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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

REDFLEX TRAFFIC SYSTEMS, INC., a Delaware corporation,

Plaintiff,

vs.

AARON M. ROSENBERG and LISA F. ROSENBERG, husband and wife,

Defendants.

AARON M. ROSENBERG and LISA F. ROSENBERG, husband and wife,

Counterclaimants,

vs.

REDFLEX TRAFFIC SYSTEMS, INC., a Delaware corporation, DOES I-X; BLACK PARTNERSHIPS I-X; and XYZ CORPORATIONS I-X,

Counterdefendants.

Case No: CV2013-001166

REDFLEX TRAFFIC SYSTEMS, INC.'S MOTION TO DISMISS COUNT II OF DEFENDANTS' COUNTERCLAIM (INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

(Assigned to the Honorable Douglas Rayes)

Oral Argument Requested

MOTION

Pursuant to Arizona Rule of Civil Procedure 12(b)(6), Plaintiff/Counterdefendant Redflex Traffic Systems, Inc. ("Redflex") moves to dismiss Count II of Defendants/Counterclaimants Aaron and Lisa Rosenberg's (collectively, "the Rosenbergs"") Counterclaim asserting a claim for intentional infliction of emotional distress. This Motion is supported by the following Memorandum.

MEMORANDUM

1. Introduction: The Rosenbergs' Claim For Intentional Infliction Of Emotional Distress Is Legally Deficient And Must Be Dismissed.

Arizona Rule of Civil Procedure ("Rule") 12(b)(6) is intended to eliminate legally deficient claims that, absent early dismissal, would needlessly consume judicial resources and impose unnecessary burden, harm or expense on defendants. See Moretto v. Samaritan Health Sys., 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997) ("A motion to dismiss tests the formal sufficiency of a claim for relief."); Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993) ("The purpose of [Rule 12(b)(6)] is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus spare litigants the burdens of unnecessary pretrial and trial activity.").[1] In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, courts should consider only the well-pled factual allegations contained in the pleading. Cullen v. Auto-Owners Ins. Co., 218 Ariz. 417, ¶ 7, 419, 189 P.3d 344, 346 (2008). While courts may assume the truth of factual allegations and indulge in reasonable inferences from those allegations, they should not assume as true any conclusions of law or unwarranted factual deductions. Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989); see also Cullen, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346 ("[M]ere conclusory statements are insufficient to state a claim upon which relief can be granted."). Further, courts should not "speculate about hypothetical facts that might entitle the plaintiff to relief." Cullen, 218 Ariz. at 420, ¶ 14, 189 P.3d at 347. Dismissal of a claim for relief is proper when the claim lacks a

[1] As the Arizona Rules of Civil Procedure were modeled after the Federal Rules of Civil Procedure, Arizona courts give great weight to cases interpreting similar federal rules. La Paz Cnty. v. Yuma Cnty., 153 Ariz. 162, 164, 735 P.2d 772, 774 (1987).

cognizable legal theory or sufficient facts to support a cognizable legal theory. See Mintz v. Bell Atl. Sys. Leasing Int'l, Inc., 183 Ariz. 550, 555, 905 P.2d 559, 564 (App. 1995) (affirming dismissal of intentional infliction of emotional distress claim). As demonstrated below, Count II of the Rosenbergs' Counterclaim fails to state a viable claim for intentional infliction of emotional distress and must be dismissed.

