SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------X

JOSEPH RAKOFSKY, and
RAKOFSKY LAW FIRM, P.C.,

Plaintiffs,

-against-

THE WASHINGTON POST, et al.,

Defendants.

----------X

INDEX NO.: 105573/11

Motion Sequences:
002, 004-010 & 014-018

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Motion Practice

In this round of voluminous motion practice comprising fifteen (15) separate motions and literally thousands of pages served and filed with the court,[1] fifty-nine (59) defendants move[2] for an order pursuant to CPLR § 3211(a)(7) and (8), dismissing the amended complaint on the grounds that the amended complaint fails to state a cause of action and/or the court lacks personal jurisdiction over the out-of-state defendants under CPLR § 302, New York's long-arm statute. Many defendants[3] also move[4] for an order pursuant to CPLR § 8303-a and/or 22 NYCRR § 130-1.1

---

1. This case should be the proverbial poster child for e-filing, or the electronic filing, of papers to avoid the needless waste of reams of paper to serve about a dozen attorneys and the court. E-filing would have been more efficient, and preserved limited judicial resources.

2. Motion sequence numbers 002, 004, 005, 006, 007, 008, 009, 010, 014, 015, 016, 017 and 018.

3. Defendants Law Offices of Michael T. Doudna, Michael T. Doudna, The Law Office of Jeanne O'Halleran, LLC, Jeanne O'Halleran, American Bar Association, abajournal.com, Debra Cassens Weiss, Sarah Randag, and 35 other defendants represented by both Eric Turkewitz, Esq. and Marc J. Randazza, Esq.

4. Motion sequence numbers 007, 010, 019 and 020.

sanctions on plaintiffs and plaintiffs' attorney for commencing this allegedly "frivolous" action and awarding defendants reasonable attorney's fees and costs. Plaintiffs Joseph Rakofsky and Rakofsky Law Firm, P.C., ("plaintiffs" or "Rakofsky") cross-move[5] for an order as follows:

> (1) pursuant to CPLR § 1001 (a), adding WP Company LLC, as a necessary party;
>
> (2) pursuant to CPLR § 3025(b), granting plaintiffs leave to serve and file a Second Amended Verified Complaint;
>
> (3) pursuant to CPLR §§ 3217 and 2101(c), permitting plaintiffs to discontinue this action against eight defendants[6] who have settled with them, and to delete their names from the caption;
>
> (4) pursuant to CPLR § 3215, granting plaintiffs a default judgment against seven defendants[7] on the issue of liability and setting this matter down for an inquest on the assessment of damages; and
>
> (5) pursuant to 22 NYCRR § 130-1.1, awarding sanctions against Marc J. Randazza, Esq., "for frivolous conduct undertaken to harass and/or maliciously injure the plaintiff."

The parties oppose the respective motions and cross-motions. The motions and cross-motions are consolidated herein for disposition.

---

5. Motion sequence numbers 008 and 020.

6. Plaintiffs did not explicitly state the names of said settling defendants for whom plaintiffs seek to voluntarily discontinue this action; it is insufficient to merely state that they were deleted from the caption of the amended complaint and have this Court surmise what should be expressly stated. In addition, it would be advisable and helpful to present executed stipulations of discontinuance for each defendant.

7. Again, plaintiffs failed to explicitly list the names of the defaulting defendants, but just attached the affidavits of service for this Court to surmise their intent. Moreover, this lack of clarity would not provide the requisite notice to the alleged defaulting defendants that plaintiffs were seeking default judgments against them.

Procedural History

Plaintiffs commenced this action in Supreme Court, New York County, on or about May 11, 2011 by filing of a summons and complaint. Approximately six (6) days later on May 17, 2011, plaintiffs filed an amended complaint as of right against 81 defendants consisting of 218 paragraphs and 82 pages ("Amended Complaint"). The Amended Complaint alleged four causes of action including one very long defamation claim against all defendants (First Cause of Action), a claim for intentional infliction of emotional distress (Second Cause of Action), intentional interference with a contract (Third Cause of Action) and violation of Civil Rights Law § 50 and 51 for improper use of plaintiff's name and picture for purposes of trade (Fourth Cause of Action) stemming from two articles published in the Washington Post on April 1 and 9, 2011 ("Washington Post Articles"), and the subsequent re-publication of the Post Articles by other defendants and substantial comments on internet "blogs" that discussed the content of said articles which questioned plaintiffs' competence and ethics to be discussed later in more detail. Instead of interposing answers, 59 defendants made the instant pre-answer motions to dismiss the Amended Complaint.

Factual Background

Rakofsky's Legal Education & Bar Admission

Rakofsky graduated and received his law degree from the Touro Law Center in 2009. Since April 29, 2010, Rakofsky has been licensed to practice law in the State of New Jersey. He is not admitted to practice law in New York State. Rakofsky is engaged in the practice of law under the name of Rakofsky Law Firm, P.C.

Rakofsky's Retention in U.S.A. v Dontrell Deaner

In or about May 3, 2010, Henrietta Watson initially retained plaintiffs to defend her grandson, Dontrell Deaner ("Deaner"), who was charged, among other crimes, with First Degree Murder in Washington D.C. Thereafter, Rakofsky met with Deaner who retained plaintiffs to represent him in the upcoming trial in the Superior Court of the District of Columbia. Since Rakofsky was not licensed to practice law in the District of Columbia, he sought and obtained admission *pro hac vice*. Rakofsky brought in local counsel, Sherlock Grigsby, Esq. ("Grigsby"), who had substantial experience in criminal defense work, to assist him in Deaner's defense. However, Rakofsky alleges that he was primary and responsible attorney that developed and executed the legal strategy in the case.

Bean's Retention and Termination as Defense Investigator

Rakofsky and/or Grigsby also retained Adrian K. Bean ("Bean"), a certified investigator under the Criminal Justice Act Defender Service of the Superior Court ("CJA") as the defense investigator in the Deaner case. As part of his investigative duties, on October 6, 2010, Rakofsky e-mailed Bean, in pertinent part, the following request:

> 1) Please trick[8] Leigh[9] (old lady) into admitting:
> a) she told the 2 lawyers that she did not see the shooting and
> b) she told 2 lawyers she did not provide the Government any information about [the] shooting.

---

8. The definition of trick, in part, is to "deceive" or "practice deception." (*See* Webster's New Twentieth Century Dictionary Unabridged, Second Edition, 1964).

9. Her name was blacked out in motion sequence number 008, but was revealed later in motion sequence 010.

(*See* Motion Sequence Number 008, Exhibit "E" to the Affidavit of Keith L. Alexander, sworn to on July 15, 2011.)

Later, Rakofsky and/or Grigsby terminated Bean's services and replaced him with another investigator. By letter dated March 5, 2011, Bean sent Grigsby an invoice for investigative services he rendered in the Deaner case. (*See* Exhibit "E" to Motion Sequence Number 009.) Rakofsky alleges that Bean did not perform any investigative services and he refused to approve Bean's voucher for payment from the CJA. As a result, Bean made a motion to the Superior Court of the District of Columbia requesting compensation for about 22 hours of investigative services and payment through a CJA voucher. Bean concluded that he was terminated and uncompensated for his work "based on his refusal to follow an e-mail request from Mr. Rakofsky...instructing him to try to 'trick' a witness into changing her testimony." (*Id.*) On page four of the attached "Investigative Report," Bean stated in bold lettering several reasons for his refusal to perform Rakofsky's e-mail request as follows:

> (1) I do not know what the term, 'trick', means in this context;
> (2) I am in the investigative business, not the trickery business;
> (3) I will not risk exposing myself to obstruction of justice or conspiracy charges; and
> (4) the implications of such a request appear to [be] inherently unethical.

(Id.)

The Trial

A day before jury selection, on March 28, 2011, the prosecution moved to suppress a Toxicology Report that Rakofsky intended to use which he alleged evidenced that the victim was "high on PCP at the time of his death." (*See* Amended Complaint at ¶ 100.) The presiding judge, William M. Jackson ("Judge Jackson") granted the prosecution's motion and prohibited Rakofsky

from mentioning and introducing any evidence that the victim was under the influence of PCP at the time of his death. *(Id.)*

Thereafter, on March 30, 2011, the trial began. In his hour-long opening statement, Rakofsky repeatedly sought to mention the Toxicology Report rationalizing that only references to PCP were prohibited and not the actual report. (*Id.* at ¶ 102.) Judge Jackson admonished Rakofsky for violating his prior ruling. *(Id.)* At the end of his opening statement, Rakofsky told the jury that he never tried a case before so that Deaner should not be prejudiced for his errors.

Due to this revelation, after the conclusion of opening statements, Judge Jackson conducted a side-bar discussion with Deaner to ascertain whether he was satisfied and comfortable with Rakofsky continuing as his attorney even though it was his first trial. (*Id.* at ¶ 102.) Deaner responded affirmatively. The trial then continued. The next morning, March 31, 2011, Judge Jackson again questioned Deaner if he was satisfied with Rakofsky's level of experience. Despite his inexperience, Deaner wanted Rakofsky to represent him. *(Id.)*

During the testimony of a prosecution witness on March 31, 2011, Deaner passed Rakofsky certain questions that he wanted Rakofsky to ask the witness. Rakofsky refused to ask those questions because he believed it would not be in Deaner's best interests. (*Id.* at ¶ 108.) Later in the afternoon, Rakofsky and Grigsby approached Judge Jackson and explained there was a "communication barrier" between them and Deaner. (*See* Exhibit "B" to Motion Sequence 010 at p. 2.) Judge Jackson suggested that they should take some time to explain to Deaner their reasoning for not asking his questions. Rakofsky then replied to Judge Jackson that "it might be a good time for you to excuse me from trying this case." (*Id.* at p. 3.) At that point, Judge Jackson inquired of Deaner who now requested new counsel. Judge Jackson then explained to Deaner the ramifications

of a mistrial and adjourned the trial to the next morning, April 1, 2011, to give Deaner an opportunity to fully contemplate his request, as follows:

> "This is what I'm going to do, Mr. Deaner, I'm inclined to grant your request, but I want you to think about it overnight. We'll come back here tomorrow morning. You can get somebody to stand in for you, if you wish."

(*Id.* at p. 12.)

The parties returned the next morning. Judge Jackson asked Deaner if he had an opportunity to think about his request and if he wanted new counsel. Deaner requested new counsel. (*See* Exhibit "C" to Motion Sequence 010 at p. 3.) Judge Jackson then summarized the events that precipitated Deaner's request as follows:

> "Mr. Rakofsky actually asked to withdraw mid-trial . . . and according to Mr. Deaner, there was conflict as well between local counsel, Mr. Grigsby's legal advice and Mr. Rakofsky's legal advice."

(*Id.*)

Judge Jackson then reiterated on the record his two previous side-bars with Deaner wherein he asked the defendant if he was satisfied with Rakofsy's level of experience. Judge Jackson then made his own candid observations concerning Rakofsky's trial performance and competency to defend Deaner in the felony murder case as follows:

> "I was astonished that someone would purport to represent someone in a felony murder case who had never tried a case before and that local counsel, Mr. Grigsby, was complicit in this.
>
> "It appeared to the Court that there were . . . defense theories out there, but [Rakofsky had] the inability to execute those theories. It was apparent to the Court that there was . . . not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think, to the detriment of Mr. Deaner."

(*Id.* at p. 4.)

Based on the above observations, Judge Jackson revealed that he would have set aside Deaner's conviction based on grounds of ineffective assistance of counsel under D.C. Code § 23-110 (1996) as follows:

> "And had there been . . . a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110."

(Id.)

Judge Jackson then granted Deaner's request for new counsel and stated an alternate reason for his ruling:

> "So I am going to grant Mr. Deaner's request for new counsel. . . . Alternatively, I would find that they are based on my observation of the conduct of the trial manifest necessity. I believe that the performance was below what any reasonable person would expect in a murder trial."

(*Id.* at p. 4-5.)

In addition to the observations concerning Rakofsky's competency, Judge Jackson also commented on Bean's motion alleging that he was terminated and uncompensated based on Bean's refusal to comply with Rakofsky's e-mail request to "trick" a witness which Bean characterized as "inherently unethical":

> "There's an e-mail from you to the investigator [Bean] that you may want to look at, Mr. Rakofsky. It raises ethical issues."

(*Id.* at p. 7.)

The Washington Post April 1, 2011 Article

That same day on April 1, 2011, The Washington Post published on its website an article entitled *D.C. Superior Court Judge Declares Mistrial Over Attorney's Competence in Murder Case*, which was authored by its reporter Keith L. Alexander ("Alexander"), with assistance from

researcher Jennifer Jenkins ("Jenkins"), reporting the mistrial in the Deaner case ("April 1st Article"). (*See* Motion Sequence 008, Exhibit "B" to the Patil Affirmation dated July 20, 2011.) The article was re-published in the Metro section of the Washington Post newspaper on April 2, 2011, under a different headline, *Mistrial Declared in '08 D.C. Case*. The article reported Judge Jackson's comments relating to Rakofsky's competence and ethical issues that surfaced through Bean's motion for compensation.

The American Bar Association and Reuters April 4, 2011 Articles

Based on the previously reported April 1st Article, the American Bar Association ("ABA") published on its website, abajournal.com, an article entitled *'Astonished' Judge Declares Murder Mistrial Due to Defense Lawyer Who Never Tried a Case*, authored by Debra Cassens Weiss ("Weiss") on April 4, 2011 (*See* Motion Sequence 018, Exhibit "1" to the Weiss Affidavit, sworn to on March 29, 2012). The same day, Reuters America, LLC, through its subsidiary, Thomson Reuters Corp. , also published a short article on its website called *Young and Unethical* written by its reporter, Daniel B. Slater ("Slater") (*See* Exhibit "D" to Motion Sequence 006). Both articles reported that Judge Jackson declared a mistrial due to Rakofsky's performance and Bean's allegation that Rakofsky requested the investigator to "trick a witness," citing to The Washington Post's April 1st Article.

Reaction to the Mistrial Proliferates on the Internet

After the April 1st Article, many "bloggers" posted online comments and articles on their legal blogs depicting the Deaner mistrial as an "object lesson" for those unsuspecting clients that contemplate retention of inexperienced defense counsel in criminal cases based on low cost and

exaggerated marketing. Reaction to the Deaner mistrial was swift and furious. The legal bloggers expressed their strongly-worded opinions as to Rakofsky's acknowledged inexperience in defending Deaner and the "ethical issues" raised by his e-mail requesting that Bean "trick" a witness. Many of these legal bloggers were named as defendants in this action.

The American Bar Association April 8, 2011 Article

With the on-going proliferation of commentary on the internet, the ABA published on its website, on April 8, 2011, an article called *Around the Blawgosphere: Joseph Rakofsky Sound Off; Client Poachers; and the End of Blawg Review?* authored by its web editor Sarah Randag ("Randag"), summarizing published web postings from "several well-known legal blogs" concerning the controversy that surrounded Rakofsky. (*See* Motion Sequence 008, Exhibit "1" through Exhibit "15" to the Randag Affidavit, sworn to on March 29, 2012, at ¶3.) Randag included an article published on the ABA website on April 5, 2011, written by Weiss, reporting that Rakofsky "appeared to be pleased in a Facebook post after . . . [Judge Jackson] declared a mistrial due to the defense lawyer's trial performance," but Rakofsky was later "humiliated by a press account of the proceeding." (*Id.* at Exhibit "3".)

The Washington Post April 9, 2011 Article

Alexander then wrote a follow-up article entitled *Woman Pays $7,700 to Grandson's Attorney Who Was Later Removed for Inexperience* which was published on The Washington Post website on April 9, 2011. (*See* Motion Sequence 008, Exhibit "C" to the Patil Affirmation dated July 20, 2011.) The article was re-published in the Metro section of The Washington Post newspaper on April 10, 2011, under the headline, *Attorney's Inexperience Gives Grandmother $7,700 Headache.*

This article described how Rakofsky allegedly solicited Deaner's grandmother to retain him to represent her grandson and reported that Judge Jackson "dismissed Rakofsky from the case and declared a mistrial, citing the lawyer's lack of competence." *(Id.)*

Plaintiffs' Motion for Leave to Amend

Plaintiffs seek leave to file a Second Amended Complaint to add causes of action for intentional interference with prospective economic advantage, injurious falsehood, negligence, and prima facie tort in the form of "cyber-bullying or mobbing" as well as to make stylistic changes[10] such as to articulate separate causes against each named defendant instead of one cause of action for each theory of liability. In the Second Amended Complaint, plaintiffs reduce the number of defendants from 81 to 74, but they vastly increase the sheer bulk of the complaint to more than 1,200 paragraphs and almost 300 pages.

It is well settled law that "leave to amend pleadings is to be freely given, absent a showing of prejudice or surprise." (*Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585, 585 [1st Dept 2009].) Nevertheless, an examination of the underlying merit of the proposed amendment is required, and "leave will be denied where the proposed pleading fails to state a claim or is palpably insufficient as a matter of law." (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005].)

Here, there is neither a showing by the defendants of prejudice nor surprise resulting from plaintiffs' delay in asserting their new causes of action. However, granting plaintiffs' motion to amend would be futile since the allegations set forth in the proposed Second Amended Complaint

---

10. Except for the new causes of action, it appears that the substantive allegations in both pleadings are similar.

are not sufficient to state a cause of action, as will be discussed below in defendants' motions to dismiss.

