[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. JUDITH J. GISCHE PART 10
Justice

Edward Fagan,

Plaintiff (s),

- v -

Charles Moerdler, et al.

Defendant(s).

INDEX NO. 117194/09
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to ____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

FILED

MAR 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/4/11

Hon. Judith J. Gische, *J.S.C.*

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

EDWARD FAGAN,

Plaintiff,

-against-

CHARLES MOERDLER, *et al.*,

Defendants.

----------x

DECISION/ ORDER
Index No.: 117194/09
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

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

Papers	**Numbered**
Defs' n/m (3211) w/BHS affirm, affids, exhs	1
Pltf's x/m	2
Pltf's opp w/EDF affirm, exhs	3-10
Pltf's amended summons w/notice	11
Affids of service	12

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, *pro se*, has asserted claims of fraud, defamation, and negligence against defendants. Defendants, who are all jointly represented, now move, pre-answer to dismiss each of the causes of action asserted in the complaint. CPLR § 3211.

Facts Presented and Arguments Considered

In a prior litigation before the United States District Court for the Southern District of New York, plaintiff, a former attorney, represented the Association of Holocaust Victims for Restitution of Artwork and Masterpieces ("AHVRAM"). Defendants, Stroock

& Stroock & Lavan LLP ("Stroock LLP") and senior litigation partner, Charles G. Moerdler ("Moerdler"), represented the defendants in that proceeding. Plaintiff alleges that in the AHVRAM proceeding, defendants Moerdler, Stroock LLP, Ernst H. Rosenberger ("Rosenberger"), Curtis C. Mechling ("Mechling"), and Bruce H. Schneider ("Schneider") committed fraud and misrepresentation in violation of New York Judiciary Law § 487 (COA1). Plaintiff also alleges that Moerdler made defamatory statements about plaintiff in a New York Law Journal ("NYLJ") article dated December 12, 2008 and in an article posted on Law.com on January 9, 2009 (COA2). Plaintiff further alleges that defendants, Stuart H. Coleman ("Coleman") and Alan M. Klinger ("Klinger"), were negligent in permitting their colleagues to submit false statements to the Court in the Federal proceeding (COA3).

Defendants move to dismiss the complaint for, *inter alia*, lack of personal jurisdiction due to improper service, failure to state a claim, res judicata, and collateral estoppel.

Plaintiff cross-moves for a traverse hearing, document discovery, and to amend the complaint and ad damnum clause.

Discussion

In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395

(1st Dept. 1997). In deciding defendants' motion to dismiss, the court must determine whether the allegations support the causes of action asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 [2005]).

Where the parties submit affidavits and other evidentiary materials in support of their respective motions, the courts are free to consider the affidavits and documents submitted to remedy any defects in the pleading. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994).

Defamation

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 N.Y.2d 453 (1967). The elements of slander are: (1) the statement was defamatory, meaning it had a tendency to expose plaintiff to public hatred, contempt, ridicule, or disgrace; (2) the statement referred to plaintiff; (3) defendant published or broadcasted the statement to someone other than plaintiff; and (4) the statement was a substantial factor in causing plaintiff to suffer financial loss. Epifani v. Johnson, 65 A.D.3d 224 (2d Dept. 2009); Rufeh v. Schwartz, 50 A.D.3d 1002, 1003 (2d Dept. 2008).

A plaintiff does not need to prove special damages, however, if he or she can establish that the alleged defamatory statement constituted slander *per se*. Rufeh v. Schwartz, *supra* at 1003. Only certain statements are considered slander per se. They are limited to four categories of statements that: (1) charge plaintiff with a serious crime; (2) tend to injure another in his or her trade, business, or profession; (3) plaintiff has a

loathsome disease; or (4) impute unchastity. *See* Liberman v. Gelstein, 80 N.Y.2d 429, 435 (1992); Epifani v. Johnson, *supra* at 234. When statements fall within one of these categories, the law presumes that damages will result, and they need not be separately proven.

It is the court's responsibility, in the first instance, to determine whether a publication is susceptible to the defamatory meaning ascribed to it. Golub v. Enquirer/Star Group, Inc., 89 N.Y.2d 1074 (1997); Rejent v. Liberation Publications Inc., 197 A.D.2d 240 (1st Dept. 1994). A court should neither strain to place a particular construction on the language complained of, nor should the court strain to interpret the words in their mildest and most inoffensive sense, in order to hold them non-defamatory. Rejent, *supra*.

