Mayer v Riordan
2017 NY Slip Op 30422(U)
March 2, 2017
Supreme Court, New York County
Docket Number: 157590/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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CARL J. MAYER, an individual,

Plaintiff,

-against-

MATHEW M. RIORDAN AND
ARLENE HARRIS,

Defendants.

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Index No. 157590/2016

DECISION/ORDER

Motion Seq. 002

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for defamation.

Defendants, Matthew M. Riorden and Arlene Harris (collectively "Defendants") now move to dismiss the Amended Complaint of Plaintiff, Carl J. Mayer, as an individual, pursuant to CPLR §§ 3211[a][5] and [a][7] and 3016[a], and for sanctions pursuant to CPLR § 8303-a. Plaintiff cross-moves for sanctions against Defendants pursuant to 22 NYCRR § 130–1.1.

Factual Background

Plaintiff's aunt, Sally Grant Morse (the "Decedent"), died on March 27, 2013. The Decedent's last will and testament (the "Will") was drafted and witnessed by Ms. Harris, and executed on May 25, 2010. The Will disinherited Decedent's Sister, Nancy Mayer (the "Decedent's Sister"), Plaintiff's mother, and Plaintiff, leaving virtually all of her estate to the Art Students League of New York, a non-profit charitable organization. When appointed executor, Ms. Harris (the "Executor"), submitted the Will to probate, Decedent's Sister objected. Defendant Riorden represented the Executor in the ensuing Will contest, and Plaintiff, a licensed attorney, represented Decedent's Sister. The Decedent's Sister alleged that the Decedent lacked

testamentary capacity, and that the Will was the product of undue influence by Defendant Harris (the "underlying litigation").

The Amended Complaint herein alleges that Defendants made five defamatory statements throughout the underlying litigation. Plaintiff alleges that Defendant Harris submitted an affidavit dated September 30, 2014 Affidavit ("Harris Affidavit") in opposition to the Decedent's Sister's motion to disqualify Kaye Scholer, Defendants' law firm, and expand discovery in the underlying litigation, which included statements that "intimated that [Plaintiff] is violent" and/or unlawful and were "reckless, defamatory and malicious. . . ." (Compl. ¶¶ 12-15, 60).

Further, Plaintiff alleges that Defendant Riorden made the remaining four defamatory statements over the course of two depositions. According to plaintiff, at the March 31, 2016 deposition of the Decedent's Sister, Riorden "publicly state[d] as fact" that Plaintiff "doesn't have 'any other clients other than you (Plaintiff's mother) . . . .'" (¶¶ 6, 58). Also, during the same deposition on that day, Riorden falsely alleged that Plaintiff "tried to hire . . . a PR firm to smear the petitioner [Ms. Harris]" (¶¶ 11, 59).

In addition, at the September 14, 2016 deposition of the Chairman of the Art Student League, Salvatore Barbieri ("Mr. Barbieri"), Defendant Riorden "accused [Plaintiff] of the crime of extortion" (¶¶ 41-42). And, during the same deposition on that day, Riorden stated to Plaintiff: "[y]ou are communicating with a represented party. You are not asking questions. You are trying to negotiate a settlement directly with a represented party . .. [sic] which you are barred from doing under the rules of conduct of lawyers in this state" (¶ 54).

Defendants' Motion

First, Defendants' argue that the defamation claim against Defendant Harris is time barred, as the Complaint was filed past the one-year statute of limitations for defamation. The alleged defamatory statement was made on September 30, 2014, while the Complaint was filed September 9, 2016, and the Amended Complaint filed on November 7, 2016.

Next, all of the alleged defamatory statements made by Defendants were privileged. They were made in the course of a judicial proceeding, and specifically, were pertinent to the underlying litigation.

Further, Defendants' statements are neither defamatory nor defamatory *per se*. Specifically, Defendant Harris' statement was made in the context of her role as the preliminary executor of the Will by explaining why Decedent disinherited Plaintiff. Similarly, Defendant Riordan's statements were questions made during depositions as to whether Plaintiff hired a public relations firm to smear Ms. Harris and whether Plaintiff has clients other than the Decedent's Sister, were made in good faith. And second, the statements: Plaintiff "basically extorted the witness" and was "violating ethical principals by negotiating settlement directly with a represented party" (Def. MOL at p.19), were non-actionable opinion made in response to Plaintiff's efforts to "negotiate settlement with a represented witness" (*Id.*).

