

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

PRESENT: IRA GAMMERMAN  
*Justice*

PART 27

Dan RATHER

INDEX NO. 603121/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

CBS Corporation v Viacom Inc  
Leslie Moonves, Simpson Crossstone AND  
ANDREW HEYWARD

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the decision accompanying memorandum  
decision

**FILED**

APR 11 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/10/08

IRA GAMMERMAN  
*J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 27

-----X  
DAN RATHER,

Plaintiff,

-against-

CBS CORPORATION, VIACOM, INC.,  
LESLIE MOONVES, SUMNER REDSTONE,  
and ANDREW HEYWARD,

Defendants

Index No. 603121/07

Part Calendar No. 20058

FILED  
APR 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK X

-----X  
**IRA GAMMERMAN, J.H.O.:**

Defendants CBS Corporation, Viacom, Inc., Leslie Moonves, Sumner Redstone, and Andrew Heyward jointly move, pursuant to CPLR 3211 (a) (1), (5), and (7), for an order dismissing the complaint. CBS Corporation was formed on January 1, 2006, by the merger of CBS Inc. (CBS) and the former Viacom, Inc. From May 4, 2000, to December 31, 2005, CBS was a wholly owned subsidiary of the former Viacom, Inc. Moonves was, at all relevant times, the chief executive officer of CBS. Redstone was, at all relevant times, the chief executive officer of the former Viacom, Inc. Heyward was, at all relevant times, the president of CBS News, a division of CBS.

This action arises out of a September 8, 2004 broadcast (Broadcast) that plaintiff Dan Rather narrated on the CBS 60 Minutes II television program. The Broadcast reported that President Bush had avoided military service in Viet Nam by using his father's political connections in Texas to be accepted into the Texas Air National Guard, and that, once in the Guard, he shirked

his duties, refused to have a physical examination, disobeyed a direct order of his commanding officer, and failed to complete his military commitment.

The complaint alleges, in sum, that because the Broadcast was attacked by persons supportive of President Bush, CBS determined to disavow the Broadcast and deceptively coerced Rather to publicly apologize for the Broadcast, although it had been largely overseen and vetted by Heyward, as well as by CBS News Senior Vice President Betsy West, Executive Producer Josh Howard, and Senior Broadcast Producers Mary Murphy and Esther Kartigan, and although none of the information conveyed in the Broadcast had been shown to be false. The complaint further alleges that the day after President Bush was reelected, in November 2004, CBS informed Rather that it would remove him from his position as anchor of the CBS Evening News, a position he had held for some 24 years; and that, after his last broadcast as anchor of the CBS Evening News, CBS barred him from appearing on 60 Minutes II, and on CBS radio stations, and kept him on its payroll without any meaningful work until May 2006, when it fired him, effective June 16, 2006. The complaint alleges that, to a large extent, these actions were taken at the instance of the former Viacom. The complaint alleges the following seven causes of action: (1) breach of contract, against CBS; (2) breach of fiduciary duty, against CBS; (3) fraud, against CBS, Moonves, and Heyward; (4) breach of implied covenant of good faith and fair dealing, against CBS; (5) tortious inducement of breach of contract, against Viacom, Redstone, Moonves, and Heyward; (6)

tortious interference with prospective business relations, against all defendants; and (7) prima facie tort, against all defendants.

I turn first to the issue of timeliness. Citing Morrison v National Broadcasting Co. (19 NY2d 453 [1967]), defendants contend that the entire complaint is time-barred because, at bottom, it seeks to recover for damage to Rather's reputation, and it was brought outside the one-year limitations period that CPLR 215 provides for actions sounding in defamation. The plaintiff in Morrison had appeared as a contestant on the television quiz show, "21," which was subsequently shown to have been rigged. Some contestants, but not the plaintiff, had been given both the questions that they would be asked and the correct answers beforehand. In the only cause of action that was before the Court, the plaintiff claimed that the exposure of the hoax had led the public to believe that all the contestants had knowingly participated in it, and that, consequently, his reputation had been badly injured. The Court held that this claim, which plaintiff had denominated as one for "economic damage," was a claim of defamation, and that it should have been brought within the one-year limitations period. Morrison is not controlling here, because, unlike the plaintiff in that case, Rather, in six of his seven causes of action, is not seeking damages solely because of injury to his reputation, see Singer v Jefferies & Co., 160 AD2d 216 (1st Dept 1990) (holding six-year period for fraud governed plaintiff's claim that he had been injured in his trade and profession, and had suffered injury to his reputation).

Accordingly, I turn to each of the causes of action alleged in the complaint.

Breach of Contract

On December 30, 1979, plaintiff and the CBS News division of CBS entered into a Staff Correspondent Agreement providing, among other things, for plaintiff's employment as anchor of the CBS Evening News television program following the retirement of Walter Cronkite. That agreement was extended and modified by agreements between the same parties, dated October 3, 1984, and April 10, 2002.

