Joffe v McCormack, Mattei & Holler
2026 NY Slip Op 31177(U)
March 24, 2026
Supreme Court, New York County
Docket Number: Index No. 159474/2025
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **04**

Justice

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DIMITRY JOFFE,

Plaintiff,

- v -

MCCORMACK, MATTEI & HOLLER, KEVIN MATTEI, NICOLE HOLLER, STEVEN HARFENIST,

Defendants.

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INDEX NO. 159474/2025

MOTION DATE 09/03/2025, 10/06/2025

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35

were read on this motion for SANCTIONS.

Upon the foregoing documents, defendants' motion pursuant to CPLR 3211[1] to dismiss this action is granted and plaintiff's motion to sanction defendants is denied.

The following factual recitation is adapted from plaintiff's complaint: Plaintiff is a lawyer and the principle of the law firm Joffe Law. On May 30, 2025, defendant McCormack, Mattei & Holler ("MMH"), a law firm, retained Joffe Law as outside counsel to appear at no-fault insurance arbitration hearings. One week later, the parties "mutually agreed to terminate Joffe Law's engagement" (NYSCEF Doc No. 1, complaint at 12). In the week that Joffe Law served as outside counsel, MMH distributed new letterhead listing Dimitry Joffe as an associate of MMH. Plaintiff asserts that he never consented to the use of his name in this fashion.

[1] The Court declines defendants' invitation to convert its motion to one for summary judgment.

On, June 9, 2025, plaintiff received a letter from defendant Steven Harfenist of the law firm of Harfenist Kraut & Perlstein, LLP, on behalf of MMH, asserting that Joffe Law was not entitled to payment for his week of work for MMH. In response, plaintiff threatened to sue MMH for breach of contract and unjust enrichment. On June 11, 2025, in an effort to resolve this dispute, plaintiff met with Harfenist and Mattei over Zoom. At the beginning of the videoconference, according to plaintiff, Harfenist stated that plaintiff was "mentally ill" and "deranged."

Plaintiff subsequently commenced this action, asserting a claim against MMH and its principals, Kevin Mattei and Nicole Holler, for violation of Civil Rights Law §§50-51 based upon their inclusion of his name on MMH's letterhead and a defamation claim against Harfenist based upon his statements at the settlement conference.

In motion sequence 001, defendants move to dismiss this action, arguing that plaintiff's claim under the Civil Rights Law does not lie because documentary evidence—arbitration awards listing Joffe, rather than Joffe Law, as counsel to MMH—establishes that Joffe was of counsel to MMH and the inclusion of his name on MMH's letterhead was not for advertising or trade purposes but informational, as contemplated by New York Rules of Professional Conduct §7.5. Defendants further argue that no defamation claim lies because Harfenist's alleged statements at the parties' meeting were nonactionable opinion, were not made to a third party (but only in front of plaintiff and Mattei, Harfenist's client), and are protected by the qualified privileged afforded to statements made in connection with prospective litigation. Defendants also argue that the defamation claim must be dismissed because plaintiff has not adequately pleaded special damages or that the statement was defamatory per se. Finally, defendants seek sanctions against plaintiff under 22 NYCRR 130-1.1 for their costs in defending what they contend is a frivolous lawsuit.

In opposition, plaintiff argues, inter alia, that defendants' arguments regarding the inclusion of his name on MMH letterhead have no foundation in law. As to his defamation claim, plaintiff argues that whether or not someone is "mentally ill" is a fact that can be objectively verified by a psychiatrist. Plaintiff also disputes defendants' position that an attorney's client is not a third party that can satisfy the publication requirement for a defamation claim, noting that the case on which defendants rely for this proposition, *Sexter v. Warmflash, P.C.*, was abrogated by the Court of Appeals in *Front, Inc. v. Khalil*.

In motion sequence 002, plaintiff moves to sanction defendants for three purported misstatements in their motion to dismiss: (1) incorrectly attributing a quote to the Court of Appeals' decision *Arrington v New York Times Company*; (2) misleadingly citing *Sexter*, despite its abrogation; and (3) incorrectly characterizing his complaint as alleging that plaintiff, rather than Joffe Law, was "of counsel" to MMH. Defendants oppose the motion, arguing that the misattribution to *Arington* was harmless error, that they did not conceal that *Sexter* was abrogated but only argued as to the scope of this abrogation, and did not mischaracterize plaintiff's complaint.

