At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Givic Center, Brooklyn, New York, on the 17th day of October, 2003

PRESENT:

HON. MURIEL HUBSHER,
Justice.

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EDUARD KORSINSKY,

Plaintiff,

- egainst - Index No. 35128/02

JONATHAN (YONA) REISS, et al.,

Defendants.

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The following papers number 1 to 7 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4, 5-6
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	7
_____ (Affirmations)	
Other Papers	

Upon the foregoing papers, defendants Rabbi Jonathan (Yona) Reiss (Reiss) and the Beth Din of America (BDA) move for an order, pursuant to CPLR 3211(a) (2) and 3211(a) (7), dismissing the amended complaint in its entirety, and for a further order, pursuant to CPLR 8303-a, granting defendants costs and reasonable attorneys' fees. Plaintiff Eduard

Korsinsky (plaintiff) cross-moves for an order disqualifying defendants' counsel in light of a conflict of interest, and for a further order striking the affirmation of Defendant Reiss.

Factual Background

The following allegations are taken from the amended complaint and assumed to be true herein *(see Rovello v Orofino Realty Co.,* 40 NY2d **633,634).** Plaintiff is a member of the Orthodox Jewish community. Reiss is the director of the BDA, a Jewish religious arbitration tribunal which is located at **305 7th** Avenue in Manhattan, New York. On or about January 30, 2002, plaintiff received a letter from Reiss requesting that he participute in a "Beth Din" arbitration to resolve certain issues between him and his ex-wife, Robyn Brody, related to arranging a Jewish divorce.[1] Plaintiff refused to submit to the Beth Din arbitration because, he believed, among other things, that the BDA was affiliated with "Menachem Genack", a close friend and advisor of the plaintiff's ex-wife and **a** senior officer at the Orthodox Union, ~~one~~ of Reiss' financial conduits. Plaintiff alleges that Reiss began sending various letters threatening him with excommunicationif he did not comply with his demands. On or about March 25,2002, plaintiff sent a letter to Reiss advising him that he would appear before the Rabbinical Court of "Beth Din Tzedek D'khal Kedushath Levi". Reiss thereafter responded by letter, dated April **9,** 2002, stating that plaintiff's ex-wife would not appear before the Rabbinical Court chosen by plaintiff. On or about May 1,2002, plaintiff reiterated his willingness to appear before the Rabbinical Court of "Beth Din Tzedek D'khal

[1] To be divorced under Jewish law, a couple must obtain a Get, which resolves certain terms of the divorce.

Kedushath Levi" and later offered to appear before another Rabbinical Court, Mechon L'Hoyroa. This latter offer was accepted by Ms. Brody, but when the parties subsequently appeared before that Rabbinical Court, plaintiff and his ex-wife were unable to agree upon mutually acceptable terms and conditions under which to arbitrate.

On August 12, 2002, notwithstanding plaintiffs willingness to appear before two different Rabbinical Courts and his compliance with the BDA's Rules and Procedures, Reiss and the BDA issued the following decree of excommunication ("the Seruv"):

Shtar Seruv

> Eduard Korsinsky has been summoned to the Beth Din of America by Robyn (Bracha) Brody for the purposes of resolving the disputes between the two of them related to the giving of a Get.
>
> Eduard Korsinsky has refused to appear in front of the Beth Din of America, and has refused to submit to a mutually acceptable Beth Din to hear the outstanding disputes between the parties despite Robyn (Bracha) Brody's willingness to do so.
>
> Eduard Korsinsky is thus a mesariv lavo ledin, one who willfully declines to appear in front of Jewish courts.
>
> Eduard Korsinsky's conduct violates Jewish law, and he is to be treated in the manner specified by Rabbi Moshe Isserless (Rama) in Shulchan Aruch Chosen Misphat 26: 1
>
> Rabbi Gedalia Dov Schwartz