Defendants contend that plaintiff's breach of contract claim must be dismissed because, on June 16, 2006, Rather was paid everything that he was owed under the April 18, 2002 agreement, and because the initial employment agreement provided at paragraph 4 that:

[n]othing herein contained shall be deemed to obligate CBS to use [Rather's] services hereunder or to broadcast any program, and CBS shall have fully discharged its obligations hereunder by payment to [Rather] of the applicable compensation set forth in paragraph 3.

That provision was carried forward through the April 10, 2002 agreement. In addition, defendants argue that the gravamen of the breach of contract claim is that Rather was "benched" for more than a year, and that such claim is, in essence, a claim of lost opportunities and of damage to reputation. As to the former, defendants assert that Rather has failed to specify any opportunities that he may have lost; as to the latter, they argue that reputation damages are not recoverable through a breach of

contract claim.

While paragraph 4 of the initial employment agreement was carried forward into the two subsequent amended agreements between CBS and Rather, it was modified by paragraph 1 (g) of the April 10, 2002 agreement, which provides, in relevant part, that:

if at any time during the period commencing after December 31, 2002 and continuing through and including November 25, 2006, CBS removes [Rather] as Anchor or Co-Anchor of CBS Evening News (Monday - Friday) on a permanent basis and CBS fails to assign [Rather] as a correspondent on 60 MINUTES II ... or such other assignment to be mutually agreed upon, CBS shall pay the remainder of [Rather's] weekly compensation through November 25, 2006, and this Agreement automatically will terminate at 11:59 PM on the last day [Rather] performs such Anchor or Co-Anchor services on CBS EVENING NEWS (Monday - Friday) for CBS and [Rather] shall be free to seek employment with any third party without limitation. CBS shall pay the remainder of [Rather's] weekly compensation immediately.

This paragraph does not require that CBS use Rather's services. It does provide, however, that, if CBS stops using those services in certain specified ways, then it must, at that time, terminate Rather's contract and pay him all the compensation due to him through November 25, 2006. The complaint alleges that Rather delivered his last broadcast as anchor of the CBS Evening News on March 9, 2005, and that from that date until May 2006, while he was nominally assigned as a correspondent on 60 Minutes II, and when that program ended, on 60 Minutes, in fact, he was prevented from functioning as such inasmuch as he was provided with little staff support, editing services were denied to him, and few of his proposed stories were approved. Accordingly, Rather will be given an opportunity to show that his nominal assignments as a

correspondent did not relieve CBS from its obligation to pay him, in March 2005, the sums to which he was then entitled, under the 2002 agreement, in the event that his services were not used in the ways specified in that agreement.

As to defendants' arguments concerning damages, the complaint alleges that the substantial payment that Rather should have received in March 2005 was delayed until June 2006. That suffices for the breach of contract claim to survive the instant motion. Moreover, while a plaintiff generally cannot recover damages to his or her reputation that result incidentally from a breach of contract (Dember Constr. Corp. v Staten Isl. Mall, 56 AD2d 768 [1st Dept 1977]), here, the alleged damage to Rather's reputation, resulting from his ouster from the nationally prominent place he had occupied at CBS News, coupled with the near silence that he was required to keep for more than a year, was not an unforeseen by-product of the alleged breach of contract. It was foreseeable at the time that the 2002 contract was executed (see Kenford Co. v County of Erie, 73 NY2d 312 [1989]), and indeed, it appears to be the very harm that paragraph 1 (g) of the 2002 contract was meant to avert. The 2002 contract, like the two earlier ones, appears to have been designed to promote Rather's visibility and enhance his reputation so as, in turn, to enhance that of CBS News, and it provided that when those reciprocal benefits were no longer available the relationship between them would end. Publicity and reputation are the very stuff of those contracts.

Breach of Fiduciary Duty

The breach of fiduciary duty claim is predicated on the long and symbiotic relationship between Rather and CBS. While an employment relationship, alone, does not give rise to fiduciary duties on the part of the employer, see Angel v Bank of Tokyo-Mitsubishi, Ltd., 39 AD3d 368 (1st Dept 2007), liability in tort may arise where a "contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation," Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 55 (1st Dept 1988), quoting Rich v New York Cent. & Hudson Riv. R.R. Co., 87 NY 382, 397 (1882). As the Rich Court also stated, a legal duty, the violation of which is actionable as a tort, may arise "out of certain relations of trust and confidence, inherent in the nature of the contract itself," as well as from certain circumstances extraneous to the contract, Rich, at 398. Here, Rather does not allege any special extraneous circumstances. He does, however, contend that the length of his contractual relationship with CBS, and the nature of the service that he performed under his contracts with CBS, whereby he became the public face of CBS News after Walter Cronkite retired, made his relationship with CBS something more than the relationship of an employer and an employee. A fiduciary relationship may develop from the ongoing conduct between the parties to a case, and the question of whether fiduciary duties have been created in a particular case is fact-specific to that case, Wiener v Lazard Freres & Co., 241 AD2d 114 (1st Dept 1998). Accordingly, it would be premature, at this stage, to dismiss this cause of action.

