UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERROL S. DANIELS, O.D., 00-CV-0668E(Sc)

Plaintiff,

-vs- MEMORANDUM

PROVIDENT LIFE AND CASUALTY INSURANCE COMPANY, and

ORDER

Defendant.

Plaintiff Daniels commenced this action against Provident Life and Casualty Insurance Company ("Provident") in New York State Supreme Court, Erie County, in June 2000[1] raising seven causes of action —*viz*., (1) and (2) for defamation, (3) and (4) for prima facie tort, (5) for abuse of process, (6) for deceptive acts and practices in violation of N.Y. Gen. Bus. Law §349(a) and (7) for punitive damages. Such was removed by defendant August 2, 2000 pursuant to 28 U.S.C. §1441. This Court has jurisdiction over this case pursuant to 28 U.S.C. §1332 because plaintiff

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[1]A summons and notice was filed June 26, 2000, an amended summons and notice was filed June 27, 2000 and the complaint was filed June 28, 2000.

is a citizen of New York, defendant is a citizen of Tennessee and the amount in controversy exceeds $75,000. Defendant filed a motion September 7, 2000 under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCvP") to dismiss the complaint for failure to state a claim and plaintiff filed a cross-motion October 13, 2000 seeking discovery, leave to file an amended complaint and equitable tolling of the statute of limitations.

This case emanates from another case between these parties involving a disability insurance policy which case had been pending before Justice Jerome C. Gorski of the New York State Supreme Court, Erie County, and is currently on appeal to the New York State Supreme Court, Appellate Division, Fourth Department ("the state court action"). R. Anthony Rupp III, Esq. of Hodgson Russ, the law firm representing Provident in the state court action, wrote a letter to Thomas Franz, Supervising Investigator of the New York State Department of Education Office of Professional Discipline ("NYSDEPD") February 4, 1999

regarding plaintiff's disability.[2] As a result of this letter, the NYSDEPD

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[2]"This office represents Provident Life and Casualty Insurance Company ('Provident') in connection with an action commenced by Errol S. Daniels, O.D. seeking the proceeds of a disability policy. For over 12 years, beginning in March 1986, Dr. Daniels received monthly disability benefits from Provident, based on his claim that he was totally disabled and unable to perform the 'duties of an optometrist.'

"Notwithstanding that he was collecting total disability benefits from Provident during this entire period, Dr. Daniels continued to treat patients on a full-time basis at the Council Eye Care location at the Transitown Plaza in Williamsville, New York. Despite his total claimed disability and his professed inability to perform the duties of an optometrist, Dr. Daniels has maintained his license to practice and has periodically re-registered with the Division of Professional Licensing Services. Dr. Daniels has never notified the Division of his alleged disability and his purported inability to practice optometry.

"Most recently, Dr. Daniels has applied for further benefits under the Provident Disability policy, claiming that he has suffered the 'entire and irrevocable' loss of the use of both of his hands. Despite this claim, Dr. Daniels continues to treat patients on a full-time basis, and he has not yet notified the Division of his alleged disability or his inability to practice optometry.

"With this letter, we ask that the Office of Professional Discipline commence an investigation of Dr. Daniels and his optometry practice. If Dr. Daniels is truly disabled and unable to perform the duties of an optometrist as he has claimed to Provident, then we are concerned about the level of care his patients are receiving, and whether Dr. Daniels should be licensed to practice optometry in the State of New York. If Dr. Daniels is not truly disabled and is in fact able to continue the practice of optometry, then we are concerned about the contrary statements he has made to Provident over the last 12 years.

"We are prepared to assist the Office in its inquiry by providing access to the investigation materials in our file. These materials consist of dozens of claim forms submitted to Provident by Dr. Daniels stating that he is unable to perform 'the duties of an optometrist'; a surveillance tape depicting Dr. Daniels continuing to treat patients; the sworn testimony of Dr. Daniels, wherein he admits that he is continuing to practice but states that he is 'not employable as an optometrist'; and a variety of other documents, sworn statements, and pieces of evidence that we

(continued...)

commenced an investigation of plaintiff. Plaintiff became aware of this investigation July 28, 1999 and, in contemplation of filing a defamation action against Provident, filed a C.P.L.R. 3102(c)[3] petition September 13, 1999 seeking discovery into any information provided by Provident to the NYSDEPD. Andrea Schillaci, Esq. October 12, 2000 Aff. Ex. A (C.P.L.R. 3102(c) petition). Justice Gorski granted the C.P.L.R. 3102(c) petition January 5, 2000 and ordered Provident to

> "turn over all communications that it had with the Department of Education concerning Dr. Daniels, including memoranda of any oral communications [and] to produce, for a limited deposition, a person who can identify who made the communications between Provident and the Department of Education, what was sent to that agency, the dates of communications, and if the communications were oral, the sum and substance of any such communications." Schillaci October 12, 2000 Aff. Ex. B (Gorski January 5, 2000 Order).

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[2](...continued)
believe would be of assistance to your Office." Schillaci October 12, 2000 Aff. Ex. F (Rupp February 4, 1999 Letter).

[3]C.P.L.R. 3102(c) states in pertinent part that, "[b]efore an action is commenced, disclosure to aid in bringing an action, *** may be obtained, but only by court order."

Counsel for Provident apparently provided an affidavit, with responsive documents attached as exhibits thereto, to Justice Gorski for an *in camera* review, taking the position that, because the communication to the NYSDEPD had been made through counsel, it was attorney work-product and therefore not subject to disclosure; however, Justice Gorski rejected this argument and ordered disclosure May 5, 2000. Schillaci October 12, 2000 Aff. Ex. D (Gorski May 5, 2000 Order). A dispute arose between the parties as to which documents were covered by Justice Gorski's order and Justice Gorski issued another order May 16, 2000 stating that all of the information disclosed *in camera* had to be disclosed to plaintiff. Schillaci October 12, 2000 Aff. Ex. E (Gorski May 16, 2000 Order). Defendant filed an appeal and Justice Gorski issued a limited stay for selected documents pending appeal. Schillaci October 12, 2000 Aff. ¶15. Defendant disclosed four documents to plaintiff May 31, 2000 pursuant to Justice Gorski's orders — *viz.*, (1) the Rupp February 4, 1999 letter, (2) a May 17, 1999 file memorandum made by

Bruce J. Jones, a Senior Investigator with Provident's Special Investigative Unit,[4] (3) a June 28, 2000 file memorandum by Jones[5] and (4) a July 6, 2000 letter from Jones to Peggy Judge.[6] Schillaci October

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[4]"On Wednesday, May 12, 1999, I met with Ed Silvestri (Investigator Frauds Bureau, State of New York) to present this case to him. The morning of our meeting, Ed advised me that an investigator from the New York State Education Department was in town from Rochester, New York, and he wanted to know if I had any objections to this investigator sitting in on our meeting. I did not object. Senior Investigator Peggy Judge (Office of Professional Discipline — New York State Education Department) was present when my presentation was made to Mr. Silvestri of the Frauds Bureau. Ms. Judge advised us that they would be taking no action until the Frauds Bureau decided what action, if any, they would take.

"My presentation was made and the [Special Investigative Unit] booklets were left with Mr. Silvestri. Nothing was left with Ms. Judge. If she needed anything, she would get it from the Frauds Bureau.

"Mr. Silvestri hoped to get this case to a prosecutor within the next few weeks. He will let me know the results." Schillaci October 12, 2000 Aff. Ex. F. (Jones May 17, 1999 file memorandum).

[5]"Spoke this date to Peggy Judge, Senior Investigator with NY Education Department, Office of Professional Discipline (716-241-2810). She advised me that the state was not going to take any criminal action against Dr. Daniels. This was a civil dispute between Provident and Dr. Daniels and should be handled in the civil courts. The Office of Professional Discipline is still trying to decide what action it will take (if any). Peggy requested to know if Dr. Daniels was aware that he was video taped performing the eye exams and what his response was. After speaking with Tony Rupp (716-848-1372), I advised Peggy that Dr. Daniels was aware of the tape and admitted it was he performing the eye examinations but has given no real explanation. Tony is going to send me the written response to the Notice to Admit of the tapes and I will send to Peggy." Schillaci October 12, 2000 Aff. Ex. F. (Jones June 28, 1999 file memorandum).

[6]"As we discussed in our recent telephone conversation, pleases find attached

(continued...)

