

STATE OF MAINE  
WALDO, SS.

SUPERIOR COURT  
CIVIL ACTION  
Docket No. CV-10-41

Alexis Ingraham et al.,  
Plaintiffs

v.

Order (Motion to Dismiss)

Madeline B. Gray,  
Defendant

Pending before the court is the defendant's motion to dismiss all claims set out in the amended complaint. The defendant argues that those claims do not set out a basis for relief. *See* M.R.Civ.P. 12(b)(6).

"A motion to dismiss tests the legal sufficiency of the complaint." *McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994). On a motion to dismiss, the court takes the allegations to be true. *In re Wage Payment Litigation*, 2000 ME 162, ¶ 3, 752 A.2d 217, 220. From this starting point, the complaint then is examined "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *McAfee*, 637 A.2d at 465. A dismissal is proper "only when it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Hall v. Board of Environmental Protection*, 498 A.2d 260, 266 (Me. 1985). *See also Heber v. Lucerne-in Maine Village Co.*, 2000 ME 137, ¶ 7, 755 A.2d 1064, 1066.

In count 1, the plaintiffs assert a claim for defamation. To prevail on a defamation claim, the claimant must establish (a) that the actor made a false and defamatory statement concerning the claimant; (b) that the statement was made as an unprivileged publication to a third party; (c) that the actor acted with fault amounting at least to negligence; and (d) that the statement was either actionable irrespective of special

harm or that the claimant suffered special harm caused by the publication. *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991). The defendant argues here that in the amended complaint, the plaintiffs do not adequately allege that her statements were false or that they were made with the requisite level of fault. A review of the pleading reveals that the plaintiffs have made sufficient allegations of those elements of their claim. See Amended Complaint at ¶¶ 5, 6 and 8. The pendency of a criminal action, even if a proper subject of judicial notice, does not defeat the adequacy of those allegations.

The defendant next moves to dismiss count 2, which combines claims for negligent infliction of emotional distress and intentional infliction of emotional distress. A claim for NIED requires proof of, among other things, bystander liability or a special relationship between the claimant and respondent. *Curtis v. Porter*, 2001 ME 158, ¶ 19, 784 A.2d 18, 25-26. In the absence of one of those circumstances, the respondent is not subject to a duty to act reasonably to avoid inflicting emotional harm on the claimant. *Id.*, 784 A.2d at 25. Here, the plaintiffs have not alleged either of these circumstances, and thus the defendant could not be found to owe them such a duty necessary as a predicate for a NIED claim. The plaintiffs' NIED claim is therefore subject to dismissal.

The defendant then contends that the plaintiffs may not pursue a claim for IIED, because any damages available under that claim would be subsumed by any recovery for defamation. The Law Court has held that psychic damages flowing from defamatory conduct cannot be channeled into a claim for NIED or IIED. *Riplett v. Bemis*, 672 A.2d 82, 87-88 (Me. 1996). See also *Norris v. Bangor Publishing Co.*, 53 F.Supp.2d 495, 508-09 (D.Me. 1999). Here, the plaintiffs allege that the conduct underlying their NIED and IIED claims is the same as alleged in their defamation count. The NIED and IIED claims are therefore barred because the allegedly actionable conduct is the same. The defendant is entitled to dismissal of these counts for this reason, in addition to the separate ground supporting dismissal of the claim for NIED.

Finally, the defendant moves to dismiss count 3 of the complaint, which purports to state a claim for "malice." Although the malice alleged in count 3 may support a claim for punitive damages, it is not a separate cause of action. Therefore, the court dismisses count 3 as a distinct liability claim but treats the remaining cause of action, sounding defamation, to include a claim for punitive damages.

The entry shall be:

For the foregoing reasons, the defendant's motion to dismiss the complaint is granted in part and denied in part. Count 2 is dismissed for failure to state a claim on which relief can be granted. Count 3 shall be treated as a claim for damages under count 1. The motion to dismiss count 1 is denied.

Dated: November 1, 2010

  
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Justice, Maine Superior Court