In support of their claim for intentional infliction of emotional distress, the Rosenbergs allege only the following: (1) Redflex purportedly maintained a company policy of providing gifts and bribes to its customers, in which practice Mr. Rosenberg voluntarily participated [Counterclaim ¶ 2]; (2) in a supposed effort to mislead the public and government officials as to the full nature and extent of the company's purported patterns and practices, Redflex allegedly portrayed Mr. Rosenberg as a "rogue employee" and attempted to make Mr. Rosenberg a "scapegoat" [id. ¶¶ 2, 7-8]; (3) in October 2012, Redflex made defamatory statements to the Chicago Tribune regarding Mr. Rosenberg's participation in anti-bribery training and discipline relating to his obtaining a $910 reimbursement from the company for a trip of a customer-employee [id. ¶¶ 5-6]; (4) Redflex senior personnel asked Mr. Rosenberg to accept blame for the $910 expense reimbursement and participate in an illegal scheme relating to the expense [id. ¶ 5]; and (5) after Redflex's termination of Mr. Rosenberg's employment, Redflex made false statements in company press releases, meetings and internal reports regarding the reasons for Mr. Rosenberg's termination, [id. ¶ 9]. As detailed below, the Rosenbergs' claim for intentional infliction of emotional distress is a classic example of a facially meritless claim that Rule 12(b)(6) is designed to eliminate at the pleading stage. First, the Rosenbergs' claim offers only conclusory and vague allegations that they allegedly suffered severe emotional distress. Second, Redflex's alleged conduct does not come close to meeting the threshold of extreme and outrageous conduct necessary under Arizona law to state a claim for intentional infliction of emotional distress. Accordingly, Redflex is entitled to dismissal of the Rosenbergs' claim for intentional infliction of emotional distress with prejudice.

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2. **The Rosenbergs Failed To Allege The Severe Emotional Distress Necessary To State A Claim For Relief.**

To state a claim for intentional infliction of emotional distress under Arizona law, the Rosenbergs must allege that: (1) Redflex's conduct was extreme and outrageous; (2) Redflex intended to cause emotional distress or recklessly disregarded the near certainty that such distress will result from its conduct; and (3) severe emotional distress occurred as a result of Redflex's conduct. Citizen Publ'g Co. v. Miller, 210 Ariz. 513, 516, ¶ 11, 115 P.3d 107, 110 (2005); accord Johnson v. McDonald, 197 Ariz. 155, 160-61, ¶¶ 23-24, 3 P.3d 1075, 1080-81 (App. 1999) (holding that plaintiff failed to state a claim for relief for intentional infliction of emotional distress); Mintz, 183 Ariz. at 555, 905 P.2d at 564 (same).[2]

Arizona law is well-established that, in order to sufficiently allege the third element, a claimant must allege sufficient facts to show that the emotional distress allegedly suffered was severe. See Midas Muffler Shop v. Ellison, 133 Ariz. 194, 198-99, 650 P.2d 496, 500-01 (App. 1982) (""[A] line of demarcation should be drawn between conduct likely to cause mere 'emotional distress' and that causing 'severe emotional distress' . . . ." (citations omitted)). Conclusory allegations that plaintiffs suffered severe emotional distress are insufficient as a matter of law to state a claim for relief. See, e.g., Leon v. Arizona, 2013 WL 2152559, *5 (D. Ariz. May 16, 2013) ("Leon has not alleged any facts that he suffered severe emotional distress as a result of Defendant's conduct. Leon alleges he suffered harassment, embarrassment, and emotional distress. Leon also asserts that he was subjected to medical abuses. These conclusory allegations do not provide any factual support." (internal citations omitted)); Mills v. Bristol-Myers Squibb Co., 2011 WL 3566131, *3 (D. Ariz. Aug. 12, 2011) ("[S]imply alleging that plaintiff has suffered 'severe and permanent injuries' and 'embarrassment and humiliation' without more facts is insufficient to plead severe emotional distress."); Hanks v. Andrews, 2006 WL 273606, *3 (D. Ariz. Jan. 30, 2006) ("Hanks' claim for intentional infliction of emotional distress falls far short of stating a claim. . . . Hanks does

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[2] Arizona has adopted the tort of intentional infliction of emotional distress as described in Restatement (Second) of Torts § 46. See, e.g., Ford v. Revlon, Inc., 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987); Midas Muffler Shop v. Ellison, 133 Ariz. 194, 197, 650 P.2d 496, 499 (App. 1982); Mintz, 183 Ariz. at 554, 905 P.2d 563.

not allege facts establishing that he actually suffered severe emotional distress, other than conclusorily alleging such to be the case."); cf. Cullen, 218 Ariz. at 419, 189 P.3d at 346 ("Because Arizona courts evaluate a complaint's well-plead facts, mere conclusory statements are insufficient to state a claim upon which relief can be granted.").