12, 2000 Aff. Ex. F. The booklets referenced in Jones's May 17, 1999 file memorandum were not disclosed to plaintiff and, after reviewing them, Justice Gorski ordered that they be disclosed August 16, 2000 stating that they should have been turned over pursuant to his previous orders. Schillaci October 12, 2000 Aff. Ex. G (Gorski August 16, 2000 Order). However, Justice Gorski vacated such Order September 5, 2000 when he learned that plaintiff had filed a complaint and that defendant had removed the case to federal court. Schillaci October 12, 2000 Aff. Ex. H (Gorski September 5, 2000 Order).

When ruling on a FRCvP 12(b)(6) motion to dismiss for failure to state a claim for which relief can be granted, the court must "accept the material facts alleged in the complaint as true and construe all reasonable

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[6](...continued)
a copy of Dr. Daniels *Response to Notice to Admit*. This is in response to the original Notice along with the surveillance videotape of Dr. Daniels performing employment-related activities at the Council Eye Care establishment that he owns and operates. As you can see from his responses, Dr. Daniels has acknowledged that it is him depicted in the videotape, performing aspects of Council Eye Care's 'standard eye Examination.

"Please let me know if you need anything else." Schillaci October 12, 2000 Aff. Ex. F. (Jones July 6, 2000 letter).

inferences in the plaintiffs's favor" — *Hernandez* v. *Coughlin*, 18 F.3d 133, 136 (2d Cir.), *cert. denied*, 513 U.S. 836 (1994) — and cannot dismiss a cause of action unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

Plaintiff's first two causes of action are for defamation. Defendant has moved to dismiss the first on the basis that it fails to allege the defamatory words and the second on the basis that the material is not defamatory or, in the alternative, that such constitutes a statement of opinion. Plaintiff has cross-moved to obtain discovery, for an equitable tolling of the statutory period of limitations in regard to the allegedly defamatory communications contained in the February 4, 1999 Rupp letter and the May 12, 1999 meeting among Jones, Silvestri and Judge and for leave to file an amended complaint to incorporate such.

Plaintiff alleges as his first cause of action for defamation that, on

> "June 28, 1999, Bruce J. Jones, acting as authorized agent on behalf of defendant Provident, made false and defamatory

> oral statements to Judge concerning plaintiff's ability to perform the duties of his profession. On June 28, 1999, Rupp, acting as agent and on behalf of defendant Provident, made false and defamatory oral statements to Bruce J. Jones for communication to Judge concerning plaintiff's ability to perform the duties of his profession." Compl. ¶¶29-30.

Defendant seeks to dismiss this cause of action on the basis that it fails to allege particular defamatory words used by Rupp and Jones on June 28, 1999. Pursuant to New York law, in "an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." C.P.L.R. 3016(a). The particular defamatory words complained of must be quoted verbatim in the complaint. *Varela* v. *Investors Insurance Holding Corp.*, 586 N.Y.S.2d 272 (App. Div. 2d Dep't 1992). The requirement that the words complained of be set forth in the complaint is strictly enforced by the courts; vague and conclusory allegations are insufficient. *Nowak* v. *EGW Home Care, Inc.*, 82 F. Supp. 2d 101, 113 (W.D.N.Y. 2000); *Majer* v. *Metropolitan Transportation Authority*, No. 90 Civ. 4608(LLS),

1990 WL 212928, at *7 (S.D.N.Y. Dec. 14, 1990). When a cause of action for defamation fails to set forth the particular words complained of, it must be dismissed. *Catterson* v. *Caso*, 472 F. Supp. 833, 840 (E.D.N.Y. 1979). Plaintiff's first cause of action fails to state the particular defamatory words complained of; rather it simply alleges that defendant made "false and defamatory oral statements *** concerning plaintiff's ability to perform the duties of his profession." Compl. ¶¶29-30.

Plaintiff alleges as his second cause of action for defamation that on

> "July 6, 1999, Bruce J. Jones, acting as agent and on behalf of defendant Provident, provided written defamatory oral [*sic*] communications to Judge falsely alleging that plaintiff made fraudulent statements concerning his ability to perform the duties of his profession. *** The written defamatory materials provided to Judge by Bruce J. Jones were prepared and provided by Rupp to Bruce J. Jones for communication to Judge concerning plaintiff's ability to perform the duties of his profession. These materials were provided, not for any legitimate purpose but rather, to alarm, harass, annoy and damage plaintiff in his profession." Compl. ¶¶32-34.

Defendant seeks to dismiss this cause of action on the basis that such material is not defamatory or, alternatively, that it constitutes a statement of opinion.

> "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a *sine qua non* of a libel claim and since only assertions of fact are capable of being proven false, [the New York Court of Appeals has] consistently held that a libel action cannot be maintained unless it premised on published assertions of fact ***.
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> "Distinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task. The factors to be considered are: '(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to "'signal *** readers or listeners that what is being read or heard is likely to be opinion, not fact.'"' ***
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> "*** [I]n distinguishing between actionable factual assertions and nonactionable opinion, the courts must consider the content of the communication as a whole, as well as its tone and apparent purpose. Rather than sifting through

> a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.' *** " *Brian* v. *Richardson*, 87 N.Y.2d 46, 51 (1995).[7]

Pure opinion — *i.e.*, "a statement of opinion which is accompanied by a recitation of the facts upon which it is based" — is not actionable; however, a mixed opinion — *i.e.* a statement of opinion which "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it" — is actionable. *Steinhilber* v. *Alphonse*, 68 N.Y.2d 283, 289 (1986). In cases of mixed opinion, it is not the false opinion that is actionable, rather "it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking." *Id.* at 290. "Whether a given statement constitutes an expression of opinion or an actionable factual assertion is a question of law for the court to

[7]Internal citations and punctuation omitted.

decide and such determination must be made by considering the context of the whole communication, along with its tone and apparent purpose."[8] *Ferris* v. *Loyal Order of Moose Oneonta Lodge*, 686 N.Y.S.2d 884, 885 (App. Div. 3d Dep't 1999).

> "The key inquiry is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact. In making this inquiry, courts cannot stop at literalism. The literal words of challenged statements do not entitle a media defendant to 'opinion' immunity or a libel plaintiff to go forward with its action. In determining whether speech is actionable, courts must additionally consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person." *Immuno AG.* v. *Moor-Janowski*, 77 N.Y.2d 235, 243, *cert. denied*, 500 U.S. 954 (1991).

"A statement charging a plaintiff with a serious crime can be considered slander per se, and does not require pleading special damages," as can a statement that imputes that a plaintiff has committed such a crime.

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[8]Internal citations omitted.

Nevin v. *Citibank, N.A.*, 107 F. Supp. 2d 333, 343 (S.D.N.Y. 2000). "'Defamation by implication' is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements." *Armstrong* v. *Simon & Schuster, Inc.*, 85 N.Y.2d 373, 380-381 (1995). Although plaintiff argues that the July 6, 2000 letter from Jones to Judge[9] referenced in plaintiff's second cause of action is defamatory because it implied that plaintiff has committed a crime — *i.e.*, insurance fraud —, a review of that letter demonstrates that it cannot be considered defamatory. Plaintiff also alleges that the oral statements referenced in that letter — *i.e.*, the recent telephone conversation — are defamatory; however, plaintiff has not set forth the allegedly defamatory words.

Plaintiff has responded to defendant's motion to dismiss his defamation causes of action by filing a cross-motion seeking three orders — *viz.*, (1) discovery to obtain the allegedly defamatory communications

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[9]See footnote 6, *supra*.

ordered to be disclosed by Justice Gorski, (2) for equitable tolling of the statute of limitations applicable to the allegedly defamatory communications contained in the February 4, 1999 Rupp letter and uttered during May 12, 1999 meeting among Jones, Silvestri and Judge and (3) for leave to file an amended complaint to incorporate such allegedly defamatory statements. Defendant opposes plaintiff's cross-motion on the ground that such would be futile because any communications were statements of opinion and because the statutory period of limitations has expired.[10] "A court *** should not grant leave to amend when the proposed amendment is legally insufficient on its face because such amendment would be futile." *Mroz* v. *City of Tonawanda*, 999 F. Supp. 436, 466 (W.D.N.Y. 1998). Defendant's contention that leave to amend would be futile because all of its communications with New York State are statements of opinion is meritless. This Court cannot rule on whether allegedly defamatory statements not yet disclosed

[10]Due to defendant's opposition on the ground that leave to file an amended complaint would be futile due to such expiration, this Court must necessarily address plaintiff's motion for such equitable tolling.

by defendant are statements of opinion, and will not issue an advisory opinion as to whether the Rupp letter — the contents of which are not now before this Court for decision — is a statement of opinion. Under New York law there is a one-year statute of limitations for defamation. N.Y. C.P.L.R. 215(3). The statute of limitations period runs from the date the allegedly defamatory matter was first published, as opposed to when plaintiff first learned of such. *Karam* v. *First American Bank of New York*, 593 N.Y.S.2d 640 (App. Div. 4th Dep't 1993); *see also Shamley* v. *ITT Corporation*, 869 F.2d 167, 172 (2d Cir. 1989). Although the statute of limitations period has expired, plaintiff is entitled to an equitable tolling because he *had* requested disclosure of the communications at issue and Justice Gorski *had* ordered that such communications be disclosed January 5, 2000 — *i.e.*, prior to the expiration of the period. *See Simcuski* v. *Saeli*, 44 N.Y.2d 442, 449-451 (1978). Defendant cannot expect to benefit by preventing plaintiff from timely filing a properly pled defamation complaint through non-

compliance with Justice Gorski's orders and then assert the statute of limitations as a defense. *Ibid*. Accordingly, plaintiff's motion for discovery of the statements made to New York State by or on behalf of defendant will be granted, the statute of limitations in regard to the allegedly defamatory communications contained in the February 4, 1999 Rupp letter and uttered during the May 12, 1999 meeting among Jones, Silvestri and Judge will be equitably tolled, plaintiff will be given leave to file an amended complaint to incorporate any such. Should plaintiff fail to timely serve and file an amended complaint, his first and second causes of action for defamation will be dismissed.

Plaintiff's third and fourth causes of action are for prima facie tort. Plaintiff's third cause of action states:

> "Defendant maliciously and without justification or excuse engaged in a course of conduct, not for any legitimate purpose, but rather designed and intended to embarrass, harass, alarm and annoy plaintiff by encouraging the State of New York, Department of Education, to undertake an investigation of plaintiff. As a result of defendant's actions, plaintiff sustained special damages, namely embarrassment

> and discomfort in dealings with his employees and expenditure of monies for legal defense." Compl. ¶¶36-37.

Plaintiff's fourth cause of action is identical to his third except insofar as it alleges that defendant encouraged "the New York State Attorney General's Office, Frauds Bureau, to undertake a criminal investigation ***." Compl. ¶39. Defendant seeks to dismiss these claims on the basis that they are merely an attempt to salvage defective defamation claims. Prima facie tort is a "cause of action that is highly disfavored in New York." *Nevin* v. *Citibank*, *N.A.*, 107 F. Supp. 2d 333, 347 (S.D.N.Y. 2000).

> "Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful. The requisite elements of a cause of action for prima facie tort are (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." *Freihofer* v. *Hearst Corp.*, 65 N.Y.2d 135, 142-143 (1985).[11]

Prima facie tort "is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy" — *Curiano* v. *Suozzi*, 63 N.Y.2d 113, 118 (1984) — however, it may not be used as a

> "catch-all alternative for every cause of action which cannot stand on its own legs. Where relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort. However, where a traditional tort remedy exists, a party will not be foreclosed from pleading, as alternative relief, a cause of action for prima facie tort." *Freihofer*, at 143;[12] *see also Nevin*, at 347 ("any claim that is covered by a traditional tort cannot be the basis for a claim of prima facie tort — even if the traditional tort turns out not to be viable").

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[11]Internal citations and punctuation omitted.

[12]Internal citations and punctuation omitted.

To state a claim for prima facie tort, a plaintiff must allege that the defendant's actions were motivated solely by "disinterested malevolence" — *Burns Jackson Miller Summit & Spitzer* v. *Lindner*, 59 N.Y.2d 314, 333 (1983) —; if the defendant has "other motives, such as profit, self-interest, or business advantage," then plaintiff's claim will fail. *Marcella* v. *ARP Films, Inc.*, 778 F.2d 112, 119 (2d Cir. 1985); *see also Entertainment Partners Group, Inc.* v. *Davis*, 603 N.Y.S.2d 439 (App. Div. 1st Dep't 1993) ("a cause of action for prima facie tort *** does not lie absent an allegation that the action complained of was motivated solely by malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations"). "An essential element of such a cause of action is an allegation of special damages, fully and accurately stated with sufficient particularity as to identify and causally relate the actual losses to the allegedly tortious acts. Failure to do so lays the cause of action open to summary dismissal." *Broadway and 67th St. Corp.* v. *City of New York*, 475 N.Y.S.2d 1, 6 (App. Div. 1st Dep't 1984).

"[A]llegations of round sums of damages without an attempt at itemization are not sufficient to constitute special damages." *D'Andrea* v. *Rafla-Demetrious*, 3 F. Supp. 2d 239, 252 (E.D.N.Y. 1996), *aff'd* 146 F.3d 63 (2d Cir. 1998). A general description of damages such as "lost employment, wages and benefits" does not satisfy the requirement of pleading special damages. *Gray* v. *Grove Manufacturing*, Co., 971 F. Supp. 78, 81 (E.D.N.Y. 1997).[13]

In the present case, it is clear from the facts alleged in the complaint that defendant did not act with "disinterested malevolence" but rather out of a desire to further its own financial interests and, furthermore, that plaintiff has "done no more than flatly assert special damages, without any attempt to identify the nature or amount of those damages." *ESI, Inc*. v. *Coastal Power Production Co.*, 995 F. Supp. 419, 435 (S.D.N.Y. 1998). Plaintiff's allegation that he suffered one million dollars in "special damages, namely embarrassment and discomfort in

[13]Internal punctuation omitted.

dealings with his employees and expenditure of monies for legal defense" is insufficient to satisfy the requirement of pleading special damages because it is an unitemized round sum and because he has only given a general description of such. Accordingly, plaintiff's third and fourth causes of action for prima facie tort will be dismissed.

Plaintiff's fifth cause of action is for abuse of process. Plaintiff alleges:

> "Defendant's failure to comply with lawful orders of the Court and failure to seek a stay pending appeal was calculated and designed to withhold production past the expiration of the statute of limitations applicable to defamation actions. Defendant's actions were intended, not for any legitimate reason, but rather, to abuse the judicial process to deprive plaintiff of his rights to institute an action for the defamatory communications uttered by Provident to the New York State Department of Education and the New York State Frauds Bureau." Compl. ¶¶50-51.

Defendant seeks to dismiss this cause of action on the basis that compliance *vel non* with discovery orders does not constitute "process."

The tort of abuse of process is an "obscure one" which is "seldom considered." *Board of Educ.* v. *Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 399-400 (1975). It has "three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." *Curiano*, at 116. "Process[14] is a direction or demand that the person to whom it is directed shall perform or refrain from the doing of some prescribed act. It follows that there must be an unlawful interference with one's person or property under color of process in order that action for abuse of process may lie." *Williams* v. *Williams*, 23 N.Y.2d 592, (1969).[15] Furthermore, the

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[14]Examples of the types of "process" susceptible to giving rise to a cause of action for the tort of abuse of process include "attachment, execution, garnishment, or sequestration proceedings, or arrest of the person, or criminal prosecution ***." *Williams*, *infra* at 596 n.1 (citation omitted); *see also Curiano*, at 116 ("the institution of a civil action by summons and complaint is not legally considered process capable of being abused."). It follows that the process must have been issued by the defendant, in the abuse of process lawsuit, and that it is "the plaintiff [who] will be penalized if he violates it," not *vice-versa*. *Cook* v. *Sheldon*, 41 F.3d 73, 80 (2d Cir. 1994).

[15]Internal citation and punctuation omitted.

"plaintiff must allege and prove actual or special damages in order to recover." *Farmingdale Classroom Teachers Ass'n*, at 405. "Special damages have been defined as temporal harm in the sense of pecuniary loss, which must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts and must be fully and accurately stated." *Ann-Margret* v. *High Society Magazine*, 498 F. Supp. 401, 408 n.18 (S.D.N.Y. 1980) (holding that alleging damages of $5 million for harm to reputation, encouragement of third-party complaints and attorney fees fails to satisfy requirement of special damages). Based upon the above, it is evident that the failure to comply with discovery orders does not by any means constitute the tort of abuse of process; accordingly, plaintiff's fifth cause of action will be dismissed.

Plaintiff's sixth cause of action is for deceptive acts and practices in violation of N.Y. Gen. Bus. Law §349(a). Plaintiff's Complaint alleges:

> "53. For good and valuable consideration plaintiff contracted with Defendant PROVIDENT to provide disability income insurance in the event of Plaintiff's inability to perform the

duties of his occupation as an optometrist in accordance with the terms of the policy.

"54. The Plaintiff was induced by Defendant PROVIDENT to purchase the aforesaid policies by representations of and by said Defendant PROVIDENT that, in the event a claim was made against the policy, payment pursuant to the policies would be readily and willingly made.

"55. Plaintiff became totally disabled as defined by the policy on and as of May 15, 1986 and made claim under the aforesaid policy. "56. In May 1986, the defendant began making payments to Dr. Daniels under the policy. Those payments were terminated as of July 1998, after this litigation was commenced seeking a declaratory judgment as to the plaintiff's rights under the policy with respect to the provisions for payments for 'presumptive disability'.

"57. Thereafter, the defendant commenced litigation against the plaintiff alleging fraud. The actions were later consolidated.

"58. Defendant PROVIDENT has engaged in intentional, wanton, willful, malicious and bad faith conduct in refusing to provide benefits as described in the policies and/or to settle the claim made by the Plaintiff against the aforesaid disability insurance policy.

"59. Defendant PROVIDENT has willfully and repeatedly failed and refused to settle claims made against disability insurance policies sold by it to the public.

"60. Defendant PROVIDENT's conduct was and is egregious in nature.

"61. As a result of the conduct of the defendant, the plaintiff has suffered and continues to suffer damages.

"62. Defendant has, through its denial of the plaintiff's claims, engaged in conduct outside the contract that was and is designed to defeat it. This conduct included sending investigators to plaintiff's office posing as patients seeking treatment, uttering false written and oral statements inviting criminal prosecution of the plaintiff and uttering false written and oral statements accusing plaintiff of professional misconduct.

* * * * *

"65. As a result of Defendant PROVIDENT's deceptive acts and practices, Plaintiff has suffered and sustained damages.

"66. The public at large has suffered as a result of the pattern of deceptive acts and practices engaged in by Defendant PROVIDENT."

Defendant seeks to dismiss this cause of action on the basis that this case involves a private contract dispute which is not covered by the provisions of N.Y. Gen. Bus. Law §349(a) which makes unlawful deceptive acts or practices in the conduct of any business, trade or commerce or in the

furnishing of any service in this state. The statute provides "no further elaboration of the prohibited conduct" — *Oswego Laborers' Local 214 Pension Fund* v. *Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24 (1995) — however the New York Court of Appeals has objectively defined a deceptive act or practice as a "representation or omission likely to mislead a reasonable consumer acting reasonably under the circumstances." *Gaidon* v. *Guardian Life Ins. Co. of America*, 94 N.Y.2d 330, 344 (1999).[16] "The typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising." *Tinlee* v. *Aetna Casualty & Surety Company*, 834 F. Supp. 605, 608 (E.D.N.Y. 1993). To establish a prima facie case, plaintiff must show that the defendant is "engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof." *Oswego*, at 25. Only consumer-oriented

[16]Internal citations and punctuation omitted.

conduct is covered; therefore the plaintiff must establish that the acts or practices complained of have an impact on consumers in general, although they need not be of a recurring nature. *Ibid*. A "plaintiff is required to allege facts that show injury or potential injury to the public ***" — *Abraham* v. *The Penn Mutual Life Insurance Company*, No. 98CIV.6439(DC), 2000 WL 1051848, at *3 (S.D.N.Y. July 31, 2000) — and, when such is missing, the complaint must be dismissed. *Tinlee*, at 609; *MaGee* v. *Paul Revere Life Ins. Co.*, 954 F. Supp. 582, 586 (E.D.N.Y. 1997).

General Business Law §349 is applicable to "insurance companies' interaction with insureds ***" — *Riordan* v. *Nationwide Mutual Fire Insurance Company*, 977 F.2d 47, 49 (2d Cir. 1992) —; however, private contract disputes between the insured and insurer over policy coverage or the processing of claims are not covered by the statute because such disputes do not affect the consuming public at large. *New York University* v. *Continental Insurance Company*, 87 N.Y.2d 308, 321

(1995); *Oswego*, at 25.[17] "An insurance company's actions in settling a claim are not inherently consumer-oriented," — *Greenspan* v. *Allstate Insurance Company*, 937 F. Supp. 288, 294 (S.D.N.Y. 1996) — nor is an insurer's denial of a claim made deceptive simply because it is mistaken. *Shapiro* v. *Berkshire Life Insurance Company*, 212 F.3d 121, 127 (2d Cir. 2000). A private contract dispute may not be transformed into a section 349 claim merely by alleging that the defendant engages in similar conduct towards others. *Barroso* v. *Polymer Research Corp. of America*, 80 F. Supp. 2d 39, 43 (E.D.N.Y. 1999) (statement that defendant engaged in "bad-faith practices with respect to policyholders nationwide" is insufficient to turn private contract dispute into General

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[17]The types of acts and practices by insurance companies which have been held to be covered under section 349 of the General Business Law include: selling disability insurance policies without intending to honor them — *Didonato* v. *INA Life Ins. Co. of New York*, No. 99 Civ. 470(JSM), 1999 WL 436444, at *1 (S.D.N.Y. June 24, 1999) —; marketing insurance policies in a manner that creates an unrealistic expectation that the premiums will disappear on a strategically chosen "vanishing date" — *Gaidon*, at 344; — failing to acknowledge correspondence from the insured; demanding a proof of loss statement from the insured without justification; refusing to accept an inventory simply because it was not on the insurer's forms; failing to respond to a proof of loss statement; requiring that building and contents claims be settled together and refusing to estimate losses. *Riordan*, at 52-53.

Business Law §349 claim). "The plaintiff must allege facts showing injury or potential injury to the public." *Greenspan*, at 294.

Taken as true, the facts alleged in the complaint indicate that this case is nothing more than a private dispute over insurance coverage with no implications to the public at large despite plaintiff's assertions that defendant "has willfully and repeatedly failed and refused to settle claims made against disability insurance policies sold by it to the public" and that the "public at large has suffered as a result of the pattern of deceptive acts and practices engaged in by Defendant PROVIDENT." Compl. ¶¶59, 66. Accordingly, plaintiff's sixth cause of action for violation of N.Y. General Business Law §349 will be dismissed.

Plaintiff's seventh and final cause of action is for punitive damages. Plaintiff alleges that the

> "actions of defendant Provident were maliciously and intentionally undertaken to harass, alarm, annoy and embarrass the plaintiff in his profession and were not made for any legitimate purpose. The actions of defendant Provident were not performed in fulfillment of a duty or

> undertaken as a result of legal or contractual compulsion, or in response to subpoena or other legal process. The actions of Provident were so egregious as to warrant the imposition of punitive damages." Compl. ¶¶68-70.

Defendant seeks to dismiss this claim on the basis that there is no separate cause of action for punitive damages. "[I]t is well settled that a claim of punitive damages will not stand as a separate cause of action since it constitutes only an element of damages on an underlying cause of action." *Carroll* v. *New York Property Insurance Underwriting Association*, 450 N.Y.S.2d 21 (App. Div. 1st Dep't 1982); *see also Jan Sparka Travel, Inc.* v. *Hamza*, 587 N.Y.S.2d 958 (App. Div. 4th Dep't 1992) ("A claim for punitive damages may not be asserted as a separate cause of action as it constitutes only a part of the total claim for damages on the underlying causes of action.").[18] Plaintiff does not appear to dispute that the request for punitive damages is not properly a cause of action in and of itself and instead "requests that the cause of action for

[18]Internal citation and punctuation omitted.

punitive damages be deemed a part of the prayer for damages." Pl.'s Mem. of Law at 26. Accordingly, this Court will dismiss plaintiff's seventh cause of action, for punitive damages, and instead will consider such as part of the prayer for relief rather than as a cause of action in and of itself.

Accordingly, it is hereby *ORDERED* that defendant's motion to dismiss is granted in part and denied in part, that plaintiff's third through seventh causes of action are dismissed, that plaintiff's motion for discovery, equitable tolling of the statute of limitations and for leave to file an amended complaint is granted, that the statute of limitations on the allegedly defamatory communications contained in the February 4, 1999 Rupp letter and uttered during the May 12, 1999 meeting among Jones, Silvestri and Judge is equitably tolled, that defendant shall provide plaintiff with discovery into any and all communications with New York State by or on its behalf regarding plaintiff within sixty days, that plaintiff may file an amended all-inclusive defamation complaint within

thirty days thereafter and that should plaintiff fail to file an amended complaint within the allocated time frame that his first and second causes of action shall be dismissed and this case shall be closed by the Clerk of this Court.

DATED: Buffalo, N.Y.

July 24, 2001

S.U.S.D.J.