Moreover, Plaintiff's Amended Complaint fails to plead his claims with particularity. Plaintiff's statement that Defendant Harris "assisted" Defendant Riorden in making the alleged defamatory statements fails to state a claim. Plaintiff also fails to plead with particularity which statements made by Defendant Riorden were defamatory.

Finally, Defendants request sanctions pursuant to CPLR § 8303-a[a] for Plaintiff's filing

of this frivolous action.

Plaintiff's Opposition

Plaintiff argues that the "absolute privilege" is inapplicable, since Defendants' statements "were so obviously malicious, defamatory and vindictive that Defendants lose the privilege" (Opp. at p.20). First, Defendant Harris' statements "accus[ed] Plaintiff of being a lawless criminal," yet no actual violence is ever cited and Plaintiff never had a criminal record. Further, the since the underlying "litigation is limited to the 3/2 rule," the alleged statements are irrelevant to the underlying litigation, as they were "made about events that occurred years before the time frame" of the underlying litigation (p.23).

Further, as Plaintiff was not a party to the underlying litigation, the statements are not privileged.

As to Defendant Riorden's false assertion that Plaintiff does not have any clients other than his mother, Plaintiff's "many . . . successful law firm's clients and litigation victories were publicly available and known by Defendants" (p.20). Further, whether Plaintiff has clients other than his mother was not pertinent to the underlying litigation. Additionally, the statement that Plaintiff tried to hire a "PR" firm to smear the petitioner is untrue and was not pertinent to the underlying litigation.

Next, Plaintiff did not have the requisite intent to commit extortion. Moreover, Plaintiff did not have authority to discuss settlement on that day, as Decedent's Sister, plaintiff in the underlying litigation, withdrew her settlement offer at the "beginning" of the deposition (p.24). Further, Plaintiff was not attempting to engage in settlement negotiations with Mr. Barbieri, but rather, asked Mr. Barbieri "about the fact that [Mr. Barbieri], and [the] Board of Directors seem

to lack even the most basic knowledge of the probate litigation. . . ." (p.25).[1]

Plaintiff also argues that the Court may not determine whether Defendants' alleged defamatory statements are privileged on a motion to dismiss. Further, the alleged "malevolent statements made with malice" by Defendants are not protected by the United States or New York Constitutions. Moreover, the statute of limitations for defamation has not expired, since "Harris' statements were republished within the past year. . . ." (*id.*). Also, the Amended Complaint sufficiently establishes that Defendants engaged in a "conspiracy to commit defamation." (*id.*).

Finally, Defendants should be sanctioned in light of Defendants' materially false contention that, "no evidence of undue influence or the Decedent's lack of testamentary capacity has surfaced despite three years of extensive discovery in the probate litigation." (p.29; Def. MOL at p.3).

Defendants' Reply

Defendants maintain that the Court may properly determine on a motion for summary judgment whether the absolute privilege applies to a statement made in the course of a judicial proceeding. Further, Plaintiff fails to "conclusively, and as a matter of law, establish the impertinence and the irrelevancy" of Defendants' statements (p.9). Likewise, Plaintiff fails to sufficiently claim that Defendants acted with malice and bad faith (*id.*). Finally, Plaintiff fails to substantiate his allegation that Harris' statements were republished.

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[1] The Opposition fails to address Defendants' argument that Defendant Riorden's statement to Plaintiff that he was violating ethical principles by negotiating settlement directly with a represented party was not defamatory.

Discussion

Statute of Limitations

On a motion to dismiss a complaint pursuant to CPLR § 3211 [a][5] on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. Once established, the burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see Christodoulou v. Christodoulou,* 89 A.D.3d 783, 932 N.Y.S.2d 700; *Rakusin v. Miano,* 84 A.D.3d 1051, 1052, 923 N.Y.S.2d 334).

