SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

NORTH STATE AUTOBAHN INC. d/b/a North State Custom,	:	
Plaintiff,	:	Index No. 67559/2017
-against-	:	
MERCEDES-BENZ USA, LLC, CELEBRITY AUTO OF WESTCHESTER, LLC d/b/a Mercedes-Benz of Goldens Bridge, and S&L COLLISION CENTER, Inc.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CELEBRITY AUTO OF WESTCHESTER, LLC D/B/A MERCEDES-BENZ OF GOLDENS BRIDGE'S MOTION TO DISMISS THE COMPLAINT

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I. PRELIMINARY STATEMENT

Plaintiff, an auto body repair shop, has filed a fatally flawed and frivolous Complaint premised upon a false fact: that defendant Celebrity Auto of Westchester, LLC d/b/a Mercedes-Benz of Goldens Bridge ("Celebrity") is not a licensed, authorized repair shop. Unquestionably, the Court should take judicial notice of Celebrity's license on file with the New York State, Division of Motor Vehicles. Thus, the claims directed at Celebrity for violation of the New York State General Business Law Section 349 *et seq.* (Count III), Tortious Interference with Contract (Count IV), and Prima Facie Tort (Count V) should all be dismissed with prejudice and with costs.

II. STATEMENT OF FACTS

Celebrity is a Mercedes-Benz automobile dealership registered with the New York State Department of Motor Vehicles and licensed as: (i) a Retail Motor Vehicle Dealer (New); (ii) Public Inspection Station; and (iii) a licensed Repair Shop. A true and correct copy of a print out from the New York State Department of Motor Vehicles, demonstrating Celebrity's fully licensed status, is attached to the Affirmation of Marc. J. Gross, Esq. as Exhibit "A".

Plaintiff is an automobile collision repair shop located in Bedford Hills, New York. *See* Complaint, ¶ 5. In or about May, 2017, a dispute arose between Plaintiff and Celebrity regarding the manner in which plaintiff would bill Celebrity for parts used in Plaintiff's autobody operation. *See* Complaint, ¶¶ 22-34. As a result of the dispute, Celebrity exercised its right to terminate its sponsorship of Plaintiff as a facility in the Mercedes-Benz Certified Collision Repair Program. *See* Complaint, ¶¶ 22-34. Plaintiff sought to rescind or otherwise disrupt the termination by communicating directly with Mercedes Benz USA, LLC. *See* Complaint, ¶¶ 35. When that failed, Plaintiff filed this Complaint against Celebrity, Mercedes Benz USA, LLC and S&L Collision Center, Inc.

As set forth in its Complaint against Celebrity, Plaintiff's entire theory of recovery is essentially grounded upon the fatal flaw that Celebrity lacks the requisite repair shop license and has, therefore, engaged in unlawful activities flowing from its business dealings with its customers. What Plaintiff glaringly omits, however, is that it failed in all respects to utilize the most fundamental due-diligence prior to filing its Complaint. Thus, while Plaintiff asserts that Celebrity lacks the requisite repair shop license, there is no doubt that this claim was made with reckless disregard of the facts. Indeed, not only does Celebrity possess a license, but Plaintiff, obviously, never bothered to even review the publicly available information on New York's Division of Motor Vehicle's Website, which unqualifyingly sets forth that Celebrity is a licensed repair shop. Incredibly, Plaintiff over-looked this essential fact and makes outrageously false claims that Celebrity has acted without a license and violated state law.

Equally as egregious, Plaintiff demands in excess of $11 million in damages. Yet, nowhere in the Complaint is Plaintiff able to articulate a cognizable claim against Celebrity for any real violation of New York law. In short, Plaintiff's Complaint is entirely meritless and even frivolous and damaging. Accordingly, the Court should grant Celebrity's motion and Plaintiff's claims against Celebrity should be dismissed in their entirety with prejudice and with costs.

III. STANDARD OF REVIEW

Pursuant to CPLR § 3211(a)(7), a complaint must be dismissed where "the pleading fail(s) to state a cause of action" as a matter of law. In ruling on a motion to dismiss under CPLR 3211(a)(7), the Court's task is to determine whether the facts, as alleged, fit within any cognizable legal theory. *See Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (N.Y. 2001); *DiMauro v. Metropolitan Suburban Bus Authority*, 105 A.D.2d 236, 238 (2d Dep't 1984) (noting that essential facts required to give notice of claim must generally appear on face of pleading and

conclusory allegations will not suffice); *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) (*citing Morone v. Morone*, 50 N.Y.2d 481, 484 (1980)) (holding that the court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory."). Nevertheless, despite the liberal pleading rules and presumption of truth in favor of the plaintiff, "where documentary evidence flatly contradicts the factual claims, the [plaintiff's] entitlement to the presumption of truth and the favorable inferences is rebutted." *Scott v. Bell Atlantic Corp.*, 726 N.Y.S.2d 60, 63 (1st Dep't 2001).

IV. ARGUMENT

A. Plaintiff Fails to State a Claim Against Celebrity Under New York State General Business Law Section 349 *et seq.*

New York State General Business Law ("GBL") § 349(a) provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in" New York are unlawful. GBL § 349(a). In order to allege a prima facie case under Section 349, "a plaintiff must demonstrate that: (1) the defendant's deceptive acts were directed at consumers; (2) the acts are misleading in a material way; and (3) the plaintiff has been injured as a result." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25, (1995).

Here, Plaintiff cannot sustain its claim of deception to consumers under GBL § 349 in that it has failed to plead any deceptive practices. Indeed, with Plaintiff having falsely and recklessly claimed that Celebrity has engaged in unlawful conduct as an unlicensed repair shop, Plaintiff's allegation of any conceivable deception necessarily collapses against the facts. It is beyond dispute

that Celebrity is a licensed repair shop and Plaintiff, an experienced litigant, knew or should have known that its contrary contentions were recklessly made. [1]

Moreover, Plaintiff also lacks standing to bring this claim against Celebrity. In *Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 208 (2004), the Court of Appeals held that when it comes to deceptive business claims under GBL 349, "the party actually injured [must] be the one to bring suit." Here, Plaintiff has pled injury to "customers" of Celebrity. Indeed, unlike the allegations in this case, "plaintiffs must . . . plead that they have suffered actual injury caused by a materially misleading or deceptive act or practice" of the defendant. *See City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 623 (2009). In fact, it is settled law that if businesses were permitted to sue derivatively under GBL 349, there would be the "potential for a tidal wave of litigation against businesses that was not intended by the Legislature." *See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995). Here, Plaintiff's conclusory allegation that it has been "damaged and injured in its business and property" as a result of Celebrity's purported deceptive practices *directed to consumers* cannot suffice.

Specifically, Plaintiff alleges that Celebrity's customers have been misled because they have been: "(i) receiving improper and inadequate representation in the negotiation of their repair costs with their insurance company; (ii) receiving invalid and potentially perjurious Certifications of Automobile Repairs; and (iii) incurring additional costs in the form of the kickbacks Celebrity paid to S&L and/or the entity that is actually repairing the customers' vehicle." *See* Complaint at ¶ 60. Not only are all of these allegations false on their face with Celebrity serving as a licensed repair shop, but Plaintiff entirely fails to indicate that it has been directly harmed -- as a consumer

[1] Plaintiff is a repetitive litigant under the GBL § 349, having secured at least one reported decision in *North State Autobahn, Inc. v. Progressive*, 102 A.D. 3d 5 (2d Dep't 2012).

-- by Celebrity's purported acts. Unquestionably, Plaintiff was a vendor and not a customer of Celebrity.

Importantly, the facts of this case are distinguishable from the facts that this same Plaintiff litigated in *North State Autobahn, Inc. v. Progressive Insurance Group,* 102 A.D.3d 5 (2d Dep't 2012), a case in which Plaintiff was afforded standing to sue under this same section of the GBL. In *Progressive,* unlike here, Plaintiff demonstrated that competing businesses were *directly injuring Plaintiff* by making false and misleading statements *about Plaintiff's business operations* to consumers, thereby diverting consumers away from Plaintiff. Here, Plaintiff knows it has not articulated any deceptive acts against Celebrity's consumers, and no such acts could have had any direct impact on Plaintiff. Accordingly, Plaintiff's derivative claim on behalf of consumers cannot stand and should be dismissed.

Additionally, Plaintiff alleges that Celebrity has violated 11 N.Y.C.R.R. 216.7 (b)(2) and 11 N.Y.C.R.R. 216.7 (b) (19) (ii), thereby leading to its purported violation of GBL § 349. Critically, however, 11 N.Y.C.R.R. 216.2, the applicable section of the regulation at issue, indicates that this regulation only applies to *insurers* licensed to do business in New York. Celebrity is neither an insurer, nor does Plaintiff allege that Celebrity is an insurer. Therefore, any allegation that Celebrity has violated this regulation and has deceived consumers in doing so is meritless and wholly improper.

Further, Plaintiff's allegations that Celebrity's request to be paid "kickbacks" is deceiving and misplaced. Indeed, Plaintiff fails to cite a single statute, regulation, or any other authority whatsoever to suggest that payments to a licensed repair shop, such as Celebrity, for work it sends to a body shop, qualify as an unlawful activity. In fact, Plaintiff fails to cite to any authority for such a prohibition because there is no such prohibition. Plaintiff should not be permitted to make

blanket, inflammatory allegations about Celebrity's licensed business practices without having any legal or factual basis to support its contentions. Clearly, based upon the foregoing, Plaintiff has failed to state a claim for any deception under New York General Business Law §349.

B. Plaintiff Fails to State a Tortious Interference with Contract Claim Against Celebrity.

Under New York law, a claim for tortious interference with contract must satisfy the following elements: "(1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages." *See Tri-Star Lighting Corp. v. Goldstein*, 151 A.D.3d 1102, 1106 (2d Dep't 2017). As the Second Circuit explained in *U.S. Fidelity and Guar. Co v. Braspetro Oil Services Co.*, "[t]o prevail on a tortious interference claim under New York law, a plaintiff must prove 'the existence of a valid contract and damages caused by the wrongdoer's knowledge of and intentional interference with that contract without reasonable justification.'" 369 F.3d 34, 41 (2d Cir. 2004) (quoting *LaBarte v. Seneca Resources Corp.*, 285 A.D.2d 974, 977 (4th Dep't 2001)). Further and importantly, a defendant acting in its own economic interest may only be found liable for tortious interference if that defendant was acting with a malicious or illegal purpose. *See Foster v. Churchill*, 87 N.Y.2d 744, 750 (1996); *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 687 (1969) ("Procuring the breach of a contract in the exercise of an equal or superior right is acting with just cause or excuse, and is justification for what would otherwise be an actionable wrong.").

Here, Plaintiff fails to allege any facts to establish that Celebrity was acting maliciously, in bad faith or even unlawfully when it allegedly "interfered" with Plaintiff's contract with co-defendant, MBUSA. Instead, the Complaint employs causal language, typically reserved for pleading negligence rather than claims for intentional tort. *See, e.g.*, Complaint at ¶ 70 ("As a

result of Celebrity procuring the breach of the Agreement, North State Custom has been damaged. . ."). Notably, under New York law, a plaintiff alleging intentional interference with a contract must establish both that the interference was *intended* and that it occurred "without reasonable justification." *See U.S. Fidelity,* 369 F.3d at 41. Plaintiff alleges that Celebrity acted with its own economic self-interest when allegedly deciding to interfere with Plaintiff's MBUSA agreement. *See, e.g.,* Complaint at ¶ 69 ("When North State Custom refused to accede to Celebrity's demands . . . and to pay Celebrity kickbacks, Celebrity procured the breach of the Agreement."). Moreover, Plaintiff's bare and conclusory allegation that "Celebrity procured the breach of the Agreement" is not premised upon any facts. Rather, it is a mere conclusion. *See id*. Accordingly, the Court should dismiss Plaintiff's tortious interference with contract claim against Celebrity.

C. Plaintiff Fails to State a Prima Facie Tort Claim Against Celebrity.

To establish a claim for prima facie tort, a plaintiff must plead: "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *See Berland v. Chi,* 142 A.D.3d 1121, 1123 (2d Dep't 2016) (citing *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-43 (N.Y. 1985)). This cause of action was "designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a "catch all" alternative for every cause of action which cannot stand on its legs." *See Lancaster v. Town of East Hampton,* 54 A.D.3d 906, 908 (2d Dep't 2008) (citing *Bassim v. Hassett,* 184 A.D.2d 908, 910 (3d Dep't 1992)).

First, Plaintiff's Complaint fails to state a claim for prima facie tort insofar as it fails to show that Celebrity inflicted damage solely out of malice against Plaintiff. *See Goldman v. Citicore I, LLC,* 149 A.D.3d 1042, 1045 (2d Dep't 2017) ("[C]entral to a cause of action alleging

prima facie tort is that the plaintiff's intent was motivated solely by malice or 'disinterested malevolence'") (citing *Diorio v. Ossining Union Free School Dist.,* 96 A.D.3d 710, 712 (2d Dep't 2012)); *Smith v. Meridian Technologies, Inc.,* 86 A.D.3d 557, 559 (2d Dep't 2011) ("'[T]he genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another.'") (quoting *Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 N.Y.2d 314, 333 (1983)); *Squire Records v. Vanguard Recording Soc'y,* 25 A.D.2d 190 (1st Dep't 1966) (holding that recovery for prima facie tort "has been limited to those instances where the sole motivation for the damaging acts had been a malicious intention to injure the plaintiff…[w]here there are other motives, e.g., profit, self-interest, business advantage, there is no recovery under tort prima facie.").

Here, Plaintiff's cause of action for prima facie tort should be dismissed because Plaintiff has acknowledged in its Complaint that Celebrity acted with motives of profit and economic self-interest. Thus, its acts were not motivated "solely by malice or 'disinterested malevolence.'" *See Goldman,* 149 A.D.3d at 1045 (quoting *Diorio,* 96 A.D.3d at 712); Complaint at ¶ 27 ("[T]hey (Celebrity's representatives) wanted to know *what percentage of each Mercedes-Benz automobile repair North State Custom was willing to kick-back to Celebrity* in exchange for Celebrity continuing to allow the MBUSA-North State Custom relationship to continue.") (emphasis added); ¶ 30 ("Celebrity would be giving the parts to North State Custom and Celebrity would then charge the customer or its insurance company for the repair parts and *receive the entire mark-up on those parts. . .*") (emphasis added); ¶ 31 ("Celebrity's body shop coordinator also informed North State Custom's representatives that this new procedure also required *North State Custom to pay to Celebrity a 'kick-back' comprised of a set percentage of the labor costs* of each Mercedes-Benz vehicle that North State Custom repaired.") (emphasis added); ¶ 74 ("As a direct consequence of

Celebrity withdrawing its sponsorship of North State Custom due to its [Plaintiff's] refusal to accede to its [Celebrity's] demands…").[2]

Moreover, as a licensed repair shop, Plaintiff cannot allege in any respect that Celebrity did anything in an unlicensed fashion to defraud anyone or break any law. Plaintiff has not, nor can it in any manner sustain any claim of deception or cite any authority or any law that Celebrity has allegedly "broken". Indeed, Plaintiff's contentions are merely bare, inflammatory conclusions that lack any basis whatsoever.

Accordingly, Plaintiff's Complaint fails to state a claim for prima facie tort because it fails to allege the requisite special damages. *See Miller v. Geloda/Briarwood Corp.*, 136 Misc.2d 155, 157 (Sup. Ct., NY Co. 1987) (holding that "an allegation that the complaining party suffered 'specific and measurable loss' is essential in order to satisfy the special damage requirement") (quoting *Wehringer v. Helmsley-Spear, Inc.*, 91 A.D.2d 585, 586 (1st Dep't 1982)). Importantly, "[b]road and conclusory terms are insufficient to fulfill this critical element of prima facie tort." *See Miller*, 136 Misc.2d at 157; *Vigoda v. DCA Productions Plus Inc.*, 293 A.D.2d 265, 266 (1st Dep't 2002) ("Plaintiffs' complaint sets forth damages in round numbers which amount to mere general allegations of lost sales from unidentified lost customers.").

Here, Plaintiff pleads its damages in general, conclusory terms, which cannot suffice for a prima facie tort claim. *See* Complaint at ¶ 73 ("North State Custom has lost access to Mercedes-Benz customers, lost the ability to access Mercedes-Benz online repair manuals and pricing guidelines, and no longer receives training regarding Mercedes-Benz repairs."); ¶ 74 ("North State

[2] Though Plaintiff alleges in ¶ 75 of the Complaint that "Celebrity had no excuse or justification for withdrawing its sponsorship of North State Custom but did so intentionally and only because North State Custom refused to participate in a scheme to defraud consumers and break the law," this allegation directly contradicts Plaintiff's earlier allegations, which specifically provide the reasoning behind Celebrity's decision to withdraw its sponsorship of Plaintiff (i.e. because Plaintiff purportedly would not agree to pay Celebrity a kick-back or allow Celebrity to receive the entire mark-up on certain vehicle parts, all of which are self-interested, economically-motivated reasons).

Custom has lost a substantial amount of Mercedes-Benz repairs."); ¶ 77 ("North State Custom has been damaged in an amount to be determined as [sic] trial, but believed to be in excess of $11,500,000.00 plus interest."). Plaintiff fails to explain *how* its damages are to be calculated and instead improperly relies again upon conclusory allegations of damages to support its claim.

Based on the foregoing, Plaintiff's prima facie tort claim against Celebrity fails and should be dismissed with prejudice.

IV. CONCLUSION

For the foregoing reasons, Celebrity respectfully requests that the Court dismiss Counts III, IV, and V of Plaintiff's Complaint with prejudice and with costs.

Dated: New York, New York
November 22, 2017

Respectfully Submitted,

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By: /s/ Marc J. Gross

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