At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 29th day of January 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

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OWOLABI SALIS,

Plaintiff,

-against-

BRIAN FIGEROUX,

Defendant.

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Index No.: 514181/2017

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	28-31
Opposing Affidavits (Affirmations)	33-35
Reply Affidavits (Affirmations)	36

Introduction

Defendant, Brian Figeroux, moves by notice of motion, sequence number three, pursuant to CPLR §§ 3211(a)(1), 3211(a)(7) and 3212 for summary judgment and to dismiss plaintiff's complaint. Plaintiff, Owolabi Salis, opposes this application.

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Background & Procedural History

Plaintiff, Owolabi Salis, commenced the instant action by e-filing a summons with notice on July 24, 2017. A complaint was e-filed on February 26, 2018, alleging the following causes of action: (1) "Breach of professional ethics and improperly influencing public opinion and an attempt to improperly influence the jury in order to damage-'Antitrust Behavior'" (Complaint at p. 3); (2) "Civil and Bill of Rights Violations" (*id.* at p 4); (3) Defamation of Character; and (4) "Causing Emotional Distress" (*id.*).

Plaintiff, an immigration attorney, was indicted on July 24, 2014, for allegedly defrauding a number of his clients. An article about plaintiff's indictment ran in Issue 50, Volume 12 of the Caribbean American Weekly newspaper (*see* NYSCEF Doc. # 34).[1] Underneath the article, on page 23 of the newspaper, there was an advertisement which read "FREE CONSULTATIONS for Salis's [*sic*] immigration clients. Protect yourself and loved ones. *Call 718-222-3155 for a FREE Immigration consultation.* You have everything to lose" (*id.*). Another advertisement ran twice on the front page of the publication, which read "DIASPORA ISSUES: FREE Consultations for Salis's [*sic*] clients. Call 718-222-3155" (*id.*). These advertisements included a photograph, identified as defendant, Brian Figeroux, Esq. (*see id.*). It is undisputed that defendant, Brian Figeroux, placed these advertisements in the newspaper.

After trial, plaintiff was acquitted of all charges (*see* Complaint at ¶ 12).

[1] It is unclear from the photographs and photocopies provided, who authored the article. Defendant, in his motion, does not dispute that he reported plaintiff's arrest in the newspaper (*see* NYSCEF Doc. # 29, Affirmation in Support at ¶ 24). However, the parties clarified at oral argument that the article was not authored by defendant; the action relates to the advertisement only.

Discussion

Defendant moves herein pursuant to CPLR § 3211(a)(1) and (7) to dismiss the complaint, based on documentary evidence or that the pleading fails to state a cause of action.[2] He also moves pursuant to CPLR § 3212 for summary judgment.

Failure to State a Cause of Action – CPLR § 3211(a)(7)

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Bennett v. State Farm Fire & Cas. Co.*, 161 A.D.3d 926, 78 N.Y.S.3d 169 [2 Dept., 2018], quoting *Sokol v Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 [2 Dept., 2010]). "[T]he pleading must be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Trump Vill. Section 4, Inc. v. Bezvoleva*, 161 A.D.3d 916, 78 N.Y.S.3d 129 [2 Dept., 2018], citing *Leon v Martinez,* 84 N.Y.2d 83, 614 N.Y.S.2d 972 [1994]; *see also Mirro v. City of New York,* 159 A.D.3d 964, 74 N.Y.S.3d 356 [2 Dept., 2018]). "[T]he sole criterion is whether factual allegations are discerned from the four corners of the complaint which, taken together, manifest any cause of action cognizable at law" (*Law Offices of Thomas F. Liotti v. Felix,* 129 A.D.3d 783, 9 N.Y.S.3d 888 [2 Dept., 2015], citing *Cohen v. Kings Point Tenant Corporation,* 126 A.D.3d 843, 6

[2] This Court notes that defendant asserts in paragraph 42 of his affidavit in support that the plaintiff failed to timely bring this action pursuant to CPLR § 215(3). As an initial matter, defendant fails to move pursuant to CPLR § 3211(e) or 3211(a)(5). Even assuming defendant properly moved, defendant failed to raise this as an affirmative defense or to timely move (*see Moezinia v. Ashkenazi,* 136 A.D.3d 990, 25 N.Y.S.3d 632 [2 Dept., 2016]).

N.Y.S.3d 93 [2 Dept., 2015]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*Trump Vill. Section 4, Inc. v. Bezvoleva*, 161 A.D.3d 916, *supra,* quoting *EBC I, Inc. v. Goldman, Sachs & Co.,* 5 N.Y.3d 11, 799 N.Y.S.2d 170 [2005]).

"In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (*Garcia v. Polsky, Shouldice & Rosen, P.C.,* 161 A.D.3d 828, 77 N.Y.S.3d 424 [2 Dept., 2018], quoting *Cron v. Hargro Fabrics,* 91 N.Y.2d 362, 670 N.Y.S.2d 973 [1998]; *see also Rad & D'Aprile, Inc. v. Arnell Constr. Corp.*, 159 A.D.3d 971, 74 N.Y.S.3d 266 [2 Dept., 2018]). "A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action" (*Kaplan v. New York City Dep't of Health & Mental Hygiene*, 142 A.D.3d 1050, 38 N.Y.S.3d 563 [2 Dept., 2016]).

First Cause of Action: Breach of Professional Ethics

That branch of defendant's motion to dismiss plaintiff's first cause of action is granted. In his first cause of action, plaintiff alleges, *inter alia,* that

> 4. "[b]oth the Plaintiff and the Defendant are guided by Attorney ethical rules which requires among others that attorneys show courtesy to one another, engage in healthy competition and respect the laws of the State of New York and the United States.
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> ...
>
> 7. By reason of the training and subsequent license of the defendant to practice law in the State of New York, the defendant knew or ought to have known that defendants in a criminal case are presumed innocent until the courts prove guilt beyond reasonable doubt.

> 8. By reason of the training and subsequent license of the defendant to practice law in the State of New York, the defendant is not of a lay intelligence and is not expected to be driven by emotions.
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> 9. Upon information and belief, fews [*sic*] days after the arrest of plaintiff by the New York district attorney but before the trial of the case to prove the guilt of the Plaintiff, the defendant published or caused to be published in a Caribbean Weekly newspaper a statement that the Plaintiff had been indicted for defrauding immigrants and that Plaintiff clients should come to his law firm. The publication included the picture of the Plaintiff.
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> 10. Upon information and belief, the defendant made or caused to be made the publication in bad faith and for an improper purpose

(Complaint at ¶¶ 4, 7-10).

According to section 12 of the preamble of the New York State Rules of Professional Conduct, as amended on March 15, 2019,

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules 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. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, because the Rules do establish standards of conduct by lawyers, a lawyer's

> violation of a Rule may be evidence of breach of the applicable standard of conduct.

(NY ST RPC Refs & Annos [McKinney]).

As no civil cause of action for violation of the Rules of Professional Conduct exists, plaintiff failed to state a cognizable cause of action. Whether defendant's advertisement violated the Rules of Professional Conduct would more properly be the subject of a disciplinary proceeding, and in this case, do not give rise to a cause of action.

Second Cause of Action: Civil Rights Violations

That branch of defendant's motion to dismiss plaintiffs second cause of action is granted. In his second cause of action, plaintiff alleges, *inter alia,* that "by reason of the foregoing, the plaintiff Civil Rights under the US and the New York Constitutions were violated by the defendant, particularly the presumption of innocence of the Plaintiff. Actions of the defendant further subjected the plaintiff to humiliation, scorn and ridicule by those with knowledge of the publication and suffered a loss of reputation in the community in which he lives and works" (Complaint at ¶ 20).

Here, plaintiff failed to state a cognizable cause of action (*see Law Offices of Thomas F. Liotti v. Felix,* 129 A.D.3d 783, *supra*). Plaintiff failed to identify what "Civil and Bill of Rights Violations" he alleges. In opposition herein, plaintiff clarified that he alleges breaches of (1) his right to a fair trial by jury; (2) violation of his due process rights; (3) presumption of innocence; and (4) the Sixth Amendment. However, this is insufficient to remedy defects in the complaint and preserve this inartfully pleaded claim or show a potentially meritorious cause of action (*see generally Garcia v. Polsky,*

Shouldice & Rosen, P.C., 161 A.D.3d 828, *supra*). In the instant case, it is undisputed that although plaintiff was indicted, he was found innocent after trial. Plaintiff failed to demonstrate, or even explain how defendant's conduct affected his trial.

Third Cause of Action: Defamation

Defendant's motion to dismiss plaintiff's third cause of action for defamation is granted. In his third cause of action, plaintiff alleges, that as a result of defendant's conduct, "the plaintiff was further defamed in his reputation and good name, substantially embarrassed and suffered mental and bodily distress" (Complaint at ¶ 21).

> The elements of a cause of action sounding in defamation are (1) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (2) published without privilege or authorization to a third party, (3) amounting to fault as judged by, at a minimum, a negligence standard, and (4) either causing special harm or constituting defamation per se (*see Kasavana v. Vela*, 172 A.D.3d 1042, 1044, 100 N.Y.S.3d 82; *Stone v. Bloomberg L.P.*, 163 A.D.3d 1028, 1029, 83 N.Y.S.3d 78; *Greenberg v. Spitzer*, 155 A.D.3d 27, 41, 62 N.Y.S.3d 372). A statement is defamatory per se if it (1) charges the plaintiff with a serious crime; (2) tends to injure the plaintiff in her or his trade, business or profession; (3) imputes to the plaintiff a loathsome disease; or (4) imputes unchastity to a woman (*see Liberman v. Gelstein*, 80 N.Y.2d 429, 435, 590 N.Y.S.2d 857, 605 N.E.2d 344).

(*Levy v. Nissani*, -- A.D.3d --, 2020 N.Y. Slip Op.00113 [2 Dept., 2020]). "Since falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action [internal quotation marks omitted]" (*Kasavana v. Vela*, 172 A.D.3d 1042, 100 N.Y.S.3d 82 [2 Dept., 2019], quoting *Gross v. New York Times Co.,* 82 N.Y.2d 146, 603 N.Y.S.2d 813 [1993]). "Thus, '[a]n expression of pure

opinion is not actionable ..., no matter how vituperative or unreasonable it may be'" (*Kasavana v. Vela*, 172 A.D.3d 1042, *supra,* quoting *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 508 N.Y.S.2d 901 [1986]).

In the instant case, defendant did not author the article for the Caribbean American Weekly Newspaper. With respect to the advertisements, it is clear that defendant attempted to solicit business from plaintiff's clients and the community by exploiting plaintiff's indictment. However vituperative or unreasonable that conduct may be, these advertisements do not constitute defamation. The portion of the advertisements offering consultations are true facts. There is no dispute that defendant did offer free consultations. The portion of the advertisement which stated "protect yourself and your loved ones" and "you have everything to lose" constitute opinion. "Expressions 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" (*Kamchi v. Weissman*, 125 A.D.3d 142, 1 N.Y.S.3d 169 [2 Dept., 2014], quoting *Mann v. Abel,* 10 N.Y.3d 271, 856 N.Y.S.2d 31 [2008]). Accordingly, plaintiff's third cause of action is dismissed.

Fourth Cause of Action: Intentional Infliction of Emotional Distress

That branch of defendant's motion to dismiss plaintiff's fourth cause of action for intentional infliction of emotional distress is granted. In his fourth cause of action, plaintiff alleges that he "suffered mental anguish, emotional distress, defamed in name and reputation" (Complaint at ¶ 22). "The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4)

severe emotional distress" (*Petkewicz v. Dutchess Cty. Dep't of Cmty. & Family Servs.*, 137 A.D.3d 990, 27 N.Y.S.3d 264 [2 Dept., 2016], quoting *Klein v. Metropolitan Child Servs., Inc.,* 100 A.D.3d 708, 710, 954 N.Y.S.2d 559 [2 Dept., 2012]).

> "The first element—outrageous conduct—serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine" (*Howell v. New York Post Co.,* 81 N.Y.2d at 121, 596 N.Y.S.2d 350, 612 N.E.2d 6 99, citing William L. Prosser, *Insult and Outrage,* 44 Cal. L. Rev. 40, 44–45 [1956]). The element of outrageous conduct has been described as "rigorous, and difficult to satisfy" (Prosser and Keeton, Torts § 12 at 61 [5th ed. 1984]; *see Howell v. New York Post Co.,* 81 N.Y.2d at 122, 596 N.Y.S.2 d 350, 612 N.E.2d 699; *Seltzer v. Bayer,* 272 A.D.2d 263, 264–265, 709 N.Y.S.2d 21). " 'Liability has been found only where the conduct has been 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' " (*Murphy v. American Home Prods. Corp.,* 58 N.Y.2d at 303, 461 N.Y.S.2d 232, 448 N.E.2d 86, quoting Second Restatement § 46, Comment d; *see Marmelstein v. Kehillat New Hempstead: Rav Aron Jofen Community Synagogue,* 11 N.Y.3d 15, 22–23, 862 N.Y.S.2d 311, 892 N.E.2d 375; *Borawski v. Abulafia,* 117 A.D.3d 662, 664, 985 N.Y.S.2d 284).

(*Taggart v. Costabile*, 131 A.D.3d 243, 14 N.Y.S.3d 388 [2 Dept., 2015]).

In the instant case, accepting all allegations in the complaint as true and affording plaintiff the benefit of every favorable inference, however insipid defendant's advertisements were, he did not display extreme and outrageous conduct (*see generally, Reilly v. Garden City Union Free Sch. Dist.*, 89 A.D.3d 1075, 934 N.Y.S.2d 204 [2 Dept., 2011]).

Conclusion

Accordingly, the defendant's motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) is granted. Anything not decided herein is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

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