The statute of limitations applicable to defamation claims is one year (CPLR § 215 [3]), and generally accrues on the date of the first publication (*Colantonio v. Mercy Med Ctr.*, 115 A.D.3d 902, 903 [2d Dept 2014]; *Hochberg v. Nissen*, 180 A.D.2d 435, 436 [1st Dept 1992], *appeal denied* 80 N.Y.2.d 755 [1992]). "Under the 'single publication rule,' which New York follows, the publication of a defamatory statement in a single [document], although widely circulated and distributed, constitutes one publication that gives rise to one cause of action, and the statute of limitations runs from the date of that publication" (*Hoesten v. Best*, 34 A.D.3d 143, 150 [1st Dept 2006]). "An exception to the single publication rule is the concept of 'republication'" (*id.*). "Republication . . . occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely 'a delayed circulation of the original edition'" (*Firth v. State of New York*, 98 N.Y.2d 365, 371 [2002], quoting *Rinaldi v. Viking Penguin*, 52 N.Y.2d 422, 43 [1981]). "The justification for this exception to the single publication rule is that the subsequent publication is intended to and actually reaches a new audience" (*id.*). As articulated by the First Department, courts have applied the republication

exception where the following factors exist: "the subsequent publication is intended to and actually reaches a new audience, the second publication is made on an occasion distinct from the initial one, the republished statement has been modified in form or in content, and the defendant has control over the decision to republish" (*Martin v. Daily News L.P.*, 121 A.D.3d 90, 103 [1st Dept 2014] [internal quotation marks and citation omitted]).

Plaintiff's defamation claim against Defendant Harris is time barred, as the Complaint was filed after the one-year statute of limitations expired. The alleged defamatory statement was made on September 30, 2014; however, the Complaint was not filed until September 9, 2016- past the one-year period. Further, Plaintiff's allegations concerning conspiracy and that Harris' statement was republished is wholly conclusory and speculative, as the Amended Complaint is void facts to substantiate such claims. Accordingly, Defendants' motion to dismiss the Amended Complaint against Defendant Harris pursuant to CPLR § 3211 [a][5], is granted.

Failure to State a Claim

The sole criterion for deciding a motion to dismiss pursuant to CPLR § 3211[a][7] is whether a pleading states a cause of action (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]). A pleading states a cause of action if factual allegations are discerned from its four corners which, taken together, manifest any cause of action cognizable at law (*id.*). If a cognizable cause of action is found, a motion to dismiss pursuant to CPLR § 3211[a][7] will fail (*id.*).

In performing this analysis, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v. East*

149th Realty Corp., 104 A.D.3d 401 [1st Dept 2013]; *Nonnon v. City of N.Y.*, 9 N.Y.3d 825 [2007]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 [1994]).

Defamation

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Foster v. Churchill,* 87 N.Y.2d 744, 751, 642 N.Y.S.2d 583, 665 N.E.2d 153 [1996][internal quotation marks omitted]). To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm (*see Dillon v. City of New York,* 261 A.D.2d 34, 38, 704 N.Y.S.2d 1 [1st Dept.1999]). Further, the "words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction" (*id*). "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable" (*id.*).

As to particularity, in an action for libel, "the particular words complained of shall be set forth in the complaint . . . " (CPLR § 3016[a]). The statute was enacted to ensure that defendants are adequately notified of the alleged defamatory statement and to discourage actions intended solely to harass. (5 Carmody–Wait 2d § 29:255; *Pappalardo v. Westchester Rockland Newspapers,* 101 A.D.2d 830, 831, 475 N.Y.S.2d 487 [2d Dept.1984], *affd* 64 N.Y.2d 862, 487 N.Y.S.2d 325, 476 N.E.2d 651 [1985]). The statutory requirement is "strictly enforced" (*Laiken*

v. American Bank & Trust Co., 34 A.D.2d 514, 308 N.Y.S.2d 111 [1st Dept.1970]; *Gardner v. Alexander Rent–A–Car, Inc.*, 28 A.D.2d 667, 280 N.Y.S.2d 595 [1st Dept.1967]), and where the allegedly defamatory words are "only paraphrased in a manner such that the actual words [are] not evident from the face of the complaint, the long-standing rule is that dismissal is required" (*Mañas v. VMS Assoc., LLC,* 53 A.D.3d 451, 454–455, 863 N.Y.S.2d 4 [1st Dept. 2008]; *Murganti v. Weber,* 248 A.D.2d 208, 208–209, 669 N.Y.S.2d 818 [1st Dept.1998]). From the foregoing, it is logically inferred that dismissal may not be required where the alleged defamatory words are evident from the face of the complaint and afford sufficient notice of the claim. (*Cf. Mañas,* 53 A.D.3d at 454-55, 863 N.Y.S.2d 4; *Murganti,* 248 A.D.2d at 208-09, 669 N.Y.S.2d 818). The Amended Complaint complies with CPLR § 3016 [a], as Plaintiff pleads the specific allegedly defamatory statements made by Defendants. Further, while Plaintiff does paraphrase Defendants' general statements surrounding the defamatory statements, he succeeds in including the alleged defamatory statements. Accordingly, the branch of Defendants' motion to dismiss the Amended Complaint pursuant to CPLR § 3016 [a], is denied.

Nevertheless, Defendant Harris' statement, read in the context of the entire document and the specific section in which it appears, is not reasonably susceptible of a defamatory meaning, but rather details examples of the fractious and decaying relationship between the Decedent and Plaintiff and Decedent's Sister (Def. Aff. Ex. G, September 30, 2014 Harris Aff. at ¶¶ 13-20).The relevant portion of the Harris Affidavit states the following:

> 18. Unfortunately, this conflict strained [the Decedent's] relationship with [the Decedent's Sister] and her nephews [the Plaintiff] and Daniel – [Plaintiff] in particular. It was [the Plaintiff] who [the Decedent] distrusted the most. [The Decedent] told me that she believed *[the Plaintiff] was willing to do anything to forward his own interests. She was so unnerved by him that she hired a New York City police officer, wearing full uniform,*

> *to accompany her to her mother's funeral in 2002*. It appeared to [the Decedent] that [the Plaintiff] was the only "active" Trustee and was doing everything within his power to frustrate her and minimize the income distributions to her – [the Decedent's Sister] and Daniel simply acquiesced to his wishes.
>
> 19. *Her concerns were not unwarranted*. Following [the Decedent's] mother's death, [the Plaintiff] brought unsuccessful litigation against the executor of her mother's estate, Daniel Gersen, to compel an accounting – because [the Decedent's] mother revised her [W]ill and removed [the Plaintiff] as co-executor of her estate. See Estate of Bassen, 6 Misc. 3d 1012-A (Sup. Ct. Westchester County, May 28, 2004) ("[Plaintiff] an attorney, asserts that he represents others interested in the decedent's estate but did not submit Notices of Appearance . . . [t]he Court has also considered the other arguments presented, and found them without merit.") When [Plaintiff's] suit failed due to lack of standing, [the Decedent's Sister] filed a motion to compel an accounting.
> (Def. Aff. Ex. G, at ¶¶ 18-19).[2]

Further, the statement is not, as Plaintiff claims, "classic defamation" as "accusing Plaintiff of being a lawless criminal" (Opp. at p.22), or "suggesting [Plaintiff] is violent and/or unlawful" (Compl. ¶ 12 [emphasis omitted]), as the statement neither states nor hints that Plaintiff is unlawful or violent.

Defendant Riorden asked the following questions during the March 31, 2016 deposition of the Decedent's Sister: "Do you know if [Plaintiff] has any other clients other than you?" (Def. Aff. Ex. H, March 31, 2016 Deposition Tr. 16:24-25) and "Do you know if [Plaintiff] has tried to hire any PR firms to smear [Defendant Harris]?" (*id.* at 17:7-8), Neither statement is susceptible to a defamatory meaning. Rather, the average reader is likely to conclude that the statements are good-faith questions. Further, Plaintiff's assertion that Harris assisted Riorden in making the aforementioned statements are conclusory, as the Amended Complaint fails to substantiate his claim with facts.

Accordingly, Defendants' motion to dismiss the Amended Complaint, as to Defendant

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[2]The italicized text represents Defendant Harris' alleged defamatory statement (*see* Compl. at ¶ 13).

Harris' statement and Defendant Riorden's statements at the March 31, 2016 deposition of the Decedent's Sister, pursuant to CPLR § 3211 [a][7], is granted.

Opinion

It is well-settled that "[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Davis v. Boeheim*, 24 N.Y.3d 262, 69, 998 N.Y.S.2d 131, 22 N.E.3d 999 [2014]). The factors to be considered in distinguishing between assertions of fact and non-actionable expressions of opinion 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 orlisteners that what is being read or heard is likely to be opinion, not fact" (*Davis*, 24 N.Y.3d at 270 [internal citations omitted], *quoting Brian v. Richardson,* 87 N.Y.2d 46, 51, 637 N.Y.S.2d 347, 660 N.E.2d 1126 [1995]). "Accordingly, the standard in this state for distinguishing protected expressions of opinion from actionable assertions of fact," is as follows:

> A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable.
> (*Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 40, 925 N.Y.S.2d 407, 413 [1st Dept 2011], quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289-290, 501 N.E.2d 550, 552 [1986]).

Defendants argue that Riorden's statement to plaintiff that "[he] basically extorted the witness" was "non-actionable opinion and/or loose hyperbolic language" (Def. MOL at pp.19-

20).

Here, considering the context and the stated underlying facts of Riorden's statement, a reasonable reader would determine that the remarks were non-actionable opinion. The transcript to Mr. Barbieri's deposition does not imply that Riorden's use of the phrase: "you basically extorted him," was based on undisclosed facts regarding Plaintiff's purported criminality. Rather, the deposition transcript demonstrates that Riorden's use of the statement was in direct response to his belief that Plaintiff was seeking to directly negotiate a settlement with Mr. Barbieri (*see Pecile v. Titan Capital Grp., LLC*, 96 A.D.3d 543, 544, 947 N.Y.S.2d 66, 67 [1st Dept 2012] (holding that "the use of the term 'shakedown' did not convey that defendants 'were seriously accusing [plaintiffs] of committing extortion'"), *quoting McNamee v. Clemens*, 762 F. Supp. 2d 584, 604 (E.D.N.Y. 2011); *Galasso v. Saltzman*, 42 A.D.3d 310, 311, 839 N.Y.S.2d 731 [1st Dept 2007]; *Trustco Bank of N.Y. v. Capital Newspaper Div. of Hearst Corp.*, 213 A.D.2d 940, 942, 624 N.Y.S.2d 291, 294 [3d Dept 1995] (holding that a newspaper's use of the word "extortion" to describe a lawsuit was non-actionable opinion). Therefore, a reasonable reader would not conclude that Plaintiff committed the crime of extortion, but rather conclude Defendant Riorden's statement to be non-actionable opinion. Accordingly, Defendants' motion to dismiss the Amended Complaint, as to Defendant Riorden's statement at the September 9, 2016 deposition of Mr. Barbieri, pursuant to CPLR § 3211 [a][7], is granted.

Absolute Privilege

At the outset, the Court is entitled to determine on a motion to dismiss whether statements are privileged (*Ticketmaster Corp. v. Lidsky,* 245 A.D.2d 142, 665 N.Y.S.2d 666 [1st Dept 1997]). A challenged communication is protected by absolute litigation privilege when it is

made by an individual participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings (*Rosenberg v. Metlife, Inc.*, 8 N.Y.3d 359, 365, 834 N.Y.S.2d 494 [2007]). In the interest of encouraging parties in judicial proceedings to communicate freely, the privilege is extended to all pertinent communications among the parties, *counsel*,witnesses, and the court *notwithstanding the motive with which they are made* (*Frechtman v. Gutterman*, 115 A.D.3d 102, 107 [1st Dept 2014] [emphases added and citations omitted];*see alsoFlomenhaft v. Finkelstein*, 127 A.D.3d 634, 637 [1st Dept 2015] [absolute privilege applies to statement made to non-party with an interest in the case]; *Herzfeld & Stern, Inc. v. Beck*, 175 A.D.2d 689, 691 [1st Dept 1991]). If a statement is pertinent to litigation, it is privileged regardless of "any malice, bad faith, recklessness or lack of due care with which it was spoken or written, and regardless of its truth or falsity" (*Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 172 [1st Dept 2007], *abrogated on other grounds by Front, Inc. v. Khalil*, 24 N.Y.3d 713 [2015]). The privilege "embraces anything that may possibly be pertinent or which has enough appearance of connection with the case" (*Seltzer v. Fields*, 20 A.D.2d 60, 63, 244 N.Y.S.2d 792 [1963], *affd* 14 N.Y.2d 624, 249 N.Y.S.2d 174, 198 N.E.2d 368 [1964])