Plaintiff alleges that defendants injured his reputation by improperly issuing a seruv[2] from the BDA, and publishing its highly defamatory statements concerning him in the Jewish Press, a weekly publication, to more than 500,000 members of the Jewish community. Plaintiff contends that the seruv was improperly issued because he was, at all times, ready and willing to appear before at least two rabbinical courts to hear the dispute between him and his ex-wife in accordance with the BDA's Rules and Procedures. Plaintiff further alleges that defendants have instigated, participated, and/or caused others to make life threatening and harassing telephone calls to him and his family members in order to force plaintiff to comply with Reiss' demands to give his ex-wife a Get. Plaintiff subsequently commenced the within action against Reiss and the BDA on or about September 5, 2002, alleging five causes of action: (1) libel; (2) intentional infliction of emotional distress; (3) violation of General Business Law $349; (4) coercion/duress; and (5) prima facie tort. Defendants now move for an order dismissing the amended complaint on the grounds that this court lacks subject matter jurisdiction over the issues raised therein (CPLR 3211[a][2]) and that the allegations in the amended complaint do not state a cause of action upon which relief can be granted (CPLR 3211 [a] [7]).

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court accepts the facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference,

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[2]A seruv is a contempt citation issued when a Jewish person refuses to ***go*** to a rabbinical tribunal or Beth Din to settle a dispute.

and determines only whether the facts as alleged fit within any cognizable legal theory ***(Rovello,*** 40 NY2d at 634). When considering an application to dismiss a cause of action pursuant to CPLR 3211 (a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint ***(see*** *Leon* ***v Martinez,*** 84 NY2d 83, 88; ***Guggenheimer v Ginzburg***, 43 NY2d 268,275; ***Rovello,*** 40 NY2d at 636). If the court finds that the plaintiff is entitled to a recovery upon any reasonable view of the stated facts, its judicial inquiry is complete and it must declare the plaintiff's complaint to be legally sufficient (see 219 ***Broadway*** *Corp.* ***v. Alexander's, Inc.***, 46 NY2d 506,509).

Libel (First Cause of Action)

The first cause of action alleges that defendants injured plaintiff's reputation by improperly obtaining and/or issuing a seruv, and publishing it to others in the Jewish community. Defendants argue that the **BDA's** issuance of the seruv is an ecclesiastical matter and, therefore, this court cannot decide the merits of this claim without engaging in questions of clear theological import, an endeavor, they argue, which is prohibited by the First Amendment. Thus, defendants contend that this court lacks the subject matter jurisdiction to adjudicate a claim challenging such an ecclesiastical ruling. Plaintiff, on the other hard, disputes the characterization of his libel cause of action as ecclesiastical in nature, and asserts that this court can determine this claim by simply applying neutral principles of law (i.e., the **BDA's** Rules and Procedures). He argues that the seruv should not have issued because he was, at all times, ready and willing to appear before at least two

Rabbinical Courts to hear the dispute between him and his ex-wife in accordance with the BDA's Rules and Procedures.

It is well settled that civil courts have no power to review determinations of ecclesiastical courts on matters pertaining to their religion (***Berman* v *Shatnes Laboratory,*** 43 AD2d 736; ***Kedroff v St. Nicholas Cathedral,*** 344 **US** 94). All matters arising out of ecclesiastical or spiritual relations in the administration of the affairs of a religious body should be determined by the superior ecclesiastical tribunal, and civil courts of this State should not concern themselves with conflicting contentions relating to doctrinal practice or the merits of a claim that discipline be imposed for alleged violations of duties owed to a religious group by any of its members ***(see Ameson v General Synod of Refm. Church,*** 44 AD2d 649). The First Amendment to the United States Constitution prohibits regulation of religious beliefs. These values are jeopardized when the resolution of the dispute turns on an inquiry into religious doctrine and practice.