Motion to Dismiss

In determining a motion to dismiss a pleading for failure to state a cause of action, the court must "accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Nonnon v City of New York*, 9 NY3d 825 [2007].) In a defamation action, the court must determine if the alleged defamatory statements are not actionable as a matter of law. (*Steinhilber v Alphonse*, 68 NY2d 283 [1986].)

Here, defendants seek dismissal of the amended complaint as it fails to state a cause of action and/or the court lacks personal jurisdiction over the out-of-state defendants.

Long-Arm Jurisdiction

Many defendants move to dismiss the amended complaint on the ground that the court lacks personal jurisdiction over the out-of-state defendants under CPLR § 302, New York's long-arm statute.

Constitutional due process requires that a court have a basis on which to assert its jurisdiction. Traditionally, this basis was supplied by the party's presence within the court's geographical jurisdiction. However, the advent of a more mobile society and the growth of national markets has made it possible for a substantial volume of business to be transacted within a state without a party ever entering into that state. Recognizing this, the U.S. Supreme Court has expanded the permissible powers of states to obtain personal jurisdiction over non-residents. In *International*

Shoe v Washington (326 US 310 [1945]), the U.S. Supreme Court set forth the standard for determining whether a non-resident may be subjected to the jurisdiction of a state's courts as follows:

> "Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

(*Id.* at 316.)

In a series of decisions, the U.S. Supreme Court has further detailed the essential considerations to be weighed in determining whether a court had personal jurisdiction over an out-of-state defendant. The Court has held that as long as a party has purposely availed itself of the benefits of the forum, has sufficient minimum contacts with it and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not physically present in that state. (*See McGee v International Life Ins. Co.*, 355 US 220 [1957]; *World Wide Volkswagen Corp. v Woodson*, 444 US 286 [1980].)

New York's Long Arm Statute, CPLR § 302, governs personal jurisdiction over a non-domiciliary who either "transacts any business" or "commits a tortious act" within the state. There is an express exception carved out for defamation cases which cannot form the basis to obtain jurisdiction through the commission of a tortious act under CPLR § 302(a)(2) and (3). However, a plaintiff in a defamation case may proceed against a non-domiciliary defendant who "transacts any business" under CPLR § 302(a)(1). Defamation cases are treated differently "to reflect the state's policy of preventing disproportionate restrictions on freedom of expression" (*SPCA of Upstate New York, Inc. v American Working Collie Assn.*, 18 NY3d 400, 404 [2012] [citations omitted]). The Court of Appeals further expounded on these policy concerns as follows:

> "The Legislature has manifested its intention to treat the tort of defamation differently from other causes of action and we believe that, as a result, particular care must be taken to make certain that non-domiciliaries are not haled into court in a manner that potentially chills free speech without an appropriate showing that they purposefully transacted business here and the proper nexus exists between the transaction and the defamatory statements at issue."

(*Id.* at 405-406).

Generally, so long as the defendant's activities in the State of New York were "purposeful" and there is a "nexus" or "substantial relationship" between the transaction and the claim asserted, jurisdiction will be invoked for transacting business under CPLR § 302(a)(1). (*Id.* at 404.) Thus, this Court needs to examine what type of purposeful activities the defendants engaged in here that bears a substantial relationship to the alleged defamatory statements. An added consideration is how to construe the transaction of business on the internet as it relates to defamation cases.

One particular federal court examined the issue of long-arm jurisdiction as it relates to conducting business on the internet and concluded that personal jurisdiction is exercised in direct proportion to "the nature and quality of commercial activity that an entity conducts on the Internet." (*Zippo Mfg. Co. v Zippo Dot Com, Inc.*, 952 F Supp 1119, 1124 [W.D. PA 1997].) It reviewed the applicable cases and developed a "sliding scale" to measure the commercial activity, which has been widely quoted and accepted. *(Id.)* However, the Second Circuit has limited its applicability in defamation cases as "to whether the defendant, through the website, purposefully avail[ed] himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws." (*Best Van Lines, Inc. v Walker*, 490 F3d 239, 252 [2d Cir. 2007] [citations omitted].) In other words, it is insufficient to gauge the overall commercial activity of the defendant on its

website alone, without determining whether such purposeful activities in this state were substantially related to the alleged defamatory statements. (*SPCA*, 18 NY3d at 405-406.)

It is quite clear that defendants[11] herein who operated legal blogs or posted comments on those blogs residing out of the country in Canada, or even in the United States ranging from Washington, D.C. and Florida in the east, to Texas and California in the west, had virtually no purposeful activity or minimum contacts with this state. There was certainly no purposeful activities in this state which were substantially related to the alleged defamatory statements as defendants neither wrote the alleged defamatory statements in this state nor did they direct them to our state alone. The statements were posted on the internet with potential world-wide accessibility.

This Court rejects plaintiffs' primary argument in opposition that defendants received "commercial benefits" from the hyper-links contained in their websites to invoke long-arm jurisdiction. This connection to New York, if any, is too attenuated to exercise personal jurisdiction over the out-of state defendants. Plainly stated, there are insufficient contacts with this state to "hale" into court multiple defendants living thousands of miles away in other states which would "chill" their right to free speech. (*SPCA*, 18 NY 3d at 405.)

Standard for Defamation Action

To establish a cause of action for defamation, plaintiffs must demonstrate the following elements:

1) a false statement on the part of the defendants concerning the plaintiffs;
2) published without privilege or authorization to a third party;

---

11. This argument does not apply to defendants The Washington Post and Reuters who have not argued that they do not transact business in this state.

3) with the requisite level of fault on the part of the defendants; and

4) causing damage to plaintiffs' reputation by special harm or defamation *per se*

(*See* Restatement [Second] of Torts § 558; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].)

CPLR § 3016(a) requires that the alleged false and defamatory words be specified with particularity in the complaint. The complaint must also allege the "time, place and manner of the false statement and to specify to whom it was made." (*Dillon*, 251 AD2d at 38 [citations omitted].)

