SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

ORAL ARGUMENT REQUESTED

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA & MIGUEL VILLALOBOS, Plaintiffs,	Index No. 24973/15E
-against-	Hon. Fernando Tapia, J.S.C. Part IA-13
DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER AND JOHN DOES 1-4, Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO PARTIALLY DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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Defendants Donald J. Trump ("Mr. Trump"), Donald J. Trump For President, Inc., Trump Organization LLC, incorrectly s/h/a The Trump Organization LLC, and Keith Schiller ("Schiller") (collectively, "Defendants") move, pursuant to CPLR 3211(a)(1) and 3211(a)(7), to partially dismiss the First Amended Complaint (the "Amended Complaint" or "Am. Compl.")[1] of Plaintiffs Efrain Galicia ("Galicia"), Florencia Tejeda Perez, Gonzalo Cruz Franco, Johnny Garcia and Miguel Villalobos (collectively, "Plaintiffs").

PRELIMINARY STATEMENT

Plaintiffs' Amended Complaint (which supersedes their original complaint filed in this action) consists entirely of a series of quizzical tort claims asserted against Mr. Trump, his company, his campaign and his Director of Security which appear to have been brought solely as a means to satisfy Plaintiffs' calculated political and publicity objectives where they have suffered no injury or damages whatsoever.

To call Plaintiffs' claims frivolous would be an understatement. In an attempt to manufacture a theory of liability where none exists, Plaintiffs have alleged in the Amended Complaint, among other things, claims for Conversion and Destruction of Property (the Second Cause of Action) and Tortious Interference with Political Speech/Prima Facie Tort (the Third Cause of Action), which are the subject of the instant motion. As will be demonstrated below, the Second and Third Causes of Action must be dismissed as a matter of law since (i) the Second Cause of Action has been mooted as a result of Defendants' return to Plaintiffs of their signage which was confirmed subsequently by an email exchange between counsel for the parties in this action and (ii) the Third Cause of Action as plead does not exist under New York law, and even if Plaintiffs could plead a claim for *prima facie* tort, it would not stand since the underlying facts

[1] A copy of the First Amended Complaint is annexed to the Affirmation of Matthew R. Maron ("Maron Aff." or "Maron Affirmation") as Exhibit A.

supporting this claim are the same as Plaintiffs' Assault and Battery Claim (the First Cause of Action)[2].

In short, due to the obvious deficiencies in these particular claims asserted by Plaintiff, they must be dismissed in their entirety, with prejudice.

STATEMENT OF FACTS

Plaintiffs consist of a group of individuals who demonstrate at various sites around New York City protesting policies which they perceive as disadvantageous to members of the Latino community. After holding prior demonstrations in front of Defendants' headquarters located at 725 Fifth Avenue in Manhattan ("Trump Tower" or the "Building"), Plaintiffs returned on the afternoon of September 3, 2015 to demonstrate yet again in front of Trump Tower. Shortly after that demonstration began, Mr. Schiller (the Director of Security for Mr. Trump and his companies) and other members of his security team performed a routine outside inspection to make sure that the sidewalk in front of the Building was not obstructed, that pedestrians could freely walk on the sidewalk, and persons exiting from vehicles on Fifth Avenue could reach the sidewalk in front of Trump Tower.

During that walk-through, Mr. Schiller observed that Plaintiffs had at least three extremely large painted cardboard signs, approximately eight feet long and three feet tall, which they were leaning up against the concrete planters. These signs, which were placed by the Plaintiffs parallel to Fifth Avenue, when combined with the demonstrators (who were also leaning and sitting on planters), were essentially forming a barricade along the length of the sidewalk directly in front of the public entrance to the Building, preventing people from safely accessing the sidewalk after exiting vehicles on the street. On two separate occasions, Mr.

[2] Defendants are not moving to dismiss the First Cause of Action in this motion.

Schiller politely asked the demonstrators to move the signs from the planters and asked them not to block the sidewalk so that people could reach it from the street.