The court finds ***Klagsbrun v Va'ad Harabonim of Greater Monsey, (53*** F.Supp.2d 732 [D.N.J.1999]), a case relied upon by defendants, particularly instructive here. In that case, the plaintiff was an Orthodox Jew accused by religious leaders of bigamy and failing to obtain a religious divorce from his wife prior to remarrying ***(see Klagsbrun,*** 53 F.Supp.2d at 734-736). The plaintiff brought an action against the rabbinical board which sanctioned him, the board's individual members, and his wife, alleging slander and libel. The defendants moved to dismiss, arguing that to determine the truth or falsity of their alleged statements, the court would have to "delve into questions of doctrine and faith," and, therefore, the court

lacked jurisdiction over this ecclesiastical dispute under the Free Exercise Clause **(see *Klagsbrun,* *53* F.Supp.2d at 739).** The district court considered the elements of slander and libel under New Jersey common law and agreed that it would have to determine whether the plaintiff had engaged in bigamy in violation of the Orthodox Jewish faith ***(id.*** at 741). The court concluded that "an inquiry into the truth or falsity of the defendant's statement concerning Seymor Klagsbrun's alleged bigamy would entail judicial intrusion into ecclesiastical doctrine and practice . . ." ***(id.).***

In the instant case, plaintiff claims that the defendants committed the torts of defamation and libel when they published the seruv in the Jewish Press. The Seruv states, in pertinent part, that plaintiff willfully fails to appear before a Rabbinical court and that his conduct violates Jewish law. In this court's view, plaintiffs argument that a seruv should not have issued is a purely ecclesiastical question that has been decided by the BDA in accordance with what it perceives to be Jewish law ***(see Neiman Ginsburg & Mairanz, P.C.*** v ***Goldburd,*** 179 Misc.2d 125, 128). As was the case in ***Klagsbrun,*** in order to adjudicate this libel claim, the court or the jury would have to determine the truth of the defendants' statements that plaintiff's conduct violated Jewish law and, in doing so, would examine and weigh competing views of religious doctrine. No doubt this court would also be called upon to inquire into the rules and customs governing rabbinical courts as such are utilized in the Orthodox Jewish religion. This would result in the court entangling itself in a matter of ecclesiastical concern, thereby violating the Establishment Clause. Contrary to plaintiff's assertion, this court has no power to review the Beth Din's determination that it was

appropriate under Jewish law to issue the seruv ***(see Neiman Ginsburg & Mairanz, P.C.,*** , 179 Misc.2d at 128; ***Klagsbrun,*** 53 *F.Supp.*2d at 739). Because the plaintiffs libel claim raises inherently religious issues, neutral principles cannot be applied to resolve this claim. This claim is, therefore, not properly cognizable in this court, and the plaintiffs first cause of action is hereby dismissed for lack of subject matter jurisdiction.

Intentional Infliction of Emotional Distress (Second Cause of Action)

The second cause of action for intentional infliction of emotional distress is based upon the allegations that Reiss and the BDA participated and/or caused others to make life threatening and harassing telephone calls to plaintiff and his close family members.

This cause of action has four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; **(3)** a causal connection between the conduct and injury; and (4) severe emotional disturbance ***(see Howell*** v ***New York Post Company, Inc.***, 81 NY2d 115, 121 ***aff'd in part*** 82 NY2d 690). Generally, the cause of action is made out "where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation." ***(Nader*** v ***General Motors Corp.,*** 25 NY2d 560,569; ***Long*** v ***Beneficial Finance Co. of New York, Inc.***, 39 AD2d 11).

Here, the court finds that the plaintiff has certainly made out a prima facie case that a malicious campaign, designed to cause emotional distress, was mounted against him by defendants ***(see Elson*** v ***Consolidated Edison Company*** of ***New York,*** 226 AD2d 288; ***Kaminski*** v ***United Parcel Service,*** 120 AD2d 409; ***Green*** v ***Fischbein Olivieri Rozenholc &***

Badillo, 119AD2d 345,350). Whether the campaign was sufficiently "outrageous" to entitle plaintiff to collect damages therefor is a factual question that cannot be decided at this stage of the litigation. Consequently, that branch of defendants' motion seeking to dismiss plaintiff's second cause of action is denied.

Violation of General Business Law § 349 (Third Cause of Action)

Plaintiff's third cause of action alleges that Reiss and the BDA have engaged in a deceptive act or practice in violation of General Business Law § 349 by "intentionally deceiving the plaintiff and other similar New York consumers by misrepresenting the Rules of the BDA and failing to inform New York consumers that the BDA does not follow its written rules and will issue letters of excommunicauon against persons who are in full compliance with the BDA's . . . rules" (Amended Complaint at ¶77). Defendants argue that plaintiff has not sufficiently alleged consumer-oriented conduct or a deceptive practice within the meaning of this law and that the dispute at issue does not implicate the public interest.

General Business Law § 349(a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" and, ***inter alia,*** affords consumers a private right of action to redress such misconduct ***(see Gaidon*** v ***Guardian Life Insur. Co.*** of ***America,*** 94 NY2d 330, 344; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.,*** 85 NY2d 20, 26; ***see also Karlin v IVF America, Inc.***, 93 NY2d 282,294). Such acts, practices or advertising must have an impact on consumers at large, and must be shown to be deceptive or misleading in a material way and to have injured the plaintiff as a result thereof ***(Oswego Laborers' Local 214 Pension***

Fund, 85 NY2d at 25-26; ***St. Patrick's Home for the Aged and*** *Infirm* v. ***Laticrete Intl., Inc.***, 264 AD2d 652, 655). To establish a prima facie violation of that statute, a plaintiff must demonstrate that the defendant is engaging in "consumer oriented" conduct that is deceptive or misleading in a material way, and that plaintiff has been injured as a proximate result thereof ***(Gaidon,*** 94 NY2d at 344; ***see Oswego Laborers' Local 214 Pension Fund,*** 85 NY2d at 24-26).

Here, plaintiff fails to allege facts sufficient to support an inference that defendants had, in their treatment of plaintiff, engaged in "consumer-oriented" conduct affecting consumers at large ***(see Gaidon,*** 94 NY2d at 344; ***Oswego Laborers' Local 214 Pension Fund,*** 85 NY2d at 24-25). General Business Law § 349 is addressed to practices which have a broader impact on consumers at large. As such, private contract disputes, unique to the parties, do not fall within the ambit of the statute ***(see Canario*** v ***Gunn,*** 300 AD2d 332; ***Fekete*** v ***GA*** *Ins.* Co. of ***New York,*** 279 AD2d 300).

The incident described in the instant claim is between plaintiff and Reiss and the BDA and has its origins in Ms. Brody's attempt to obtain a Jewish divorce (Get) from plaintiff. The statements contained in the seruv/excommunication letter concerned matters unique to the plaintiff and were not directed at the general public; nor were such statements on matters on which the general public could in any way rely. The BDA's issuance **of** the seruv pertaining to plaintiff and his alleged violation of Jewish law, which has in no way affected consumers at large, does not suffice to state a claim under General Business Law § 349. Accordingly, plaintiffs third cause of action is dismissed.

Additionally, the Court has herein determined that the published seruv on its face may or may not have violated Jewish law an issue this court has decided may not be determined by the civil court. Therefore whether or not it was "deceptive under prohibitory of GBL 349 cannot be reviewed by this court.

Coercion/Duress (Fourth Cause of Action)

Plaintiff's fourth cause of action styled as one for coercion/duress is based upon allegations that defendants engaged in intimidating and harassing conduct consisting of, among other things, threatening plaintiff and his family members with physical injury or damage to property for the sole purpose of forcing plaintiff to give his ex-wife a Jewish divorce and submit to the jurisdiction of the BDA under Reiss' terms. However, there is no substantive cause of action for coercionduress. Under New York Law, coercionduress is most often recognized as a defense to a claim for breach of contract, not a tort cause of action *(see Nice* v *Combustion Engineering, Inc.,* 193 AD2d 1088; *see also Weiss v. La Suisse,* 69 F.Supp.2d 449 [S.D.N.Y. 19991). Moreover, to the extent this cause of action seeks to recover damages sustained as a result of the life threatening and harassing telephone calls allegedly made by defendants, the cause of action is, in material respects, duplicative of the second cause of action, which the court finds sufficient to withstand defendants' motion to dismiss. Accordingly, plaintiff's fourth cause of action is dismissed.

Prima Facie Tort (Fifth Cause of Action)

In addition, plaintiffs claim sounding in prima facie tort must fail. Prima facie tort permits a recovery for the intentional infliction of harm, without any excuse or justification, by an act or acts which would otherwise be lawful and which result in special damages *(Freihofer* v *Hearst Corp.,* 65 NY2d 135, 142-143; *Curiano* v *Suozzi,* 63 NY2d 113, 117; *Burns Jackson Miller Summit & Spitzer v Lindner,* 59 NY2d 314,332). Here, the complaint contains no allegation of special damages, a critical element of the cause of action *(see*

Freihofer, 65 NY2d at 143; Pappas v Passias, 271 AD2d 420, 421). Accordingly, plaintiffs fifth cause of action is dismissed.

Finally, that branch of defendants' motion for cost and sanctions is denied as unwarranted.

Plaintiff's Cross Motion

Disqualify Defendants' Counsel

That branch of plaintiffs cross motion seeking to disqualify the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP (the Paul Weiss law firm) from representing the defendants in this action on the ground that one of its attorneys, Eric S. Goldstein, will be called as a witness is denied. Section 5-102 (B) of the Disciplinary Rules of the Code of Professional Responsibility (DR)[3] (22 NYCRR 1200.21 [b]) requires the lawyer to withdraw from a case where it is likely that the lawyer will be called as a witness, and that the testimony is or may be prejudicial to his or her client. Disqualification, however, is required only where the testimony by the attorney is considered "necessary" (*S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-446; *see also, Talvy v American Red Cross*, 205 AD2d 143, 152, *affd* 87 NY2d 826). "Testimony may be relevant and even highly useful

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[3] DR 5-102 (B) provides as follows:

> "Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client."

but not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence." (*S&S* ***Hotel Ventures Ltd. Partnership, 69*** NY2d at ***446).***

Here, plaintiff argues that the Paul Weiss law firm should be disqualified because it is likely that plaintiff will call one of its attorneys, Mr. Goldstein, as a witness and that his testimony is likely to be prejudicial to defendants. In this regard, plaintiff notes that Mr. Goldstein serves as the President of the BDA's board, and therefore has a close affiliation with that organization. By reason of that position, plaintiff contends that Mr. Goldstein is a central figure in this litigation, who undoubtedly has personal knowledge of the underlying circumstances herein.

Contrary to plaintiff's assertions, the court finds that he has failed to show that Mr. Goldstein's testimony is necessary ***(see S & S Hotel Ventures Ltd. Partnership,*** 69 NY2d at 445-446; ***Plotkin v Interco Development*** *Corp.,* ***137*** AD2d ***671).*** In his regard, plaintiff fails to explain precisely what testimony he requires from Mr. Goldstein, why he requires it, and, in what respect such testimony will be prejudicial to the defendants ***(see*** DR 5-102 [B]). Plaintiff's conclusory allegations with respect to Mr. Goldstein's personal knowledge of the underlying circumstances herein are insufficient to establish a plausible basis for disqualification of Mr. Goldstein or the Paul Weiss law firm as the defendants' counsel in this action ***(see*** S ***& S Hotel Ventures Ltd.*** *Partnership,* 69 NY2d at ***446; see also Plotkin., 137*** AD2d at ***673).***

Strike Reiss' Affirmation

Finally, as plaintiff correctly notes, Reiss improperly submitted an affirmation instead of an affidavit. Because Reiss is a party to the action, his affirmation, which was not executed before a notary public or other authorized official, is improper and the contents of same are hereby disregarded by the court (*see* CPLR 2106; ***Slavenburg*** *Corp.* ***v Opus Apparel,*** 53 NY2d 799, 801; ***Pisacreta v Minniti,*** 265 AD2d 540). However, while the contents thereof have had no bearing on this court's determination, the court has deemed it as a vehicle for the transmission of the documentary evidence considered herein.

Conclusion

Defendants motion is granted to the extent that plaintiff's first, third, fourth, and fifth causes of action are dismissed. Defendants' request for an award of costs and attorney's fees is denied as the record, in this court's view, does not support the imposition of such costs pursuant to CPLR 8303-a. That branch of plaintiff's cross motion seeking to disqualify defendants' counsel is denied.

The foregoing constitutes the decision and order of the court.

ENTER,

J. S. C.