Plaintiffs set forth many statements published by the defendants in print and an on-line that they allege are false and defamatory which can be isolated into two discrete categories:

(1) Defendants' alleged mis-characterization of Rakofsky's e-mail request to "trick" a witness and Bean's subsequent motion which Judge Jackson stated raised "ethical issues" ("the trick e-mail, the Bean Motion and Judge Jackson's comments"); and

(2) Defendants' incorrectly reported that Judge Jackson declared a mistrial due to Rakofsky's competence or inexperience ("no mistrial due to incompetence").

(Amended Complaint at ¶¶ 129-194).

Defendants challenge the sufficiency of these pleadings based on the "fair report" privilege, the "republication" exception and/or that the alleged defamatory statements are non-actionable as expressions of pure opinion which will be discussed below.

Fair Report Privilege

Defendants assert that the "fair report" privilege bars plaintiffs' defamation claims under the Civil Rights Law § 74. With the enactment of the Civil Rights Law § 74 in 1962, the Legislature created a statutory privilege that prohibits, in relevant part, the maintenance of a civil action including defamation and other related claims based on the publication of a "fair and true

report" of any judicial proceeding. The apparent purpose of the privilege is to promote the dual public policy interest of ensuring the free flow of true information without fear of being sued, and public dissemination of judicial decisions and proceedings for proper administration of justice. (*Beary v West Publishing Co.*, 763 F2d 66 [2nd Cir] *cert denied* 474 US 903 [1985].)

This privilege has been liberally interpreted to provide broad protection for news reports of judicial proceedings. (*Holy Spirit Assn. for the Unification of World Christianity v New York Times Co.*, 49 NY2d 63 [1979].) In view of the above purpose and the liberal interpretation, courts have established the meaning of a"fair and true" report as a substantially accurate report. (*Id.* at 67, quoting *Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, 260 NY 106, 118 [1932].) In contrast, courts have rejected the notion that a news report be tested for literal accuracy because the language should not be "dissected and analyzed with a lexicographer's precision." (*Holy Spirit* at 68.) The standard must comport with substantial as opposed to literal accuracy because a "newspaper article [or on-line report] is, by its very nature, a condensed of events which must, of necessity, reflect to some degree the subjective viewpoint of its author." (*Id.*). Even the failure to report other facts that were favorable to the complainant in the published news report constitutes a fair report where "those omissions did not alter the substantially accurate character of the article." (*McDonald v East Hampton Star*, 10 AD 3d 639, 640 [2d Dept 2004].) In summary, the courts must look for substantial and contextual accuracy of the news report as the standard for determining a fair report under the Civil Rights Law § 74.

In this case, plaintiffs' Amended Complaint and proposed Second Amended Complaint are replete with hyper-technical allegations that defendants "misrepresented and misquoted" various statements of Rakofsky, Bean and Judge Jackson. (Amended Complaint at

¶ 132.) Rather than wading through the hundreds of alleged defamatory statements, this Court will analyze the statements through two general categories: (1) the trick e-mail, the Bean motion and Judge Jackson's comments, and (2) whether the mistrial was due to incompetence.

A comparison of the initial Washington Post Articles and the subsequent news reports and comments, and Rakofsky's e-mail to Bean requesting that he "trick" a witness, Bean's later motion filed in court to obtain compensation for his investigative services and Judge Jackson's comment that the same raises "ethical issues," reveals that they are a substantially and contextually accurate report. While the precise words are not exactly identical, they are similar enough to convey a fair report of the Rakofsky e-mail and the Bean motion that were inextricably intertwined with the judicial proceedings before Judge Jackson in the Deaner case. Even though the "trick" e-mail, the Bean motion and Judge Jackson's comments do not portray Rakofsky in a positive light, and Rakofsky may wish to disavow or interpret them in a different way, the defendants were permitted to publicly disseminate them as a report of a judicial proceeding.

The second category encompasses the many alleged defamatory statements that Judge Jackson declared a mistrial due to Rakofsky's competence or inexperience. Rakofsky does not deny Judge Jackson made several comments that he was not competent and too inexperienced to provide a proper defense to Deaner in a murder trial. In fact, during the trial, Judge Jackson had two side-bar discussions with Deaner pointedly inquiring whether he was satisfied with Rakofsky's competence and lack of trial experience. The gravamen of Rakofsky's argument is that there was no causal connection between the mistrial and his competence and inexperience. Rather, Rakofsky contends that Judge Jackson declared a mistrial based on Rakofsky's own application due to a conflict between him and Deaner.

Rakofsky may be correct that on March 31, 2011, he made the initial application to Judge Jackson to withdraw as Deaner's counsel. However, at that point, Judge Jackson inquired of Deaner, and Deaner then requested new counsel. Judge Jackson adjourned the trial to the next morning, April 1, 2011, to follow-up on Deaner's request for new counsel. On April 1, 2011, Judge Jackson granted Deaner's request for new counsel after making considerable comments concerning Rakofsky's competence and lack of trial experience. You can not look at Judge Jackson's comments in isolation, but in context considering all of his comments and Rakofsky's trial performance. The clear import of Judge Jackson's rulings was to excuse Rakofsky due to his lack of competence and inexperience to defend Deaner in a murder trial. It is acknowledged that the Deaner murder trial was Rakofsky's first trial in a foreign jurisdiction and with which he was totally unfamiliar, and Judge Jackson was vigilant in protecting Deaner's right to effective assistance of counsel.

Significantly, the reported fact that Judge Jackson declared a mistrial in the Deaner case was not defamatory because even Rakofsky initially celebrated the mistrial as a positive development in his career. In other words, defendants' report that a mistrial occurred does not constitute defamation. Instead, the reported statements that Rakofsky was allegedly not competent, inexperienced and unethical are the operative words which may give rise to defamation, except that said content was privileged under the Civil Right Law § 74.

Republication Exception

Some defendants also assert that plaintiffs' defamation claims are barred by the "republication" exception or otherwise known as the "wire service defense." It is well settled that a republisher may rely on the research of the original publisher, "absent a showing that the republisher

'had, or should have had, substantial reasons to question the accuracy of the articles or the *bona fides* of [the] reporter.' " (*Karaduman v Newsday, Inc.*, 51 NY2d 530, 550 [1980], quoting *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 383 [1977].) This exception applies where one news agency republishes the content of a news story that was originally published by another reputable news agency or source. (*Zetes v Richman*, 86 AD2d 746 (4th Dept 1982] [defendant was immune from liability for republishing story originally published by United Press International]; *Rust Communications Group, Inc. v 70 State St. Travel Serv.*, 122 AD2d 584 [4th Dept 1986].)

In this case, many defendants republished direct quotes or summarized the content of articles that were originally published by The Washington Post on April 1st and 9th, 2011. These defendants were entitled to rely upon the research and reporting of The Washington Post, a reputable news agency, which was clearly a substantially accurate report as stated above, in their republication. To the extent that defendants republished content from The Washington Post Articles, plaintiffs' claims for defamation are barred by the "republication" exception.

Expressions of Pure Opinion

To the extent the defendants are not covered by the fair report privilege or the republication exception, defendants assert that the statements complained of are non-actionable as expressions of pure opinion.

About two years ago, the Appellate Division, First Department (Saxe, J.) wrote a scholarly decision analyzing whether certain comments posted on the internet were actionable as defamatory factual statements or just pure opinion. (*Sandals Resorts Intl. Ltd., v Google, Inc.*, 86 AD3d 32 [1st Dept 2011] [on-line e-mail posting that impliedly accused the owners of a Jamaican

resort of racism was non-actionable opinion].) The First Department explained that defamation must be premised on published assertions of fact rather than on assertions of opinion. (*Id.*, at 38.) In the leading case of *Steinhilber v Alphonse* (68 NY2d 283 [1986]), the Court of Appeals articulated the standard for distinguishing between fact and opinion as follows:

> "A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon an undisclosed fact. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable. 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."

(*Id.* at 289-290 [citations and footnote omitted].)

Based on long-standing precedent, the First Department emphasized that the court needs to examine the entirety of the words, including its tone and purpose, as well as the "broader social context" to determine whether the content of the published statement constitutes defamation. (*Sandals*, 86 AD3d at 41.) The "broader social context" is one of four factors enunciated by the federal courts to distinguish between protected opinions and unprotected factual assertions. (*Ollman v Evans*, 750 F2d 970 (DC Cir 1984), *cert denied* 471 US 1127 [1985].).

This determination is quite a complex balancing act as "even apparent statements of fact may assume the character of statements of opinion, and thus privileged, when made in public debate, heated labor disputes, or other circumstances in which the audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole." (*Steinhilber*, 68 NY2d at 294 [citations omitted].) With this in mind, the proper inquiry is, "whether the reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff." (*Sandals*, 86 AD3d at 42, quoting *Brian v*

Richardson, 87 NY2d 46, 51 [1995], which quoted *Immuno AG v Moor-Jankowski*, 77 NY2d 235, 254 [1986].)

The Appellate Division seemed to make a distinction between traditional print outlets and on-line posts and e-mails when considering the "broader social context" of the communications. It stated that "[t]he culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a " 'freewheeling, anything goes writing style.' " (*Sandals*, 86 AD3d at 43 [citations omitted].). The Appellate Division observed that readers give less credence to allegedly defamatory comments published on the Internet, as well in e-mail posts or blogs, than in other contexts. (*Id.* at 44.) It concluded that "the anonymity of the e-mail makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than as fact." (*Id.*)

In this case, a review of the complained of statements show that they are non-actionable opinions. This Court did not view the words in isolation, but considered the entirety of the communications which contained references to the Washington Post Articles or contained hyper-links to them. These references and hyper-links provide sufficient basis for the reader to understand the facts upon which they were based.

The hostile tone of the complained statements indicates that the writer was expressing his or her strongly-held personal view as to whether Rakofsky, as a newly minted lawyer who may have marketed himself as an experienced litigator, was justified in representing Deaner as lead counsel in a murder trial without any trial experience, and terminating the investigator without compensation as a result of his refusal to comply with Rakofsky's alleged instruction to "trick" a witness at trial which Judge Jackson stated raised "ethical concerns." The purpose of the on-line

posts was to engage readers in open and unfettered critical discussion of ideas and to express opinions on those topics.

When viewed from the broader social context, it is readily apparent that the on-line commentary and posts on legal blogs discussing Rakofsky were exchanges of opinions between criminal defense lawyers and other individuals who were concerned that Deaner was denied the constitutional right to effective assistance of counsel for his defense that has been the hallmark of our criminal justice system for more than fifty years. (*See Gideon v Wainright*, 372 US 335 [1963].) It was essentially a public debate on the internet with on-line users posting their partially anonymous statements in response to the Washington Post Articles and later articles and commentary featured on the legal blogs.[12] The average reader would view its assertions with some reservations, as did a minority of commentators who defended Rakofsky's actions, and treat its contents as mere opinion rather than as a statement of fact.

Plaintiffs allege that defendants' false statements subjected him to public ridicule. In order to protect our prized First Amendment rights to free speech and press as well as debate on public issues, courts have insulated defendants from liability for stating opinions that another person was "immoral" and "unethical" (*Hollander v Cayton*, 145 AD 2d 605, 606 [2d Dept 1988]), and for "lying, deceiving, [and] making false promises" (*Epstein v Board of Trustees of Dowling College*, 152 AD 2d 534, 535 [2d Dept 1989]). Plaintiffs may not recover from defendants for expressing their opinions of Rakofsky's performance on the Deaner case no matter how unreasonable or erroneous

---

12. Defendants Banned Ventures LLC and Bannination, who are online service providers operating essentially a message or virtual bulletin board, are also immune from liability for the statements made by "tarrant84" on their website under the Communications Decency Act, codified at 47 USC § 230. (*See Shiamili v The Real Estate Group of New York, Inc.*, 17 NY3d 281 [2011].)

Rakofsky believes them to be. (*See New York Times Co. v Sullivan*, 376 US 254, 271-272 [1964]; *Rinaldi v Holt, Rinehart & Winston*, 42 NY 2d at 380-381.)

Intentional Infliction of Emotional Distress

Plaintiffs asserted a second cause of action for intentional infliction of emotional distress premised on the same facts underpinning the defamation claims. In order to prove such a cause of action, plaintiffs must demonstrate the following elements:

(I) extreme and outrageous conduct;

(ii) intent to cause, or disregard of a substantial probability of causing severe emotional distress;

(iii) a causal connection between the conduct and injury; and

(iv) severe emotional distress.

(*Howell v New York Post Co., Inc.*, 81 NY2d 115, 121 [1993]; Restatement [Second] of Torts § 46.)

In this case, the Amended Complaint and proposed Second Amended Complaint fail to state a cause of action as to the elements stated above. Specifically, the pleadings falls short of the extreme and outrageous conduct required to substantiate plaintiffs' claims. (*See Freihofer v Hearst Corp.*, 65 NY2d 135 [1985].) In addition, plaintiffs can not recover for intentional infliction of emotional distress caused by duplicative claims of defamation alleged in the pleadings. (*Manno v Hembrooke*, 120 AD2d 818, 820 [3d Dept 1986]; *Levin v McPhee*, 917 F Supp 230, 242 [SDNY 1996], *affd* 119 F3d 189 [2d Cir 1997].) This conclusion is based on the well settled law that "'a cause of action for intentional infliction of emotional distress should not be entertained 'where the conduct complained of falls well within the ambit of other traditional tort liability.' " *Butler v Delaware Otsego Corp.*, 203 AD2d 783, 784 [3d Dept 1994] [citations omitted].)

Intentional Interference With Contract

Plaintiffs asserted a third cause of action for intentional interference with contract based again on the same facts underpinning the defamation claims. To establish such a cause of action, plaintiffs must demonstrate the following elements:

(i) a valid contract exists;

(ii) a third party had knowledge of the contract;

(iii) that third party intentionally procured the breach of the contract; and

(iv) caused damage to plaintiffs.

(*Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]; *Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998].)

In this case, the Amended Complaint and proposed Second Amended Complaint fail to state a cause of action as to the elements stated above. Specifically, the plaintiffs failed to plead the existence of any specific valid contract between plaintiffs and their clients, that defendants had any knowledge of such undisclosed valid contract, that defendants intentionally procured the breach of such contract, and how plaintiffs were thereby damaged. Plaintiffs' proposed claim for intentional interference with prospective economic advantage would also fail to state a cause of action as they failed to properly plead that defendants employed "wrongful means" which includes "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions and some degree of economic pressure." (*Guard Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980].)

Civil Rights Law §§ 50 and 51

Plaintiffs asserted a fourth cause of action for violation of Civil Rights Law §§ 50 and 51 also wholly premised on the same facts underpinning the defamation claims.

New York does not recognize a common-law right to privacy. (*Roberson v Rochester Folding Box Co.*, 171 NY 538 [1902].) In order to provide a limited right to privacy, the Legislature enacted the Civil Rights Law §§ 50 and 51 to protect the usage of a person's "name, portrait or picture" for "advertising" or "trade" purposes without "written consent of such person." This statute has been narrow construed to meet its limited objective to prohibit commercial appropriation of a person's name and likeness. (*Freihofer v Hearst Corp.*, 65 NY2d 135 [1985].) These sections also do not apply to reports of "newsworthy events or matters of public interest" otherwise known as the newsworthy exception. (*Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d 436, 441 [2000].) To foster freedom of expression, the meaning of "newsworthiness" has been broadly construed to permit a wide and liberal interpretation. (*Id.*)

In this case, it is abundantly clear that coverage of a murder trial in the Deaner case comes within the broadly construed newsworthy exception as a report of a newsworthy event or a matter of public concern. Thus, plaintiffs' fourth cause of action fails to state a claim for a violation of Civil Rights Law §§ 50 and 51.

New Claims: Injurious Falsehood, Prima Facie Tort & Negligence

Plaintiffs also seek leave to assert several new causes of action for injurious falsehood, prima facie tort and negligence. With respect to injurious falsehood, plaintiffs' claims are duplicative of their claims of defamation which have been found to fail to state a cause of action. The same holds true for the both injurious falsehood and need not be repeated.

While plaintiffs withdrew their new claim of negligence in open court on April 8, 2013, which was primarily premised on the rejected defamation theory, they would nonetheless be

unable to recover for negligence because the facts alleged are "inseparable from the tort of defamation, and as such, plaintiff[s] [are] relegated to any remedy that would have been available on that basis." (*Butler*, 203 AD2d at 785; *see also Amodei v New York State Chiropractic Assn.*, 160 AD2d 279 [1st Dept 1990].) In other words, plaintiffs can not simply transpose the defamation claim into a contrived negligence claim. (*Colon v City of Rochester*, 307 AD2d 742 [4th Dept 2003], *Iafallo v Nationwide Mutual Fire Ins. Co.*, 299 AD2d 925, 925 [4th Dept 2002] ["a defamation cause of action is not transformed into one for negligence merely by casting it as a negligence cause of action"].)

In order to prove a cause of action for prima facie tort, plaintiffs must demonstrate the following elements:

(i) the intentional infliction of harm;
(ii) which results in special damages;
(iii) without excuse or justification; and
(iv) by an act or series of acts which would otherwise be lawful.

(*Freihofer*, 65 NY2d at 142-143.) The failure to allege special damages would require dismissal of the claim. (*Id.*) This cause of action would also fail as a "catch-all alternative" for other unsupported tort claims because it cannot be "a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort." (*Id.* at 143.)