Although there were dozens of other signs at the demonstration, including countless signs with the word "Racist" on them, Mr. Schiller never requested that any of these signs be moved as they were being hand-held by the demonstrators and were not blocking safe passageway on the sidewalk for pedestrians and persons exiting vehicles on Fifth Avenue in front of the Building. *See* the photographs collectively annexed as Exhibit B to the Maron Aff.

Subsequently, Mr. Schiller received a call from the Fire Safety Officer of the Building advising him that a crowd in front of the public entrance of the Building was growing and in danger of becoming unruly. He immediately contacted the New York City Police Department at that time and notified them of the situation that was developing directly outside of the Building. Mr. Schiller then went back outside to the front of the Building to survey the situation himself. He immediately observed several persons angrily confronting the demonstrators—some of whom were now dressed in Ku Klux Klan costumes—including a black male who was demanding that one of the protestors remove the hood of his Ku Klux Klan outfit, and also a Latino male who was loudly arguing with one of the demonstrators. *See* the photographs annexed as Exhibits C and D to the Maron Aff.

Mr. Schiller also noticed that two of the eight foot by three foot signs that he previously asked the demonstrators to move from the planters were still leaning against the planters. The two signs positioned next to one another by the Plaintiffs had formed a ***sixteen*** foot barricade that was preventing persons from exiting vehicles on Fifth Avenue from accessing the sidewalk in front of the public entrance to the Building. *See* the photograph annexed as Exhibit E to the Maron Aff.

Because his previous two requests of the Plaintiffs to move the signs off of the planters had been disregarded, Mr. Schiller hastily seized the two barricade signs, folded them up, and began walking back toward the entrance to Trump Tower. At that point, he felt someone physically grab him from behind and also felt that person's hand on his firearm, which was strapped on the right side of his rib cage in a body holster. Based on his years of training, he instinctively reacted by turning around in one movement and striking the person with his open hand. Mr. Schiller later learned that the person who attacked him while his back was turned was plaintiff Galicia. In order to diffuse the situation and not escalate it further, Mr. Schiller did not engage Mr. Galicia and instead continued walking into Trump Tower. Had Mr. Galicia not grabbed him from behind and (even if inadvertently) not reached for his holster, Mr. Schiller never would have reacted the way that he did and he would not have been struck. He had removed the two signs that were blocking the sidewalk and was walking back into the Building and was simply defending himself after he was grabbed from behind by Mr. Galicia.

Other than the two signs that had formed a sixteen foot barricade on the sidewalk, none of the countless other signs that were being held by the hundreds of demonstrators—which again were labelled with many inflammatory and provocative messages calling Mr. Trump a "Racist"—were removed or disturbed by Trump security in any way. *See* Maron Aff., Ex. B. In fact, a third sign of the exact same size of the two that he had confiscated, was held aloft by the protestors, some of whom were dressed in Ku Klux Klan costumes. *See id.*, Ex. E. Mr. Schiller and his security team did not confiscate that sign because it was not used to block the sidewalk and was being held up in the air by the Plaintiffs. They were absolutely respectful of the demonstrators' right to voice their opinions in front of the Building—despite the substantial number of the protestors and their Ku Klux Klan outfits and "Racist" signs—and all that was

asked of them was that they maintain the sidewalk area in a safe manner and not block pedestrian access. The fact that the hundreds of demonstrators, including Plaintiffs and the individuals dressed in Ku Klux Klan outfits, continued demonstrating until approximately 8 p.m. that night, waving their signs aloft, marching, arguing, yelling through cardboard megaphones, and banging drums, speaks to the respect given to their right to protest by Defendants.

Thereafter, Plaintiffs' commenced the instant action by Order to Show Cause seeking a preliminary injunction to enjoin Defendants from impeding on their rights to demonstrate at the Building. On October 20, 2015, the parties were informed that the Court partially granted Plaintiffs' motion for injunctive relief which was based upon a proposed order submitted by Defendants. *See* Maron Aff., Ex. F. Hours later, to avoid unnecessary court intervention, Defendants' Executive Vice President and General Counsel, Alan Garten, proposed returning the signage in question to Plaintiffs' co-counsel, Roger Bernstein. Mr. Garten and Mr. Bernstein (along with Plaintiffs' co-counsel Benjamin Dictor) arranged for the signage to be returned to Mr. Dictor at his office in Manhattan that same day.

