

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

```

-----x
McAllister Olivarius,                       :
                                              :
  Plaintiff,                                :    17 Civ. 9941 (JSR)
                                              :
    -v-                                       : OPINION AND ORDER
                                              :
Mark Myers Mermel,                          :
                                              :
  Defendant.                                :
-----x

```

JED S. RAKOFF, U.S.D.J.

This case is the unfortunate devolution of a dispute between the McAllister Olivarius law firm and its former client Mark Myers Mermel regarding legal fees. In its single-count Complaint, plaintiff McAllister Olivarius alleges that defendant Mermel registered the domain name `mcallisterolivariustruth.com` in order to divert potential clients and others seeking information about the firm and, having done so, to induce plaintiff to reduce the amount it was seeking from him in unpaid legal fees by threatening to publish allegedly damaging documents about plaintiff on the website. Defendant thereby, in plaintiff's view, violated the Anticybersquatting Consumer Protection Act. Before the Court is defendant's motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). ECF No. 8.

BACKGROUND



The pertinent allegations of the Complaint are as follows:

Plaintiff is a general partnership that operates as a law firm both in the United Kingdom and the United States. Complaint ("Compl.") at p.1 ¶ 1, ECF No. 1. Dr. Ann Olivarius, together with Dr. Jef McAllister, founded McAllister Olivarius in 1996 as a general practice law firm. See id. at p.2 ¶ 1. The firm specializes in cases involving gender discrimination and sexual harassment in employment and educational settings. Id.

Since its founding, plaintiff has regularly, continuously, and systematically used the name "McAllister Olivarius" in connection with the marketing and promotion of its legal services throughout the United States and abroad. See id. at p.4 ¶ 6. Among other things, McAllister Olivarius promotes itself through articles about its cases published in media outlets and online via its website and social media presence. Id. The firm's cases also have generated articles in multiple publications, including the New York Times, the Los Angeles Times, Huffington Post, and the Chronicle of Higher Education. Id. Plaintiff's website, mcolaw.com, has attracted more than 78,000 visitors worldwide since January 1, 2014. Over 800,000 people have viewed information distributed by Olivarius via Twitter in October and November 2017. Id.

Defendant Mark Myers Mermel is a real estate developer and a former candidate for Lieutenant Governor of New York. Id. at p.2 ¶ 2. Mermel has earned postsecondary degrees from the University of Vermont, Columbia University, and the Divinity School at Yale

University. Id. at p.2 ¶ 2. Mermel retained plaintiff as counsel on or about May 15, 2012 in connection with a dispute with Yale. Id. at p.5 ¶ 8. The terms of plaintiff's representation in connection with this dispute were memorialized in a written engagement letter, which was signed by Mermel on May 15, 2012 (the "Engagement Letter"). Id. at p.5 ¶ 9; see also id. at Ex. A. The Engagement Letter contains a provision that "[a]ny dispute or legal issue arising from these terms of business or the engagement letter will be determined by the laws of the State of Connecticut, without reference to the principles of conflicts of law, and considered exclusively by Connecticut and US courts." Id. at Ex. A, Terms of Business ¶ 10.

Between May 2012 and August 2014, plaintiff sent eight invoices to Mermel, each setting forth the fees owed for its legal representation of Mermel and detailing the time spent and work performed. Id. at p.6 ¶ 12. Defendant refused, and continues to refuse, to pay plaintiff as required by the terms of the Engagement Letter. Id. at p.6 ¶ 11. Accordingly, on June 20, 2016, plaintiff filed a civil action against defendant for breach of contract and quantum meruit in the Superior Court for New Haven County, Connecticut. Id. at p.6 ¶ 13.

At some point, Mermel registered the domain name mcallisterolivariustruth.com. Id. at p.6 ¶¶ 14-15. The website bore the title "McAllister Olivarius TRUTH" in large letters on every page. Id. at Ex. B. It had a home page, as well as pages named "Practice Areas," "Attorneys", and "Contact." Id. The home page

displayed a picture of balance scale and the text "HI, MR JEF!" Id. The "Practice Areas" page was blank. Id. The "Attorneys" page listed two lawyers with no connection to McAllister Olivarius. See id.; see also id. at p.6 ¶ 16. This page also displayed the following text: "When you experience an injury, everything can change - we know that at Wilson & Doyle. With more than a century of combined experience litigating on our clients' behalf, you can focus on recovering, instead of finding yourself overwhelmed and worried about your court case." Id. at Ex. B. The Contact page included a form for visitors to send a message. Id. at p.6 ¶ 16.

On July 1, 2016, in response to one of plaintiff's written demands for payment, Mermel threatened to populate the website with select documents that, Mermel claimed, "would cast Plaintiff and its principals in a negative light with 'other potential clients' and 'cripple if not close' its business." Id. at p.7 ¶ 17. Mermel then offered to forego this plan if "both parties would simply 'walk away' from the unpaid balance, or, alternatively, plaintiff [substantially] reduced its balance." Id. at p.7 ¶ 18.

On June 27, 2017, McAllister Olivarius sought leave to amend its original complaint in New Haven County Superior Court to add an anticybersquatting claim. Id. at p.7 ¶ 19. Mermel subsequently removed the website from the internet. Id. at p.7 ¶ 20. On July 24, 2017, plaintiff sought leave to file a second amended complaint, adding an intentional spoliation of evidence claim. Id. at p.7 ¶ 21. Mermel opposed. Id. at p.7 ¶ 22. The New Haven County Superior Court

denied plaintiff's request on September 25, 2017, ruling that plaintiff's new claims were insufficiently related to its debt collection claims to warrant joinder in that action. Id. at p.7 ¶ 22. Plaintiff brought the instant action on December 20, 2017. See ECF No. 1.

DISCUSSION

Defendant, pro se, now moves to dismiss plaintiff's complaint for lack of subject matter jurisdiction and failure to state a claim. See ECF No. 8. When, as here, a party proceeds pro se, a court must liberally construe the party's briefs, "reading such submissions 'to raise the strongest arguments they suggest.'" Bertin v. United States, 478 F.3d 489, 491 (2d Cir. 2007) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). "The policy of liberally construing pro se submissions is driven by the understanding that '[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training.'" Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007). Although one suspects that these principles were formulated for the benefit of persons less educated than Mr. Mermel, they nevertheless fully apply here.

I. Subject Matter Jurisdiction

A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) can be granted "when

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.