### Fraud and Breach of Implied Covenant

A claim of breach of the implied covenant of good faith and fair dealing is not necessarily duplicative of a claim of breach of contract. Here, however, Rather adduces exactly the same factual allegations to support both claims, see Mem. in Opp. to Defendants' Motion, at 4-6. Accordingly, I am dismissing the breach of implied covenant claim as redundant with the breach of contract claim.

Rather's fraud claim is based on alleged statements to the effect that CBS would take steps to restore his reputation, which he alleges were made to induce him to make the public apology for the Broadcast, the text of which CBS provided to him, and to keep him from speaking out and investigating for himself. To the extent that this cause of action is not redundant with Rather's contract claim, it amounts to no more than a claim of defamation. As such, it is time-barred.

### Tortious Inducement

Defendants do not contend that the complaint fails to plead the elements of a claim of tortious inducement of breach of contract. They argue, however, that CBS Corporation cannot be liable for such tort because a corporation cannot interfere with its own contracts; that Viacom cannot be liable because it was not formed until after the events alleged in the complaint took place; and that the individual defendants cannot be liable because the complaint does not allege that they acted outside the scope of their employment. Defendants represent that, on December 31, 2005, and January 1, 2006, a new Viacom, Inc. was formed, and CBS and

that what had been Viacom, Inc. merged to become CBS Corporation. Rather alleges this cause of action against Viacom, but the complaint makes it plain that the Viacom that Rather targets is the Viacom that existed in 2004-2005. As a matter of law, by virtue of the merger of the old Viacom, Inc. with CBS, CBS Corporation is the successor-in-interest to the old Viacom, Inc., as well as to CBS, see e.g. Matter of Colt Indus. v New York City Dept. of Fin., 66 NY2d 466 (1985). Accordingly, CBS Corporation can be held liable for the old Viacom, Inc.'s alleged inducement of breach of Rather's contract with CBS. Defendants have not shown that the new Viacom, Inc. is not also a successor in interest to the old Viacom, Inc. Notably, defendants do not argue that, if the old Viacom, Inc. interfered with its then subsidiary's contract with Rather, it did so on the basis of its own economic interest, rather than on the basis of the political animus of one or more of its executives. A showing of economic interest is a defense to a claim of tortious inducement of breach of contract (White Plains Coat & Apron Co. v Cintas Corp., 8 NY3d 422 [2007]), and the showing must be evidentiary, see Felsen v Sol Cafe Mfg. Corp., 24 NY2d 682, 687 (1969); Koret, Inc. v Christian Dior, S.A., 161 AD2d 156 (1st Dept 1990); but see MTI/The Image Group, Inc. v Fox Studios East, Inc., 262 AD2d 20 (1st Dept 1999). Accordingly, at this stage, it would be premature to dismiss this claim against either CBS Corporation or Viacom. However, Rather does not contest defendants' argument that the complaint does not allege that the acts of the individual defendants were beyond the scope of their employment, or were

motivated by a desire for personal gain. Accordingly, I am dismissing this claim as against those defendants, see Chambers Assocs. LLC v 105 Acquisition LLC, 37 AD3d 365 (1st Dept 2007).

Interference with Prospective Business Relations and Prima Facie Tort

I am dismissing the sixth cause of action because Rather has failed to identify any prospective business relations that any of the defendants may have interfered with. While Rather argues that defendants should be estopped from making that argument because they prevented him from seeking other employment during the time that he was "benched," the fact remains that Rather cannot prove any damages in connection with this claim. I am also dismissing the claim of prima facie tort because Rather has not pled any special damages, an essential element of such a claim, see DeMicco Bros., Inc. v Consolidated Edison Co. of New York, 8 AD3d 99 (1st Dept 2004).

Conclusion

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted, and the third, fourth, sixth, and seventh causes of action of the complaint are dismissed; and it is further

ORDERED that the complaint is hereby severed and dismissed as against defendants Leslie Moonves, Sumner Redstone, and Andrew Heyward, and the Clerk is directed to enter judgment in favor of said defendants with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs;

and it is further

ORDERED that CBS Corporation and Viacom, Inc. are directed to serve their answer to the complaint within 20 days of service upon them of a copy of this order with notice of entry.

Dated: 4/10/08

ENTER:

12

J.S.C. Jof

**IRA GAMMERMAN**

**FILED**  
APR 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK