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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1042-15T4

MICHAEL J. MANDELBAUM,

Plaintiff-Appellant,

v.

JACK ARSENEAULT,

Defendant-Respondent.

Argued December 20, 2016 – Decided September 28, 2017

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0927-15.

Joel M. Silverstein argued the cause for appellant (Stern & Kilcullen, LLC, attorneys; Mr. Silverstein and Michael Dinger, on the briefs).

Nace Naumoski argued the cause for respondent (Stewart Bernstiel Rebar & Smith, attorneys; Cathleen Kelly Rebar, of counsel; Mr. Naumoski, on the brief).

PER CURIAM

This case arises out of the divorce of plaintiff Michael J. Mandelbaum and Debra A. Mandelbaum. One of Debra's lawyers,

defendant Jack Arseneault, sent filings in the divorce litigation to The Wall Street Journal (WSJ), resulting in their widespread publication. Michael sued Arseneault for abuse of process (count one), libel (count two), invasion of privacy – false light (count three), invasion of privacy – public disclosure of private facts (count four), and civil conspiracy (count five). Michael appeals an October 30, 2015 order granting Arseneault's motion to dismiss Michael's complaint without prejudice for failure to state a claim, and granting his motion to strike paragraphs 4-12, 29, 41, and 52 of the complaint. We affirm the dismissal without prejudice of count one, reverse the dismissal of counts two through five, and reverse the striking of the paragraphs.

I.

"Because this appeal comes to us on a Rule 4:6-2(e) motion to dismiss, we accept as true all factual assertions in the complaint." Smith v. SBC Communs., Inc., 178 N.J. 265, 268-69 (2004). Thus, the following facts are drawn from Michael's complaint.

The complaint's paragraphs 4-12 alleged as follows. Debra secretly decided to divorce Michael to claim as much of Michael's family's money as possible. In preparation, she attempted to obtain and hide assets; opened secret personal safe deposit boxes; tried to taunt him to hit her by hitting him in the groin and by

initiating verbal altercations; and falsely told others he abused her. On December 17, 2013, Debra removed expensive jewelry from their house and hid it in her personal safe deposit box. The next day, Michael discovered she removed the jewelry and insisted they go to the bank the morning of December 19 to retrieve it. They argued. Later, Debra researched post-concussion syndrome, and arranged for their older son to take their youngest child to school so she and Michael would be alone in the house before the bank opened on December 19.

On the morning of December 19, Michael and Debra argued. When Michael tried to walk away, Debra hit, grabbed and blocked him, and confronted him in the hallway. "There, Debra stepped away from Michael, gave him a strange look as she continued backwards toward the staircase landing, and slid down the stairs feet-first on her stomach, mocking him with facial gestures as she began her slide down the stairs."

Michael immediately attended to Debra, called a doctor, and later called 911. After the police arrived, Debra lied to police that Michael had "grabbed her and pushed her, causing her to lose her balance and fall down the stairs." Michael was arrested.

When Debra was taken to the hospital, she lied to a police officer that Michael abused her for years. She also lied that he "advanced toward her in a threatening manner and grabbed her upper

arms," that she fell down the stairs "as she began to back away from Michael, in an attempt to free herself," and that while he "didn't specifically push her down the stairs[,] she would not have fallen if she wasn't afraid of what he was going to do as he grabbed her arms and threatened to kill her."

While at the hospital, Debra telephonically completed a domestic violence complaint upon which a municipal court judge relied in issuing a temporary restraining order (TRO). She lied to the judge that Michael "was pushing and shoving and screaming," that she stepped back from his aggressiveness, "lost [her] balance and fell down the stairs." She stated that Michael "did not physically have his hands on my body and push me but he kept . . . grabbing me and pushing me and, . . . taking threatening steps," "grabbing me on my arms," face, and shoulders and "stepp[ing] towards me with his hands outstretched."

By December 25, Debra contradicted those false allegations. She admitted to her sister-in-law that "Michael did not push her or lay a hand on her," and that she fell down the stairs because she "slipped or lost her balance." Debra told a contractor that "Michael did not lay a hand on me." Debra told another sister-in-law that Michael did not push her down the stairs. Nonetheless, on January 6, 2014, the Prosecutor's Office filed a criminal

complaint-arrest warrant charging Michael with aggravated assault, N.J.S.A. 2C:12-1(b)(7).

Since December 21, 2013, Arseneault served as Debra's co-counsel in the divorce case and represented Debra in the criminal case. By January 9, 2014, he knew Michael's arrest, the TRO, and the criminal complaint-arrest warrant (collectively the "Process") were based on Debra's accusations "she had fallen down the stairs as a result of Michael pushing, shoving, and grabbing her, and that those accusations were false." In a January 9 email to Michael's counsel, Arseneault acknowledged Debra's admission "that her husband did not push her down the stairs."

Nonetheless, Arseneault conspired with Debra to exploit her false allegations and abuse the Process as leverage to extort a settlement from Michael and his family that was larger than she legally deserved in the divorce case. The complaint's paragraph 29 alleged Arseneault's compensation included a percentage of any settlement Debra received in the divorce case.

Arseneault also used Debra's false allegations and the resulting Process to coerce Michael into signing a January 23, 2014 consent order in which Debra agreed to dismiss the TRO and Michael agreed to pay her $25,000 per month plus household and transportation expenses and $140,000 in legal and other costs.

When Michael moved to dismiss the divorce complaint, Arseneault included in the June 12, 2014 opposition papers a certification by Debra, in which she resurrected her false and abandoned allegation that Michael pushed, shoved, and grabbed her, causing her to fall down the stairs. Arseneault also included exhibits, including the police officer's probable-cause affidavit repeating that allegation and describing Michael's arrest, and a joint tax return of Debra and Michael in which Michael's social security number was unredacted.

The complaint's paragraph 41 alleged that in an August 6, 2014 letter, Arseneault threatened a "public undressing" of Michael and his family if he did not accede to Debra's monetary demands.

In September 2014, Arseneault followed through on that threat by contacting the WSJ and providing it with certain filings in the divorce case, including Debra's certification and the exhibits stating Michael had "grabbed and pushed her, causing her to lose her balance and fall." Although Arseneault knew Debra's accusation was false, he decided not to advise the WSJ's reporter.[1]

[1] The parties have supplied us with Debra's certification and over 200 pages of exhibits Arseneault admittedly supplied to the WSJ, but have not supplied us with the WSJ's resulting article.

As a result, the WSJ published an online article which quoted Debra's false accusation and provided electronic links to Debra's certification and the exhibits. The article stated that Michael, son of a part owner of the Minnesota Vikings, had been charged with aggravated assault and that Debra had obtained a TRO.

The WSJ story was picked up by numerous other publications, including Sports Illustrated, the New York Post, The Star-Ledger, and online sites, each of which reported that Michael pushed Debra down the stairs. That resulted in a "firestorm of negative publicity" for Michael and his family, death threats to Michael, and harassing phone calls to his father.

The complaint's paragraph 52 alleged that in early 2014, Michael asserted that Debra failed to pay certain expenses that were her responsibility under the consent order. Michael proposed that he reduce his next $25,000 monthly payment accordingly.

In a December 14, 2014 letter, Debra's other divorce counsel responded by threatening that if Michael "withholds so much as one dollar from [Debra's] monthly support payments," he would be "publicly disgraced once again." The other counsel was "instructed to so respond by Arseneault and/or his co-conspirator, Debra."

Michael filed a complaint against Arseneault in the Law Division. Arseneault successfully moved to dismiss the complaint

under Rule 4:6-2(e), and to strike the above-mentioned paragraphs of the complaint under Rule 4:6-4(b). Michael appeals.

II.

We first review the motion court's grant of Arseneault's motion to strike. Rule 4:6-4(b) permits a court to dismiss a pleading that is "scandalous, impertinent, or . . . abusive," or to strike any part of a pleading "that is immaterial or redundant." The rule is similar to Fed. R. Civ. P. 12(f), which permits federal courts to strike "any redundant, immaterial, impertinent, or scandalous matter." Under that rule, the federal courts review orders on motions to strike "for an abuse of discretion." See, e.g., Operating Eng'rs Local 324 Health Care Plan v. G&W Constr. Co., 783 F.3d 1045, 1050 (6th Cir. 2015); United States v. Coney, 689 F.3d 365, 379 (5th Cir. 2012). We will hew to the same standard of review.

The motion court ruled the complaint's paragraphs 4-12, 29, 41, and 52 were "not relevant to the underlying claims. Moreover, the court does not recognize events prior to defendant's involvement in the matter, or Defendant's alleged motive as sufficiently related to those claims being asserted here." To the contrary, as set forth above, those paragraphs were relevant because the facts alleged were "of consequence to the determination of the action." See N.J.R.E. 401.

Paragraphs 4-12 alleged how and why Arseneault's co-conspirator Debra prepared to stage her fall down the stairs. The complaint claims Arseneault intentionally misrepresented why Debra fell, making relevant Debra's "motive, opportunity, intent, preparation[and] plan." See N.J.R.E. 404(b); see also State v. Louf, 64 N.J. 172, 177 (1973) ("the acts and declarations of any of the conspirators in furtherance of the common design may be given in evidence against any other conspirator").

Paragraph 29 alleged Arseneault had a financial motive to take these actions to maximize Debra's settlement. Motive is relevant. See State v. Calleia, 206 N.J. 274, 293 (2011). Indeed, "the court must look to the motivation of the attorney" to resolve an abuse of process claim. LoBiondo v. Schwartz, 199 N.J. 62, 109 (2009).

Paragraph 41 alleged Arseneault's letter threatened a "public undressing" of Michael and his family shortly before Arseneault sent the certification and exhibits to the WSJ.[2] Finally, paragraph 52 alleged Michael's proposal that triggered a threat

[2] Arseneault contends paragraph 41 misread his letter, which stated Debra had made "a good-faith effort to avoid a 'public undressing' of the family's assets." However, Arseneault's letter concluded that Michael's position "leaves her with no alternative but to" "air the family finances." Drawing all reasonable inferences in Michael's favor, the letter may be read as a threat of a "public undressing."

he would be "publicly disgraced once again," allegedly at the behest of conspirators Arseneault and Debra. The facts concerning these threats are relevant.

As these paragraphs are relevant, "[t]here is no justification for striking" them. DeGroot v. Muccio, 115 N.J. Super. 15, 19 (Law Div. 1971). Arseneault claims it was scandalous to allege he entered into a contingency fee in a family matter in violation of R.P.C. 1.5(d). However, "[n]o matter how the language may vilify defendants, it will not be 'scandalous' within the meaning of the cited rule unless it is irrelevant." DeGroot, supra, 115 N.J. Super. at 19 (citing Chew v. Eagan, 87 N.J. Eq. 80, 81-82 (Ch. 1916)); see also Coney, supra, 689 F.3d at 380 (holding the "pleadings are not scandalous because they are directly relevant").

Accordingly, the motion court abused its discretion in striking those paragraphs. Thus, we consider those paragraphs in reviewing whether the complaint states a claim.

III.

We next address the motion court's dismissal of the complaint without prejudice for "failure to state a claim upon which relief can be granted." R. 4:6-2(e). Our Supreme Court has instructed trial courts "to approach with great caution applications for dismissal under Rule 4:6-2(e)," which "should be granted in only

the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989).

"The standard traditionally utilized by courts to determine whether to dismiss a pleading for failure to state a claim on which relief may be granted is a generous one" for plaintiffs. Green v. Morgan Props., 215 N.J. 431, 451 (2013). The standard is "whether a cause of action is 'suggested' by the facts" alleged in the complaint. Printing Mart-Morristown, supra, 116 N.J. at 746 (citation omitted). "[A] reviewing court 'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Ibid. (citation omitted). Our examination of the complaint should be one "that is at once painstaking and undertaken with a generous and hospitable approach." Ibid.

"We review a grant of a motion to dismiss a complaint for failure to state a cause of action de novo, applying the same standard under Rule 4:6-2(e) that governed the motion court." Wreden v. Township of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014). We address each count of the complaint in turn.

A.

Count one charges Arseneault with abuse of process, namely Michael's arrest, the criminal complaint-arrest warrant, and the

TRO. We affirm the dismissal of this count on the ground that Arseneault did not use or threaten the use of process in a coercive manner as required by our precedent.