These motions are consolidated for disposition.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is afforded a liberal construction, where the facts as alleged in the complaint are accepted as true and the plaintiff is accorded the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must "determine only whether the facts as alleged fit within any cognizable legal theory . . . the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id*. at 87-88). On a motion to dismiss pursuant to CPLR 3211(a)(1), "[d]ismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff's

factual allegations and conclusively establishes a defense to the asserted claims as a matter of law" (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc, Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal citations and quotations omitted]). "To be considered documentary," evidence "must be unambiguous and of undisputed authenticity" (*Toribio v 575 Broadway LLC*, 61 Misc 3d 1224(A) [Sup Ct, NY County 2018] [internal citations and quotations omitted]).

Civil Rights Law §§ 50-51

Defendants' motion to dismiss plaintiff's claim under the Civil Rights Law is granted.

Civil Rights Law §50 provides that

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Civil Rights Law §51 provides, in turn, that

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages […]

The Court of Appeals, "recognizing the Legislature's pointed objective in enacting sections 50 and 51" has repeatedly "underscored that the statute is to be narrowly construed and strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person" (*Messenger ex rel. Messenger v Gruner + Jahr Print. and Pub.*, 94 NY2d 436, 441 [2000] [internal citations and quotations omitted]). Plaintiff's allegations, taken as true, do not establish the required commercial appropriation of plaintiff's name for either advertising purposes or purposes of trade. A name "is used for advertising purposes if it appears in a publication which,

taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service" (*Beverley v Choices Women's Med. Ctr., Inc.*, 78 NY2d 745, 751 [1991] [internal citations and quotations omitted]). A use for "trade purposes," in turn, involves a use that would "draw trade" to MMH (*Kane v Orange County Publications*, 232 AD2d 526, 527 [2d Dept 1996] citing *Flores v. Mosler Safe Co.,* 7 NY2d 276, 284 [1959]; *see also Davis v. High Society Magazine, Inc.,* 90 A.D.2d 374, 457 N.Y.S.2d 308 [2d Dept 1982] [to constitute a "trade purpose," use of plaintiff's name must be spurred by profit motive or to encourage sales or distribution of publication]).The inclusion of an attorney's name on a law firm's letterhead does not fall within either category.

A law firm's letterhead is used for communications with clients, opposing counsel, and courts, and lacks the "glowing characterizations and endorsements" or "laudatory references" that serve "to preserve existing patronage and to educate and solicit new clients" that are "commonly recognized as quintessential advertising material" (*Beverley v Choices Women's Med. Ctr., Inc.*, 78 NY2d 745, 751 [1991]). Neither is the inclusion of plaintiff's name in MMH's letterhead so closely tied to a commercial end that it can be said to be for "purposes of trade" (*see Griffin v Law Firm of Harris, Beach, Wilcox, Rubin and Levey*, 112 AD2d 514, 516 [3d Dept 1985] [allegation that defendants used plaintiff's name in Federal complaint to defeat plan to build competing hotel insufficiently related to commercial end to constitute use "for the purposes of trade"]). In short, the letterhead's identification of plaintiff as associated with MMH is not, in and of itself, an invasion of his privacy under the Civil Rights Law (*see Marks v Elephant Walk, Inc.,* 156 AD2d 432, 434 [2d Dept 1989] [firm president's statement in *Women's Wear Daily* that plaintiff had joined firm as a designer did not support claim under Civil Rights Law §§ 50 and 51 as reference was "fleeting and incidental," and potential rewards for using plaintiff's name too remote and

speculative to sustain claim]). To the extent plaintiff argues that the inclusion of his name was inappropriate because his firm, Joffe Law, was "of counsel," to MMH, the Court concludes that this is a distinction without a difference under the circumstances but is, in any event, belied by the arbitration awards and emails between the parties submitted by defendants.

