

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT <http://www.ca2.uscourts.gov/>). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of November, two thousand nine.

PRESENT:

BARRINGTON D. PARKER,
PETER W. HALL,
GERARD E. LYNCH,
Circuit Judges.

ELIZABETH MARGRABE,

Plaintiff-Appellant,

v.

No. 09-0878-cv

SEXTER & WARMFLASH, P.C., DAVID WARMFLASH, MICHAEL PRESENT,
Defendants-Appellees.

FOR APPELLANT: CRYSTAL MASSARELLI, Greenberg & Massarelli, LLP,
Purchase, N.Y. (William Greenberg, on the brief), Appearing for
Appellant.

FOR APPELLEES: ANDREW R. JONES, Furman Kornfeld & Brennan LLP, New
York, N.Y. (A. Michael Furman, on the brief), Appearing for
Appellees.

Appeal from the United States District Court for the Southern District of New York
(Karas, *J.*; Yanthis, *M.J.*).

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND
DECREED that the judgment of the District Court, entered on February 17, 2009, is
AFFIRMED.

Appellant Elizabeth Margrabe (“Ms. Margrabe”) seeks review of an Opinion and Order
of the District Court, granting Appellees’ Fed. R. Civ. P. 12(b)(6) motion to dismiss. We assume
the parties’ familiarity with the facts, procedural context, and specification of appellate issues.

This Court reviews *de novo* a district court’s dismissal of a complaint pursuant to Rule
12(b)(6), “construing the complaint liberally, accepting all factual allegations in the complaint as
true, and drawing all reasonable inferences in the plaintiff’s favor.” *Chambers v. Time Warner,
Inc.*, 282 F.3d 147, 152 (2d Cir. 2002); *see also Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d
292, 300 (2d Cir. 2003).

Appellant first argues that the District Court erred in dismissing her breach of fiduciary
duty claim. The District Court ruled that Appellees did not breach their fiduciary duty to Ms.
Margrabe because they did not disclose a client confidence or secret. We agree with the lower

court that Ms. Margrabe’s breach of fiduciary duty claim ought to be dismissed, but we affirm the dismissal on alternate grounds. *See Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 159 (2d Cir. 1999) (“[W]e are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied.”) (internal quotation marks omitted).

Assuming *arguendo* that Appellees breached a disciplinary rule by disclosing Ms. Margrabe’s letter, New York courts have held that an attorney’s breach of a disciplinary rule does not *per se* give rise to a cause of action for breach of fiduciary duty. *See, e.g., Schwartz v. Olshan Grundman Frome & Rosenzweig*, 753 N.Y.S.2d 482, 487 (N.Y. App. Div. 2003). In order to sustain a claim of breach of fiduciary duty under New York law, Appellant must prove “the existence of a fiduciary relationship, misconduct by the [Appellees], and damages directly caused by the [Appellees’] misconduct.” *Berman v. Sugo LLC*, 580 F. Supp. 2d 191, 204 (S.D.N.Y. 2008) (citing *Kurtzman v. Bergstol*, 835 N.Y.S.2d 644, 646 (N.Y. App. Div. 2007)). In the instant case, Appellant has not adequately alleged damages that were directly caused by the Appellees’ alleged misconduct. As damages, Ms. Margrabe seeks \$361,964.71 in legal fees and other expenses associated with defending herself against the defamation suit. However, Ms. Margrabe did not incur these fees as a result of Appellants’ alleged breach of fiduciary duty, to wit, the improper disclosure of client secrets or confidences. Rather, Ms. Margrabe would have incurred these fees regardless of whether Appellees had attached her discharge letter to their complaint. Thus, Appellees’ disclosure of the discharge letter in connection with the defamation

suit is not relevant to the calculation of damages. Accordingly, Appellant cannot make out a *prima facie* case of breach of fiduciary duty and her claim must be dismissed.

Appellant next argues that the District Court erred in dismissing her *prima facie* tort claim. We affirm the District Court, however, because Appellant did not allege that the only motivation for the act was “disinterested malevolence.” To prevail on a *prima facie* tort claim, a plaintiff must plead that the *only* motivation for the act was “disinterested malevolence.” It is well established that a plaintiff cannot recover unless a defendant’s conduct was not only harmful, but done with the *sole* intent to harm. *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 571 (2d Cir. 1990) (citing *Burns Jackson Miller Summit & Spitzer v. Lindner*, 451 N.E.2d 459, 467 (N.Y. 1983)). “We have held that motives other than disinterested malevolence, ‘such as profit, self-interest, or business advantage’ will defeat a *prima facie* tort claim.” *Id.* (quoting *Marcella v. ARP Films, Inc.*, 778 F.2d 112, 119 (2d Cir. 1985)).

In the instant case, Appellant pleaded that Appellees initiated the defamation action in order to coerce her into abandoning her claim to the disputed fees. This admission defeats her *prima facie* tort claim because, assuming the truth of Appellant’s allegations as we must when reviewing a motion to dismiss, it is clear that Appellees had a monetary interest in initiating the defamation action. Thus, Appellees were not motivated *solely* by “disinterested malevolence” and, accordingly, Ms. Margrave’s *prima facie* tort claim must be dismissed.

Finally, Ms. Margrave argues that the District Court erred in dismissing her intentional infliction of emotional distress (“IIED”) claim. Under New York law, IIED requires pleading the following four elements: (1) extreme and outrageous conduct, measured by the reasonable

bounds of decency tolerated by society; (2) intent to cause or disregard of a substantial probability of causing severe emotional distress; “(3) a causal connection between the conduct and the injury; and (4) severe emotional distress.” *Conboy v. AT & T Corp.*, 241 F.3d 242, 258 (2d Cir. 2001); *Howell v. New York Post Co.*, 612 N.E.2d 699, 702 (N.Y. 1993). The conduct at issue “must transcend the bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community.” *Klinge v. Ithaca Coll.*, 652 N.Y.S.2d 377, 379-80 (N.Y. App. Div. 1997). The conduct alleged “must consist of more than mere insults, indignities and annoyances.” *Liebowitz v. Bank Leumi Trust Co. of New York*, 548 N.Y.S.2d 513, 521 (N.Y. App. Div. 1989). Moreover, “[c]ourts are reluctant to allow recovery under the banner of intentional infliction of emotional distress absent a deliberate and malicious campaign of harassment or intimidation.” *Cohn-Frankel v. United Synagogue of Conservative Judaism*, 667 N.Y.S.2d 360, 362 (N.Y. App. Div. 1998). Finally, a court may decide whether alleged conduct is sufficiently outrageous as a matter of law. *Koulikina v. City of New York*, 559 F. Supp. 2d 300, 324 (S.D.N.Y. 2008) (citing *Howell*, 81 N.E.2d at 702).

This Court agrees with the District Court that, as a matter of law, Appellant’s complaint does not and cannot allege that Appellees’ filing of the defamation suit was so outrageous as to be utterly intolerable in a civilized society. The “mere commencement of a civil action, even if alleged to be for the purposes of harassment or intimidation, is insufficient to support a claim of IIED.” *O’Bradovich v. Village of Tuckahoe*, 325 F. Supp. 2d 413, 435 (S.D.N.Y. 2004) (citation omitted). The New York Court of Appeals has held similarly. *See Fischer v. Maloney*, 373 N.E.2d 1215, 1217 (N.Y. 1978) (deliberate commencement of a civil action for defamation to

malign, harass, intimidate and inflict mental and emotional distress does not give rise to an IIED claim). Accordingly, the District Court did not err in dismissing Appellant's IIED claim.

For the foregoing reasons, the order of the District Court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____