Here, the Rosenbergs fail to allege any facts showing that they suffered severe emotional distress (let alone any distress) as a result of Redflex's alleged conduct. The Rosenbergs instead make only the conclusory allegation that they "experienced severe emotional distress." [Counterclaim ¶ 14.] The Rosenbergs do not allege that they suffered the type of distress that is necessary to succeed on a claim for intentional infliction of emotional distress. See Midas Muffler Shop, 133 Ariz. at 198-99, 650 P.2d at 500-01 (identifying heart attack, fright resulting in premature birth of a child, writhing in bed in a state of extreme shock and hysteria, and severe anxiety requiring hospitalization as examples of severe emotional distress). And Mr. Rosenberg's alleged harm to his reputation and income loss (alleged in support of the Rosenbergs' defamation counterclaim) does not rise to the level of severe emotional distress necessary to support a claim for relief. [See Counterclaim ¶ 11.] In short, as in Leon, Mills and Hanks, the Rosenbergs' conclusory assertions are insufficient to state a claim for intentional infliction of emotional distress. See, e.g., Leon, 2013 WL 2152559 at *5; Mills, 2011 WL 3566131 at *3; Hanks, 2006 WL 273606 at *3. As the Rosenbergs' intentional infliction of emotional distress claim as pled is legally deficient, it must be dismissed. Cullen, 218 Ariz. at 419, 189 P.3d at 346.

3. Redflex's Alleged Conduct Was Not Extreme And Outrageous.

In evaluating a claim for intentional infliction of emotional distress, Arizona courts are charged with the responsibility for making an initial determination as to whether the alleged misconduct is sufficiently extreme and outrageous. See Midas Muffler Shop, 133 Ariz. at 197, 650 P.2d at 499 (citing Cluff v. Farmers Ins. Exchange, 10 Ariz. App. 560, 460 P.2d 666 (App. 1969), *overruled on other grounds by*, Godbehere v. Phoenix Newspapers Inc., 162 Ariz. 335, 783 P.2d 781 (1989)); Mintz, 183 Ariz. at 554, 905 P.2d at 563 (affirming dismissal of former employee's claim against employer for intentional infliction of emotional distress). To properly allege that a defendant's conduct was sufficiently extreme and outrageous, "the plaintiff must show that the

defendant's conduct was 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" Johnson, 197 Ariz. at 160, ¶ 23, 3 P.3d at 1080 (quoting Cluff, 10 Ariz. App. at 562, 460 P.2d at 668); see also Allen v. Quest Online, LLC, 2011 WL 4403674, *10 (D. Ariz. Sept. 22, 2011) ("It is not enough 'that the [Defendant] acted with an intent which is tortious or even criminal, or that [he or she] intended to inflict emotional distress, or even that [his or her] conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.'" (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). The "conduct necessary to sustain an intentional infliction claim falls at the very extreme edge of the spectrum of possible conduct." Watts v. Golden Age Nursing Home, 127 Ariz. 255, 258, 619 P.2d 1032, 1035 (1980) (holding that plaintiff failed to demonstrate she suffered from intentional infliction of emotional distress).

In their Counterclaim, the Rosenbergs allege that Redflex engaged in the following conduct: (1) Redflex allegedly portrayed Mr. Rosenberg as a "rogue employee" and sought to use him as a "scapegoat" to deflect public attention from Redflex's purported policy of providing gifts and bribes to its customers; (2) Redflex allegedly defamed Mr. Rosenberg in statements to the Chicago Tribune regarding his participation in anti-bribery training and discipline relating to a $910 expense reimbursement relating to a Chicago employee; (3) senior Redflex personnel allegedly asked Mr. Rosenberg to accept blame for the $910 expense reimbursement and to participate in an improper scheme relating to the charge; and (4) Redflex made false statements in company press releases, at meetings and in internal reports regarding Mr. Rosenberg's termination. [Counterclaim ¶¶ 2, 5, 6, 7, 8, 9.] This alleged conduct on its face does not, individually or collectively, rise to the level of "extreme and outrageous" conduct under Arizona law necessary to support a claim for intentional infliction of emotional distress.

