DOCKET NO: FST CV 21-6052725 S	: SUPERIOR COURT
DECCAN VALUE LLC	: JUDICIAL DISTRICT OF
V.	: STAMFORD-NORWALK
MALIK, JOHN I.	: AT STAMFORD
	: MAY 21, 2024

MEMORANDUM OF DECISION

Plaintiffs[1] have moved for summary judgment to dismiss the counterclaims alleged by defendant John Malik ("Malik"). For the reasons stated below, the motion is denied.

The Standards for Deciding a Motion for Summary Judgment

"The standards . . . [for] review of a . . . motion for summary judgment are well established. Practice Book [§17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of

[1] Plaintiffs are Deccan Value LLC, Deccan Value Investors GP LLC, Deccan Value Investors L.P. and additional counterclaim defendant Vinit M. Bodas ("Bodas") (collectively "Deccan").

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material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . ." *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 115-16 (2012), quoting *H.O.R.S.E. of Connecticut, Inc. v. Washington*, 258 Conn. 553, 558-60 (2001). (Citations omitted).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent...." *Zielinski v. Kotsoris*, 279 Conn. 312, 318 (2006).

Once the movant for summary judgment has satisfied the initial burden of showing the absence of a material issue of fact, the burden shifts to the opponent to establish that there is a genuine issue of material fact: "it is then 'incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.'" *Iacurci v. Sax*, 313 Conn. 786, 799 (2014), quoting *Connell v. Colwell*, 214 Conn. 242, 251 (1990). The nonmoving party, however, has no obligation to submit documents establishing the existence of a genuine issue of material fact until the moving party has met its burden of "showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any [such]

issue of material fact." *State Farm Fire & Casualty Co. v. Tully*, 322 Conn. 566, 573 (2016).

Intentional Infliction of Emotional Distress

In *Maselli v. Regional School District Number 10*, 198 Conn.App. 643, 664-65 (2020), the Appellate Court reiterated the elements and the role of a court in evaluating a claim of intentional infliction of emotional distress:

> "'In order for the plaintiff to prevail in a case for liability under ... [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. ... Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine. ... Only where reasonable minds disagree does it become an issue for the jury.' ... 'Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society .... Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! ...' ....
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> '[I]n assessing a claim for intentional infliction of emotional distress, the court performs a gatekeeping function. In this capacity, the role of the court is to determine whether the allegations of a complaint, counterclaim or cross complaint set forth behaviors that a reasonable fact finder could find to be extreme or outrageous. In exercising this responsibility, the court is not [fact-finding], but rather it is making an assessment whether, as a matter of law, the alleged behavior fits the criteria required to establish a claim premised on intentional infliction of emotional distress.'" (Citations omitted).

Deccan argued that the conduct described in the evidence was not "extreme and outrageous" as a matter of law. "'The standard for extreme and outrageous behavior has historically been construed very strictly'; ... and it has been said that '[t]his tort must be strictly policed to avoid turning ordinary life and its insults and ignorant behavior into an endless and uncontrollable pool for litigation.'" 198 Conn.App. at 666 (citations omitted).

Malik alleged that he received a threatening, untraceable, email from an anonymous person using a pseudonym he believed was sent by Bodas to intimidate him from participating in the investigation of Bodas and Deccan by the Securities Exchange Commission ("SEC"), which he refers to as "the Intimidation Email."[2] Malik perceived the Intimidation Email as a death threat.

This Court denied a motion to strike the intentional infliction of emotional distress counterclaim and concluded based on the facts pled:

> "The Court cannot conclude, as a matter of law, that the allegations that Bodas sent an anonymous email that Malik was under constant surveillance and warned about what reasonably could be construed as implicit threats of violence by foreign agents 'with a big budget' hired by an unnamed person should he cooperate with the SEC investigation could not constitute extreme or outrageous behavior to sustain a claim of intentional infliction of emotional distress. Conduct alleged to be extreme and outrageous must be evaluated in the context of the facts alleged. See *Maguire v. Kane*, 2011 WL 230619, * 5 (Conn. Super. 2021)(Krumeich, J.T.R). '[a] reasonable jury, viewing the email in

[2] The Intimidation Email stated as follows:
"Mr. Malik
I represent an Israeli investigative firm of former Mossad agents. We have been provided a very large budget to investigate you.
We have found a lot of incriminating information about you. Mr. Saliba has provided us photographs and taped conversations about your association with male and female models. You may recall the attached Instagram posting. We have located the female prostitute who works as your beard, if you do not stop your aggressive, unethical and shameful behavior regarding our client we intend to do everything possible to make this information easily accessible.
Stop the blackmail now.
We are watching your every move- look around!
LAST WARNING."

context of the circumstances under which it was sent and received, could find that Bodas and Deccan intentionally caused Malik extreme emotional distress under 'facts that to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! ...' *Maselli*, 198 Conn.App. at 665."

The previous decision is not binding because the standards for deciding a motion for summary judgment are different than those for deciding a motion to strike. See e.g., *Town of Sprague v. Gentes*, 2023 WL 3071165 *3 (Conn.Super. 2023) (O'Hanlan, J.) (motion to strike decision is not law of the case). The Court must review the evidence to determine whether the parties may satisfy their respective burdens summarized above.

There was sufficient evidence that Bodas sent the Intimidation Email to frighten and intimidate Malik from cooperating with the SEC investigation of Bodas and Deccan to satisfy the "extreme and outrageous" element of the tort of intentional infliction of emotional distress.

Deccan argued that Malik cannot satisfy the element that "the emotional distress sustained by the plaintiff was severe...." The *Maselli* Court addressed the "severe" emotional distress element:

> "The distress necessary to sustain a claim of intentional infliction of emotional distress has been defined simply, but clearly, as 'mental distress of a very serious kind.' ... Our appellate courts, however, have never adopted a bright-line test for determining what kinds of mental distress are sufficiently serious to sustain a claim of intentional infliction of emotional distress, but our trial courts have consistently used the standard set forth in the Restatement. ...
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> Comment (j) to the Restatement (Second) of Torts, § 46, provides in relevant part: 'The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity." 1 Restatement (Second), supra, § 46, comment (j),

pp. 77–78. Emotional distress is unlikely to be considered severe in the absence of treatment, medical, psychological, or otherwise. ... '[T]he only evidence of severe emotional distress that the plaintiff presented with respect to this conduct is that she became frightened and choked up upon being told that her career might be in jeopardy. There was no evidence that the plaintiff was in distress for an extended period or that she sought medical treatment.'... Mere embarrassment, humiliation and hurt feelings do not constitute severe emotional distress. 'common feelings and emotions, such as hurt feelings, embarrassment and humiliation, are things we all experience in our daily lives, and thus things we must learn to live with'." 198 Conn.App. at 667-68 (citations omitted).

Deccan argued that Malik did not suffer severe distress from the Intimidation Email, noted there was no evidence he sought any psychological or medical treatment and cited deposition testimony that Malik did not take the threat seriously or fear for his life. Deccan also challenged whether the Intimidation Email could reasonably be construed as a death threat on its face.

Malik submitted evidence that he was in fear and distress for a considerable period and that he suffered sleeplessness, physical distress and upset stomach he treated by medications due to anxiety over the explicit and explicit threats he perceived as conveyed under the Intimidation Email.[3] If the jury believed Malik, it could find that he suffered severe distress over an extended period.[4] His failure to

[3] Deccan argued that the Intimidation Email could not reasonably be perceived to be a death threat. A reasonable jury could conclude that the implicit threat perceived by Malik was not irrational and that inducing fear of assault or assassination may have been an intended result from the Intimidation Email.

[4] There is no bright line test for severe emotional distress. See DeLorco v. Waveny Care Ctr, Inc., 2018 WL 4078276 *10 (D.Conn. 2018): "[w]hile Connecticut courts have not created a bright-line test for determining the requisite level of severity, courts frequently consider intensity and duration of the harm as relevant factors." A reasonable jury could conclude from subjective and objective evidence Malik's emotional distress was more severe and lasting than "[m]ere embarrassment, humiliation and hurt feelings do not constitute severe emotional distress." 198 Conn.App. at 667-68. *Squeo v. Norwalk Hosp. Ass'n*, 316 Conn. 558, 586-92 (2015), cited by Deccan, concerned the test for bystander emotional distress that the Supreme Court: "to satisfy the fourth prong of the *Clohessy* test and assert a valid claim for bystander emotional distress, a bystander must suffer emotional distress that is severe enough either to warrant a psychiatric diagnosis or to otherwise substantially impair his or her ability to cope with life's daily routines and demands." This stringent test has never been applied to a claim of intentional infliction of emotional distress.

seek medical or psychological treatment under the circumstances as he perceived them would not preclude proof of severe emotional distress as a matter of law.

As the Appellate Court reminded in *Sen v. Tsiongas*, 192 Conn.App. 188, 197 (2019): "'[w]hen deciding a summary judgment motion, a trial court may not resolve credibility questions raised by affidavits or deposition testimony submitted by the parties.'" Id. quoting *Doe v. West Hartford*, 328 Conn. 172, 197, 177 A.3d 1128 (2018). Genuine and material issues of fact preclude summary judgment on the intentional infliction of emotional distress count.

Negligent Infliction of Emotional Distress

In *Dorfman v. Smith*, 342 Conn. 582, 612 n. 14 (2022), the Supreme Court stated the elements of a claim of negligent infliction of emotional distress:

> "The elements of the tort of negligent infliction of emotional distress are: '(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress.'"

As noted above, Malik has produced evidence from which a reasonable jury may find his "emotional distress was severe enough that it might result in illness or bodily harm", 342 Conn. at 612 n. 14, and Malik can satisfy the remaining elements based on the evidence submitted. Genuine and material issues of fact preclude summary judgment on the negligent infliction of emotional distress count.

Breach of Contract (Disparagement)

The parties agreed that third-party discovery on the disparagement counterclaim is ongoing so the Court will defer ruling on this part of the summary judgment motion. The parties will supplement the record and briefing on this issue after discovery.

Breach of Contract (Indemnification)

Malik has asserted he has the right to be indemnified for his fees and costs incurred in connection with the SEC investigation under the applicable Deccan partnership agreements. Deccan has countered that Malik, as a former partner, is not entitled to be indemnified because under the agreements "Indemnified Party" must be a "Partner," and the term "Partner" explicitly "shall exclude any persons or entities who cease to be Partners." Malik argued that he remained a partner until the end of March 2020 and the activities at issue in the SEC investigation occurred while he was a partner in 2019.

The agreements are governed by Delaware Law. In *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (2010), the Delaware Supreme Court observed:

> "When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions. On the contrary, when we may reasonably ascribe multiple and different interpretations to a contract, we will find that the contract is ambiguous. An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract." (Footnotes omitted).[5]

[5] "We will not read a contract to render a provision or term 'meaningless or illusory.'" 991 A.2d at 1160 (footnote omitted). "'Under general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless.'" 991 A.2d at 1160 n.17, quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del.1992).

The language of the agreements is ambiguous.[6] The term "Indemnified Party" is defined as a "Member" in the Limited Partnership agreement (Section 2.10).[7] Section 2.11 (a) provides "[t]o the fullest extent permitted by law, the Company shall indemnify and hold harmless each Indemnified Party from and against any and all Indemnified Losses suffered or sustained by such Indemnified Party by reason of any act, omission or alleged act or omission arising out of, related to or in connection with the Company or this Agreement, or any and all claims, demands, actions, suits, or proceedings (civil, criminal, administrative or investigative ...), actual or threatened, in which an Indemnified Party may be involved as a party or otherwise, arising out of or in connection with such Indemnified Party's service to or on behalf of, or management of the affairs or assets of, the Company, or which relate to the Company...." The provision that Deccan relies on is in the preamble and defines "Partners" as any person admitted to the partnership and excludes any person who ceases to be a partner and provides the agreement governs the partnership. There is no language that expressly takes away the indemnity protection from withdrawn partners for activity undertaken while they were an "Indemnified Party." A reasonable jury could find that Malik is entitled to enforce the indemnification provisions under these circumstances. Certainly, Malik could seek indemnification during the period before his withdrawal from the partnership became effective.

[6] The language in the applicable sections of the Deccan Value Investors GP LLC Limited Liability Company Agreement is virtually identical and equally ambiguous.

[7] Using "Member" rather than "Partner" may have been a cutting and pasting error when the two agreements with identical indemnification provisions were drafted.

Attorney's Fees and Costs (Count Seven)

"Connecticut case law follows the general rule, frequently referred to as the 'American Rule,' that attorney's fees are not allowed to the prevailing party as an element of damages unless such recovery is allowed by statute or contract." *Atl. Mortg. & Inv. Corp. v. Stephenson*, 86 Conn. App. 126, 132 (2004).

Deccan argued that Malik cannot recover as a matter of law under the attorney's fees provision in the agreements, which provide:

> "Unless prohibited by applicable law, the claimant in any such dispute that fails to prevail on each and every claim raised therein shall be required to pay to the other party all reasonable out of pocket costs, including, but not limited to, attorneys' fees, incurred by such other party in connection with the dispute."

Interpreted literally, Malik may recover his litigation costs, including attorney's fees if he prevails as claimant and Deccan fails to prevail on each and every one of his claims. The same would be true if Deccan fails to prevail on all its claims against Malik. Since no trial has yet to occur and no verdict has been rendered this motion is premature.[8]

Moreover, the language is ambiguous in that it appears to award fees against a party who does not prevail on a single claim but prevails on all other claims or a majority of claims, perhaps because it is stated negatively unlike most prevailing party attorney's fees provisions; the provision as written may be against public policy as a penalty,[9] but may be interpreted as non-punitive if the recovery of fees is on a claim-by-claim basis, rather than interpreted to penalize a party who prevails on all claims but one or even a majority of claims.

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[8] The "unless otherwise prohibited by applicable law" language suggests that at some point this provision will be subject to motion practice outside the ambit of this motion. Although this is a fully integrated contract, subsequent modifications also may ameliorate the odd punitive interpretation advanced by Deccan. See e.g., *Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1229 (De.Ch. 2000).

[9] See e.g., *Vines v. Orchard Hills, Inc.*, 181 Conn. 501, 513 (1980).

Malik alleged, to the extent that the attorney's fees provisions is read literally it would punish a party who prevails on some but not all claims and would be unconscionable. Delaware would apply unconscionability to enforce some but not all of an unconscionable contract found to be oppressive. See e.g., *James v. National Financial, LLC*, 132 A.3d 799, 813 (2015). This motion does not raise the merits of Malik's unconscionability claim merely whether Deccan is entitled to have the claim dismissed as a matter of law. A court could conclude that the literal clause was oppressive and unconscionable and not enforce the punitive aspects of the fee provision while leaving intact the prevailing party's fee rights on claims in which the claimant prevailed, and the non-claimant did not prevail. Deccan has not shown it is entitled to have Count Seven dismissed as a matter of law.

Attorney's Fees and Costs (Count Eight)

Alternatively, Malik alleged he is entitled to fees if Deccan fails to prevail on all its claims. Since no trial has yet to occur and no verdict has been rendered this motion is premature.

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Krumeich, J.T.R.

"Decision entered in accordance with the foregoing 5/21/2024. all Counsel and self-represented parties of record notified on 5/21/2024.
William Bradell, TA
William Bidell