Abrams v Durst
2021 NY Slip Op 31615(U)
May 14, 2021
Supreme Court, New York County
Docket Number: 153001/2020
Judge: Philip Hom
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 2

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ROBERT ABRAMS,

Plaintiff,

- v -

DOUGLAS DURST, JONATHAN DURST, JORDAN BAROWITZ, THE DURST ORGANIZATION, JOHN AND JANE DOES

Defendant.

INDEX NO. 153001/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35
were read on this motion to/for DISMISS.

In this defamation action, defendants bring a pre-answer motion to dismiss this Complaint pursuant to CPLR 3211(a) (7), and request the imposition of sanctions. Plaintiff opposes,[1] and Defendants reply.[2]

Background

For purposes of this motion to dismiss, the facts alleged in the Complaint dated and filed March 20, 2020 are taken to be true (NYSCEF Document No. 1, Complaint). On March 22, 2019, Plaintiff, an experienced attorney representing the administrator of the estate of Kathleen McCormack Durst ("Ms. Durst"), commenced a wrongful death action in New York Supreme Court, New York County, against Robert Durst ("RDurst"), who allegedly murdered Ms. Durst

[1] Plaintiff does not request leave to file an amended complaint, by motion, cross-motion, or otherwise.

[2] Prior to this action's recent reassignment to this court, Plaintiff requested and Defendants opposed leave to file a sur-reply. The then Presiding Justice did not grant Plaintiff leave to file a sur-reply. Accordingly, this court does not now consider Plaintiff's request, Defendants' opposition, and the assertions and arguments set forth in their letter submissions.

on January 31, 1982 (*Bamonte v Durst*, Sup Ct, New York County, Index No. 153054/2019) (the "wrongful death action"). That Complaint did not name the Defendants herein as parties (Doc 7, wrongful death complaint, annexed as Exhibit 2 to the Affirmation in Support of Motion of Charles G. Moerdler, Esq. [moving aff], Doc 5; Doc 22, attached as Exhibit 1 to the Affirmation in Opposition of Robert Abrams, Esq. [opposing aff], Doc 21).

The instant Complaint alleges that in response to the wrongful death action, Defendant Jordan Barowitz ("Barowitz"), issued the following public statement on behalf of Defendants Douglas Durst ("DDurst"), Jonathan Durst ("JDurst"), and the Durst Organization (collectively, the "Durst Defendants"): "the accusations are fiction, and this is a lawyer's attempt to make a buck" (the "statement"). Plaintiff alleges that the statement was defamatory, and "was a malicious and baseless attempt to professionally and personally vilify Plaintiff and distract public attention from, among other things, the Durst Defendants' individual and collective failure to cooperate with the police investigation into [Ms. Durst's] murder and/or to assist Robert Durst cover-up his crimes" (Complaint, ¶ 14). Plaintiff further alleges the Durst defendants were aware of, authorized and approved the statement prior to its publication, knew the statement was false, and made the statement to injure Plaintiff's professional reputation and standing.

The statement was published on March 22, 2019 by two newspapers: (1) the New York Post, as part of an article by Priscilla DeGregory entitled "Robert Durst's 'crime family' helped cover up first wife's murder: lawsuit" (the "Post article") (*id.* ¶ 17); and (2) the New York Daily News, as part of an article by Shayna Jacobs entitled "Estate of Late Robert Durst Wife sues him for Wrongful Death and implicates his famous family" (the "News article") (collectively, "the articles") (*id.* ¶ 18). The articles, which are not attached to the Complaint, are annexed as exhibits to the moving aff (Docs 11 & 12, respectively).

Plaintiff further alleges that by making the knowingly false statement, Defendants: "demonstrate a reckless disregard for the truth" (Complaint, ¶ 20); "knew that accusing Plaintiff of lying to a court of law was tantamount to accusing Plaintiff of committing a criminal act" (*id.* ¶ 21); acted with spite and malice in making the false statement, which "is about and concerning Plaintiff" (*id.* ¶ 23) and published the statement to a broad audience. Additionally, as the statement "falsely charged Plaintiff with a serious crime and injured Plaintiff in his business and profession" (*id.* ¶ 28), the statement's publication is defamation *per se,* damages are presumed, and, in any event, Plaintiff's reputation and good standing have been and will continue to be harmed. Plaintiff seeks compensatory damages in an amount to be determined at trial, nominal damages, punitive damages, pre and post-judgment interest, and costs and attorney's fees.

The Wrongful Death Action Complaint

The law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, L.L.P. (the "Abrams Fensterman firm") represented the administrator in the wrongful death action.[3] The wrongful death complaint was verified by the administrator, Carol Bamonte, and the Summons and Complaint were signed by Plaintiff herein on behalf of the Abrams Fensterman firm. That complaint includes various allegations concerning the lengthy background surrounding the events that transpired with respect to Ms. Durst, including various court proceedings, decrees and decisions, as well as the various investigations and media coverage, including the 2015 six part HBO documentary: "The Jinx: The Life and Deaths of Robert Durst." Familiarity with this background is presumed.

[3] By Decision and Order dated August 6, 2019, the court granted defendant Robert Durst's motion to dismiss the wrongful death action (Index No. 153954/2019, doc 53). Plaintiff therein filed Notices of Appeal dated September 4, 2019 and September 18, 2019 (*id.*, Docs 58 &60) Thereafter, by letter dated July 10, 2020 addressed to the Clerk of the Court of the Appellate Division, 1st Department, plaintiff withdrew the unperfected appeal (2019-03558, Doc 7).

Although the wrongful death complaint did not name the Durst defendants as parties, it did make a number of allegations against them and other members of the Durst family, the Durst Organization, and others. That complaint references members of the Durst family as RDurst's "crime family collaborators" and "the Durst crime family" (wrongful death complaint ¶¶ 92-94, 137-138). Further, that complaint alleges, among other things, that Ms. Durst informed Seymour Durst ("SDurst"), RDurst's father and the "Patriarch of the powerful and wealthy family real estate business known as 'The Durst Organization,'" as well as others "both inside and outside of the Durst orbit, that she would expose what she believed were illegal business practices developed, implemented and approved by" SDurst, RDurst and "other Durst Organization decision makers" (*id.* ¶ 20 [b]). SDurst warned RDurst that Ms. Durst "was a threat to the family's business and directed [R] Durst to take care of this problem" (*id.* ¶ 20 [c]); within hours of Ms. Durst's murder by RDurst, SDurst, along with "family members [and] members of The Durst Organization," "conspired to protect [R] Durst and The Durst Organization from any connection to [Ms. Durst's] disappearance and murder, demonstrating their knowledge and/or their accomplice liability, as accessories after the fact, and/or their clear consciousness of guilt" (*id.* ¶ 26).

The wrongful death complaint further alleges that after RDurst killed Ms. Durst and disposed of her body, and "with the help of others, including his father and other family members," and Durst Organization professionals and representatives, RDurst "created a false narrative to deceive, *inter alia*, the police, prosecutors and [Ms. Durst's] loved ones about [R] Durst's involvement in [Ms. Durst's] disappearance and murder" (*id.* ¶ 27). With SDurst's "leadership," and "guidance and input" from named members of the Durst Organization, RDurst "concocted a detailed cover-up strategy, which was based on a multitude of intentionally false

misrepresentations" (*id.* ¶ 30), including giving false and negative information to the police and media (*id.* ¶¶ 61, 62). RDurst "and his crime family collaborators" knew Ms. Durst was dead and "needed to continue to embrace the public lie that [Ms. Durst] abandoned [R] Durst" (*id.* ¶ 92). In "collaboration" with DDurst, and others from the Durst family and "the inner circle," RDurst put in place a plan to address a District Attorney's investigation (*id.* ¶ 102). The "actions and inactions" of SDurst, DDurst, JDurst, and "other Durst Organization members also provide evidence of [R] Durst's responsibility for [Ms. Durst's] death" (*id.* ¶ 139).

Legal Standards

CPLR §3211 (a) (7)

In determining Defendants' pre-answer motion to dismiss for failure to state a cause of action pursuant to CPLR §3211 (a) (7), the Court liberally construes the Complaint, accepts the alleged facts as true, and accords plaintiff "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2 83, 87 [1994]). The motion "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks and citations omitted]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [internal citation omitted]).