First, Arizona courts consistently hold that false and/or potentially defamatory statements are not sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress. Johnson, 197 Ariz. at 160-61, 3 P.3d at 1080-81; Duhammel v. Star, 133 Ariz. 558, 561, 653 P.2d 15, 18 (App. 1982), *disapproved on other grounds by*, Godbehere v. Phoenix Newspapers, Inc.,

162 Ariz. 335, 783 P.2d 781 (1989); Rosales v. City of Eloy, 122 Ariz. 134, 136, 593 P.2d 688, 690 (App. 1979) (holding that former employer's statement to newspaper that "charges" had been filed against employee did not rise to the level of extreme and outrageous conduct); see also Bodett v. CoxCom, Inc., 366 F.3d 736, 747 (9th Cir. 2004) (holding employers accusations that former employee-supervisor performed an exorcism, proselytized and harassed an employee was not sufficiently extreme and outrageous under Arizona law). Indeed, in Johnson, in affirming the trial court's dismissal of an intentional infliction of emotional distress claim, the Arizona Court of Appeals held that potentially defamatory statements to Arizona senators about molestation victims, including potentially defamatory accusations of embezzlement, were not extreme and outrageous. 197 Ariz. at 160-61, ¶ 24, 3 P.3d at 1080-81 (App. 1999) (citing Benishek v. Cody, 441 N.W.2d 399, 402 (Iowa App. 1989) (accusing employee of embezzling from employer and terminating her on those grounds was not extreme and outrageous); Batson v. Shifflett, 602 A.2d 1191, 1217 (Md. App. 1992) (holding that defamatory statements accusing labor union president of engaging in "conspiracy, perjury, falsification of records" were not sufficiently extreme and outrageous to support judgment for intentional infliction of emotional distress); Hanssen v. Our Redeemer Lutheran Church, 938 S.W.2d 85, 94 (Tex. App. 1996) (depicting employee as being a thief was not extreme and outrageous)). Similarly, in Duhammel, the Arizona Court of Appeals held that false accusations made to the city council and various newspaper reporters that the defendant engaged in police brutality was not extreme and outrageous. 133 Ariz. at 561, 653 P.2d at 18. The court explained: "Were we to hold otherwise, every . . . statement to the news media . . . would give rise to a claim alleging the intentional infliction of emotional distress." Id.

Equally insufficient here are the Rosenbergs' allegations of Redflex's supposed defamatory remarks. Accepting the Rosenbergs' allegations as true, Redflex told the Chicago Tribune that Mr. Rosenberg was disciplined and participated in "anti-bribery" training and, subsequently stated that Mr. Rosenberg was terminated because he engaged in "dishonest and unethical conduct over a number of years" and "misappropriate[d] company funds over a period of years." [Counterclaim ¶¶ 2, 5, 6, 7, 8, 9.] As in Johnson and Duhammel, this conduct is not sufficiently outrageous to

support a claim for intentional infliction of emotional distress. Johnson, 197 Ariz. at 161, ¶ 24, 3 P.3d at 1081; Duhammel, 133 Ariz. at 561, 653 P.2d at 18.

Further, Redflex's alleged portrayal of Mr. Rosenberg as a rogue employee and alleged use of Mr. Rosenberg as a scapegoat to divert attention from Redflex's alleged improper conduct does not constitute extreme and outrageous conduct under Arizona law. See, e.g., Hinchey v. Horne, 2013 WL 4543994, *14 (D. Ariz. Aug. 28, 2013) (finding allegations that plaintiff's employer "developed a personal animosity toward Plaintiff" and "concocted a scheme to destroy [her] good name as an investigating officer by portraying her as a rogue investigator with a political agenda who set out to do political harm to [Defendant]" was not sufficiently outrageous to state a claim for relief); Coors Brewing Co. v. Floyd, 978 P.2d 663, 666 (Colo. 1999) (allegations that employer "engaged in an extensive criminal conspiracy involving illegal drugs and money laundering" and terminated employee as a scapegoat to protect employer from liability for its illegal conduct was not sufficiently outrageous); see also Johnson, 197 Ariz. at 161, ¶¶ 22, 24, 3 P.3d at 1081 (allegations of intentional character assassination not extreme and outrageous to support a claim for intentional infliction of emotional distress).[3]