Here, plaintiffs' claim of prima facie tort must fail because they cannot demonstrate the first element of intentional infliction of harm which was inextricably intertwined with the dismissed second cause of action for intentional infliction of emotional distress. Plaintiffs also failed to sufficiently plead special damages which is a critical element of prima facie tort. Most importantly, defendants have set forth a legally cognizable excuse and justification such as the content of the

comments and reports were newsworthy and privileged pursuant to Civil Rights Law § 74 as set forth above.

Sanctions

Many defendants seek to impose sanctions on plaintiffs and plaintiffs' attorney for commencing this allegedly "frivolous" action and awarding defendants reasonable attorney's fees and costs pursuant to CPLR § 8303-a and/or 22 NYCRR § 130-1.1. Plaintiffs also seek to impose sanctions against Marc J. Randazza, Esq. ("Randazza"), "for frivolous conduct undertaken to harass and/or maliciously injure the plaintiff."

CPLR § 8303-a provides for an award of mandatory costs and fees for making "frivolous" claims. In order to meet this definition of frivolousness under this statute, a court must find either that (1) the "claim . . . was commenced, used or continued in bad faith, solely to delay or prolong, the resolution of the litigation or to harass or maliciously injure another"; or (2) "the claim . . . was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law." CPLR § 8303-a(c)(I), (ii).

Pursuant to 22 NYCRR §130.1-1, a court, in its discretion, may also impose financial sanctions upon any party who engages in frivolous conduct. Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. (22 NYCRR §130.1-1 [c][1-3].) In determining whether the conduct was frivolous, "the court shall consider, among other issues the circumstances under which the conduct

took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party." (22 NYCRR §130.1-1[c][3].)

Defendants assert that plaintiffs commenced this action and continued this action in bad faith. Moreover, defendants argue that plaintiffs knew or should have known that they did not have a good faith basis in law or fact for any of the original four causes of action and the proposed three new claims. Plaintiffs contend that Randazza screamed expletives at Rakofsky and illegally threatened to commence a "wiretapping civil suit" against plaintiff's former counsel, Richard D. Borzouye, Esq. if he opposed Randazza's motion to be admitted *pro hac vice* to practice law in this state.

Plaintiffs have several redeeming arguments to avoid sanctions. First, there was some basis in fact for plaintiffs to argue that defendants did not fairly report Judge Jackson's comments as to the cause of the mistrial. It is uncontroverted that Rakofsky initially requested a mistrial due to a break-down of communications between him and his client. The record is unclear as to whether Judge Jackson considered Rakofsky's request in isolation, or in conjunction with later comments concerning Rakofsky's trial performance, when Judge Jackson ultimately declared a mistrial. Second, plaintiffs partially acted in good faith in withdrawing the new claim of negligence. Third, there is a fine legal line for interpretation of alleged actionable defamatory statements of fact as opposed to non-actionable pure opinion statements. In this regard, plaintiffs made colorable legal arguments that some of the alleged defamatory material included actionable statements of fact or "mixed opinion"

that may have been sufficient to survive the dismissal motions. Fourth, some of the statements were extremely offensive or unnecessarily derogatory.

There are also no grounds to impose sanctions on Randazza. Plaintiffs opposed Randazza's motion[13] for admission *pro hac vice* with essentially the same reasons as this instant motion for sanctions. About two years ago by decision and order dated September 15, 2011, the Hon. Emily Jane Goodman, J.S.C., granted Randazza's motion over plaintiffs' objection. While the previous motion was different than the instant one, Justice Goodman necessarily found that Randazza's conduct was acceptable to practice law in this state, and impliedly not sanctionable. In any event, under these circumstances, no sanctions are warranted about two years later.

Conclusion

Based on the foregoing, it is hereby

ORDERED, that defendants' pre-answer motions to dismiss under sequence numbers 002, 004, 005, 006, 007, 008, 009, 010, 014, 015, 016, 017 and 018 are granted; and it is further

ORDERED, that defendants' motions under sequence numbers 007, 010, 019 and 020, pursuant CPLR § 8303-a and/or 22 NYCRR § 130-1.1, imposing sanctions on plaintiffs and plaintiffs' attorney for commencing this allegedly "frivolous" action and awarding defendants reasonable attorney's fees and costs are denied; and it is further

ORDERED, that plaintiffs' cross-motion pursuant to 22 NYCRR § 130-1.1, awarding sanctions against Marc J. Randazza, Esq., "for frivolous conduct undertaken to harass and/or maliciously injure the plaintiff," is denied; and it is further

---

13. Motion Sequence Number 001.

ORDERED, that the branch of plaintiffs' cross-motion pursuant to CPLR § 1001(a), adding WP Company LLC as a necessary party, is denied; and it is further

ORDERED, that the branch of plaintiffs' cross-motion pursuant to CPLR § 3025(b), granting plaintiffs leave to serve and file a Second Amended Verified Complaint, is denied; and it is further

ORDERED, that the branch of plaintiffs' cross-motion pursuant to CPLR §§ 3217 and 2101(c), permitting plaintiffs to discontinue this action against eight defendants who have settled with them and to delete their names from the caption, is denied without prejudice with leave to renew upon plaintiffs either submitting stipulations of discontinuance or at least specifically stating the names of the eight settling defendants; and it is further

ORDERED, that the branch of plaintiffs' cross-motion pursuant to CPLR § 3215, granting plaintiffs a default judgment against seven defendants on the issue of liability and setting this matter down for an inquest on the assessment of damages, is denied without prejudice (and due consideration if it is appropriate to seek this relief again based on the rulings herein) as plaintiffs failed to both list the names of the defaulting defendants and to provide the requisite specificity to the alleged defaulting defendants that plaintiffs were seeking default judgments against them.

Settle Order[14] within thirty (30) days of entry of this decision and order.

The foregoing constitutes the decision and order of this Court.

Dated: New York, New York
April 29, 2013

Hon. Shlomo S. Hagler, J.S.C.

14. This Court respectfully requests that all moving defendants submit only one combined notice (or cross-notice) of settlement to avoid duplication and preserve limited judicial resources. Plaintiffs may submit a separate notice (or cross-notice) of settlement.