While a court may consider evidentiary material submitted by a defendant in support of a CPLR §3211 (a) (7) motion (*Sokol v Leader*, 74 AD3d 1180, 1181, 1181 [2d Dept 2010], the burden does not shift to the non-moving party to rebut the moving party's asserted defense(s)

(*id*). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "Unlike on a motion for summary judgment where the court searches the record and assesses the sufficiency of the parties' evidence, on a motion to dismiss the court merely examines the adequacy of the pleadings" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks and citation omitted]). "Whether a plaintiff can ultimately establish [his] allegations is not part of the calculus in determining a motion to dismiss" (*EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

With respect to "determining the sufficiently of a defamation pleading, [courts] consider whether the contested statements are reasonably susceptible of a defamatory connotation" (*Davis,* 24 NY3d at 268 [internal quotation marks and citations omitted]). "If, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action" (*Silsdorf v Levine*, 59 NY2d 8, 12 [1983] [internal citation omitted]). Courts "apply this liberal standard fully aware that permitting litigation to proceed to discovery carries the risk of potentially chilling free speech," because courts "recognize as well a plaintiff's right to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets [the] minimal standard necessary to resist dismissal of [the] complaint" *(Davis,* 24 NY3d at 268 [internal quotation marks and citation omitted]).

Defamation

Defamation arises from "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 NY2d 744, 751 [1996] [internal quotation marks and citations omitted]). "The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [internal citation omitted]). To establish a prima facie case of defamation, a plaintiff "must show that the matter published is 'of and concerning'" the plaintiff (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016] [internal citation omitted]). "Truth provides a complete defense to defamation claims" (*Dillon*, 261 AD2d at 39, citing *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369 [1977]), *cert denied* 434 US 969 [1977]). "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a *sine qua non* of a libel claim and since only assertions of fact are capable of being proven false," the Court of Appeals has "consistently held that a libel action cannot be maintained unless it is premised on published assertions of fact" (*Brian v Richardson*, 87 NY2d 46, 51 [1995] [internal citations omitted]).

The complaint must allege the particular words complained of, to whom it was made, and the time, place and manner of the false statement (CPLR 3106 [a]; *Dillon*, 261 AD2d at 38). "In addition to considering the immediate context in which the disputed words apply, the courts are required to take into consideration the larger context in which the statements were published, including the nature of the particular forum" (*Brian,* 87 NY2d at 51). 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 instruction" (*Dillon*, 261

AD2d at 38, citing *Silsdorf v Levine*, 59 NY2d 8 [1983], *cert denied* 464 US 831 [1983]). "Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance" (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985], internal citations omitted]).

Overview of The Arguments

Defendants assert four main arguments in support of this pre-answer motion to dismiss, and Plaintiff opposes each argument. First, Defendants argue that the statement is a constitutionally protected opinion and is not actionable as a matter of law. Second, they contend that the statement is qualifiedly privileged and therefore protected, as it was made in response to Plaintiff's own public accusations. Third, Defendants assert that truth, including substantial truth, is a complete defense and the fair reporting privilege likewise attaches. Fourth, they argue that the alleged defamatory statement was not of and concerning Plaintiff. As the court finds the first and fourth arguments dispositive, the other two arguments are not addressed herein.

Fact or Opinion

Legal Standard

"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" (*Mann v Abel*, 10 NY3d 271, 276 [2008] [internal citations omitted]). "'However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the completion of other ideas. But there is no constitutional value in false statements of fact'" (*Rinaldi v Holt, Rinehard & Winston, Inc.*,42 NY2d 369, 380 [1977], quoting *Gertz v Robert Welch, Inc.*, 418 US 323, 339-340 [1974]). A statement of opinion consisting of language that is "loose, figurative or

hyperbolic and lack[ing] a precise meaning" is non-actionable (*Rockwell Capital Partners, Inc. v HempAmericana, Inc.*, 173 AD3d 639, 639 [1st Dept 2019], internal quotation marks and citations omitted]).

"Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff" (*Brian*, 87 NY2d at 51 [internal quotation marks and citations omitted]). "[E]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole" (*Steinhilber v Alphonse*, 68 NY2d 283, 294 [1986] [internal quotation marks and citation omitted]).

"A pure opinion may take one of two forms. It may be a statement of opinion which is accompanied by a recitation of the facts upon which it is based, or it may be [a]n opinion not accompanied by such a factual recitation so long as it does not imply that it is based on undisclosed facts" (*Davis,* 24 NY3d at 269 [internal quotation marks and citations omitted]). "Where the author of a derogatory statement of opinion implies that it is based on facts not disclosed to his audience, a claim for defamation may be premised on this implied factual assertion" (*Chiavarelli v Williams*, 256 AD2d 111, 113 [1st Dept 1998] [internal citation omitted]). An opinion implying that it is based on facts unknown to the reader "is a 'mixed opinion' and is actionable" (*Steinhilber*, 68 NY2d at 289 [citations omitted]). "The actionable element of a 'mixed opinion' is not the false opinion itself -- it is the implication that the speaker

knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking" (*Steinhilber*, 68 NY2d at 290 [citation omitted]).

"Distinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task" (*Brian*, 87 NY2d at 51). In so determining, the court considers three factors: "(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 or listeners that what is being read or heard is likely to be opinion, not fact" (*id.* [internal quotation marks and citations omitted]). "It is the last of these factors that lends both depth and difficulty to the analysis" (*id*). "Whether a particular statement constitutes an opinion or an objective fact is a question of law" (*Mann,* 10 NY3d at 276 [internal citation omitted]), "and one that must be answered on the basis of what the average person hearing or reading the communication would take it to mean" (*Steinhilber,* 68 NY2d at 290 [internal citations omitted]).

Contentions

Defendants argue that the statement, particularly when viewed in full context and in light of the surrounding circumstances, is a constitutionally protected opinion and not a factual assertion. Since the first element of a defamation claim is falsity and only assertions of fact can be proven false, here the statement is one of opinion and is not actionable.

Defendants set forth the three factors considered by the court in determining whether, as a matter of law, a statement is an opinion or a factual assertion. They assert that as part of this analysis, the Court looks to the statement's specific language, and the content, tone and purpose

of the whole communication, including the social context and the surrounding circumstances. Even an apparent factual statement may assume the character of an opinion, if it is made under circumstances in which the use of epithets, hyperbole or fiery rhetoric may be anticipated by the audience.

Defendants contend that here, when "[r]ead in full context and in light of the surrounding circumstances, it cannot be seriously disputed that the challenged comments are nonactionable statements of opinion" (Doc 4, Memorandum of Law in Support of the Durst Defendants' Motion [supporting memo], at 13). They assert that here, when viewed by "any reasonable reader" of the articles, the statement of Defendant Barowitz "reflects his view of the allegations in the Wrongful Death Complaint and his belief about the motivation for the action being brought" (*id*).

Additionally, Defendants argue that the second half of the sentence ("this is a lawyer's attempt to make a buck"), "could not have been reasonably interpreted as fact," as the actual motivations of Plaintiff and the Abrams Fensterman firm are known only to them, are generally not verifiable, and are quintessentially subjective (*id*. at 15). The statement "is the type of non-specific, pejorative rhetoric that is routinely held to be non-actionable opinion" (*id*.). Defendants conclude that when the statement is read in the context of the articles, "and particularly considering the scurrilous accusations lodged" in the wrongful death complaint "that prompted the articles, the statements at issue are constitutionally protected opinion" (*id*. at 16).

In opposition, Plaintiff argues that the statement, "which falsely accused Mr. Abrams of fabricating the allegations in the Wrongful Death Complaint for financial gain is not an expression of pure opinion" (Doc 28, Opposing Memorandum of Law [opposing memo], at 5).

He asserts that "New York courts have repeatedly refused to dismiss a defamation case where the statement at issue implied that someone fabricated allegations for profit" (*id*).

Plaintiff further contends that Defendants mainly rely on cases determining summary judgment motions, and Defendants "fail to explain this Court's role in distinguishing between fact and opinion in the context of a motion to dismiss" (*id*. at 6). He argues that in considering the three factors used in determining whether a reasonable reader could read the statement as one of fact, each of these factors "suggests that the statement at issue could reasonably be interpreted as an assertion of fact." (*id*. at 7). Plaintiff concludes that as a matter of law, the challenged statement is not an opinion. Rather, "it is a statement of fact, which the plaintiff can prove is false and defamatory," and accordingly, Defendant's motion to dismiss should be denied (*id*. at 9).

In reply, Defendants reiterate that "no reasonable reader," when viewing the statement in its full context, tone and apparent purpose, "would have understood the statement as anything other than" Defendant Barowitz's opinion "about the merits of a lawsuit Defendants believe is baseless and unfounded" (Doc 31, Reply Memorandum of Law in Support of Motion [reply memo], at 5). Defendants argue that "where, as here, a statement reflects a vigorous denial of accusations, especially where, as here, it is without adding colorful language or facts or the implication that additional facts underlie the statement, it is a protected opinion and not actionable" (*id*. at 9). They contend that the cases cited by Plaintiff are distinguishable, and that "controlling precedent" "dictates dismissal (*id*. at 5-6).

Discussion

Applying the legal principles to the matter before the court, the court finds that as a matter of law the challenged statement is opinion, not fact. The average person reading the statement, particularly in full context, would read the statement as an opinion. That the statement appears in news articles and not on the opinion page is not dispositive. Also not dispositive is whether in isolation a word or a portion of the statement can be identified as or argued to be an assertion of fact, as the court applies "a holistic approach" to the inquiry of whether a communication is opinion or fact (*Davis*, 24 NY3d at 270).

Here, the challenged statement appears within the articles' reporting of the filing and allegations of the wrongful death complaint; the Post article states that the statement was "said in response" (Doc 11). The Post article includes, among others, the following reporting of the allegations: RDurst killed Ms. Durst, "and then his wealthy father and other members of his 'crime family' helped cover it up" (Doc 11); SDurst and "other relatives and people linked to the Durst Organization 'conspired to protect [Robert] Durst and the Durst Organization from any connection to [Ms. Durst's] disappearance and murder" (*id.*); the Durst family and organization are "'accessories after the fact' to [Ms. Durst's] murder (*id.*); RDurst's "'crime family members' helped develop a 'false alibi'" (*id.*); and SDurst, "who has since died, 'ordered his family and employees 'not to cooperate with the police investigation'" (*id.*). The News article similarly reports about and quotes a number of the allegations in the wrongful death complaint. The article includes that: "members of the Durst family conspired to cover up [Ms. Durst's] killing" (Doc 12]; the complaint "directly implicates several" of the Durst family members [*id*]; and "the suit accuses members of Robert Durst's family of 'actively participating and executing [Robert] Durst's false narrative,' which the suits says supports 'the complicity of the Durst family in this

crime'" (*id.*). The statement, by itself and in this full context, is an opinion, not an assertion of fact.

To the extent that plaintiff argues that the statement is a mixed opinion and thus actionable, the Court disagrees. The statement from Defendant Barowitz, who the News article identifies as "a rep for the Durst family" and "spokesman" (Doc 12), and the Post article identifies as a "Durst family spokesman" (Doc 11), does not state or imply that it is based on certain facts, unknown to the reader, that support his opinion. Examining the broader context of the statement as it appears in the articles similarly does not support such an implication.

The Court grants Defendants' CPLR 3211 (a) (7) dismissal motion on the grounds that, as a matter of law, the challenged statement is one of opinion, not fact, and, accordingly, the Complaint fails to state a cause of action in defamation.

Of and Concerning Plaintiff

The Contentions

In support of their argument that the statement is not "of and concerning" Plaintiff, and, accordingly, the Complaint fails to state a cause of action for defamation, Defendants argue that he statement does not identify Plaintiff or even the law firm by name. Similarly, the Post article and the News article do not do so. The average reader "would have no way of knowing or be able to understand, whether by innuendo or otherwise, if [Defendant] Mr. Barowitz was referring personally to Mr. Abrams as contrasted with counsel of record, the Abrams Fensterman firm" [footnote omitted]] [(Doc 4, supporting memo, at 22-23). A statement about an organization or company, as a matter of law, is not "of and concerning" a particular individual plaintiff. "In fact,

the unspecified statement 'this is a lawyer's attempt to make a buck' could have easily referred to any of the lawyers in the law firm that brought the case or the firm as a whole" [*id.* at 23].

Defendants further contend that the question is not whether Plaintiff himself believed the statement to be "of and concerning" him. Rather, the question is whether a reasonable reader could have so understood. Defendants argue that the answer to this question is no, and, accordingly, the Complaint should be dismissed.

Plaintiff contends that it is "frankly outrageous for Defendants' counsel to assert that the defamatory statement was not 'of and concerning' Robert Abrams" (Doc 21, opposing aff, ¶ 27). He asserts that "[t]his is the case as Defendants' counsel has made a public statement regarding this action that, 'We got [Abrams'] last case dismissed, and we will get this one thrown out as well'" (the March 2020 statement) (*id.*), referencing and attaching a March 23, 2020 news article that appeared approximately one year later in the New York Post following Plaintiff's March 20, 2020 filing of the defamation action (the March 2020 article) (Doc 27, Ex 6 to the opposing aff). The March 2020 article is entitled "Lawyer for Kathie Durst's family sues Durst Organization for Defamation" (*id*).

Plaintiff further contends that a defamatory statement need not mention a plaintiff by name, and the Defendants do not argue that the statement was "so vague as to render a reasonable reader clueless about the target of the defamation" (Doc 28, opposing memo, at 12). Defendants "referred to [a] single 'lawyer's attempt to make a buck,'" and, contrary to Defendant's suggestion, "[i]t is, therefore, abundantly clear that a reasonable reader would conclude that the lawyer referenced in the Daily News and the New York Post was the one who signed the complaint in the Wrongful Death action: Robert Abrams" (*id.*).

Further, Plaintiff argues that "[a]t a minimum, there is a question of fact as to whether Defendants were referring to Robert Abrams or the Abrams Fensterman firm. Defendants have not presented any evidence to suggest that they were referring to the Abrams Fensterman firm as opposed to Robert Abrams" (*id.*). Plaintiff contends that the Court "should not adopt unsworn representations in [a] memorandum of law as grounds to deprive Robert Abrams of his day in court" (*id.*).

Defendants reply that Plaintiff "makes no effort to demonstrate whether or how a reasonable reader of these newspapers, without ready access to the Complaint (or its signature bloc), would have been able to even identify the attorneys of record, the Abrams Fensterman firm, let alone Mr. Abrams individually" (reply memo, at 13). They argue that the "'of and concerning' requirement is a threshold *question of law* and the Complaint can and should be dismissed on these grounds alone" (*id.*).

Discussion

As noted, it is a Plaintiff's prima facie burden to demonstrate that the matter published is "of and concerning" the plaintiff (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d at 86). While it is not necessary that the statement or publication name the plaintiff, the plaintiff "must plead and prove that the statement referred to [him] and that a person hearing or reading the statement could have interpreted it as such" (*id.* [internal citation omitted]). "This burden is not a light one, and the question of whether an allegedly defamatory statement could reasonably be interpreted to be 'of and concerning' a particular plaintiff is a question of law for the courts to decide" (*id.* at 86-87 [citations omitted]). (*See also Carlucci v Poughkeepsie Newspapers, Inc.*, 57 NY2d 883, 885 [1982] [citation omitted] [concluding as a matter of law that the "reading

public acquainted with the parties and the subject could not take the article," as of and concerning the plaintiff]).

"It seems to be well settled that, where a libel does not name the plaintiff, he may give evidence of all the surrounding circumstances and other extraneous facts which will explain and point out the person to whom the allusion applies" (*Cole Fischer Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 426 [1st Dept 1968] [internal quotation marks and citation omitted]). "While a plaintiff may use extrinsic facts to prove that the statement is 'of and concerning' him, he must show the reasonableness of concluding that the extrinsic facts were known to whom the statement was made" (*Three Amigos SJL Rest., Inc. v CBS News, Inc.*, 132 AD3d 82, 89 [1st Dept 2015], *affd* 28 NY3d 82 [2016]).

Mindful of these and the preceding principles, the court now turns to examining both the challenged sentence itself and the broader context of the articles and surrounding circumstances. Here, the first half of the sentence states that "[t]he accusations are fiction," and the second half states "and this is a lawyer's attempt to make a buck." The statement follows the articles' reporting of the wrongful death complaint. The articles also quoted the next statement stated by Barowitz: "Unfortunately, Robert's [Durst] mendacity has left a trail of heartbreak, grief and broken lives."

Neither the first half nor the second half of the challenged statement names or otherwise identifies Plaintiff. So too the articles do not name or identify Plaintiff. With respect to the first half of the sentence regarding the accusations, the Post article specifies that the "wrongful death suit" was "filed by Kathie's sister, Carol Bamonte." This article repeatedly attributes the quoted portions of the Complaint to the suit or Bamonte as follows: "Bamonte claims," "the suit says"; "Bamonte says in her suit;" and "the sister alleges" (Doc 11). The News article similarly does

not name Plaintiff or otherwise identify him. The article attributes or quotes the Complaint's allegations as follows: "the suit says," the estate of Ms. Durst "alleges," the "lawsuit says," "it alleges" and the "suit accuses" (Doc 12). After the News article so reports, it states that "[a] rep for the Durst family blasted the allegations in a statement" and the statement is attributed to "spokesman" Barowitz (Doc 12). The second half of the challenged sentence states "a lawyer" and, again, neither the statement or the articles name or otherwise specify or identify Plaintiff or any individual or firm as the lawyer. Nor do the articles contain Plaintiff's photograph or other references by which the reader can identify that the statement is "of and concerning" Plaintiff.

While Plaintiff alleges in his Complaint the statement is "about and concerning" him (Doc 1, ¶ 23) and in his affidavit as "of and concerning" him, this conclusory language is not supported by a reading of the statement or the article. Also unavailing is Plaintiff's assertion that there is a question of fact as to whether the alleged defamatory statement referred to him or the Abrams Fensterman firm. The Abrams Fensterman firm is not a plaintiff in the instant Complaint, and the instant Complaint does not allege that the statement is about the firm. In any event, the statement and the article also do not name or otherwise identify the Abrams Fensterman firm, the preceding analysis also demonstrates that the statement is not of and concerning the firm, and Plaintiff has not shown the reasonableness of concluding that the firm's representation of the executor in the wrongful death action was known to the reader.

Similarly, Plaintiff's reliance on the March 2020 article addressing Plaintiff's defamation complaint is misplaced. First, the name "Abrams" in the March 2020 statement appears in brackets, and it is not clear if the statement originally named Plaintiff or the name was inserted by the newspaper. Nor are the speakers of the challenged statement in the 2019 articles and the March 2020 article the same. The 2019 statement is made by Barowitz; the March 2020

statement is made by a named attorney for the Durst Defendants, who is not a named defendant in the defamation complaint. In any event, a defendant's other statements reported in subsequent articles are not part of the context in which the earlier statement must be considered (*Trustco Bank of N.Y. v Capital Newspaper Div. of Hearst Corp.*, 213 AD2d 940, 943 [3d Dept 1995].

The two cases cited by Plaintiff to support his argument that the statement was of and concerning him are distinguishable. In *Dalbec v Gentleman's Companions, Inc*. (828 F2d 921 [2d Cir 1987]), the defamatory statement identified plaintiff by her first name, her former last name, and her physical description. The court reasoned that the dissimilarities in the physical description and the full name did not support defendant's argument that the article was not "of and concerning" plaintiff. There was testimony that plaintiff was "physically smaller when she was in high school, lending credence to her theory that people who knew her then believed that the statement was about her" (*id*. at 925). "In the context of the magazine's use of [plaintiff's] maiden name and the small town where she resides, [the court is] unable to conclude that the jury's finding in this regard was not rational" (*id*). In contrast, the instant case lacks these or other identifying factors, the Complaint alleges only in conclusory fashion that the statement was "about" and concerning Plaintiff, the allegation is contradicted by the statement and its context in the articles, and Plaintiff does not remedy this pleading defect by asserting extrinsic facts supporting the conclusory allegation.

In *Zervos v Trump* (171 AD3d 110 [1st Dept 2019]), the first alleged defamatory statement came hours after plaintiff's press coverage and referred to plaintiff as "her," and the other challenged statements came within eight days and referred to plaintiff and other women who came forward as "these women." Defendant "also re-tweeted statements by others, including one that had a picture of plaintiff and stated, 'This is all yet another hoax'" (*id*. at 116).

Under these circumstances, the First Department found that the lower court properly denied defendant's CPLR 3211 motion as "[e]ven where statements alleged by plaintiff do not refer to her by name, most of the challenged statements could reasonably be considered of and concerning her" (*id*. at 130). The court found that the challenged statements "are easily understood as relating to plaintiff's accusations, as well as the accusations by other women who had come forward by that time" (*id.* [internal citation omitted]). In contrast, the instant case does not have other references or a photograph identifying the plaintiff and readers would not reasonably be able to discern from the statement or the news articles that the statement is about and concerning Plaintiff.

Under these circumstances, the court finds that, as a matter of law, Plaintiff failed to set forth a cause of action for defamation, as readers of the allegedly defamatory statement set forth in the Post article and the News article would not be able to discern that the statement was "of and concerning" Plaintiff (*see* S*alvatore v Kumar*, 45 AD3d 560 [2d Dept 2007] [affirming dismissal of defamation claim pursuant to CPLR 3211 (a) (7), as the allegedly defamatory statements set forth in the publication did not identify plaintiffs by name and instead referred generally to certain executives and personnel, and plaintiffs failed to show that readers of the publication would be able to discern that the statements were "of and concerning" plaintiffs]; *see also Matter of Soames v 2LS Consulting Engineering, D.P.C.*, 187 AD3d 490, 492 [1st Dept 2020] [affirming the granting of a motion to dismiss where the defamation claim arose from a Facebook post that was "not 'of and concerning' plaintiff and plaintiff offer[ed] no information about the colleagues whom, he claim[ed], understood the post to be about him"]).

Accordingly, the court grants defendants' motion to dismiss the Complaint pursuant to CPLR 3211 (a) (7) on this basis as well.

Sanctions

Defendants also move to impose sanctions against Plaintiff and his counsel pursuant to Subpart 130-1 the Rules of the Chief Judge (Rules) (22 NYCRR 130-1.1). They argue, among other things, that this action is demonstrably frivolous, thus violating the Rules and, with other conduct, violating the New York Code of Professional Conduct Rules 3.4 (d) (1), 3.4 (e), 3.6 (a), 3.6 (b) and 8.4 (h). Further, with respect to the wrongful death action complaint, it "is self-evident" that repeatedly characterizing members of the Durst family as the non-existent 'Durst crime family'" was not relevant to that action, which asserted a claim solely against Robert Durst (supporting memo, at 24-25). Defendants assert that sanctions are appropriate because the "relentless public attacks and frivolous and harassing campaign by the Plaintiff and the Abrams Fensterman firm against the Durst Family and the Durst Organization must end" (footnote omitted) (*id.* at 25).

Plaintiff argues that this action "is clearly not frivolous" (opposing memo, at 14), and the sanction request lacks any factual or legal merit. Plaintiff further contends that Defendants cannot pursue, before this court, sanctions based on the allegations in the wrongful death action; Defendants did not request sanctions in the wrongful death action and a court did not find that the allegations were frivolous. Moreover, Defendants' "assertions of frivolity and falsity are based largely on unsworn, unsupported, self-serving statements in a memorandum of law" (*id.*).

While the Court grants Defendants' motion to dismiss, the Court denies, in the exercise of its discretion, Defendants' motion for sanctions. The Court does not find that the Complaint's allegations are frivolous. As to the request for sanctions with respect to the wrongful death action and other filings or conduct, such request is not now properly before this Court.

Accordingly, it is

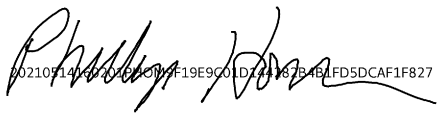
ORDERED that Defendants' motion to dismiss the Complaint is granted, and the Complaint is dismissed; and it is further

ORDERED that Defendants' motion for sanctions is denied; and it is further

ORDERED that, within twenty days after this decision and order is uploaded to NYSCEF, counsel for Defendants shall serve a copy of this decision and order, with notice of entry, upon all parties; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.



5/14/2021
DATE

PHILLIP HOM, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE