of Directors with five members

independent of the Gad family, id. 295, who are the Board of

Directors defendants here. Id. 35-39. Plaintiff does not

allege a hostile work environment after the Board of Directors

joined the corporation in mid-2018, which is fatal to her claim.

Santiago-Mendez v. City of New York, 136 A.D.3d 428, 429 (1st

Dep't 2016).

To sustain a hostile work environment claim against officers

of a corporate employer under the New York Human Rights Law

or New York City Human Rights Law, plaintiff must show that they

created, encouraged, approved, condoned, or acquiesced in an

objectively hostile or abusive workplace environment, which

altered the conditions of her employment. N.Y. Exec. Law§

296 (1); N. Y.C. Admin. Code (1) (a) and (13) (b) (1);

v. New 14 N.Y.3d 469, 480-81 Forrester

v. Jewish Guild for the Blind, 3 N.Y.3d 295, 310-11 Doe

v. Bloomberg 178 A.D.3d 44, 45, 48 (1st Dep't 2019);

Clayton v. Best Buy Co., Inc., 48 A.D.3d 277, 277 (1st Dep't

Plaintiff fails to allege the specific elemental facts



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that the Board of Directors actively encouraged, approved, or participated or was personally involved in the conduct that created the hostile workplace environment based on her gender or how Gad's gender based, hostile conduct otherwise was jarusauskaite620 8 [* 8] 49-50. See

2019);

Stor. 2017);

620, 620 2015).

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2018 2019, FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019 NYSCEF DOC. NO. 30 RECEIVED NYSCEF: 07/02/2020

10 of 28 attributable to the Board of Directors. Doe v. Bloomberg L.P.,

178 A.D.3d at Mejia v. T.N. 888 Eighth Ave. LLC Co.,

169 A.D.3d 613, 614 (1st Dep't Arifi v. Central Moving &

Co., Inc., 147 A.D.3d 551, 551 (1st Dep't Santiago

Mendez v. City of New York, 136 A.D.3d at 429; Llanos v. Citv of

New York, 129 A.D.3d (1st Dep't



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Plaintiff does allege that the Board of Directors received reports from Almod Diamonds' accountant and a law firm after the Board took office in July and in January she complained to the Board of Directors about Gad's prior hostile conduct. Yet she alleges neither any ongoing hostile conduct by him after February nor any workplace environment or conditions of her employment that were affected after her store closed in January. Thus, while she might claim that the Board of Directors condoned or acquiesced in Gad's prior conduct by not intervening and taking corrective action, by July there was no workplace environment nor conditions of employment in which to intervene or to correct. *Clayton v. Best Buy Co., Inc.*, 48 A.D.3d at 277. Plaintiff does not allege that, as a result of the Board of Directors' inaction in the latter part of or in Gad's hostile conduct continued. Therefore the Board of Directors may not be held responsible for such conduct.

jarusauskaite620 9 [* 9] OF EMOTIONAL DISTRESS

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11 of 28 B. INTENTIONAL INFLICTION



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To sustain a claim of intentional infliction of emotional distress against the Board of Directors, plaintiff must show that (1) they engaged in extreme and outrageous conduct, (2) with intent to cause or in disregard of a substantial probability that the conduct would cause severe emotional distress, (3) a causal connection between their conduct and plaintiff's injury, and (4) severe emotional distress. *Chanko v. American Broadcasting Cos. Inc.*, 27 N.Y.3d 46, 56 (2016); *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993). To plead extreme and outrageous conduct, plaintiff must show that the Board of Directors' conduct was "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15, 23 (2008); *Howell v. New York Post Co.*, 81 N.Y.2d at 122; *Trujillo v. Transperfect Global, Inc.*, 164 A.D.3d 1161, 1162 (1st Dep't 2018); *Schottenstein v. Silverman*, 128 A.D.3d 591, 592 (1st Dep't 2015).

Plaintiff does not allege that the Board of Directors engaged in the extreme or outrageous conduct necessary to support her claim of intentional infliction of emotional distress. Even accepting as true plaintiff's allegations that the Board of



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Directors failed to intervene, such passivity does not meet the

jarusauskaite620 [* 10] FAILURE TO OVERSEE MONITOR OPERATIONS

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120 1095, 1097 FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019
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12 of 28 high bar of indecent, intolerable, and uncivilized conduct to

sustain a claim for intentional infliction of emotional distress.