Defamation

Defendants' motion to dismiss plaintiff's defamation claim is also granted. A defamatory statement is "a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace or to induce an evil or unsavory opinion of him [or her] in the minds of a substantial number of the community" (*Jacobus v Trump*, 55 Misc 3d 470, 474 [Sup Ct, NY County 2017] [internal citations and quotations omitted], *affd*, 156 AD3d 452 [1st Dept 2017]). "To sustain a cause of action for defamation, the plaintiff must plead (1) a false statement, and (2) publication of it to a third party, (3) absent privilege or authorization, which (4) causes harm, unless the statement is defamatory per se, in which case harm is presumed (*id.* [internal citations and quotations omitted]). However, "[e]xpressions 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]).

Whether a statement is pure opinion is a question of law for the court, determined by considering:

> (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 what is being read or heard is likely to be opinion, not fact.

(*Colantonio v Mercy Med. Ctr.*, 73 AD3d 966, 967-68 [2d Dept 2010] [internal citations and quotations omitted]). "[E]ven apparent statements of fact may assume the character of statements

of opinion, and thus be privileged, when made in … circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole" (*Frechtman v Gutterman*, 115 AD3d 102, 106 [1st Dept 2014] [internal citations omitted]). Moreover, "[l]oose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]).

The Court concludes that Harfenist's alleged statements "are too vague, subjective, and lacking in precise meaning […] to be actionable" (*Jacobus v Trump*, 156 AD3d 452, 453 [1st Dept 2017]; *see Lapine v Seinfeld*, 31 Misc 3d 736, 754 [Sup Ct, NY County 2011] [description of plaintiff as a "wacko" or "nut job" expressions of "rhetorical hyperbole" that "negate[d] the impression" that the speaker was conveying facts]; *Rojas v Debevoise & Plimpton,* 167 Misc 2d 451, 457 [Sup Ct, NY County 1995] [comments that plaintiff was "crazy," "lying" and "not credible" non-actionable statements of opinion]; *McNamee v Clemens*, 762 F Supp 2d 584, 603 [EDNY 2011] ["statements implying McNamee has a mental disorder are rhetorical hyperbole and thus nonactionable"]). Moreover, "[t]he immediate context in which the statements were made would signal to the reasonable reader or listener that they were opinion and not fact" (*Jacobus v Trump*, 156 AD3d 452, 453 [1st Dept 2017]), as Harfenist's alleged statements were made in a meeting precipitated by plaintiff's threat of litigation (*see O'Brien v Lerman*, 117 AD2d 658 [2d Dept 1986] [mortgage company employee's statement, in letter to company's attorney, that plaintiff "went crazy" at closing when mortgage company did not tender certified funds could not, under the circumstances, reasonably be understood as imputing insanity or mental instability to plaintiff]). Accordingly, no defamation claim lies.

Sanctions

Finally, the parties' respective motions for sanctions are denied. Plaintiff's complaint is not so completely without merit in law that sanctions are warranted (*see* 22 NYCRR 130-1.1[c][3]). Neither has plaintiff established that defendants violated 22 NYCRR 130-1.1(c)(3). To the extent defendants' motion papers incorrectly attribute the phrase "the statute is to be narrowly construed and strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person" to *Arrington v New York Times Company*, 55 NY2d 433 (1982), this quoted language reflects the law as set out in *Arrington*, albeit not in that language. Accordingly, this attribution error was ultimately harmless. Neither does defendants' reliance on *Sexter* support the imposition of sanctions; defendants acknowledged *Sexter*'s abrogation in their motion papers but argued that, in abrogating *Sexter*, "[t]he Court of Appeals left untouched the principle that any communications between an attorney and his client are privileged as statements made in the course of judicial proceedings"—they in no way misled the Court or plaintiff such that sanctions are warranted. Finally, to the extent defendants characterized the complaint as alleging that plaintiff was "of counsel" to MMH, rather than Joffe Law, no prejudice inheres to any imprecision in their language in light of the Court's conclusion that documentary evidence establishes that this is a distinction without a difference.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted and it is hereby dismissed with prejudice; and it is further

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

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

ORDERED that defendants shall, within ten days of the date of this decision and order, serve a copy of same with notice of entry on plaintiff and the Clerk of the Court; and it is further

ORDERED that service upon the Clerk 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); and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

3/24/2026
DATE

HON. JUDY H. KIM, 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