ARGUMENT

I. Motion to Dismiss Standard

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court should accept the allegations contained in either a complaint or counterclaim as true and determine whether the facts, as alleged, fit within a cognizable legal theory. *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 570-571 (2005); *Delran v. Prada USA*, Corp., 23 A.D.3d 308, 308 (1st Dep't 2005). If, even after the allegations are assumed to be true, where a given cause of action cannot be established, it must be dismissed. However, "factual

allegations that do not set forth a viable cause of action, or that consist of bare legal conclusions" are not presumed to be true and are not accorded every favorable inference. *Delran*, 23 A.D.3d at 308, *citing Skillgames, LLC v. Brody,* 1 A.D.3d 247, 250 (1st Dep't 2003); *Caniglia v. Chicago Tribune-N.Y. News Syndicate,* 204 A.D.2d 233, 233-34 (1st Dep't 1994).

Additionally, the Court should not hesitate to dismiss causes of action which contain vague, conclusory, or unsubstantiated allegations, or that fails to allege the required elements. *See All the Way E. Fourth St. Block Ass 'n v. Ryan-NENA Cmty. Health Ctr.,* 30 A.D.3d 182, 182 (1st Dep't 2006) (affirming dismissal of complaint on "grounds of vague, conclusory and unsubstantiated allegations"); *Fowler v. Am. Lawyer Media,* 306 A.D.2d 113 (1st Dep't 2003) (affirming dismissal).

Indeed, under these circumstances, "the criterion becomes whether the proponent of the pleading has a cause of action, not whether he has stated one." *Rivietz v. Wolohojian*, 38 A.D.3d 301, 301 (1st Dep't 2007) (internal quotation marks and citation omitted).

Furthermore, where evidentiary material is submitted in support of a motion to dismiss, dismissal is required where the documentary evidence conclusively establishes that a material fact alleged by a plaintiff is not a fact at all and that the plaintiff has no cause of action. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977); *Katebi v. Fink*, 51 A.D.3d 424, 425 (1st Dep't 2008) (dismissing complaint whose allegations were contradicted by evidentiary material); *see also Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002); *David v. Hack*, 97 A.D.3d 437, 438 (1st Dep't 2012). It is well settled that the law of this Department allows courts to dismiss claims based email correspondence submitted in support of a motion to dismiss. *See Estate of Feder v. Winne, Banta, Hetherington, Basralian & Kahn, P.C.,* 117 A.D.3d 541 (1st Dep't 2014) ("[t]he motion court properly considered the email and correspondence from

defendant to plaintiff….in dismissing the complaint for failure to state a cause of action"); *Eighth Ave. Garage Corp. v. Kaye Scholer LLP,* 93 A.D.3d 611, 612 (1st Dep't 2013) (concluding that the "Supreme Court properly considered the evidence submitted on the motion [to dismiss], including the e-mails, which conclusively disposed of plaintiffs' claims.").

II. Plaintiffs' Conversion and Destruction of Property Claim (Second Cause of Action) Fails as a Matter of Law

A claim for conversion arises "when someone, intentionally, and *without authority*, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (2006) (*emphasis added*). Furthermore, to state a claim for conversion, a plaintiff must allege that a demand was made for the return of the property at issue, and that the defendant *refused* to return it or disposed of the property altogether. *See TeeVee Toons, Inc. v. Prudential Sec. Credit Corp*., 8 A.D.3d 134, 134 (1st Dep't 2004) citing *Matter of White v. City of Mount Vernon,* 221 A.D.2d 345, 346 (2d Dep't 1995) (emphasis added).

Here, nowhere in the Amended Complaint is it alleged that Plaintiffs demanded that Defendants return the signs taken during the demonstration held on September 3, 2015. And when the signs were taken by Defendants' personnel on that day, they were preserved in order to be used as evidence in this matter. In fact, on the day when the parties were notified of the Court's decision on Plaintiffs' motion for a preliminary injunction in this case, Defendants offered to return the signs to Plaintiffs' counsel and, as documented in an email exchange which occurred on October 20, 2015, arranged for the signs to be hand delivered to the offices of Benjamin Dictor, co-counsel for Plaintiffs. *See* emails exchanged between counsel for Plaintiffs' and Defendants' in-house counsel, dated October 20, 2015, which are collectively annexed to the Maron Aff. as Exhibit H. Therefore, not only do Plaintiffs fail to plead a requisite element

necessary to allege a claim for conversion, but documentary evidence consisting of email exchanges between the parties conclusively establishes an additional ground requiring dismissal of Plaintiffs' conversion claim. *See Estate of Feder*, 117 A.D.3d at 541; *Eighth Ave. Garage Corp.*, 93 A.D.3d at 612.

III. Plaintiffs' Claims for Tortious Interference with Political Speech/ Prima Facie Tort (Third Cause of Action) Fails as a Matter of Law

As for plaintiffs' purported "tortious interference with political speech" claim, no such cause of action exists under New York law. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee *only* against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (emphasis added). This is precisely what plaintiffs are attempting to accomplish here. For this reason, Plaintiffs also attempt to cast this unrecognizable "free speech" claim as one for *prima facie* tort. However, this claim fails for the exact same reason.

For this same reason, plaintiff's attempt to recast this "free speech" claim as a claim for "*prima facie* tort" also fails. As the New York courts have repeatedly held, *prima facie* tort was not designed "to provide a catch all alternative for every cause of action which cannot stand on its [own] legs." *Kickertz v. New York University*, 110 A.D.3d 268, 280 (1st Dep't 2013). It is well settled that pleading a cause of action for *prima facie* tort in the alternative (where other torts have been plead) is not permissible. *See Curiano v. Suozzi*, 63 N.Y.2d 113, 116 (1984).

A *prima facie* tort claim requires: "(1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be legal." *AREP Fifty-Seventh, LLC v. PMGP Associates, L.P.*, 115 A.D.3d 402, 403 (1st Dep't 2014) citing *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 A.D.3d 99 (1st Dep't 2004). Furthermore, there is no recovery in *prima facie* tort unless malice is the sole

motive for defendant's otherwise lawful act, that is, unless defendant acts from "disinterested malevolence." *See Ford v. Fink,* 84 A.D.3d 725, 728 (2d Dep't 2011).

Plaintiffs have already alleged a claims against Defendants for Assault and Battery (First Cause of Action), Negligent Hiring (Fourth Cause of Action) and Negligent Supervision (Fifth Cause of Action, as well as the Conversion claim (Second Cause of Action) which is subject to this motion. There is no question that each of these foregoing claims sounds in tort. Indeed, Plaintiffs go out of their way to reference the other torts alleged in the Amended Complaint within the allegations of their purported *prima facie* tort claim. *See* Am. Compl. ¶¶ 63, 64. Since their *prima facie* tort claim cannot stand on its own, it cannot be asserted by Plaintiffs since they have alleged other tort claims in their pleading. *Curiano,* 63 N.Y.2d at 116.

However, even if Plaintiffs claim (as they appear to do) that they can assert a *prima facie* tort claim against Defendants, they do not and cannot, allege that malice was the sole motive for Defendants' otherwise lawful acts of taking the signs after Plaintiffs' repeated refusal to remove them. Additionally, Plaintiffs failed to plead special damages; another element of a *prima facie* tort claim. Because Plaintiffs allegations fall short of the basic pleading requirements for a *prima facie* tort claim (and a wrought with conclusory contentions) the Third Cause of Action should be dismissed.

CONCLUSION

For the reasons set forth above and in the accompanying Maron Affirmation, Defendants respectfully request that the Court (1) dismiss the Second and Third Causes of Action in the Amended Complaint with prejudice, and (2) grant Defendants such other and further relief as this Court deems just and proper.

Dated: New York, New York
December 1, 2015

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