

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D32818  
G/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - October 20, 2011

ANITA R. FLORIO, J.P.  
THOMAS A. DICKERSON  
CHERYL E. CHAMBERS  
JEFFREY A. COHEN, JJ.

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2010-11146

DECISION & ORDER

Vincent Polimeni, et al., appellants, v Asbestos  
Lead & Hazardous Waste Laborers' Local 78,  
respondent.

(Index No. 7153/10)

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Stephan Garber, Garden City, N.Y., for appellants.

Cohen, Weiss and Simon LLP, New York, N.Y. (Joseph J. Vitale and Bruce S.  
Levine of counsel), for respondent.

In an action, inter alia, to recover damages for defamation, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Adams, J.), entered September 22, 2010, as granted those branches of the defendant's motion pursuant to CPLR 3211(a)(7) which were to dismiss the first, second, and fourth causes of action insofar as asserted against it.

ORDERED that the order is affirmed insofar as appealed from, with costs.

As the Supreme Court correctly concluded, the first cause of action to recover damages pursuant to Civil Rights Law §§ 50 and 51 for invasion of the plaintiff Vincent Polimeni's right of privacy fails to state a cause of action upon which relief can be granted, as the flyer on which Polimeni's name and photograph appeared was not used for advertising or trade purposes (*see Kane v Orange County Publs.*, 232 AD2d 526, 526-527; *cf. Beverley v Choices Women's Med. Ctr.*, 78 NY2d 745, 751). Moreover, the flyer falls within the public interest exception to Civil Rights Law §§ 50 and 51 (*see Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d 436, 441; *Freihofner v Hearst*

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*Corp.*, 65 NY2d 135, 141; *Walter v NBC Tel. Network, Inc.*, 27 AD3d 1069, 1070-1071; *Creel v Crown Pubs.*, 115 AD2d 414, 415-416).

The Supreme Court also properly granted that branch of the defendant's motion which was to dismiss the second cause of action to recover damages for defamation of Polimeni's character. CPLR 3016(a) requires that the allegedly defamatory material be set forth in the complaint. Although the flyer was annexed to the complaint (*see Pappalardo v Westchester Rockland Newspapers*, 101 AD2d 830, *aff'd* 64 NY2d 862), a perusal of the flyer does not reveal the allegedly defamatory material and, thus, dismissal of that cause of action is required (*see Black-Kelly v Marley*, 83 AD3d 981; *Hausch v Clarke*, 298 AD2d 429, 430).

Finally, the Supreme Court properly granted that branch of the defendant's motion which was to dismiss the fourth cause of action to permanently enjoin the defendant from trespassing on the property of the plaintiff Shelvin Plaza Associates, LLC (*see Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408).

FLORIO, J.P., DICKERSON, CHAMBERS and COHEN, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court