"The test to determine whether a statement is pertinent to litigation is extremely liberal, such that the offending statement, to be actionable, must have been outrageously out of context" (*id.* [internal citation and quotations omitted]; *accord Caplan v. Winslet*, 218 A.D.2d 148, 153, 637 N.Y.S.2d 967, 970 [1st Dept 1996] ["no strained or close construction will be indulged to exempt a case from the protection of privilege"]; *see also International Pub. Concepts, LLC v. Locatelli*, 46 Misc.3d 1213(A), at *4, 2015 WL 321852 [Sup. Ct. N.Y. County, Jan. 15, 2015] [applying absolute privilege to statements putting non-parties on notice of

anticipated litigation and potential subpoenas]). And, where the privilege is invoked, "any doubts are to be resolved in favor of pertinence" (*Flomenhaft*, 127 A.D.3d at 637).

However, the absolute privilege afforded to statements made during judicial proceedings can revoked (*Halperin v. Salvan*, 117 A.D.2d 544, 548, 499 N.Y.S.2d 55 [1st Dept 1986]). The Court in *Halperin* held that the privilege may be lost if counsel goes,

> [b]eyond the bounds of reason and by main force bring into a lawsuit matters so obviously impertinent as not to admit of discussion, and so needlessly defamatory as to warrant the inference of express malice . . . .
> (*Halperin*, 117 A.D.2d at 548, *quoting Youmans v. Smith*, 153 N.Y. 214, 220, 47 N.E. 265 [1897]).

Given that the "liberal standard" used to evaluate the pertinence of allegedly defamatory statements mandates that "any doubts are to be resolved in favor of pertinence," the Court finds that Defendants' statements are protected by the absolute litigation privilege.

The statement made in the Harris Affidavit is pertinent, as it addresses the core of the underlying proceeding. Specifically, the statements describe the events that contributed to the Decedent removing Plaintiff and Decedent's Sister from the Will (*supra* at p.9-10; Harris Aff. at ¶¶ 13-20). Since the nature of the underlying proceeding is whether Defendant Harris exerted "undue influence" on the Decedent to remove Decedent's Sister and Plaintiff from the Will, the statements are clearly pertinent to the underlying litigation.

Likewise, Riorden's questions during both depositions are privileged as they were pertinent to the underlying litigation. First, during the March 31, 2016 deposition of the Decedent's Sister, the question regarding whether Plaintiff has clients other than her is pertinent, since it was directed toward the Decedent's Sister, a witness in the underlying litigation, and

sought information about Plaintiff, her attorney in the underlying litigation. Further, the Decedent's Sister admits that her belief that the Will was based upon a "mistaken beliefs [sic] of fact held by [Decedent]" and "was a part of undue influence practiced upon her by Ms. Harris and/or others" was based upon conversations with Plaintiff, and therefore the source of information is pertinent (Def. Ex. E, December 9, 2015 Aff. Of Nancy Mayer, at ¶12).

Second, at the Decedent's Sister's deposition on the aforementioned day, Defendant Riorden's question about whether Plaintiff has tried to hire a P.R. firm to smear Defendant Harris is likewise pertinent, since it seeks to determine whether Plaintiff has attempted to influence the determination of the probate proceeding by hiring a public relations firm to smear Harris.

Third, Riorden's statement during the September 14, 2016 deposition of Salvatore Barbieri, the Arts Students League President, that: "[y]ou basically extorted the witness and said you are costing them money" (Compl. ¶ 42), was made by one counsel to his adversary and was in response to what Riorden believed to be Plaintiff's attempt to negotiate a settlement of the underlying litigation.

Additionally, Plaintiff's arguments fail to demonstrate that the statements were so impertinent as to warrant the loss of Defendants' absolute privilege. As Defendants note in their brief, Plaintiff fails to argue specifically *why* the absolute privilege is lost, but instead submits his argument consists of conclusory statements void of fact (*see Castro v. N.Y. Univ.*, 5 A.D.3d 135, 136, 773 N.Y.S.2d 29, 30 [1st Dept 2004] ("it is well settled that affidavits devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief"). For instance, the Opposition includes the following conclusory statements: "[o]n the *Halperin* standard, . . . Defendants statements were so obviously

malicious, defamatory and vindictive that Defendants lose the privilege" (Opp. at p.20); "[i]t is clearly unprofessional, made with malice and bad faith under the *Halperin* standard would [sic] not be protected speech" (p.21); "[t]hese statements are not privileged" (p.22); and "[u]nder the *Halperin* standard these comments are not privileged . . . ." (p.23).

Therefore, Defendants' statements were pertinent to the underlying litigation, and afforded absolute privilege. Accordingly, Defendants' motion to dismiss the Amended Complaint against Defendants pursuant to CPLR § 3211 [a][7], is granted.

Defamation Per Se

"A false statement constitutes defamation *per se* when it charges another with a serious crime or tends to injure another in his or her trade, business or profession" (*Geraci v. Probst*, 61 A.D.3d 717, 718 [2d Dept 2009]).

Just as with the defamation claim, the defamation *per se* allegations are dismissed with prejudice as privileged as they are pertinent to the underlying litigation. Further, Plaintiff's Amended Complaint makes conclusory statements that "[D]efendant's defamatory statements . . . are ones that would tend to harm the reputation of [Plaintiff] and/or deter third persons from associating with [Plaintiff] in the conduct of his profession . . . ," but fails to cite to specific instances where his profession was effected by the statements. Therefore, Plaintiff's defamation *per se* claim fails (*Godfrey v. Spano*, 13 N.Y.3d 358, 373, 920 N.E.2d 328, 334 [2009] ("conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss"), citing *Caniglia v. Chicago Tribune–N.Y. News Syndicate,* 204 A.D.2d 233, 233–234, 612 N.Y.S.2d 146 [1st Dept 1994]).

Accordingly, Defendants' motion to dismiss the Amended Complaint against Defendants,

as to defamation *per se*, pursuant to CPLR § 3211 [a][7], is granted.

Sanctions

CPLR § 8303–a. permits the award of "costs and reasonable attorney's fees not exceeding ten thousand dollars" against a party, his attorney, or both, who are found to have brought a *frivolous action* in bad faith or as a means of "harass[ing]" the successful adversary. Once there is a finding of frivolousness, sanction is mandatory (*Grasso v. Mathew,* 164 A.D.2d 476, 564 N.Y.S.2d 576, *lv. denied* 78 N.Y.2d 855, 573 N.Y.S.2d 645, 578 N.E.2d 443).[3]

Defendants argue that Plaintiff's Complaint and Amended Complaint are meritless. However, as addressed in the discussion of law in the foregoing sections, Plaintiff's claims are not completely without merit. Thus, the branch of Defendants' motion for sanctions against Plaintiff, is denied.

Plaintiff also seeks sanctions against Defendant under 22 NYCRR § 130–1.1. Conduct in litigation is frivolous in New York if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (22 NYCRR 130–1.1[c]).

Plaintiff argues that Defendants made material misstatements of fact in their Memorandum of

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[3] The relevant portion of CPLR § 8303-a states:
(a) If in an action to recover damages for personal injury. . . , and such action . . . is found . . . to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars . . . (c) In order to find the action . . . frivolous under subdivision (a) of this section, the court must find one or more of the following: (i) the action . . . was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; (ii) the action . . . was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Law filed on November 29, 2017. Specifically, Plaintiff argues that the apparent false statement is "[b]latently false for all the reasons outlined above in Sections I-IV of the Facts recitation above. There is massive evidence that the Decedent was delusional and therefore lacked testamentary capacity" (Opp. at p.29). However, Plaintiff's contention is conclusory. In addition, the Opposition fails to address the Decedent's doctor's medical report stating that "[the Decedent] appears to fully understand what she is choosing and does not appear depressed, confused or in any way mentally incapacitated" (Def. Aff. Ex. D, June 25, 2010 Letter from Dr. Barbara L. Schultz, M.D. to Dr. Alisan Goldfarb). Accordingly, Plaintiff's cross-motion for sanctions is denied.

CONCLUSION

Based on the forgoing, it is hereby:

ORDERED that the branch of Defendants motion to dismiss Plaintiff's Amended Complaint pursuant to CPLR §§ 3211[a][5] and [a][7], is granted. It is further;

ORDERED that the branch of Defendants motion for sanctions against Plaintiff pursuant to CPLR § 8303-a, is denied. It is further;

ORDERED that Plaintiff's cross-motion for sanctions against Plaintiff pursuant to 22 NYCRR § 130–1.1, is denied. It is further;

ORDERED that Defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 2, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

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