Moreover, the allegation that Redflex made statements at company meetings and in company press releases as to the reasons for Mr. Rosenberg's termination does not render Redflex's conduct extreme and outrageous. Cf. Diamond Shamrock Refining and Mktg. Co. v. Mendez, 844 S.W.2d 198, 202 (Tex. 1992) ("[T]here would be little left of the employment-at-will doctrine if an employer's public statement of the reason for the termination was, so long as the employee disputed that reason, in and of itself some evidence that a tort of intentional infliction of emotional distress had been committed."). And, in any event, "it is extremely rare to find conduct in the employment

[3] The Rosenbergs' allegations regarding Redflex's purported motivation (i.e., allegedly utilizing Mr. Rosenberg as a scapegoat in an effort to mislead the public and government officials as to the nature and extent of the company's practices and using Mr. Rosenberg's disclosures against him in an effort to destroy Mr. Rosenberg's reputation), even if accepted as true, are irrelevant to the Rosenbergs' claim for intentional infliction of emotional distress. See Floyd, 978 P.2d at 666 (employer's illegal conduct was irrelevant to former employee's claim for intentional infliction of emotional distress because it was not conduct directed toward the employee); Johnson, 197 Ariz. at 161, ¶ 24, 3 P.3d at 1081; Mintz, 183 Ariz. at 554, 905 P.2d at 554 (demotion of an employee based on employer's personal agenda did not give rise to claim for intentional infliction of emotional distress).

context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Mintz, 183 Ariz. at 555, 905 P.2d at 564 (brackets and citations omitted); accord Nelson v. Phoenix Resort Corp., 181 Ariz. 188, 199, 888 P.2d 1375, 1386 (App. 1994) (terminating employee in front of media reporters not sufficiently extreme and outrageous).

In view of the narrow confines within which Arizona permits claims for intentional infliction of emotional distress, the Redflex conduct the Rosenbergs allege is neither extreme and outrageous, nor does it exceed "all possible bounds of decency . . . to be regarded as atrocious and utterly intolerable in a civilized community.'" Johnson, 197 Ariz. at 160, ¶ 23, 3 P.3d at 1080 (citation omitted). The Rosenbergs' claim for intentional infliction of emotional distress should, accordingly, be dismissed.

4. Mrs. Rosenberg Is Not A Proper Claimant.

Finally, it is unclear from the Counterclaim whether Mr. Rosenberg singularly or the Rosenbergs jointly assert a claim for intentional infliction of emotional distress. If Mrs. Rosenberg asserts a claim for intentional infliction of emotional distress, her claim fails for the additional reason that the Counterclaim does not allege any Redflex tortious conduct, directed at Mrs. Rosenberg or undertaken in her presence. "Arizona law does not recognize a claim for emotional distress for persons who merely witnessed another person being injured, unless the claimant was also within the zone of danger." Wilcox v. City of Phoenix, 2009 WL 3174758, *9 (D. Ariz. Sept. 29, 2009); see also Restatement (Second) of Torts § 46(2)(a) ("Where such conduct is directed at a third person, the actor is subject to liability only if he intentionally or recklessly causes severe emotional distress . . . to a member of such person's immediate family who is present at the time . . . ."). Mrs. Rosenberg has not alleged any facts showing that Redflex made defamatory comments about, or otherwise targeted her, or that she was physically present at the time the alleged actions were taken against Mr. Rosenberg. Accordingly, Redflex is entitled to dismissal of Mrs. Rosenberg's intentional infliction of emotional distress claim (if any).

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5. **Relief Requested.**

The Rosenbergs' claim for intentional infliction of emotional distress is legally deficient in multiple respects requiring its dismissal.

DATED: November 5, 2013.

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The Honorable Douglas Rayes
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