

**Yan v Mo**

2021 NY Slip Op 31090(U)

April 5, 2021

Supreme Court, New York County

Docket Number: 159213/2019

Judge: Shawn T. Kelly

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 57

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DAVID YAN,

Plaintiff,

- v -

HUGH MO, ELIZABETH MO, PEDRO MEDINA, THE LAW  
FIRM OF HUGH H. MO, P.C., JOANNE ORPHANIDES

Defendant.

INDEX NO. 159213/2019

MOTION DATE 12/16/2020

MOTION SEQ. NO. 001, 002

**DECISION + ORDER ON  
MOTION**

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 21, 27, 29, 31, 32, 33, 34, 35, 36, 37, 38, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

Defendants Hugh H. Mo (“H. Mo”), Elizabeth L. Mo (E. Mo”), the Law Firm of Hugh H. Mo, P.C. (the “Firm”), and Pedro Medina, Jr. (“Medina”) (collectively “Defendants”) move pursuant to CPLR § 3211(1)(1) and CPLR § 3211(a)(7) to dismiss the complaint filed by Plaintiff David Yan (“Yan”). Plaintiff cross moves to amend the complaint.

Defendant Joanne Orphanides moves to dismiss in motion sequence 002 adopting the Firm’s papers and arguments. As such, motion sequence 002 is consolidated for decision with motion sequence 001.

Plaintiff Yan, an attorney, commenced this case based on statements in a Memorandum of Law (“Memorandum”) filed by the Firm challenging Yan’s application for attorney’s fees and costs in connection with his representation of his clients in a federal case entitled *Meide Zhang and Zhongliang Qiu v. Liang Zhang, et al.*, Case No. 1:16-cv-04013, U.S. District Court,

S.D.N.Y (LGS)(HBP), (the “Zhang Case”). The specific statements Plaintiff bases his claims on are:

“In examining Plaintiffs’ counsels [Yan’s] fee application, a troubling fraud committed by Mr. Yan against the Court, Defendants, and Trial One’s Mandarin Chinese interpreter was discovered that unequivocally undermines the credibility of this fee application and justifies denial in its entirety.”

“At Trial One, Mr. Yan directed Ms. Wang to inflate her rate to \$150 per hour because Defendants were ordered to pay one-third of all interpreter costs.”  
(NYSCEF Doc. No. 34 pp 6-7).

The Memorandum was electronically filed with the Southern District on September 20, 2018 in connection with Plaintiff Yan’s motion for attorney fees and costs in the Zhang Case. Subsequently, Plaintiff filed the present lawsuit contending defamation.

### Analysis

Dismissal under CPLR § 3211(a)(1) is warranted where the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]; see *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept. 2014]).

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true” (*Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [2018]). In addition, “on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (see, *Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin*

*Brothers Ltd. v City National Bank*, 270 NYS3d 192, 192 [2018] [noting that “conclusory allegations fail”]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a Complaint should be dismissed pursuant to §3211(a)(7) is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Foley v D’Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (see *EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if “from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law”]).

### **Defamation**

Defendants contend that the statements in question are absolutely privileged as they were part of a memorandum filed in federal court in the context of a judicial proceeding. In opposition, Plaintiff alleges that the statements are not privileged as Defendants knew the statements were not true when they included the statements in their brief.

It is well settled that there is an absolute privilege for defamatory words in the context of a judicial proceeding (see *Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209 [1983]). Further, the privilege attaches to such statements irrespective of an attorney's motive for making them (see *Wiener v Weintraub*, 22 NY2d 330, 331 [1968]). The purpose of this absolute privilege is to protect the official processes of government (see *Toker v Pollak*, 44 NY2d 211, 405 NYS2d 1, [1978]), so that persons may speak freely without any fear of financial hazard or litigation (see

also, *Park Knoll, supra*, at 209; *Baratta v Hubbard*, 136 AD2d 467, 523 N.S2d 107 [1st Dept 1988]; *Fowler v Conforti*, 152 Misc2d 909, 912–13, 583 NYS2d 789, 792 [1992], *aff'd*, 194 AD2d 394, 598 NYS2d 782 [1993]).

A statement made by counsel during a judicial proceeding, even if made with malice or bad faith, is protected by absolute privilege as long as the statement may, in some way, be considered pertinent to the litigation (*see Rabiea v Stein*, 69 AD3d 700, 700–01, 893 NYS2d 224, 224–25 [2010]; *Martirano v Frost*, 25 NY2d 505, 507, 307 NYS2d 425 [1969]; *Impallomeni v Meiselman, Farber, Packman & Eberz*, 272 AD2d 579, 708 NYS2d 459 [2000]).

Here, accepting the allegations in the complaint as true and resolving all inferences in favor of the Plaintiff (*see Leon v. Martinez*, 84 NY2d 83, 87–88, 614 NYS2d 972), the complaint fails to state a cause of action against the Defendants to recover damages for defamation, as the statements in issue were made in judicial brief and pertained directly to issue of attorneys fees and costs. Accordingly, Defendants' motion to dismiss is granted and the complaint is dismissed.

#### **Defendant Joanne Orphanides**

Defendant Orphanides in motion sequence 002 seeks dismissal incorporating and adopting the arguments set forth by her co-defendants as discussed above. Defendant Orphanides was the translator in the Zhang litigation and her motion to dismiss is granted upon the same basis discussed above.

#### **Cross Motion**

Plaintiff cross moves for leave to amend the complaint, however, Plaintiff does not attach the proposed Amended Complaint or refer to the amendments in any way. Although leave to amend a complaint should be freely granted (*see CPLR 3025[b]; Henderson v Gulati*, 270 AD2d 308, 705 NYS2d 54[2000]), when a proposed amendment is devoid of merit or fails to state a

cause of action, leave to amend should be denied (*see Guzov v Manor Lodge Holding Corp.*, 13 AD3d 482, 787 NYS2d 84 [2004]). Plaintiff does not include discussion of the amendments in his notice of motion or in his affirmation. Accordingly, Plaintiff's cross motion is denied.

Accordingly, it is hereby

ORDERED that Plaintiff's cross motion for leave to amend is denied; and it is further

ORDERED that Defendants' motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

4/5/2021

DATE



SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE