# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. MARY V. ROSADO** **PART** **33M**

***Justice***

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MICHAEL FLOMENHAFT, THE FLOMENHAFT LAW FIRM, PLLC

Plaintiff,

- v -

WHITE AND WILLIAMS, LLP, CHRISTOPHER M. DIMURO,

Defendant.

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**INDEX NO.** 154599/2022

**MOTION DATE** 09/01/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after oral argument, which took place on February 7, 2023, where David Zegarelli, Esq. appeared for Plaintiffs Michael Flomenhaft ("Flomenhaft") and the Flomenhaft Law Firm, PLLC ("FLF") (collectively "Plaintiffs"), and Agatha Mingos appeared for Defendants White and Williams, LLP ("W&W") and Chrisopher M. Dimuro ("Dimuro") (collectively "Defendants"), the Defendants' motion to dismiss pursuant to CPLR §§ 3211(a)(1) and (7) is granted.

## I. Background

This is a defamation action arising out of statements made during litigation in the Southern District of New York ("SDNY") and New York County Supreme Court (collectively the "Underlying Litigation"). Plaintiffs filed their Complaint on July 7, 2022 (NYSCEF Doc. 6). The Complaint provides pertinent details regarding the parties' relationship.

Flomenhaft is a personal injury attorney (*id.* at ¶¶ 12-27). The Flomenhaft Law Firm is a personal injury firm which is retained on a contingency fee basis and requires loans to maintain

cash flow (*id.* at ¶ 28). Non-party JusticeFunds, LLC ("JusticeFunds") provides legal financing to law firms like FLF in the form of loans (*id.* at ¶ 30). On December 20, 2018, JusticeFunds and Plaintiffs entered into a loan agreement (the "Loan Agreement") wherein JusticeFunds agreed to loan seven million dollars ($7,000,000.00) to FLF (*id.* at ¶ 37). The Loan Agreement contained an arbitration agreement which stated:

> "[a]ny and all disputes…arising out of or relating to this Agreement or any other Loan Document or the breach termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Agreement or any other Loan Document to arbitrate shall be submitted to final and binding arbitration before Judicial Arbitration and Mediation Services, Inc. "JAMS"). (*id.* at ¶ 47).

The parties also agreed that any such arbitration would be kept confidential (*id.* NYSCEF Doc. 48). Allegedly, the full amount promised was never disbursed, but JusticeFunds sought to compel Plaintiffs to repay the amount that had been disbursed (*id.* at ¶ 45). Defendants W&W and DiMuro were retained as attorneys for JusticeFunds regarding the dispute (*id.* at ¶ 50). Plaintiffs allege that on May 19, 2021, Defendants violated the confidentiality clause by filing a complaint in SDNY alleging that Plaintiffs' failure to return $1.465 million in loaned funds was "tantamount and equal to the crime of theft." (*id.* at ¶¶ 53-55). Plaintiffs allege that this was a sham lawsuit meant to embarrass Plaintiffs into an unfavorable settlement (*id.* at ¶ 56). Allegedly a Law360 article was published regarding the lawsuit with the headline "Litigation Financier Says NY Firm Owes $1.4M in Loans" (*id.* at ¶ 60).

Defendants voluntarily dismissed the SDNY action after the judge in that action *sua sponte* issued an Order to Show Cause regarding whether diversity jurisdiction had been met (*id.* at ¶ 61). Shortly thereafter, on June 7, 2021, Defendants filed another lawsuit with mostly the same allegations in New York County Supreme Court (*see JusticeFunds, LLC v The Flomenhaft Law Firm, PC et. al*, New York County Supreme Court, Index No. 653638/2021).

Allegedly, after threatening to file a motion to stay the state court action and compel arbitration, the parties attempted to settle the matter (*id.* at ¶¶ 68-69). When the parties were unable to resolve and settle the matter, Plaintiff initiated an action in the United State District Court for the Southern District of Florida to compel arbitration of the claims asserted in SDNY and in New York County Supreme Court (*id.* at ¶¶ 71-72). The parties eventually agreed to arbitrate before JAMS in an amended arbitration agreement dated February 25, 2022 (NYSCEF Doc. 16). Plaintiff now alleges that the statements made by Defendants in the pleadings they filed on behalf of JusticeFunds constitute defamation *per se* (NYSCEF Doc. 6 at ¶¶ 74-86).

On July 27, 2022, Defendants filed the instant pre-answer motion to dismiss (NYSCEF Doc. 7). Defendants argue that the Complaint should be dismissed because the statements made in the Underlying Litigation are protected by the absolute litigation privilege (NYSCEF Doc. 8). Defendants assert that merely because there existed an arbitration agreement with a confidentiality clause does not mean that Defendants have waived the absolute litigation privilege. Defendants also argue that Plaintiffs have not pled sufficient facts to make the sham litigation exception apply.

Plaintiffs filed their opposition on October 21, 2022 (NYSCEF Doc. 29). Plaintiffs argue that the Underlying Litigation fits into the sham litigation exception because it was "procedurally moribund" pursuant to the compulsory arbitration and confidentiality provisions. Plaintiffs argue that because Defendants completely ignored the arbitration provision, they abused the litigation privilege in a sufficient manner to lose it. Plaintiffs further assert that whether the sham litigation privilege applies is an issue of fact which cannot be resolved on a pre-answer motion to dismiss.

Defendants filed their reply on November 3, 2022 (NYSCEF Doc. 30). Defendants argue that the sham litigation exception applies only where a complaint contains sufficient factual support for the conclusion that Defendants' statements were made solely to defame (*id.*).

Defendants argue that the arbitration only occurred after executing an negotiated amendment to the arbitration agreement, and that the merits of the claims are still being arbitrated, showing that they are no sham.

## II. Discussion

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

"There is a deep-rooted, long-standing public policy in favor of a person's right to make statements during the course of court proceedings without penalty" (*Denson v Donald J. Trump for President, Inc.*, 180 AD3d 446, 453-454 [1st Dept 2020] citing *Rosenberg v Metlife, Inc.*, 8 NY3D 359, 365 [2007]). "Statements uttered in the course of a judicial or quasi-judicial proceeding are absolutely privileged so long as they are material and pertinent to the questions involved notwithstanding the motive with which they are made (*Herzfeld & Stren, Inc. v Beck*, 175 AD2d 689, 691 [1st Dept 1991] citing *Wiener v Weintraub*, 22 NY2d 330 [1968]). Statements made during the course of litigation have been held to be absolutely privileged against defamation if "by any view or under any circumstances, they are pertinent to the litigation" (*Frechtman v*

*Gutterman*, 115 AD3d 102, 106 [1st Dept 2014]). In other words, unless the offending statement is outrageously out of context, the litigation privilege will apply (*Gottwald v Sebert*, 193 AD3d 573 [1st Dept 2021]).

There is a sham-action exception to the litigation privilege (*Weeden v Lukezic*, 201 AD3d 425 [1st Dept 2022]). The sham-action exception to the litigation privilege applies where an action is brought solely to defame the defendant (*Gottwald, supra* at 580). However, where there are no alleged facts supporting a conclusion that a party initiated a sham action for the purpose of disseminating defamatory allegations against a plaintiff, the absolute privilege will apply, even if there are allegations of malice or bad faith (*Weeden*, *supra* at 429).

Plaintiffs have alleged in their Complaint that Defendants have abused the absolute litigation privilege in order to embarrass and extort Plaintiffs into a favorable settlement with Defendants (NYSCEF Doc. 6 at ¶ 56). There are no facts which indicate that the action was brought solely to defame, other than the conclusory assertion made at paragraph 56 of the Complaint. Indeed, the dispute over sums owed under the Loan Agreement are still being arbitrated, meaning they are no sham (*see Yan v Mo*, 2023 NY Slip Op. 01858 [1st Dept 2023] *see also Manhattan Sports Restaurants of America, LLC v Lieu*, 146 AD3d 727 [1st Dept 2017] [where claims have been diligently prosecuted, there are no facts supporting a conclusion that litigation is a sham action brought solely to defame]).

Plaintiffs' argument that Defendants' actions were procedurally improper due to the existence of an arbitration clause, and therefore are sham actions, is unavailing. This argument misconstrues both the application of arbitration clauses and the sham action exception. First, even though a broad and binding arbitration may exist, the parties' conduct in litigating an action in a public forum may waive the right to arbitrate (*Tengtu Intern. Corp. v Pak Kwan Cheung*, 24 AD3d

public forum may waive the right to arbitrate (*Tengtu Intern. Corp. v Pak Kwan Cheung*, 24 AD3d 170 [1st Dept 2005] [holding that the affirmative use of the judicial process to prosecute claims also encompassed by an arbitration agreement results in a waiver of the right to arbitration]; *see also Rusch Factors, Inc. v Fairview Mfg. Co.*, 34 AD2d 635 [1st Dept 1970]). Until a motion to compel arbitration was made, the parties were free to litigate their claims in Court if they so desired (*see Sherrill v Grayco Builders, Inc.*, 64 NY2d 261 [1985] [finding that a right to arbitration, like contract rights generally, may be modified, waived, or abandoned]).

Therefore, simply because Defendants decided to prosecute claims potentially covered by an arbitration agreement in Court does not convert their potentially meritorious claims into a sham-action. Second, the claims which have gone to arbitration are, to this Court's knowledge, still being arbitrated. Therefore, the statements made in the Underlying Litigation, far from being made "solely to defame" were actually made to recoup a disputed amount of money.

The cases that Plaintiff relies on are inapplicable to the facts alleged here. First, in *Flomenhaft v Finkelstein*, 127 AD3d 634 (1st Dept 2015), there were allegations that the Plaintiff's former client was lied to and induced to start a lawsuit with no basis in law or fact as a result of fraud perpetrated by the Defendant. In that case, the underlying action was withdrawn after the former client realized he had been lied to, thereby giving rise to facts which made the sham action exception applicable. Meanwhile, here, the dispute over the proceeds under the Loan Agreement has continued, and Plaintiff does not deny in his Complaint that he was advanced the funds that Defendants seek to recoup (*see* NYSCEF Doc. 3 at ¶ 42 ["JusticeFunds only advanced $1.465 million to the Flomenhaft Law Firm"]). Based on the facts alleged, the pleadings were not false, or a sham meant solely to defame. Procedural blunders or a potential waiver of the right to arbitrate do not convert a potentially meritorious pleading into a "sham action."

Likewise, while Plaintiff has directed this Court's attention to the recently decided case, *TRB Acquisitions LLC v Yedid*, 2023 N.Y. Slip. Op. 01654 (1st Dept 2023), the facts of that case are also inapposite. In *TRB*, the First Department recognized a narrow exception to the absolute litigation privilege for instances of extortion. Indeed, in *TRB*, a party threatened to provide false testimony if their demands were not accepted, and following rejection of that extortion, they proceeded to offer false testimony in separate litigation. However, nowhere is it alleged that Defendants threatened Plaintiffs at all prior to filing their lawsuits, and therefore, this "extortion" exception does not apply.

Finally, while Plaintiffs urge this Court to find an exception to the litigation privilege where parties enter into a confidentiality agreement, Plaintiffs fail to cite any precedent, either binding or persuasive, which would support this exception. As recognized by the Court of Appeals, the litigation privilege is of paramount importance in benefitting the public and promoting the administration of justice (*Park Knoll Associates v Schmidt*, 59 NY2d 205 [1983]). Exceptions made to the litigation privilege are recognized as "narrow" (*TRB Acquisitions LLC v Yedid*, 2023 NY Slip Op 01654 [1st Dept 2023] ["the narrow exception recognized to decide the present appeal only concerns extortion based on threats of false testimony."]). Therefore, in lieu of the recognized public policy in favor of the absolute litigation privilege, and the absence of any applicable exception to the litigation privilege, Plaintiff's Complaint is dismissed.

Accordingly, it is hereby,

ORDERED that Defendants White and Williams, LLP and Christopher M. Dimuro's motion to dismiss Plaintiffs Michael Flomenhaft and the Flomenhaft Law Firm, PLLC's Complaint is granted, and the Plaintiffs' Complaint is dismissed in its entirety; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on Plaintiffs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/5/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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| 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 |