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

PRESENT: GISCHE Justice PART 10

DAILEBEAST AND MEDIA INC

- v -

MATHEW MICHAELS

INDEX NO. 117024/08

MOTION DATE

MOTION SEQ. NO. 3

MOTION CAL. NO.

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

	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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
SEP 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/11/09

JUDITH J. GISCHE, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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INTELLECT ART MULTIMEDIA, INC.,

Plaintiff,

-against-

MATTHEW MILEWSKI, JOHN DOES 1-5, XCENTRIC VENTURES, LLC,

Defendants.

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Decision/Order
Index No.: 117024/08
Seq. Nos. : 002, 003

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers - Mot 002	**Numbered**
Xcentric n/m (CPLR § 3211)	1
EM affid	2
Pltf x-mot, exhs	3
JMK affirm, exhs	4
MM affid	5
6/25/09 Transcript	2

Papers - Mot 003	**Numbered**
Milewski's n/m (CPLR § 3211)	1
SG affid, exhs	2
SG affid, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This case arises out of the *pro se* defendant Matthew Milewski's alleged actions undertaken to express displeasure with plaintiff's services. Milewski allegedly posted a complaint on a website known as Ripoff Report located at www.ripoffreport.com and operated by defendant Xcentric Ventures, LLC ("Xcentric"). Both defendants now

move, pre-answer, to dismiss claims asserted against them.[1] Plaintiff opposes each motion and has cross-moved to amend its complaint and compel certain discovery.

The following facts are primarily based upon the complaint and the affidavit of Sanjay Gupta, President of Plaintiff. Plaintiff operates a college level summer program under the trade name Swiss Finance Academy ("SFA"). SFA offers course work in finance, business consulting and entrepreneurship. Plaintiff claims that it "has a highly satisfied customer base of more than 430 alumni."

On or about February 29, 2008, Milewski applied to SFA for the Summer 2008 program, and on or about March 5, 2008, Milewski was admitted to same. The program was held in Lugano, Switzerland, although Milewski states in his affidavit that he was originally told by plaintiff that the program was to be held in Verbier, Switerzerland. Milewski admits in his affidavit that he received emails from plaintiff notifying him that the program would be held in Lugano on or about May 5, 2008, but claims that he inadvertently overlooked those emails and didn't learn that the program would be held in Lugano until shortly before the program was scheduled to commence on July 15, 2008.

Although Milewski had paid a deposit to reserve his space in the Summer 2008 program, by July 15, 2008 when the program commenced, Milewski attended without having paid the balance of the tuition due, to wit: $7,000. Plaintiff claims that it allowed Milewski to participate in the program despite having failed to pay the tuition due because Milewski made specific representations that proceeds from a student loan

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[1] Milewski also asks that the court, in the alternative, treat his motion as one for summary judgment. However, since issue has not yet been joined, the court declines to do so. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

would be delivered to plaintiff.

Beginning on July 24, 2008, plaintiff maintains that Milewski "engaged in disruptive behavior, including, but not limited to being rude and insulting to plaintiff's staff members and inappropriate behavior in class." Plaintiff claims that as a result of such behavior, and Milewski's failure to pay the tuition, Milewski was expelled from the Summer 2008 program.

On or about July 19, 2008, a report was posted on ripoffreport.com regarding SFA. In that positing, the author, "Lilly", accused plaintiff of being a "bait & switch company," making "false promises," and being run "by two incompetent (sic) people." The report also contained the following statements:

[1] "[i]t is a 100% bait and switch scam";

[2] "[t]hey tell you where the location is then a week before the program starts they change the location and say no refunds whatsoever";

[3] "[t]hey tell you a week before you come you must bring your OWN pillow, sheets, comforter and shower towels";

[4] "all we got for breakfast was TOAST";

[5] "everything they taught was a 'JOKE'";

[6] if I took a poll from the 150 people that went this summer 130 peopel would ask for a refund cause they know they got worked";

[7] "[e]ven there [sic] phone number is fake";

[8] "its [sic] all a joke and a scam that needs to be stopped"; and

[9] "[a]lmost all of the people where [sic] very disappointed with the program."

Plaintiff claims that after "considerable research and investigation, and upon

information and belief, the author of the July 19, 2008 posting on ripoffreport.com is Milewski." Plaintiff also contends in a conclusory manner that Xcentric "plays a significant role in creating, developing, or transforming the information provided by its users" and that "[t]he very name and nature" of Ripoff Report is designed to "elicit" and "prompt" users to publish "defamatory information."

Plaintiff additionally claims that on August 27, 2008, an update was made to the posting, which also contains defamatory information. Plaintiff, however, does not know at this time the author(s) of this update, nor does plaintiff otherwise allege any purported defamatory comments published in the August 27, 2008 update.

Plaintiff claims that enrollment in its Summer 2009 program has fallen by approximately 70%, which is attributable to Milewski's posting.

In the complaint, plaintiff asserts the following causes of action: [1] defamation against Milewski (first cause of action), John Does 1-5 (second cause of action) and Xcentric (third cause of action); [2] breach of contract against Milewski (fourth cause of action); [3] products liability against Xcentric (fifth cause of action);

Milewski moves to dismiss the first cause of action for defamation. Xcentric moves to dismiss the third cause of action for defamation and the fifth cause of action for products liability. Plaintiff cross-moves to amend the complaint to add causes of action against Xcentric for: [1] tortious interference with prospective business relations (sixth cause of action); [2] tortious interference with contractual relations (seventh cause of action); [3] breach of contract (eighth cause of action); [4] negligent misrepresentation (ninth cause of action); [5] common law negligence (tenth cause of action); and [6] injurious falsehoods (eleventh cause of action). Plaintiff also seeks an

order directing Xcentric to provide plaintiff with identifying information for its users "Lilly", "Disappointed," "Anonymous," "Not Jeremy," and "Richard."

Discussion

The court accepts the facts alleged by plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

The court will first address the defendants' motions to dismiss the claims asserted in the original verified complaint, since plaintiff, in cross-moving to amend the complaint, does not seek to alter or otherwise amplify its original claims contained therein.

Milewski's motion to dismiss

Milewski moves to dismiss the first cause of action for defamation. He denies being the author of the purportedly defamatory posting. However, he argues on this motion that the allegedly defamatory statements upon which plaintiff's claim is premised are expressions of opinion and are, therefore, protected First Amendment speech. In opposition, plaintiff clarifies its claim for defamation in its memorandum of law at pgs. 6 - 8, and argues that the following statements are all "false assertions of fact":

[1] "[I]t is a 100% bait and switch scam."

[2] "[T]hey tell you where the location is then a week before the program starts they change the location and say no refunds whatsoever."

[3] "[A]ll we got for breakfast was TOAST."

[4] "Its [sic] all a joke and a scam that needs to be stopped."

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 NY2d 453 (1967). The elements of libel are: [1] a false and defamatory statement of fact; [2] regarding the plaintiff; [3] which are published to a third party and which [4] result in injury to plaintiff. Idema v. Wager, 120 FSupp2d 361 (SDNY 2000); Ives v. Guilford Mills, 3 FSupp2d 191 (NDNY 1998). Certain statements are considered libelous per se. They are limited to four categories of statements that: [1] charge plaintiff with a serious crime; [2] tend to injure plaintiff in its business, trade or profession; [3] plaintiff has some loathsome disease; or [4] impute unchastity. Liberman v. Gelstein, 80 NY2d 429 (1992); Harris v. Hirsh, 228 AD2d 206 (1st Dept 1996). Where statements are libelous per se, the law presumes that damages will result and they need not be separately proved.[2]

A claim for defamation is defeated by a showing that the published statements are substantially true. Newport Service & Leasing v. Meadowbrook Distributing Corp., 18 AD3d 454 (2d Dept 2005). They are also subject to a defense that the material, when read in context, would be perceived by a reasonable person to be nothing more than a matter of personal opinion. Immuno AG v. Moor-Jankowski, 77 NY2d 235 (1991).

It is the court's responsibility in the first instance to determine whether a

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[2]There is some concern that the doctrines of per se defamation may not withstand first amendment constitutional scrutiny. See: Liberman v. Gelstein, 80 NY2d 429, 434 (1992), *supra*, footnote 1. Since this argument has not been raised at bar, the court does not reach it.

publication is susceptible to the defamatory meaning ascribed to it. Golub v. Enquirer/Star Group, Inc., 89 NY2d 1074 (1997); Rejent v. Liberation Publications Inc., 197 AD2d 240 (1st Dept 1994). A court should neither strain to place a particular construction on the language complained of, nor should the court strain to interpret the words in their mildest and most inoffensive sense, to hold them non-libelous. Rejent v. Liberation Publications, Inc., *supra.*

Competing with an individual's right to protect one's own reputation, is the constitutionally guaranteed right to free speech. One of the staples of a free society is that people should be able to speak freely. United States Constitution v. New York State Constitution, Article I § 8. Consequently, statements that merely express opinion are not actionable as defamation, no matter how offensive, vituperative or unreasonable they may be. Immono AG v. Moore-Jankowski, *supra*. Moreover, in the context of statements pertaining to issues of consumer advocacy, courts have been loathe to stifle someone's criticism of goods or services. Tzougrakis v. Cyveillance, Inc., 145 FSupp2d 325 (SDNY 2001); Themed Restaurants, Inc. v. Zagat Survey, LLC, 21 AD3d 826 (1st Dept 2005); Frommer v. Abels, 193 AD2d 513 (1st Dept 1993); Behr v. Weber, 172 AD2d 441 (1st Dept 1991). The courts have recognized that personal opinion about goods and services are a matter of legitimate public concern and protected speech.

The court holds that the cause of action for defamation against Milewski must be dismissed because the challenged speech is merely an alleged statement of Milewski's personal opinion about the quality of services provided by plaintiff.

In deciding whether the challenged language constitutes statements of fact or opinion, the court's role is to determine whether the reasonable reader would have

believed that the statements were conveying facts about the plaintiff. Millus v. Newsday, 89 NY2d 840 (1996); Brain v. Richardson, 87 NY2d 46 (1995). The analysis requires the court to look at the content of the whole communication, its tone and apparent purpose, in order to determine whether a reasonable person would view them as expressing or implying facts. Immuno AG v. Moor-Jankowski, *supra*.

The New York Court of Appeals has held that the following factors should be considered in distinguishing fact from opinion: [1] whether the language used has a precise meaning or whether it is indefinite or ambiguous; [2] whether the statement is capable of objectively being true or false, and [3] the full context of the entire communication or the broader social context surrounding the communication. Brain v. Richardson, *supra*. Moreover, the Court of Appeals makes a distinction between a statement of opinion that implies a factual basis that is not disclosed to the reader and an opinion that is accompanied by a recitation of facts on which it is based. Gross v. New York Times, 82 NY2d 146 (1993). The former is actionable, the later is not.

Here the web site presents to others as a personal statement by its maker. The facts on which the maker bases his conclusions are his experiences in dealing with plaintiff and while attending plaintiff's SFA program in June 2008. The alleged defamatory statements in the complaint are susceptible to ambiguous meanings. Loose, figurative or hyperbolic statements, even if deprecating to the plaintiff, are not actionable. Dillon v. City of New York, 261 AD2d 34 (1st Dept 1999).

Perhaps most compelling however, is the fact that the website, when viewed in its full context, reveals that Milewski is a disgruntled consumer and that his statements reflect his personal opinion based upon his personal dealing with plaintiff. They are

subjective expressions of consumer dissatisfaction with plaintiff and the statements are not actionable because they are Milewski's personal opinion. Since the statements are protected opinion, the first cause of action is dismissed.

Xcentric's motion to dismiss

Xcentric seeks to dismiss the complaint against it on grounds that the court lacks personal jurisdiction and, alternatively, to dismiss the causes of action for defamation and products liability for failure to state a claim.

Since it is undisputed that Xcentric is not subject to general jurisdiction based on presence or domicile in New York under CPLR § 301, in order for plaintiff to avoid dismissal for lack of personal jurisdiction, the court must find that Xcentric is subject to long-arm jurisdiction in New York. Plaintiff argues that Xcentric is subject to long-arm jurisdiction with respect to the defamation claim pursuant to CPLR § 302 (a) (1), and with respect to the products liability claim pursuant to CPLR § 302 (a) (1) and (a) (3).

Where a defendant moves to dismiss the complaint asserting that the court lacks personal jurisdiction over them, the plaintiff bears the burden of proof (see Barington Capital Group, L.P. v. Arsenault, 281 AD2d 166 [1st Dept 2001]). However, in responding to such a motion, plaintiff need only demonstrate that facts "may exist" to exercise personal jurisdiction over the defendant (Hessel v. Goldman, Sachs & Co., 281 AD2d 247 [1st Dept 2001]).

To determine whether a non-domiciliary may be sued in New York, the court must first determine whether New York's long-arm statute, CPLR § 302, confers jurisdiction over it in light of its contacts with this State. LaMarca v. Pak-Mor Mfg. Co., 95 NY2d 210 (2000). If any of the provisions of CPLR § 302 apply, then the court must

determine whether the exercise of jurisdiction comports with due process (id). The purpose of CPLR § 302 is to extend New York jurisdiction to nonresidents who have engaged in some purposeful activity in New York in connection with the cause of action asserted. Parke-Bernet Galleries Inc. v. Franklyn, 26 NY2d 13 (1970).

Under CPLR 302 (a) (1), "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." The issue of whether an internet website standing alone is sufficient to confer jurisdiction is a developing area of law. Courts typically look at the nature of the website. A defendant is more likely to be found to be transacting business within the state vis-a-vis a website if the website is "interactive," thereby permitting the exchange of information between the website users and the defendant, as opposed to "passive" websites that merely display information and do not permit an exchange thereof. See Hollins v. U.S. Tennis Ass'n, 469 FSupp2d 67, 74 (EDNY.2006); Bankrate, Inc. v. Mainline Tavistock, Inc., 18 Misc3d 1127(A) (Sup Ct, Kings Co 2008); Sayeedi v. Walser, 15 Misc3d 621 (N.Y.City Civ.Ct. 2007); Baggs v. Little League Baseball Inc., 17 Misc3d 212 [Richmond County, Sup.Ct.2007]; Chestnut Ridge Air, Ltd. v. 1260269 Ontario Inc., 13 Misc3d 807, 810 (Sup Ct, N.Y. Co 2006); see also Aqua Prods., Inc. v. Smartpool, Inc., 2005 WL 1994013 (SDNY 2005); Heidle v. The Prospect Reef Resort, Ldt., 364 F Supp2d 312 (WDNY 2005); Shultz v. Ocean Classroom Found., Inc., 2004 WL 488322 (SDNY 2004); In re Ski Train Fire in Kaprun, Austria on November 11, 2000, 230 FSupp2d 376 (SDNY 2002); Spencer Trask Ventures v. Archos S.A., 2002 WL 417192 (SDNY 2002); Thomas Publishing Co. v. Industrial Quick Search, Inc., 237 FSupp2d 489 (SDNY

2002); Citigroup Inc. v. City Holding Co., 97 FSupp2d 549 (SDNY 2000).

Plaintiff argues that Ripoff Report is an interactive website. Plaintiff claims that Xcentric makes money by "soliciting business from the companies and individuals who have had negative posts made against them. For a fee, Xccentric offers to enroll companies and/or individuals in a program by which Xcentric will 'follow-up' with the aggrieved individuals or entities" to resolve the complaints posted on Ripoff Report. Plaintiff further maintains that in this case, Xcentric has "rights" to Milewski's posting via Xcentric's Terms of Service. Plaintiff further claims that Xcentric drafted its own headline to draw attention to Milewski's posting.

Here, the court finds that plaintiff has alleged sufficient facts to show that Xcentric does indeed transact business within New York through its Ripoff Report website, given the high level of interactivity of the website, the undisputed fact that information is freely exchanged between website users, i.e. Milewski, and Xcentric, Xcentric's alleged role in manipulating user's information and data, and Xcentric's solicitation of companies and individuals to "resolve" the complaints levied against them on Ripoff Report. Since plaintiff's claims against Xcentric arise from Milewski's alleged posting on Xcentric's website, CPLR § 302 (a) (1) applies to the facts in this case.

Next, the court must determine whether due process will be served by the exercise of long-arm jurisdiction over Xcentric (International Shoe Co. v. Washington, 326 US 310 [1945]; LaMarca, *supra*). The due process inquiry consists of a two-part analysis: [1] minimum contacts must exist between the defendant and the forum; and [2] the assertion of jurisdiction must not offend traditional notions of fair play and substantial justice. CPLR § 302, Commentary C302:3. Here, the court finds that the

exercise of personal jurisdiction over Xcentric comports with due process. New York has an interest in providing a forum to redress the harms that flow from alleged defamatory statements directed to readers within its borders, even if plaintiff is a nonresident of New York. See i.e. Keeton v. Hustler Magazine, Inc., 465 US 1473 (1984); see also Calder v. Jones, 465 US 783 (1984). Moreover, Xcentric's activities giving rise to plaintiff's claims are such that it should have reasonably anticipated being haled into New York court (see generally World-Wide Volkswagen Corp. v. Woodson, 444 US 286 [1980]).

Finally, Xcentric has failed to demonstrate that the assertion of jurisdiction here is unreasonable (see Burger King Corp. v. Rudzewicz, 471 US 462 [1971]). The mere fact that Xcentric is an Arizona corporation does not, standing alone, establish undue burden on Xcentric because it must defend this action in New York. Accordingly, Xcentric's motion to dismiss based on lack of personal jurisdiction is denied.

Substantively, Xcentric seeks to dismiss the defamation and products liability causes of action for failure to state a claim. Plaintiff has alleged in its third cause of action that "Xcentric played a significant role in creating, developing and/or transforming the information provided by users of" Ripoff Report. While plaintiff generally claims that Xcentric created defamatory headings for Milewski's purported posting, plaintiff has failed to set forth the allegedly defamatory headings in the complaint. CPLR § 3016 (a) requires that the particular words complained of be set forth in a complaint alleging defamation. Thus, plaintiff's defamation claim against Xcentric fails because plaintiff has not sufficiently pled the alleged defamatory statements authored by Xcentric.

Moreover, to the extent that the third cause of action is premised upon

statements made by Milewski and/or other users of Ripoff Report, Xcentric is protected by the Communications Decency Act, which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 USCA § 230 (c) (1). Accordingly, the third cause of action is hereby severed and dismissed.

Plaintiff's fifth cause of action for products liability must also be dismissed. First, plaintiff has failed to demonstrate that, as a matter of law, the Ripoff Report website is a product so that Xcentric should be held strictly liable for any "injury" caused thereby. Although plaintiff argues that the national trend is moving towards a more expansive definition of the term "product" in products liability analysis, this court is not persuaded that this website in the context of plaintiff's claims is a "product" which would otherwise trigger the imposition of strict liability. Here, plaintiff's claims arise from the fact that the website is a forum for third-party expression. Xcentric further solicits business through the website, but what it offers is the "service" of following up with posters and resolving their complaints.

Regardless, the court does not need to reach this novel issue, since plaintiff has not even alleged that the website was in a defective condition which gave rise to its claimed injuries. Rather, it was Milewski's purported posting that gave rise to plaintiff's injuries, not Xcentric's website itself. The claim that Ripoff Report was defectively designed to elicit defamatory statements from its users is devoid of commonsense and reasoning, is unsupported by law, and is, therefore, reject.

Accordingly, the fifth cause of action is hereby severed and dismissed.

Plaintiff's cross-motion

Plaintiff cross-moves for: identifying information from Xcentric and to amend its complaint. The court will first address the requested discovery.

Plaintiff seeks identifying information for Xcentric's users named "Lilly", "Disappointed," "Anonymous," "Not Jeremy," and "Richard." At the outset, requests for information regarding "Disappointed," "Anonymous," "Not Jeremy," and "Richard" are overbroad because it is undisputed that plaintiff's allegations contained in the complaint do not arise from postings made by these users. To the extent that plaintiff seeks identifying information for "Lilly", the author of the only posting from which plaintiff claims it was defamed, this demand is moot, since the court has herein ruled that Lilly's statements are not actionable. Since plaintiff otherwise has no need for this information, that aspect of the cross-motion is hereby denied.

Plaintiff further seeks to amend its complaint to add various causes of action against Xcentric. Each of these proposed causes of action will be discussed hereafter. [1] tortious interference with prospective business relations against Xcentric (sixth cause of action); [2] tortious interference with contractual relations against Xcentric (seventh cause of action); [3] breach of contract against Xcentric (eighth cause of action); [4] negligent misrepresentation against Xcentric (ninth cause of action); [5] common law negligence against Xcentric (tenth cause of action); and [6] injurious falsehoods against Xcentric (eleventh cause of action).

In the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025 (b). Fahey v. County of Ontario, 44 NY2d 934 (1978). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43

NY2d 400 (1977); Adams Drug Co. v. Knobel, 129 AD2d 401 (1st Dept 1987). However, an order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. Thus, "the sufficiency or meritoriousness of a proposed pleading or matter" should be resolved at the outset "to obviate the possibility of needless time consuming litigation." Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 (1982). The moving party is required to show that it the new claims have a colorable basis. NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 (1st dept. 1990).

In evaluating prejudice, the court may look at any delay and its effect on the parties' positions in the underlying litigation. There should be some explanation for the delay, and prejudice may be found if some special right is lost by the passage of time or if undue expense is implicated. Barbour v. Hospital for Special Surgery, 169 AD2d 385 (1st dept. 1991).

Plaintiff's claim for tortious interference with prospective business relations is not tenable because plaintiff has failed to allege the specific business relationships it was prevented from entering into as a result of Xcentric's alleged interference. Burns Jackson Miller Summit & Spitzer v. Lindner, 88 AD2d 50 (2d Dept 1982). The fact that enrollment is down, as of February, by 70%, is a mere conclusion which fails to otherwise support the proposed claim.

Plaintiff's proposed claim for tortious interference with contractual relations against Xcentric also fails because plaintiff has failed to allege the specific contracts that were interfered with by Xcentric. See M.J. & K. Co., Inc. v. Matthew Bender and Co., Inc., 220 AD2d 488 (2d Dept 1995).

Plaintiff's breach of contract claim is not colorable since plaintiff is not a party to the contract that was allegedly breached, to wit, the published Terms of Service to which third-parties purportedly agree to before posting on Ripoff Report. See Furia v. Furia, 116 A.D.2d 694 (2d Dept 1986).

Plaintiff's negligent misrepresentation claim fails because plaintiff has not alleged a special or fiduciary relationship with the defendant. See Fab Industries, Inc. v. BNY Financial Corp., 252 AD2d 367 (1 Dept 1998). Moreover, the alleged misrepresentation was made by Xcentric to third-parties, not plaintiff.

Plaintiff's negligence claim against Xcentric fails because plaintiff has failed to allege that Xcentric owed it a duty which it breached.

Finally, plaintiff's claim for injurious falsehoods fails since plaintiff has failed to allege special damages. See BCRE 230 Riverside LLC v. Fuchs, 59 AD3d 282 (1st Dept 2009).

Accordingly, plaintiff's cross-motion is denied in its entirety.

Since the only remaining cause of action is for breach of contract against Milewski, and plaintiff's claimed damages of $7,000 are within the jurisdictional limit of the Civil Court of the City of New York, the court hereby orders, pursuant to CPLR 325 (d), that this case be removed from this Court and transferred to the Civil Court of the City of New York.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant Milewski's motion to dismiss is granted and the first cause of action is hereby severed and dismissed; and it is further

ORDERED that defendant Xcentric's motion to dismiss is granted and the complaint against it is hereby severed and dismissed; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that the remainder of this action, bearing Index No. 117024/08 be, and it hereby is, removed from this Court and transferred to the Civil Court of the City of New York, County of New York; and it is further

ORDERED that the Clerk of New York County shall transfer to the Clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the Clerk of the Civil Court of the City of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the Clerk of the County of New York, shall issue to this action a Civil Court Index Number; and it is further

ORDERED that the above-entitled action be, and is hereby, transferred to said Court, to be heard, tried, and determined as if originally brought therein but subject ot the provisions of CPLR 325 (d).

Any requested relief not otherwise addressed herein has nonetheless been considered by the court and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 11, 2009

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.