Chanko v. American Broadcasting Cos. Inc., 27 N.Y.3d at 56;

Trujillo v. Transperfect Global, Inc., 164 A.D.3d at 1162;

Schottenstein v. Silverman, 128 A.D.3d at 592. Therefore

plaintiff's claim for intentional infliction of emotional

distress against the Board of Directors also fails.

C. AND

A claim that the Board of Directors failed to discharge

their fiduciary obligations to oversee and monitor Almod

Diamonds' operations belongs to the corporation and its

shareholders. Mule v. Sillerman, A.D.3d (1st



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Dep't Deckter v. Andreotti, A.D.3d 486, 487 (1st Dep't
2019); Asbestos Workers Phila. Pension Fund v. Bell, 137 A.D.3d
681, 684 (1st Dep't 2016); Wandel v. Dimon, 135 A.D.3d 515,
515-16 (1st Dep't 2016). plaintiff does not allege that
she is or ever was a shareholder of Almod Diamonds, she may not
maintain such a claim. Castellotti v. Free, 136 A.D.3d 198,
(1st Dep't 2016); Lichtenstein v. Willkie Farr & Gallagher LLP,
A.D.3d (1st Dep't 2014).

If plaintiff's claim of failure to oversee and monitor
operations is construed as negligent supervision of Almod
Diamonds' officers or employees, unlike her claims for
jarusauskaite620 11 [* 11] Law§§

Servs.

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Law§§

(2007);

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570 (2012);

Suozzi,

Summit Spitzer

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13 of 28 intentional conduct, the New York Workers' Compensation Law precludes a negligence claim against the Board of Directors for the injuries plaintiff alleges in the course of her employment.

N.Y. Workers' Comp. 11, 29(6); Martinez v. Canteen Vending Roux Fine Dining Chartwheel, 18 A.D.3d 274, 275 (1st Dep't 2005); Conde v. Yeshiva 16 A.D.3d 185, 186 (1st Dep't 2005). Workers' Compensation 11 and 29(6) bar such a claim because Workers' Compensation is the exclusive remedy for injuries sustained during her employment. Isabella v. Hallock, 22 N.Y.3d 788, 793 (2014); Weiner v. City of New York, 19 N.Y.3d 852, 854 (2012); Fung v. Japan Airlines Co . . Ltd., 9 N.Y.3d 351, 357 Macchirole v. Giamboi, 97 N.Y.2d 147, 150 (2001).

D. PRIMA FACIE

The elements of a prima facie tort are (1) intentional infliction of harm, (2) causing special damages, (3) without justification or excuse, (4) by otherwise lawful acts. Posner v. Lewis, 18 N.Y.3d 566, n.1 Freihof v. Hearst Corp., 65 N.Y.2d 135, 142-43 (1985); Curiano v. 63 N.Y.2d 113, 117 (1984); Burns Jackson Miller & v. Lindner, 59 N.Y.2d 314, 332 (1983). To establish special damages caused by



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the Board of Directors' tortious conduct, plaintiff must plead a

"specific and measurable loss." *Freihofer v. Hearst Corp.*, 65

N.Y.2d at 143. *Britt v. City of New York*, 151 A.D.3d 606,

jarusauskaite 2012 [* 12] 607 (2017);

2017); *Wigdor*

2016);

420, 2013).

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14 of 28 (1st Dep't *Matthaus v. Hadjedj*, 148 A.D.3d 425, 426

(1st Dep't v. *SoulCycle, LLC*, 139 A.D.3d 613, 614

(1st Dep't *Phillips v. New York Daily News*, 111 A.D.3d

421 (1st Dep't

Although plaintiff claims she incurred more than in

attorneys' fees and expenses to defend herself against *Almod*

Diamonds' and *Gad's* fabricated criminal charges, she alleges that

she incurred these damages before *Gad's* libelous e-mail dated

February 13, that she ran away instead of assisting the



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police in the investigation of the store's robbery. This email in turn was at least five months before the Board of Directors joined Almod Diamonds. Although plaintiff also claims ongoing attorneys' fees and expenses, she neither attributes them to the Board of Directors' acts or omissions, nor identifies or itemizes them as required for special damages to support a prima facie tort. *Britt v. City of New York*, 151 A.D.3d at Matthauss. *Hadjedj*, 148 A.D.3d at 426; *v. SoulCycle, LLC*, 139 A.D.3d at 614; *Phillips v. New York Daily News*, 111 A.D.3d at 421. Plaintiff's claim that she has suffered a "specific and measurable" loss amounts to nothing more than a conclusory allegation that does not satisfy the specificity required for special damages .

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"because "they

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15 of 28 Moreover, in determining whether defendants' alleged
injurious acts satisfy the elements of a prima facie tort,
disinterested malevolence must be the sole motivation for those
acts. *Posner v. Lewis*, 18 N.Y.3d at n.1; *Curiano v. Suozzi*,
63 N.Y.2d at 117; *Burns Jackson Miller & v. Lindner*, 59
N.Y.2d at 333. By simply alleging that the Board of Directors
intentionally inflicted harm without excuse or justification,
plaintiff fails to demonstrate that the requisite disinterested
malevolence was their sole motivation. *Murphy v. American Home*
Prods. Corp., 58 N.Y.2d 293, (1983); *Britt v. City of New*
York, 151 A.D.3d at *Wigdor v. LLC*, 139 A.D.3d at
614; *v. Inc.*, 139 A.D.3d 419, (1st Dep't
2016) .

In fact, the complaint's allegations contradict such a
motivation. *Britt v. City of New York*, 151 A.D.3d at AREP
Fifty-Seventh, *LLC v. PMGP Assoc., L.P.* .. 115 A.D.3d (1st
Dep't 2014); *Princes Point, LLC AKRF Eng'g, P.C.*, 94 A.D.3d
588, 589 (1st Dep't 2012). Instead, the complaint alleges that



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the Board of Directors failed to take any action against Gad they are making too much money off of Almod," and hope to make multiples more." Aff. of David J. Eiseman Ex. A (Compl.) 19. Board of directors, due to . cowardice and greed, are knowing participants and enablers of the scheme" jarusauskaite620 14 [* 14] 20. "mania "is

DEFENDANTS ALMOD DIAMONDS' GAD'S MOTION FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019 NYSCEF DOC. NO. 30 RECEIVED NYSCEF: 07/02/2020

16 of 28 to blame plaintiff for the armed robbery of the store. Id.

Enabling Gad's toward Raimonda" a cowardly act by the Board defendants . . who are simply too enthralled with the money they're making to cause a stir." The complaint points out that, while the Directors are not Gad family members, a Gad sibling did appoint each of the Directors. These specific allegations of the Board of Directors' motivations--profit, greed, self-interest, and cowardice--negate any conclusory allegation that malevolence was the sole motivation for their conduct.

IV. AND



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Defendants Almod Diamonds and Gad move to dismiss the complaint against them based on an inconvenient forum, C.P.L.R. § 327(a), and pendency of another action, C.P.L.R. § 3211(a) (4), as well as failure to state a claim. C.P.L.R. § 3211(a) (7). These defendants also maintain that the court lacks subject matter jurisdiction over plaintiff's hostile work environment claim, C.P.L.R. § 3211(a) (2), and that the applicable statute of limitations bars plaintiff's intentional tort claims. C.P.L.R. § 3211(a)(5).

A. C.P.L.R. §§ 327 {a } AND 3211 (a) (4)

Defendants Almod Diamonds and Gad fail to show that the prior pending criminal actions, Gad's charges against plaintiff

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Power

"any

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17 of 28 and her charges against Gad, on which these defendants rely as

bases to dismiss or stay this action, include any of plaintiff's



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claims here. Even were the court impermissibly to draw inferences in defendants' favor, it is impossible to conceive how either a defendant or a complainant in a criminal prosecution might herself prosecute claims for a hostile work environment, emotional distress, defamation, or a prima facie tort. Those prior criminal prosecutions thus do not preclude plaintiff from litigating her claims here. C.P.L.R. § 3211(a) (4); Natixis Funding Corp. v. Mid-Atl., LLC, 181 A.D.3d 481, 484 (1st Dep't Sprecher v. Thibodeau, 148 A.D.3d 654, 656 (1st Dep't 2017); Wimbledon Fin. Master Fund, Ltd. v. Bergstein, 147 A.d.3d 644, 645 (1st Dep't 2017); Reliance Ins. Co. v. American Elec. Co., 224 A.D.2d 235, 235 (1st Dep't 1996}. Even more definitively, because the prior criminal actions are in Mexico, C.P.L.R. § 3211(a) (4), which relates only to actions in state or the does not apply.