We have defined "process" as the "procedural methods used by a court to 'acquire or exercise its jurisdiction over a person or over specific property,'" including "the 'summons, mandate, or writ used by a court to compel the appearance of the defendant in a legal action or compliance with its orders,'" as well as the "'arrest of the person and criminal prosecution.'" Ruberton v. Gabage, 280 N.J. Super. 125, 131 (App. Div.) (citations omitted), certif. denied, 142 N.J. 451 (1995); see Wozniak v. Pennella, 373 N.J. Super. 445, 461 (App. Div. 2004).

"The tort of malicious abuse of process lies not for commencing an improper action, but for misusing or misapplying process after it is issued." Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 431 (App. Div. 2009); see Earl v. Winne, 14 N.J. 119, 128-29 (1953). "The tort is defined in Ash v. Cohn, 119 N.J.L. 54, 58 (E. & A. 1937)." Tedards v. Auty, 232 N.J. Super. 541, 549 (App. Div. 1989). A plaintiff claiming malicious abuse of process must allege "(1) that defendants made an improper, illegal and perverted use of the process, i.e., a use neither warranted nor authorized by the process, and (2) that in use of

such a process there existed an ulterior motive." Ash, supra, 119 N.J.L. at 58.

As the motion court stated, Michael alleged three instances of malicious abuse of process. First, Michael alleged "Debra and Arseneault successfully used the Process – especially the Domestic Violence TRO and the thinly veiled threat that Debra would again reverse course [and] cooperate with the prosecutor . . . as leverage to cause Michael to enter into the Consent Order." Specifically, Michael cited Debra's earlier statements, to Michael and their children that she was not cooperating with the prosecution "at this time." Michael alleged Debra made those statements on Arseneault's advice. Even if Debra's statements are attributed to Arseneault, they were not abuse of process.

As the motion court recognized, "[i]n order for there to be 'abuse' of process, . . . a party must 'use' process in some fashion, and that use must be 'coercive' or 'illegitimate.'" Hoffman, supra, 404 N.J. Super. at 431 (quoting Ruberton, supra, 280 N.J. Super. at 130-31). "There must be such use of it as in itself is without the scope of the process and hence improper." Gambocz v. Apel, 102 N.J. Super. 123, 130 (App. Div.)(quoting Earl v. Winne, 34 N.J. Super. 605, 614-16 (Law Div. 1955)), certif. denied, 52 N.J. 485 (1968). "If the process is not used at all no action can lie for its abuse." Ruberton, supra, 280 N.J. Super.

at 131 (quoting Earl, supra, 34 N.J. Super. at 615). "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Gambocz, supra, 102 N.J. Super. at 128 (quoting Prosser, Law of Torts, § 115, pp. 876-77 (3d ed. 1964)).

Debra's statements did not mention, use, or threaten to use the arrest or the criminal complaint-arrest warrant. Even if her statement could be regarded as a threat to "carry out the [criminal] process to its authorized conclusion," it was not abuse of process. Ibid.

Second, Michael alleged that Arseneault "again leverag[ed] the Process in a further attempt to extort from Michael and his family [an] outlandish settlement" when Arseneault sent the WSJ filings in the divorce case, in particular Debra's certification and the exhibits, including the TRO, the criminal complaint-arrest warrant, and the probable-cause affidavit describing Michael's arrest. However, publicizing process is not abuse of process.

The New Jersey cases which have found abuse of process have involved active use of the process "to 'acquire or exercise its jurisdiction over a person or over specific property.'" Ruberton,

supra, 280 N.J. Super. at 131; see, e.g., Ash, supra, 119 N.J.L. at 55-56, 59 (finding creditors arranged for writs of execution to be returned unsatisfied to set up a debtor's arrest and coerce payment of a debt); Wozniak, supra, 373 N.J. Super. at 461-62 (finding a landlord filed a criminal complaint, leading to a tenant's booking under threat of arrest, to get the tenants to dismiss a civil complaint); Tedards, supra, 232 N.J. Super. at 543-44, 548-49 (finding wife's attorney misused a writ of ne exeat by threatening to arrest the husband to coerce payment of a debt); see also Restatement (Second) of Torts, § 682 cmt. a, illus. 1-3 (1977). "There must be an unlawful interference with the person or property under color of process." Earl, supra, 34 N.J. Super. at 615. No New Jersey case has found publicizing process is abuse of process.