Competing with an individual's right to protect one's own reputation, is the constitutionally guaranteed right to free speech. One of the staples of a free society is that people should be able to speak freely. United States Constitution v. New York State Constitution, Article I § 8. Consequently, statements that merely express opinion are not actionable as defamation, no matter how offensive, vituperative, or unreasonable they may be. Immono AG v. Moore-Jankowski, 77 N.Y.2d 235 (1991). If the material, when read in context, could be perceived by a reasonable person to be nothing more than a matter of personal opinion, no claim for libel exists. Immuno AG, *supra*.

Under New York law, only statements of objective fact, as opposed to a statement of opinion, can form the basis for a defamation action. An opinion, which is a person's thought, belief or inference, is not capable of being proven false (Black's Law

Dictionary [8th Ed 2004]; *see also* Four Corners Comm. v. Graphic Arts Mut. Ins. Co., 25 Misc.3d 1236[A] [NY Sup 2009]).

The court holds that plaintiff's causes of action for defamation against defendants must be dismissed because the challenged speech consists of defendants' personal opinions about plaintiff's actions based upon their experiences in dealing with plaintiff.

The NYLJ article, titled "Lawyer Disbarred for Failing to Pay Sanctions, Fees in Holocaust Case" by Noeleen G. Walder, includes quotes from Moerdler stating, *inter alia*, that plaintiff "simply has no grasp of the truth" and "[plaintiff] seems to have gone off the rails and that's really too bad." The Law.com article, titled "Former Attorney Sues Judge Over Alleged Bias, Favoritism" by Mark Hamblett, includes one quote from Moerdler stating "this is bizarre and has absolutely no merit."

The speech, even when viewed in its full context, is a subjective expression of dissatisfaction with plaintiff's conduct and the statements are not actionable because they are defendants' personal opinions. Even if deprecating to plaintiff, loose, figurative or hyperbolic statements, are not actionable. Dillon v. City of New York, 261 A.D.2d 34 (1st Dept. 1999)

Since the statements are protected opinion, plaintiff's second cause of action for defamation and defamation *per se* is severed and dismissed.

Fraud

To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the

misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff. Held v. Kaufman, 91 N.Y.2d 425 (2d Dept. 1998).

New York Judiciary Law § 487 provides:

> An attorney or counselor who:
>
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
>
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Section 487 permits a civil action to be maintained by any party who is injured by an attorney's intentional deceit or collusion on a court or on any party to litigation, and it provides for treble damages. Amalfitano v. Rosenberg, 533 F.3d 117 (2d Cir. 2008). While a "chronic and extreme pattern" of delinquency is a violation of Section 487 (*see* Galland v. Kossoff, 824 N.Y.S.2d 630, 631 (1st Dept. 2006); Solow Management Corp. v. Seltzer, 795 N.Y.S.2d 448, 448 (1st Dept. 2005); Havell v. Islam, 739 N.Y.S.2d 371, 372 (1st Dept. 2002), a "single intentionally deceitful or collusive act" has also been held as sufficient (*see* NYAT. Operating Corp. v. Jackson, Lewis, Schnitzler & Krupman, 191 Misc.2d 80 (N.Y.Sup. 2002) (single instance of lying under oath). Amalfitano v. Rosenberg, *supra* at 123-24.

Here, plaintiff alleges that Moerdler, Stroock LLP, Rosenberger, Mechling, and Schneider committed fraud and misrepresentation, thereby violating New York Judiciary Law § 487. Plaintiff alleges that defendants deceived the Federal court by, *inter alia*, misrepresenting the terms and conditions of a prior settlement agreement, submitting false affidavits and memoranda of law, and having an undisclosed special relationship with Judge Kram, the District Court Judge presiding over the AHVRAM case. Specifically, plaintiff alleges that defendants falsely stated that a prior settlement agreement precluded any and all claims in the AHVRAM case and other related cases. This issue, however, was considered and substantively decided by Justice Kram.

In a prior court decision, dated August 19, 2005 (Association of Holocaust Victims for Restitution of Artwork and Masterpieces, a/k/a "AHVRAM" v. Bank Austria Creditanstalt AG, 2005 WL 2001888 (S.D.N.Y. 2005) (the "August 19, 2005 Order"), Judge Kram dismissed the complaint in that action, ruling as follows:

> In ¶ 271 of the Amended Complaint, Mr. Fagan asserts that the word 'ARTWORK' does not appear in the Settlement Agreement and Release because "the 1998 Claims related EXCLUSIVELY to bank accounts, monies or assets . . .' Id. ¶ 275. This is totally false. The Settlement Agreement and Release defines 'Released Claims' to include, *inter alia*, claims for 'Looted and/or Aryanized Assets,' (Settlement Agreement ¶ 1 (B)), which specifically include 'any and all personal . . . property, including . . . silver, gold, jewelry . . . [and] art masterpieces.' Class Action Compl. ¶ 17.
>
> . . .
>
> In the instant case, Mr. Fagan also asserts that an alleged scheme to defraud occurring from 'the 1950s to the present' falls outside the scope of the Settlement. . . . Again, Mr. Fagan's claim is belied by the Settlement, which states that 'actions, conducts, or omissions on or subsequent to January 1, 1947 that result from, arise out of or relate to the actions, conduct, or omissions from the Releasees prior to January 1, 1947' are explicitly covered

> by the Agreement. Settlement Agreement ¶ 7. Moreover, according to that same agreement, the parties specifically agreed that Bank Austria would be released from all claims 'from the beginning of time to the date of this Agreement' relating to Holocaust-era conduct and the claims in the Consolidated Class Action Complaint, including those related to 'looted and/or Aryanized Assets,' which include 'art masterpieces.' In light of that release, it is, quite frankly, incomprehensible that Mr. Fagan would initiate the instant action.
>
> . . .
>
> Despite his representations that AHVRAM, the purported entity of which he claims to be a member and brings this suit on behalf of, 'was formed', . . . there is, according to the Defendant, no record of such entity being formed in New York State . . . [t]o that end, Mr. Fagan appears to be seeking damages on behalf of a fictitious entity.

Plaintiff, thereafter, moved before Judge Kram for, *inter alia*, reconsideration of the August 19, 2005 Order and to file a second amended complaint. In a decision dated November 17, 2005 (Association of Holocaust Victims for Restitution of Artwork and Masterpieces, a/k/a "AHVRAM" v. Bank Austria Creditanstalt AG, 2005 WL 3099592 (S.D.N.Y. 2005) (the "November 17, 2005 Order"), Judge Kram denied plaintiff's motion.

The court finds that plaintiff's first cause of action is barred by the doctrine of *res judicata*. The doctrine of *res judicata* precludes a party from litigating "a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." Matter of Hunter, 4 N.Y.3d 260, 269 (2005). Once a claim is brought to its final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981). This court is bound by the decision in the Federal action and it cannot be collaterally attacked here,

in State court.

Even if plaintiff, as an attorney but not an actual party to the prior Federal action, is not barred by principles of *res judicata*, he is nonetheless barred by principles of collateral estoppel. Judge Kram's August 19, 2005 Order concerned a motion for sanctions against plaintiff personally, as well as a motion to dismiss. Thus, plaintiff had notice and an opportunity to be heard, which are the predicates for denying re-litigation of the same issues. In re Abady, 22 A.D.3d 71 (1st Dept. 2005).

Judge Kram has already substantively decided that terms and conditions of the parties' prior settlement agreement precluded plaintiff from bringing its claim in the AHVRAM case. This Court cannot look behind Judge Kram's decision; it is not her appellate court. Plaintiff is seeking an end-run around Judge Kram's decision because he is dissatisfied with the result. Furthermore, plaintiff's bare allegations that Judge Kram engaged in misconduct and that there was "collusion" between her and the parties is not a cognizable private cause of action that can be brought in State court.

Plaintiff's third cause of action for negligence alleges that the Stroock partners had the responsibility of preventing the drafting, preparation, and filing of false information, and are individually responsible for the acts of Moerdler and Mechling. The court dismisses plaintiff's third cause of action because it is contingent upon there being a viable first cause of action. Since the first cause of action fails, so must the third cause of action.

Although other arguments are offered by defendants to dismiss the complaint, including lack of jurisdiction, the court does not need to address each one separately, because there is ample reason, as stated above, to dismiss the complaint. Plaintiff's

cross-motion for a traverse hearing is moot.

Accordingly, defendants' motion to dismiss the complaint is granted and plaintiff's cross-motion is denied in its entirety.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendants' motion to dismiss the complaint against plaintiff, EDWARD FAGAN, is GRANTED and the complaint is hereby dismissed; and it is further

ORDERED that plaintiff, EDWARD FAGAN's cross-motion is DENIED; and it is further

ORDERED that any requested relief not expressly addressed has nonetheless been considered; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
March 4, 2011

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.