Almod Diamonds and Gad further maintain that the doctrine of forum non conveniens warrants dismissal of plaintiff's action, but fail to meet the heavy burden of establishing that New York is an inconvenient forum and there is no substantial nexus between this action and New York. C.P.L.R. § 327(a); Fekah v. Baker Hughes, Inc., 176 A.D.3d 527, 529 (1st Dep't Bacon



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Swaney N.Y.,

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18 of 28 v. Nygard, A.D.3d 565, 566 (1st Dep't 2018); Pacific Alliance

Asia Opportunity Fund L.P. v. Kwok Ho Wan, A.D.3d 452, 453

(1st Dep't 2018); v. Academy Bus Tours of N.Y., Inc., 158

A.D.3d 437, 438 (1st Dep't 2018). The relevant factors include

(1) the burden this action imposes on the New York court, (2) the

potential hardship to defendants in defending the action here,

(3) the unavailability of an alternate forum in which plaintiff

may sue, (4) whether the parties are nonresidents, and (5)

whether the transactions from which the claims arise occurred

primarily in a foreign jurisdiction. Fekah v. Baker Hughes,

Inc., 176 A.D.3d at 529; Bacon v. Nygard, A.D.3d at 566;

v. Academy Bus Tours of Inc., 158 A.D.3d at 438.

The court also may consider the location of potential witnesses

and documentary evidence and the potential applicability of



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foreign law. *Fekah v. Baker Hughes, Inc.*, 176 A.D.3d at 529.

Defendants emphasize that plaintiff is a resident of Mexico,

but gloss over her allegations that defendant directed all the

tortious conduct of which she complains from New York. The

first, second, and fifth factors all militate in favor of New

as the convenient forum. First, defendants do not

demonstrate any burden on the New York court, as plaintiff's

claims invoke New York law, and defendants rely on it to support

their motion. *Lobo v. Gatehouse Partners, LLC*, 169 A.D.3d 555,

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19 of 28 556 (1st Dep't 2019); *Bacon v. Nygard*, A.D.3d at 566. Nor do

defendants demonstrate any hardship to them, as they maintain

their principal physical location in New York. *Lobo v. Gatehouse*

Partners, LLC, 169 A.D.3d at 556; *Bacon v. Nygard*, A.D.3d at

566; *Pacific Alliance Asia Opportunity Fund L.P. v. Kwok Ho Wan*,

A.D.3d at 453; *Swaney v. Academv Bus Tours of N.Y., Inc.*, 158



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A.D.3d at 438-39. Regarding the fifth factor, while plaintiff experienced the effects of defendants' alleged tortious conduct in Mexico, as set forth above, she alleges that defendants caused these effects from New York. Gad's direction of subordinates' actions, parade around the New York office with a photograph in which he claimed that plaintiff appeared nude, and hostile and defamatory messages sent from New York all further establish that New York is a convenient forum. *Lobo v. Gatehouse Partners, LLC*, 169 A.D.3d at 556; *Bacon v. Nygard*, A.D.3d at 566; *Pacific Alliance Asia Opportunity Fund L.P. v. Kwok Ho Wan*, A.D.3d at 453; *Swaney v. Academy Bus Tours of N.Y., Inc.*, 158 A.D.3d at 438-39.

A court in Mexico might serve as an alternative forum, but not a more suitable one. Plaintiff's claims derive from New York law. Plaintiff is a resident of Mexico, but defendants acknowledge that the store in Playa del Carmen where she suffered the effects of their actions has closed, plaintiff is willing and
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2015) .

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2017,

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20 of 28 able to travel to New York, and witnesses and other relevant

evidence are available here. Fekah v. Baker Hughes, Inc., 176

A.D.3d at 529; Pacific Alliance Asia Opportunity Fund L.P. v.

Kwok Ho Wan, A.D.3d at 453; v. Academy Bus Tours of

N.Y., Inc., 158 A.D.3d at 439; Lerner v. Friends of Mayanot

Inst . , Inc., 126 A.D.3d 431, 432 (1st Dep't

In sum, defendants of fer no compelling reason why

plaintiff's claims may not be effectively litigated in a New York

forum. Therefore the court denies Almod Diamonds' and Gad's

motion to dismiss the claims against these defendants based on an

inconvenient forum contrary to the interest of substantial

justice. C.P.L.R. 327(a); XL Specialty Ins. Co. v. AR Capital,

181 A.D.3d 546, 546-47 (1st Dep't Lobo v. Gatehouse

Partners, LLC, 169 A.D.3d at 556; Bacon v. Nygard, A.D.3d at

566; v. Academy Bus Tours of N.Y. , Inc., 158 A.D.3d at



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438-39.

B. C.P.L.R. § 3211 (a) (5) AND (7)

1. Libel

Plaintiff claims that Gad published two libelous statements.

The first is Gad's e-mail dated January 9, that plaintiff
was losing money for the corporation, even though she saved
in construction costs: "Raimonda right now all she's
doing is losing money." Af f. of Eli or D. Ex. A (Compl.)

jarusauskaite620 19 [* 19] 2018,

Playa

2019,

Offor 502, 502-503

2019); 408, 409

2018);

2018);

2016,

2019,

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21 of 28 91. The second is Gad's e-mail dated February 13,
remarking again that plaintiff managed the only store that lost



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money and adding that plaintiff ran away instead of assisting the police in the investigation of the store's robbery: "The only store that we allow to lose money is del carmen, formally manged [sic] by Raimonda until she ran away from the police."

Id. 259 (emphasis in original) . Because plaintiff filed her

Summons with Notice May 8, the one year statute of

limitations bars both plaintiff's libel claims. C.P.L.R. §

215(3); v. Mercy Med. Ctr., 171 A.D.3d (1st

Dep't Schwartz v. Chan, 162 A.D.3d (1st Dep't

Smulyan v. New York Liguigation Bar, 158 A.D.3d 456, 457

(1st Dep't Sprecher v. Thibodeau, 148 A.D.3d at 655.

2. Slander

In support of her claim for slander, plaintiff alleges that

in the spring of approximately three years before she filed

her Summons with Notice May 8, Gad walked around the Almod

Diamonds' office in New York showing a photograph that depicted a

nude woman and insisting that it depicted plaintiff. Thus the

one year statute of limitations similarly bars plaintiff's

slander claim.

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407 Pitcock

LLP, 2010);

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2009); Off., 550

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Zamen, 2010);

2008);

210 2002). FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019
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22 of 28 3. Injurious Falsehood

The one year statute of limitations likewise bars

plaintiff's claim for injurious falsehood, since the last false

or disparaging statement plaintiff attributes to Gad occurred

February 13, 2018, almost 15 months before she commenced this

action. C.P.L.R. 215(3). Similarly to her claim for a prima

facie tort, plaintiff also fails to allege injury to a legally

protected property interest or other special damages as required

to support an injurious falsehood claim. v. Lowenberg, 95

A.D.3d 405, (1st Dep't 2012); v. Kasowitz, Benson.

Torres & Friedman 74 A.D.3d 613, 615 (1st Dep't BCRE



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Riverside LLC v. Fuchs, 59 A.D.3d 282, 283 - 84 (1st Dep't

Rosenberg v. Home Box Inc., 33 A.D.3d 550, (1st

Dep't

4. Prima Facie Tort

A prima facie tort is also subject to a one year statute of

limitations. Bohn v. 176 87th Owners Corp., A.D.3d

598, 599 (1st Dep't 2013); Casa de Meadows Inc. (Caymen Is.) v.

76 A.D.3d 917, 921 (1st Dep't Russek v. Dag Media

Inc., 47 A.D.3d 457, 458 (1st Dep't Havell v. Islam, 292

A.D.2d 210, (1st Dep't Plaintiff alleges the

following harms after May 8, 2018.

jarusauskaite620 21 [* 21] 2018,

2018

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2019, FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019 NYSCEF
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23 of 28 First, Almod Diamonds superiors failed to respond to her

inquiry July 24, whether she needed to leave Mexico because

of the danger that Gad's accusations posed to her. A Human



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Resources manager then responded when she complained in December that Gad had harassed and threatened her in telephone conversations, text messages, and emails, forcing her to leave Playa del Carmen due to the danger his threats posed, that personnel who knew of his actions remained silent, and that she deserved answers after her devoted service to the corporation. The response explained the absence of a response to her earlier inquiry: don't see any responses from your colleagues because they are mindful of making any comments. about that." Aff. Ex. A (Compl.) 318. Finally, after a law firm reported uncontradicted evidence of Gad's wrongdoing toward plaintiff, and she complained to the Board of Directors in person in January the Board ignored her complaints and took no corrective action against Gad nor measures to protect her. These harms are not directly due to Gad's conduct, but are due to Almod Diamonds' inaction when confronted with his conduct. The complaint's allegations that Almod Diamonds superiors failed to respond to plaintiff because they sought to avoid conflict with Gad negates any conclusory allegation that disinterested malevolence was the sole motivation for Almod Diamonds' inaction.

jarusauskaite620 22 [* 22] 607; AREP



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PMGP L.P 403;

P.C.,

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607;

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402, 403 FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019
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24 of 28 Britt v. City of New York, 151 A.D.3d at Fifty-seventh.

LLC v. Assoc., .. 115 A.D.3d at Princes Point, LLC

v. AKRF Eng'g. 94 A.D.3d at 589. The last incident in

January implicates only the Board of Directors' inaction,

addressed above in connection with their motion. Finally, and

similarly to her failed prima facie tort claim against the Board

of Directors, plaintiff's conclusory allegation that she has

suffered a specific and measurable loss neither itemizes nor

identifies her special damages from any of these three incidents

with the requisite specificity. Britt v. City of New York, 151



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A.D.3d at Matthauss v. Hadjedj, 148 A.D.3d at 426; Wigdor v.

SoulCycle, LLC, 139 A.D.3d at 614; v. New York Daily

News, 111 A.D.3d at 421 .

5. Hostile Work Environment

Plaintiff's claim that Gad repeatedly subjected her

to a campaign of deprecatory and vulgar name-calling, insults,

and other offensive remarks related to her gender, constituting

verbal forms of sexual harassment, allege a hostile work

environment under the New York and City Human Rights Laws.

N.Y. Exec. Law§ 296(1); N.Y.C. Admin. Code 8-107(a) (1);

Bateman v. Montefiore Med. Ctr., A.D.3d WL 2561570,

at *1 (1st Dep't May 21, v. Department of Educ.

the City of N.Y. , 177 A.D.3d (1st Dep't 2019); Gordon v .

jarusauskaite620 23 [* 23] Org. 480, 2018);

2015).

"whore" "bitch,"

2018); Org.

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1160 2014);

2012). FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO. 154732/2019
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25 of 28 Bayrock Sapir. LLC, 161 A.D.3d 481 (1st Dep't

Anderson v. Edmiston & Co., Inc., 131 A.D.3d 416, 417 (1st Dep't

Plaintiff demonstrates that the hostile work environment

was related to her gender by alleging not only that Gad

repeatedly called her a and but also that he was

driven by a fixation on her as an attractive woman and by

jealousy of his brother's romantic relationship with her.

Plaintiff's frequent complaints of Gad's pervasive menacing

conduct, using Almod Diamonds' resources, that its superiors

acknowledged, but to which they failed to respond, implicate

Almod Diamonds as well as Gad. Boliak v. Reilly, 161 A.D.3d 625,

626 (1st Dep't Gordon v. Bayrock Sapir. LLC, 161

A.D.3d at 481; Cole v. Sears, Roebuck & Co., A.D.3d 1159,

(1st Dep't McRedmond v. Sutton Place Rest. & Bar.

Inc., 95 A.D.3d 671, 673 (1st Dep't

Most if not all of the pervasive menacing conduct and

deprecatory and vulgar name-calling, insults, and other offensive

remarks emanated from Gad in New York; impacted not only

plaintiff in Mexico, but also her co-employees in New York;

disparaged plaintiff among her co-employees in New York; and

humiliated her when she traveled to New York to address the



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hostility. Plaintiff directed her repeated complaints about the hostile work environment to Almod Diamonds' co-owners, general jarusauskaite620 24 [* 24] State

See

(2017); 290-91

(2010); 605, 606

2014);

2014).

S.A.,

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26 of 28 counsel, Human Resources Department, and Board of Directors, all

in New York. These combined impacts of defendants' conduct in

New York confer its subject matter jurisdiction over plaintiff's

hostile work environment claim. Surely the New York

Legislature and the New York City Council did not intend that a

New York City employer would escape liability for creating a

pervasive hostile work environment that extended from New York

City beyond its boundaries, simply by targeting an employee who

reported to the New York City employer but was assigned duties

beyond its boundaries. Griffin v. Sirva, Inc., 29 N.Y.3d



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174, 188 Hoffman v. Parade Publs., 15 N.Y.3d 285,

Benham v. eCommission Solutions, LLC, 118 A.D.3d

(1st Dep't Hardwick v. Auriemma, 116 A.D.3d 465, 466-67

(1st Dep't

Finally, Almod Diamonds and Gad insist that Diusvi Diamonds,

de C.V., not Almod Diamonds, Ltd., was plaintiff's

employer, relying 267, 268, and 281 of her complaint.

§ 268, however, reciting plaintiff's communication to Almod

Diamonds' Human Resources Department, may be interpreted as

referring to Diusvi Diamonds as her employer: "if I don't leave

the company (Diusvi Diamonds) he will invent false stories

against me . " Paragraph 267, reciting plaintiff's

complaint to the police of Gad's harassment, merely refers to Gad

jarusauskaite620 25 [* 25] "who DIUSVI."

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CONCLUSION FILED: NEW YORK COUNTY CLERK 07/02/2020 04:50 PM INDEX NO.
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27 of 28 had much power over the employees of Paragraph



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281, reciting plaintiff's demand for answers from Almod Diamonds

superiors, merely asks: was done from Diusvi side to

protect me Plaintiff acknowledges that Diusvi Diamonds

is Almod Diamonds' company." Shiloh Aff. Ex A (Compl.)

133. This explanation, coupled with her complaint's repeated

references to her as Almod Diamonds' employee, id. 1, 17, or

Gad's manager, id. 142, hired by Almod Diamonds, id. 76,

which had the power to fire her, id. 2, 16, 23, 145, 154, 183,

212, 289, raise the overwhelming inference that Almod Diamonds

was her employer.

6. Intentional Infliction of Emotional Distress

To the extent that plaintiff's claim for intentional

infliction of emotional distress against Almod Diamonds and Gad

relies on evidentiary facts that satisfy the elements of the

claim, it relies on the same factual allegations and seeks the

same damages as her hostile work environment claim. Therefore

the court dismisses her emotional distress claim against these

defendants as duplicative. *Mira v. Harder* (Evans), 177 A.D.3d

426, 427 (1st Dep't 2019).

V.

In sum, the court grants the motion by defendants Segall,



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Yahalomi, Fayne, Suskind, and Frankel to dismiss the complaint

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28 of 28 against them. C.P.L.R. 3211(a) (7). The court denies the motion by defendants Almod Diamonds, Ltd., and Gad to dismiss plaintiff's hostile work environment claim, but grants their motion to dismiss the remainder of plaintiff's claims. C.P.L.R. 3211 (a) (5) and (7) .

Defendants Almod Diamonds, Ltd., and Gad shall answer the complaint's remaining claim within days after service of this order with notice of entry. C.P.L.R. 3211(f). These defendants and plaintiff shall convene for a Preliminary Conference July 23, at p.m., via telephone, to be



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arranged by the court.

This decision constitutes the court's order. The Clerk

shall enter a judgment dismissing the complaint against

defendants Yahalomi, Fayne, and Frankel and

dismissing all claims against defendants Almod Diamonds, Ltd.,

and Gad except the complaint's claim for a hostile work

environment. C.P.L.R. 3211(a) (5) and (7).

DATED: June 26,

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