Michael cites a trial court decision from New York holding:

> Threats to give wide publicity to the contents of a complaint, in order to coerce and extort payments from the defendant in the action, motivated by a desire to escape adverse publicity, and the consummation of such threats do not constitute a legitimate and proper use of the process of the court.
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> [Cardy v. Maxwell, 169 N.Y.S.2d 547, 550 (Sup. Ct. 1957).]

However, New York's highest court later held a similar claim — that a lawsuit "was totally without basis in fact and was begun

solely for the purpose of ruining his business reputation by widespread publication of the complaint" – did "not state a cause of action for abuse of process." Williams v. Williams, 246 N.E.2d 333, 335 (N.Y. 1969). The high court ruled "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." Ibid. As "it is unclear what strength Cardy v. Maxwell carries" in New York, we decline to follow it. Chrysler Corp. v. Fedders Corp., 540 F. Supp. 706, 729 (S.D.N.Y. 1982) (declining to follow Cardy); see Holiday Magic, Inc. v. Scott, 282 N.E.2d 452, 457 (Ill. App. Ct. 1972) (same; "Cardy is actually a legal anomaly").

Third, Michael alleged Arseneault "and/or" Debra instructed her other divorce counsel to threaten Michael that he would be "publicly disgraced once again," with the intent "to abuse and leverage the Process to (a) coerce Michael to refrain from enforcing his rights under the terms of the Consent Order, and (b) thereby continue exacting [excessive] payments from Michael." Again, this alleged threat did not mention any Process, instead threatening publicity. That was inadequate to allege abuse of process, even if it was done to prompt a civil settlement. See Ruberton, supra, 280 N.J. Super. at 130-31.

Michael notes that, in some circumstances, "it is what is done in the course of negotiation, rather than the issuance or any

formal use of the process itself, which constitutes the tort." Gambocz, supra, 102 N.J. Super. at 128 (quoting Prosser, supra). We agree "maliciously threatening [misuse of] process in an existing case could be as unfairly coercive as abusing process in some more direct way." Hoffman, supra, 404 N.J. Super. at 432. However, "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required." Gambocz, supra, 102 N.J. Super. at 128 (quoting Prosser, supra). Here, the other counsel's letter, like Arseneault's previous "public undressing" letter, made no definite threat the Process would be actively misused. See Baglini v. Lauletta, 338 N.J. Super. 282, 296-97 (App. Div. 2001).

Thus, we affirm the motion court's dismissal of count one for failure to state a claim for malicious abuse of process against Arseneault. However, we do not agree with the court's assertions that "the claim exists almost entirely against Debra," that Arseneault's alleged actions were "proper," "consistent with his responsibilities as Debra's attorney," and "taken in the normal course of his duties," or that he "acted appropriately in representing his client." The complaint alleged Arseneault acted, knowing the Process was based on false statements, for the ulterior motive of extorting money from Michael and his family. Although the complaint did not adequately allege the actions were an abuse

of process, they "may have been otherwise tortious or violated ethical standards." Ruberton, supra, 280 N.J. Super. at 132.

B.

Count two charges Arseneault with libel by providing the WSJ with the false statements in Debra's certification and the exhibits that "(1) Michael had pushed, shoved, and grabbed her, causing her to fall down the stairs and (2) Michael had thereby committed a 'felony,' 'an aggravated assault,' or other crime."

"'[L]ibel is defamation by written or printed words.'" W.J.A. v. D.A., 210 N.J. 229, 238 (2012) (citation omitted). "[T]he elements of the cause of action for defamation [are] '(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher.'" Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009) (citation omitted).

The motion court dismissed Michael's libel claim because of his "inability to demonstrate fault." However, on a motion to dismiss under Rule 4:6-2(e), "the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint[.]" Green, supra, 215 N.J. at 452. Michael's complaint adequately alleged that "Arseneault made and published each of these written accusations and statements against Michael with

actual knowledge that they were false, with reckless disregard of their falsity, or with negligence in failing to ascertain the falsity of the statement before communicating it."

The motion court found Arseneault "had no reason not to believe the sworn affidavit of a Police Officer, or numerous other sworn certifications that formed the basis of his belief." However, the complaint did not concede Arseneault believed Debra's statements were true.

To the contrary, the complaint alleged "Arseneault was aware that Debra's accusations against Michael set forth in . . . Debra's Certification were false." The complaint further alleged "Arseneault knew that Michael's arrest and the issuance of the criminal complaint-arrest warrant and of the Domestic Violence TRO were based on Debra's accusations that she had fallen down the stairs as a result of Michael pushing, shoving, and grabbing her, and that those allegations were false." The complaint alleged Arseneault was aware Debra repeatedly made admissions contradicting her accusations, but sent her contrary accusations to the WSJ without advising the WSJ of her admissions.

The motion court erred in finding facts contrary to the complaint's allegations. On a motion for failure to state a claim, the "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-

Morristown, supra, 116 N.J. at 746. The court was required to "'accept as true the facts alleged in the complaint.'" Maeker v. Ross, 219 N.J. 565, 569 (2014) (citation omitted).

The motion court further found Arseneault's supposed "reliance on sworn affidavits was reasonable." The court noted the "New Jersey Disciplinary Rules of Conduct permit a lawyer who is participating in the litigation of a matter to state information contained in a public record unless the lawyer knows, or reasonably should know his statement will likely materially prejudice the proceeding," citing R.P.C. 3.6(a), (b)(2). However, the complaint alleged Arseneault knew the information in Debra's certifications and the exhibits was false.

Nothing in the Rules of Professional Conduct states that it is ethical for a lawyer to publicize as true statements the lawyer knows to be false.[3] Indeed, the ethical rules "include reasonable restrictions upon [attorneys'] extrajudicial speech to discourage and prevent extraneous matters from being insinuated" which "could

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[3] Under the Rules, lawyers may not knowingly "offer evidence that the lawyer knows to be false," R.P.C. 3.3(a)(4), or "counsel or assist a witness to testify falsely," R.P.C. 3.4(b). Moreover, lawyers may not knowingly "(1) make a false statement of material fact or law to a third person; or (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." R.P.C. 4.1(a).

divert the search for truth." In re Hinds, 90 N.J. 604, 625 (1982) (discussing R.P.C. 3.6's predecessor, D.R. 7-107).

In any event, R.P.C. 3.6 is no defense to tortious conduct. Nor was Michael required "to make out a violation of the New Jersey Disciplinary Rules of Professional Conduct," as the motion court stated. Like the ABA model rules, New Jersey's ethical "[r]ules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." Baxt v. Liloia, 155 N.J. 190, 197 (1998) (quoting Model Rules of Professional Conduct, Scope (Am. Bar Ass'n 1992)). Similarly, "state disciplinary codes are not designed to establish standards for civil liability." Id. at 202.

Arseneault argues Debra's statements in the documents he submitted with his motion to dismiss establish her accusations were true. "In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (citation omitted). Arseneault cites Debra's certification, the officer's probable cause affidavit, and the TRO transcript, which were all referenced in the complaint as bases for Michael's claim. "[A] court may consider documents specifically referenced in the

complaint 'without converting the motion into one for summary judgment.'" Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015) (citation omitted), appeal dismissed, 224 N.J. 523 (2016).

However, the complaint alleged Debra's statements in those documents were false. In the TRO transcript, Debra claimed Michael "was pushing and shoving," "grabbing me and pushing me," and physically "grabbing me on my arms," face, and shoulders, causing her to lose her balance and fall. The probable-cause affidavit related Debra's statements that Michael "grabbed and pushed her, causing her to lose her balance and fall down the stairs." Debra's certification said Michael "physically pushed and shoved me," "continued to grab my arms and shake and shove me, causing me to lose my balance" and fall.

Arseneault argues Debra's statements in the documents were consistent with her later "admissions" that Michael did not push her or lay a hand on her. To the contrary, a fact finder could find Debra's accusations in the documents were inconsistent with her later admissions, and were thus "'false and defamatory.'" Leang, supra, 198 N.J. at 585 (citation omitted). On a motion under Rule 4:6-2(e), Michael is "entitled to every reasonable inference of fact." Printing Mart-Morristown, supra, 116 N.J. at 746.

We reject the motion court's reasoning for dismissing the libel claim raised in count two, and reverse. The court also dismissed counts three and four primarily based on the same reasoning. We similarly reject that reasoning as to counts three and four, and now consider the court's secondary reasons for dismissing those counts.

C.

In count three, Michael claimed Arseneault invaded his privacy by portraying him in a false light when he provided to the WSJ documents containing Debra's accusations that he had "physically abused his wife, causing her to fall down a flight of stairs, and was, therefore, guilty of domestic violence and a crime."

A defendant commits false-light invasion of privacy when he

> gives publicity to a matter concerning another that places the other before the public in a false light [if]
>
> . . . .
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.
>
> [Romaine v. Kallinger, 109 N.J. 282, 294 (1988) (quoting Restatement, supra, § 652E);

accord Durando v. Nutley Sun & N. Jersey Media Grp., Inc., 209 N.J. 235, 249 (2012).]

The motion court's secondary reason for dismissing count three was that "the publicity element of the false light claim is absent when the matter was previously publicized." However, no New Jersey case makes prior publication a defense to publicizing a matter portraying someone in a false light. Neither the court nor Arseneault cited any authority for such a defense.

The Restatement, supra, contains no prior-publication defense for publicity portraying a person in a false light. It simply provides that publicity "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Id. § 652D comment a; see id. § 652E comment a. "[A]ny publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in" those sections. Restatement, supra, § 652D cmt. a.

We need not decide whether there is a prior-publication defense to false-light invasion of privacy. Even if prior publication could be a defense, there was no basis in the complaint

for the motion court's "finding that the facts were previously published." Thus, it could not be a proper basis for dismissal under Rule 4:6-2(e). See Printing Mart-Morristown, supra, 116 N.J. at 746.

The motion court referenced an article in The Star-Ledger. This apparently referred to a January 7, 2014 article in The Star-Ledger, which Arseneault attached to his motion to dismiss Michael's complaint. However, the article was not referenced in the complaint, was not a basis of Michael's claims, and was not a "public record." Cf. Banco Popular, supra, 184 N.J. at 183. Arseneault argues the article became a public record because it was attached to a brief Debra submitted in the divorce case. However, "[b]riefs are not filed in the technical sense," "do not become part of the docketed case file," and are "not an acceptable vehicle for the presentation of facts or documents not of record." Pressler & Verniero, Current N.J. Court Rules, comment on R. 1:6-5 (2017).

"If, on a motion to dismiss based on [Rule 4:6-2(e)], matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46[.]" R. 4:6-2. Summary judgment was inappropriate here.

Even if prior publication could be a defense to portraying a person in a false light, the prior publication was in a Newark newspaper, and essentially repeated only the allegations in the probable-cause affidavit. By contrast, the complaint alleged Arseneault sent the WSJ not only the probable-cause affidavit but also Debra's certification and the exhibits, including the criminal complaint-arrest warrant and the TRO. The complaint further alleged that, based on Arseneault's disclosure, the WSJ published an online article which was "picked up by numerous other publications, including, without limitation, Philly.com, the Star Ledger, the New York Post, Sports Illustrated, Vikings Territory, and Mail Online," and that they all published additional details.

The motion court took the position that "[i]n no way does the [relative] size [of the circulation] of The Star-Ledger prohibit the court from finding that the facts were previously published." The court also asserted "that the news was published by a 'local New Jersey newspaper' is of no consequence," and that the WSJ "published facts not in The Star-Ledger article has no effect."

We disagree. Even if prior publication could be a defense, knowingly or recklessly causing publicity reaching many additional people placing someone in a false light could result in additional damages and give rise to a cause of action against the person causing the additional publicity. Otherwise, a person could take

false matter someone had "posted in the window of [a] shop," and knowingly and recklessly give the false matter widespread publicity to many millions in newspapers, magazines, or websites of national or global circulation, without liability. See Restatement, supra, § 652D cmt. a, illus. 2. Moreover, the relative circulations of The Star-Ledger, the WSJ, Sports Illustrated, the New York Post, and the other websites mentioned in the complaint are not before us. That itself is sufficient to prevent summary judgment.[4]

Summary judgment may be granted only if "there is no genuine issue as to any material fact challenged." R. 4:46-2(c). Because of this "inadequate record, we are unable to conclude that there is no genuine issue as to any material fact." Lyons v. Township of Wayne, 185 N.J. 426, 437 (2005). Moreover, "when viewed in the light most favorable to the non-moving party," the evidence was not "'so one-sided that [Arseneault] must prevail as a matter of law.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523,

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[4] Thus, we need not resolve whether the additional facts disclosed by Arseneault to the WSJ and subsequently publicized were themselves sufficient to cause additional damages and give rise to a cause of action. However, we note that "a fundamental requirement of the false light tort is that the disputed publicity be in fact false, or else 'at least have the capacity to give rise to a false public impression as to the plaintiff.'" Romaine, supra, 109 N.J. at 294 (citation omitted).

533 (1995) (citation omitted). Thus, the court erred in dismissing count three.

D.

In count four, Michael claimed Arseneault invaded his privacy by public disclosure of a private fact as follows: "At least some of the facts Arseneault disclosed to the Wall Street Journal, including, without limitation, Michael's Social Security Number, were actually private." Michael was "forced to take protective measures because of the possible attempt of an imposter to use his social security number to open credit cards in his name." As a "result of Arseneault's disclosure of such private facts, Michael has suffered and will continue to suffer substantial pecuniary and other harm and damages."

The complaint adequately set forth a cause of action for invasion of privacy by publicizing a private fact.

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of [the other's] privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.
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> [Castro v. NYT Television, 384 N.J. Super. 601, 610-11 (App. Div. 2006) (quoting Restatement, supra, § 652D); see G.D. v. Kenny, 205 N.J. 275, 309 (2011).]

The motion court's secondary reason for dismissing the private-fact count was that Michael "did not set forth facts in support of that claim, and any potential damages would be pure speculation." However, Michael's allegation that he had to take protective measures and suffered pecuniary damages was sufficient under the lenient standard of Rule 4:6-2(e). See Printing Mart-Morristown, supra, 116 N.J. at 760 (finding an allegation "plaintiffs lost any gain from" a job sufficiently alleged damages). The issue of damages "should await the development of a record," and thus "we will not permit the complaint to be stricken at this juncture." Id. at 770.

Arseneault argues there can be no liability because the joint tax return bearing Michael's unredacted social security number was an exhibit to the certification Debra filed in the divorce action. Generally, "there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as . . . the pleadings that [the plaintiff] has filed in a lawsuit." Dzwonar, supra, 348 N.J. Super. at 178 (emphasis omitted) (quoting Restatement, supra, § 652D cmt. b). However, the Rules of Court may have excluded the tax return from public access. See R. 1:39-3(d)(1), 5:5-2(d); see also Pressler & Verniero, supra, cmt. 5 on R. 5:5-2. The rules also provide a social security number is "a confidential personal identifier" that generally may not be set

forth "in any document or pleading submitted to the court." R. 1:38-7(a), (b). "[I]f the record is one not open to public inspection, as in the case of income tax returns, it is not public, and there is an invasion of privacy when it is made so." Restatement, supra, § 652D cmt. b.

Arseneault contends he relied on Debra's other divorce counsel to redact the social security numbers. The motion court found Arseneault's "reliance on the requirement that attorneys not set forth confidential personal identifiers in any document or pleading submitted to the court was similarly reasonable in shaping his belief that forwarding the records to WSJ was not a violation of the Rules of Professional Conduct." However, nothing in the complaint suggested that Arseneault relied on that requirement or other counsel, or had that belief. Moreover, a violation of the ethics rules was not a required element of invasion of property by publicity of private facts.

As Michael's allegations concerning his social security number was sufficient to state a claim, the motion court erred in dismissing count four.[5]

E.

[5] Thus, we need not address Michael's argument that the TRO was also private information under R. 1:38-3(d)(9).

Count five alleged Arseneault and Debra conspired to commit the torts alleged in counts one, two, three, and four. The motion court ruled that "[a]s a result of Counts One through Four being dismissed, Count Five – civil conspiracy – is DISMISSED WITHOUT PREJUDICE on the premise that there is no valid underlying tort to substantiate the claim." As we have reversed the dismissal of counts two, three, and four, there are underlying torts which Arseneault allegedly conspired to commit. Accordingly, we reverse the dismissal of count five. *See* *State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l, Inc.*, 387 *N.J. Super.* 469, 486 (App. Div. 2006).

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION