MEDIA LAW

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CONTENTS

INTRODUCTION

This year's Survey governs a range of colorful cases from all levels of state and federal courts in New York. Cases tested the limits of tort law and other matters related to the media—newspapers, television stations, social media and reality television shows—and the bounds of the First Amendment. Cases dealt with incendiary allegations of criminal activity, high-profile professional misconduct, and the extent to which journalists are protected under statutes and the First Amendment itself. This article also covers cutting-edge legislation regarding the so-called "right to be forgotten," which could alter the landscape of media law regulation in the digital age.

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I. FIRST AMENDMENT AND PRIOR RESTRAINTS

A New York lawyer's lawsuit against seven media entities and seventeen journalists and commentators he accused of political bias in their news coverage of the 2016 presidential campaign was dismissed by a federal court in *Hollander v. CBS News Inc*.[1] The plaintiff, Roy Den Hollander, believed the media exhibited a pro-Hillary Clinton agenda during the campaign, while also reporting news with an anti-Donald Trump bent.[2] During the campaign, a federal judge also knocked out the plaintiff's efforts to seek injunctive relief against members of the news media because any effort to block the press or inhibit the flow of news and information would be an unconstitutional prior restraint.[3]

The plaintiff's second attempt to sanction the press came in the present lawsuit, which he vested in the Racketeer Influence and Corrupt Organizations Act (RICO), claiming the news media engaged in illegal wire fraud through what he perceived as "biased" news.[4]

The court granted the news organizations' motion to dismiss claims based on Federal Rules of Civil Procedure 12(b)(1) and (6) because news and information was protected under the First Amendment, and the plaintiff, as an ordinary consumer of news and information, lacked sufficient standing or suffered any tangible injury.[5]

Throughout the opinion, the court repeatedly invoked long-standing First Amendment principles, especially the concept of wide-open debate on public issues under *New York Times v. Sullivan*, rendering the lawsuit inappropriate.[6] Though litigation against the media can be sustained, even with First Amendment protections, such as in areas of liability for false published information in tort law with libel, the court emphasized that the plaintiff was unable to lay any foundation relevant to harm or injury he suffered as a result of presidential campaign news coverage.[7] The court also pointed to a more recent Supreme Court precedent on political speech, public issues and tort liability, *Snyder v. Phelps*, in which the

1. 16 Civ. 6624(PAE), 2017 U.S. Dist. LEXIS 71445, at *1–*3 (S.D.N.Y. 2017).

2. *Id.* at *6, *8–*9.

3. *Id.* at *3, *7. "The [c]ourt, however, has already rejected Hollander's bid for injunctive relieve as seeking a prior restraint incompatible with the First Amendment. And Hollander acknowledges that, with the 2016 presidential election having occurred, there is no longer a basis to seek injunctive or declaratory relief." *Id.* at *7.

4. *See id.* at *2–*3, *7, *11 (first citing 18 U.S.C. §§ 1961–68 (2012)).

5. *Hollander*, 2017 U.S. Dist. LEXIS 71445, at *3 (citing FED. R. CIV. P. 12(b)(1), (6)).

6. *See id.* at *9–*12 (first quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011); and then quoting N.Y. Times v. Sullivan, 376 U.S. 254, 269, 271 (1964)) (citing *Sullivan*, 376 U.S. at 279–80).

7. *See id.* at *11–*13.

court exalted political speech, even offensive, outrageous, hostile, and ugly political speech.[8]

The court in *Hollander* wrote, "[t]he First Amendment, and first principles of constitutional law, bar this lawsuit. The speech for which Hollander seeks relief, political speech regarding a presidential election campaign, is at the core of what the First Amendment protects."[9] Further, the court added that a non-legal or "out-of-court" remedy exists for the plaintiff.[10] The court concluded by reciting doctrine and logic from Justice Louis Brandeis in his famous concurring opinion in *Whitney v. California*[11]: "Hollander is at liberty to counter [the] defendants' reporting and commentaries with speech of his own. But he may not foist on the journalists with whom he disagrees the cost of his competing speech."[12]

II. DEFAMATION

A. Elements

Three employees of a parent company which owned a strip club that was the subject of a federal investigation into ties to organized crime could not bring claims for defamation against a television station and reporters, the Court of Appeals held in *Three Amigos SJL Restaurant v. CBS News*.[13] The high court, along with the appellate division, affirmed dismissal of the case based on the prima facie element of defamation: "of and concerning" the plaintiff.[14]

A basic libel case requires the plaintiff to be identified or identifiably linked to the potentially defamatory statement in order to establish that the false statement was about the plaintiff.[15] Regardless of whether the allegations that the strip club at the issue of the broadcast report and accompanying website story on the federal investigation and the allegations of illegal activity and organized crime links to the club, the

8. *Id.* at *12 (citing 562 U.S. at 454). "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.'" *Snyder*, 562 U.S. at 452 (quoting *Sullivan*, 376 U.S. at 270).

9. *Hollander*, 2017 U.S. Dist. LEXIS 71445, at *9.

10. *Id.* at *13–*14 (first citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring); and then citing United States v. Alvarez, 567 U.S. 709, 727 (2012)).

11. *Id.* (quoting 274 U.S. at 377).

12. *Id.* at *14.

13. *See* 28 N.Y.3d 82, 84–86, 65 N.E.3d 35, 36–37, 42 N.Y.S.3d 64, 65–66 (2016).

14. *Id.* at 86, 65 N.E.3d at 37, 42 N.Y.S.3d at 66 (quoting Julian v. Am. Bus. Consultants, Inc., 2 N.Y.2d 1, 17, 137 N.E.2d 1, 11, 155 N.Y.S.2d 1, 16 (1956)).

15. *Id.* (quoting *Julian*, 2 N.Y.2d at 17, 137 N.E.2d at 11, 155 N.Y.S.2d at 16) (citing PROSSER & KEETON ON TORTS § 111 (W. Page Keeton et al. eds., 5th ed. 1984)).

Cheetah Club, the individual plaintiffs bringing the appeal were not specifically mentioned by name in the news reports.[16]

"In context, the statement that Cheetah's was 'run by the mafia' could not reasonably have been understood to mean that certain unnamed individuals who do not work for Cheetah's but oversee its food, beverage and talent services are members of organized crime," the court wrote.[17] The unspecified nature of the statements could have also triggered a dismissal based on the group libel doctrine, which bars defamation claims by groups of plaintiffs.[18]

In an extensive dissent, Judge Stein argued the three plaintiffs were sufficiently identifiable as management of the Cheetah Club, and also a small enough group to suffice for identification.[19]

A *Bloomberg News* article linking an Irish businessman/antiques dealer to the illegal rhinoceros horn trade, art fraud, and real estate money laundering was not defamatory while a trial court dismissed libel and intentional infliction of emotional distress claims.[20] The plaintiff Richard Kerry O'Brien was the subject of a news story under the headline, "The Irish Clan Behind Europe's Rhino-Horn Theft Epidemic," which he claimed was false and defamatory because it implied he was involved in international criminal activity, harming his reputation.[21] Specifically, he argued that false elements of police operations, including recovery of rhino horns, fake rhino horns, the arrest and release of the plaintiff, as well as a statement that he was "King of the Travelers" who sold homes to law enforcement in a sting.[22]

The court reiterated blackletter libel law that a statement is defamatory if: 1) it is false; 2) exposes the plaintiff to public contempt,

16. *Id.* at 87, 65 N.E.3d at 37, 42 N.Y.S.3d at 66.

17. *Id.* (first citing Hays v. Am. Def. Soc., 252 N.Y. 266, 269–70, 169 N.E. 380, 381 (1929); then citing Carlucci v. Poughkeepsie Newspapers, Inc., 57 N.Y.2d 883, 885, 442 N.E.2d 442, 443, 456 N.Y.S.2d 44, 45, (1982); and then citing Kirch v. Liberty Media Corp., 449 F.3d 388, 398 (2d Cir. 2006)).

18. *Three Amigos SJL Rest.*, 28 N.Y.3d at 87, 65 N.E.3d at 37–38, 42 N.Y.S.3d at 66–67 (citing Gross v. Cantor, 270 N.Y. 93, 94, 96, 200 N.E. 592, 592–93 (1936)).

19. *Id.* at 89–90, 65 N.E.3d at 39, 42 N.Y.S.3d at 68 (citing Harwood Pharmacal Co. v. Nat'l Broad. Co., 9 N.Y.2d 460, 462, 174 N.E.2d 602, 603, 214 N.Y.S.2d 725, 727 (1961)). Judge Stein also argued that proving "of and concerning" should have been left for a jury to decide. *Id.* (citing *Harwood Pharmacal Co.*, 9 N.Y.2d at 462, 174 N.E.2d at 603, 214 N.Y.S.2d at 727).

20. O'Brien v. Higginbotham, No. 162746/2014, 2017 N.Y. Slip Op. 30335(U), at 1, 10–11 (Sup. Ct. N.Y. Cty. Feb. 3, 2017) (first citing Stepanov v. Dow Jones & Co., 120 A.D.3d 28, 39, 987 N.Y.S.2d 37, 45 (1st Dep't 2014); and then citing N.Y. C.P.L.R. 3211(a)(1), (a)(7) (McKinney 2016)).

21. *Id.* at 1, 8.

22. *Id.* at 4.

ridicule and aversion; 3) is published; and 4) is unprivileged.[23]

In rejecting the plaintiff's claims and granting the defendant's motion to dismiss, the court found many of the allegations in the news account were drawn from law enforcement investigatory documents and government reports, which were privileged.[24] The reporter's "substantially accurate" account extended to contentious facts which were later questioned or disproved in subsequent investigations.[25] Moreover, the court held that the reporter and news operation did not have an additional duty to conduct its own subsequent investigation into the veracity of law enforcement's evidence.[26]

> [D]efendants may not be charged with knowledge of these facts that were unknown when their article was published. While [the] plaintiff also maintains that [the] defendants were irresponsible in not testing the rhinoceros horns before reporting that the horns were real, [the] defendants owed no duty to uncover any error in the official investigation by Conducting [sic] their own investigation.[27]

Additionally, several nonprivileged pieces of information published in the news story were either not factual, truthful, not susceptible to defamatory meaning, or not about the plaintiff.[28] In particular, statements about real estate money laundering were not about the plaintiff.[29]

The court concluded:

> [B]ecause [the] defendants' article does not imply [the] plaintiff's involvement in the Rathkeale Rovers' criminal activity, the article does not implicitly defame [the] plaintiff. Moreover, even if [the] plaintiff's claim that law enforcement authorities in Operation Oakleaf bear

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23. *Id.* at 3–4 (first citing *Stepanov*, 120 A.D.3d at 34, 987 N.Y.S.2d at 41; then citing Dillion v. City of New York, 261 A.D.2d 34, 37–38, 704 N.Y.S.2d 1, 5 (1st Dep't 1999); then citing Thomas H. v. Paul B., 18 N.Y.3d 580, 584, 965 N.E.2d 939, 942, 942 N.Y.S.2d 437, 440 (2012); then citing Martin v. Daily News LP, 121 A.D.3d 90, 100, 990 N.Y.S.2d 473, 481 (1st Dep't 2014); then citing Sandals Resorts Int'l Ltd. v. Google, Inc., 86 A.D.3d 32, 38, 925 N.Y.S.2d 407, 412 (1st Dep't 2011); and then citing Bement v. N.Y.P. Holdings, Inc., 307 A.D.2d 86, 92, 760 N.Y.S.2d 133, 137–38 (1st Dep't 2003)).

24. *Id.* at 3–4 (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2009)).

25. *O'Brien*, 2017 N.Y. Slip Op. 30335(U), at 4 (citing Daniel Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d 434, 436, 630 N.Y.S.2d 18, 22 (1st Dep't 1995)).

26. *Id.* at 5 (first citing Freeze Right Refrigeration & Air Conditioning Servs. v. City of New York, 101 A.D.2d 175, 183, 475 N.Y.S.2d 383, 389 (1st Dep't 1984); and then citing Rodriguez v. Daily News, LP, 142 A.D.3d 1062, 1064, 37 N.Y.S.3d 613, 615 (2d Dep't 2016)).

27. *Id.* (first citing *Freeze Right Refrigeration*, 101 A.D.2d at 183, 475 N.Y.S.2d at 389; and then citing *Rodriguez*, 142 A.D.3d at 1064, 37 N.Y.S.3d at 615).

28. *Id.* at 8–10 (first citing CIV. RIGHTS § 74; and then citing *Stepanov*, 120 A.D.3d at 35, 987 N.Y.S.2d at 42).

29. *Id.* at 10.

> animosity toward the Travelers, [the] plaintiff fails to show [the] defendants' intent to defame [the] plaintiff, as required for defamation by implication.[30]

B. Libel per se

A libel per se claim based on a negative review on the consumer review website Yelp.com was properly dismissed by the trial court, the appellate division, affirmed in *Crescendo Designs, Ltd. v. Reses*, because it was non-actionable opinion.[31] The plaintiff had installed a home theater system in the defendant's home, which was the subject of a negative review, which the plaintiff asserted constituted libel per se.[32] Defamation and libel per se claims must be based on factual allegations, usually statements imputing criminal activity or dishonesty in a business or trade.[33] This determination is a matter of law that the court must determine, particularly assessing the context of the statement.[34] The court granted the defendant's motion under Civil Practice Law and Rules (CPLR) 3211(a)(7) for failure to state a cause of action.[35]

"Here, given the context in which the challenged statements were made and viewing the content of the review as a whole, a reasonable reader would have believed that the writer of the review was a dissatisfied customer who utilized the Yelp website to express an opinion," the court wrote.[36]

C. Public Figure/Private Figure and Actual Malice

A man misidentified in a newspaper photograph as a sex offender

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30. *O'Brien*, 2017 N.Y. Slip Op. 30335(U), at 11 (citing *Stepanov*, 120 A.D.3d at 39, 987 N.Y.S.2d at 45).

31. 151 A.D.3d 1015, 1016, 58 N.Y.S.3d 112, 113 (2d Dep't 2017) (first citing Mann v. Abel, 10 N.Y.3d 271, 277, 885 N.E.2d 884, 886, 856 N.Y.S.2d 31, 33 (2008); then citing Woodbridge Structured Funding, LLC v. Pissed Consumer, 125 A.D.3d 508, 508, 6 N.Y.S.3d 2, 2 (2015); and then citing Konig v. C.S.C. Holdings, LLC, 112 A.D.3d 934, 935, 977 N.Y.S.2d 756, 758 (2013)).

32. *Id.*

33. *See id.* (quoting Brian v. Richardson, 87 N.Y.2d 46, 51, 660 N.E.2d 1126, 1129, 637 N.Y.S.2d 347, 350 (1995)) (citing *Mann*, 10 N.Y.3d at 276, 885 N.E.2d at 885, 856 N.Y.S.2d at 32).

34. *Id.* (first quoting *Mann*, 10 N.Y.3d at 276, 885 N.E.2d at 885, 856 N.Y.S.2d at 32; and then quoting *Richardson*, 87 N.Y.2d at 51, 660 N.E.2d at 1129, 637 N.Y.S.2d at 350).

35. *Id.* (citing N.Y. C.P.L.R. 3211(a)(7) (McKinney 2016)).

36. *Crescendo Designs, Ltd.*, 151 A.D.3d at 1016, 58 N.Y.S.3d at 113 (first citing *Mann*, 10 N.Y.3d at 277, 885 N.E.2d at 886, 856 N.Y.S.2d at 33; then citing *Woodbridge Structured Funding, LLC*, 125 A.D.3d at 509, 6 N.Y.S.3d at 3; and then citing *Konig*, 112 A.D.3d at 935, 977 N.Y.S.2d at 758).

was not a public figure and could establish that he was defamed under the gross irresponsibility standard, a trial court held.[37] The plaintiff, Jeffrey Lederer was photographed outside a New York City social club by a freelance photographer whose photo was sold to a photo agency and ultimately published in the *New York Daily News*.[38] The plaintiff was incorrectly identified as Jeffrey Epstein, a registered sex offender who is friends with British Prince Andrew.[39]

On the legal standard applied for private or non-public figures, such as the plaintiff, the court wrote, "[a] person is grossly irresponsible in this regard when he or she fails to verify the accuracy or veracity of information before disseminating it or evinces an inability or unwillingness to take any steps to obtain such a verification."[40]

The significant issue in this case, however, was whether the *Daily News* could seek contribution and indemnification from the freelance photographer and the photo agency.[41] Because the freelancer and the photo agency did little to nothing to verify the identity of the man photographed, the court found the third-party complaint established that they acted with gross irresponsibility and should be subject to contribution.[42]

The court rejected the newspaper's demand for both common law and contractual indemnification.[43] The court wrote:

> Here, the *News* defendants repeatedly published photos of the plaintiff, identifying him as Epstein, to accompany articles implying that he engaged in illegal and immoral conduct, which reached thousands of readers. Since the standard for common-law indemnification requires that the party claiming entitlement to indemnity be without fault, the *News* defendants have not pleaded facts sufficient to make out such a cause of action, since they do not and cannot allege that they are without fault.[44]

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37. Lederer v. Daily News, LP, No. 650400/15, 2016 N.Y. Slip Op. 31394(U), at 1, 7 (Sup. Ct. N.Y. Cty. 2016) (citing Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975)).

38. *Id.* at 2.

39. *Id.* at 2–3.

40. *Id.* at 6 (first citing Matovcik v. Times Beacon Record Newspapers, 108 A.D.3d 511, 511, 968 N.Y.S.2d 559, 561 (2d Dep't 2013); and then citing Fraser v. Park Newspapers of St. Lawrence, Inc., 246 A.D.2d 894, 896–97, 668 N.Y.S.2d 284, 286–87 (3d Dep't 1998)).

41. *Id.* at 3.

42. *Lederer*, 2016 N.Y. Slip Op. 31394(U), at 4, 7 (first citing *Chapadeau*, 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64).

43. *Id.* at 10.

44. *Id.* at 8 (citing D'Ambrosio v. City of New York, 55 N.Y.2d 454, 461, 435 N.E.2d 366, 368, 450 N.Y.S.2d 149, 151 (1982)).

D. Opinion

A series of postings on social media detailing the break-up of a business would have to be viewed within the context of the posting to determine whether they were libelous, the appellate division held in *Torati v. Hodak*.[45] Here, loose, hyperbolic language posted anonymously on consumer review websites describing the plaintiff as a "bad apple," "incompetent and dishonest," and a "disastrous businessman" who consumers should "[s]tay far away" from could not be deemed defamatory because they were statements of opinion.[46] A handful of Yelp! reviews were also not actionable under the statute of limitations because the lawsuit was filed more than one year after the statements were posted.[47]

However, a series of posts on Facebook were actionable, the court held, because they were factual.[48] The defendant unsuccessfully argued that the Facebook messages were immune because they only reached three readers/viewers who were members of the plaintiff's family.[49] The court made an interesting statement on the context of the internet, noting "[r]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts."[50]

The court added: "While the Internet reviews contain elements of both fact and opinion, when viewed in context, they suggest to a reasonable reader that the author was merely expressing his opinion based on a negative business interaction with [the] plaintiffs."[51]

In a trial court case, though no media entities were litigants, a series of Tweets and televised insulting comments by candidate Donald Trump and his campaign aide Corey Lewendowski were deemed pure opinion and not actionable, a state court ruled.[52] The defendants made a series of

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45. 147 A.D.3d 502, 503, 47 N.Y.S.3d 288, 290 (1st Dep't 2017) (first citing Mann v. Abel, 10 N.Y.3d 271, 276, 885 N.E.2d 884, 885, 856 N.Y.S.2d 31, 32 (2008); and then citing Steinhilber v. Alphonse, 68 N.Y.2d 283, 294, 501 N.E.2d 550, 555, 508 N.Y.S.2d 901, 907 (1986)).

46. *Id.* (alteration in original) (first citing *Mann*, 10 N.Y.3d at 276, 885 N.E.2d at 885, 856 N.Y.S.2d at 32; and then citing Dillon v. City of New York, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1, 5 (1st Dep't 1999)).

47. *Id.* (citing N.Y. C.P.L.R. 215 (McKinney 2003 & Supp. 2018)).

48. *Id.* at 504, 47 N.Y.S.3d at 290.

49. *Id.*

50. *Torati*, 147 A.D.3d at 503, 47 N.Y.S.3d at 290 (quoting Sandals Resorts Int'l Ltd. v. Google, Inc., 86 A.D.3d 32, 44, 925 N.Y.S.2d 407, 416 (1st Dep't 2011)).

51. *Id.* (first citing *Mann*, 10 N.Y.3d at 276, 885 N.E.2d at 886, 856 N.Y.S.2d at 33; and then citing Steinhilber v. Alphonse, 68 N.Y.2d 283, 294, 501 N.E.2d 550, 555, 508 N.Y.S.2d 901, 906, (1986)).

52. Jacobus v. Trump, 55 Misc. 3d 470, 471, 473, 485–86, 51 N.Y.S.3d 330, 333–35,

insulting comments about the plaintiff, a political strategist and public relations professional, who at one point may have been considered for a job in the Trump campaign.[53] Among the offending statements were epithets calling her a "dummy," "really dumb," and an allegation that the plaintiff had sought a job with the campaign but later turned against the campaign.[54]

The plaintiff asserted the statements were "libel per se" because they "accuse[d] her of unprofessional conduct."[55] Disparaging comments about a person's profession or trade could be defamatory without proof of special damages.[56] The court, however, ruled that because of the unprovable nature of the comments and their context, they were properly regarded as statements of opinion, not libelous per se.[57] "In light of the foregoing, and absent any authority for the proposition that the circumstances of this case render [the] defendants' statements an exception to what appears to be the law that they are nonactionable opinion, [the] plaintiff fails to state a claim[,]" the court wrote.[58]

In a federal case, a convicted rapist, characterized in a newspaper story as, among other things, "[w]acko rapist," could not recover damages for defamation under the protected opinion doctrine, the Southern District ruled.[59] The newspaper story also said the plaintiff was "[a] homeless, ascot-wearing sex fiend who claimed to be a French TV reporter to pick up women is blaming everyone but himself" and ". . . reportedly lured women with his pleasant face, strong French accent, talk of wine and cheese picnics and overt come-ons . . . ."[60]

The newspaper reporter drew much of the account from public records—trial testimony, court documents, and law enforcement press releases—that were privileged under § 74 of the Civil Rights Law.[61]

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344 (Sup. Ct. N.Y. Cty. 2017).

53. *Id.* at 471, 473, 51 N.Y.S.3d at 333–35.

54. *Id.* at 473, 51 N.Y.S.3d at 334–35.

55. *Id.* at 473, 51 N.Y.S.3d at 335.

56. *Id.* at 480, 51 N.Y.S.3d at 340 (first quoting Frechtman v. Gutterman, 115 A.D.3d 102, 104, 979 N.Y.S.2d 58, 61 (1st Dep't 2014); and then quoting Liberman v. Gelstein, 80 N.Y.2d 429, 435, 605 N.E.2d 344, 347, 590 N.Y.S.2d 857, 860 (1992)) (citing Geraci v. Probst, 15 N.Y.3d 336, 344, 938 N.E.2d 917, 922, 912 N.Y.S.2d 484, 489 (2010)).

57. *Jacobus*, 55 Misc. 3d at 484, 51 N.Y.S.3d at 343.

58. *Id.* at 485–86, 51 N.Y.S.3d at 344.

59. Akassy v. N.Y. Daily News, No. 14CV1725-LTS-JCF, 2017 U.S. Dist. LEXIS 9155, at *11, *13 (S.D.N.Y. Jan. 23, 2017) (first citing Egiazaryan v. Zalmayev, 880 F. Supp. 2d 494, 503 (S.D.N.Y. 2012); and then citing Fleckenstein v. Friedman, 266 N.Y. 19, 23, 193 N.E. 537, 538 (1934)).

60. *Id.* at *3 (citing Complaint at 36–37, *Akassy*, 2017 U.S. Dist. LEXIS 9155 (No. 153252/2016)).

61. *Id.* at *8–*9 (first citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2009); and then

Additionally, other statements, such as the plaintiff's characterization, were not actionable under the First Amendment and the protection of statements of opinion in matters of public interest.[62] "The use of the colloquial term 'wacko' is obviously a statement of opinion, and thus, not defamatory," the court wrote.[63]

The court added that other hyperbolic language in the article, such as the statements about the plaintiff's homelessness, his false claims to be a French journalist, and his luring of women were "substantially true" and fact-based characterizations and also reflected in the public record.[64]

1. Privilege—Fair and True Report—§ 74

A number of reported opinions protected media defendants for engaging in fair and true or accurate reporting of judicial proceedings or investigative reports or other government or public records under Civil Rights Law § 74.[65]

Erroneous information misidentifying a man as a rapist that was broadcast on a television news report was still privileged under § 74, the appellate division ruled.[66] Similarly, another appellate division panel ruled that statements drawn from court records identifying a person as "a debtor" and published in a newspaper were also privileged.[67]

A newspaper's coverage of a college basketball grade scandal were based on a range of investigative and public records that were privileged

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citing Rodriguez v. Daily News, LP, 142 A.D.3d 1062, 1064, 37 N.Y.S.3d 613, 615 (2d Dep't 2016)). "The statements in the article are substantially consistent with Jacobs' affidavit and the court documents and district attorney's press release appended to [the] [d]efendant's submissions." *Id.* at *9.

62. *Id.* at *9–*10 (quoting Cafferty v. S. Tier Pub. Co., 226 N.Y. 87, 93, 123 N.E. 76, 78 (1919)) (citing *Fleckenstein*, 266 N.Y. at 23, 193 N.E. at 538).

63. *Akassy*, 2017 U.S. Dist. LEXIS 9155, at *11 (citing Lapine v. Seinfield, 31 Misc. 3d 736, 754, 918 N.Y.S.2d 313, 327 (Sup. Ct. N.Y. Cty. 2011)).

64. *Id.* at *11–*13 (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975)).

65. CIV. RIGHTS § 74.

66. Rodriguez v. Daily News, LP, 142 A.D.3d 1062, 1063, 37 N.Y.S.3d 613, 615 (2d Dep't 2016) (quoting Freeze Right Refrigeration & Air Conditioning Servs. v. City of New York, 101 A.D.2d 175, 183, 475 N.Y.S.2d 383, 389 (1st Dep't 1984)) (first citing Gong v. Dow Jones & Co., Inc., No. 652905/11, 2012 N.Y. Slip Op. 33220(U), at 7 (Sup. Ct. N.Y. Cty. July 25, 2012); and then citing Bernacchi v. Cty. of Suffolk, No. 19861/2008, 2010 N.Y. Slip Op. 33164(U), at 2–3 (Sup. Ct. Suffolk Cty. Nov. 8, 2010)) ("The privilege is not defeated by the NYPD's error in identifying the plaintiff by his photograph as the assailant. The statute 'was designed precisely to protect the publisher of a fair and true report from liability for just such an error and to relieve it of any duty to expose the error through its own investigation.'").

67. Curto v. N.Y. Law Journal, 144 A.D.3d 1543, 1544, 40 N.Y.S.3d 841, 842 (4th Dep't 2016) (citing Alf v. Buffalo News, Inc., 21 N.Y.3d 988, 990, 995 N.E.2d 168, 169, 972 N.Y.S.2d 206, 207 (2013)) (holding that news coverage of public records and statements held in public records is "axiomatic").

under Civil Rights Law § 74 and could not be actionable under the tort of libel, a state court ruled.[68] Here, *The Journal News* newspaper, its sister online publication, and its parent company, Gannett Satellite Information Network, were named as defendants in a defamation case brought by a former assistant basketball coach for Westchester Community College, Richard Fields.[69] Five individual reporters who worked on the stories were also named as defendants, as was the newspaper's publisher and editor.[70] The plaintiff, who lost his job, claimed statements published in the press accounts alleging that he played a role in altering players' academic transcripts were defamatory.[71]

The newspaper's motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action was based on the materials it used for the stories: public records from official government reports, primarily investigative reports by the county district attorney's office and the New York State Inspector General's Office.[72]

Section 74 indemnifies publishers who base their reports on "fair and true report of any judicial proceeding, legislative proceeding or other official proceeding."[73] "Notably, the announcement of an investigation by a public agency, made before the formal investigation has begun, as well as the report of an ongoing investigation are protected as a report of an official proceeding within the contemplation of the statute as long as the report is accurate," the court wrote.[74] Thus, the newspaper's "accurate" quoting of officials and official sources fell within the statute's purpose.[75]

The court also found the plaintiff's service of certain defendants lacking under CPLR 308.[76]

In another case, a newspaper's "sensationalist" coverage of an Article 78 challenge by a rejected Department of Correction's (DOC) job applicant was based on information deemed privileged as a fair and

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68. Fields v. Cty. of Westchester, No. 50797/2016, 2017 N.Y. Slip Op. 50076(U), at 10 (Sup. Ct. Westchester Cty. Jan. 23, 2017) (quoting *Rodriguez*, 142 A.D.3d at 1063, 37 N.Y.S.3d at 615).

69. *Id.* at 1–2.

70. *Id.* at 2–3.

71. *Id.* at 2.

72. *Id.* at 9–10.

73. Fields, 2017 N.Y. Slip Op. 50076(U), at 10 (quoting *Rodriguez*, 142 A.D.3d at 1063, 37 N.Y.S.3d at 615).

74. *Id.* at 11 (citing Freeze Right Refrigeration & Air Conditioning Servs. v. City of New York, 101 A.D.2d 175, 182, 475 N.Y.S.2d 383, 388 (1st Dep't 1984)).

75. *Id.*

76. *Id.* at 8–9 (citing N.Y. State Higher Educ. Servs. Corp. v. Palmeri, 167 A.D.2d 797, 798, 563 N.Y.S.2d 358, 360 (3d Dep't 1990)).

accurate report of a governmental proceeding.[77] The newspaper article, under the headline, "Drunk driving-pothead thinks he's fit to be a corrections officer" was based on information, some inaccurate, presented during the plaintiff's petition challenging his rejected job application with the DOC.[78]

Even though defamation is a false statement of fact that causes harm to reputation, such as public contempt or disgrace, because the material was gathered from a public hearing, the court invoked § 74.[79] The court wrote, "[d]efendants should not be faulted for parroting DOC findings."[80] The article also mentioned some of the underlying charges against the plaintiff had been dropped and his plea agreement was not accurately characterized.[81] The court wrote, "[w]hen considering the article in its entirety, the presence of an inaccurate statement does not require a finding that Civil Rights Law [§] 74 does not apply."[82]

2. Miscellaneous

A. SOL/Single Publication Rule

A defamation complaint filed nearly three years after a series of articles was initially published online was dismissed under both New York's one-year statute of limitations and the single-publication rule.[83] The plaintiff was the subject of seven articles published between May and December 2013 in the local news website, Patch.com, alleging among other things, that he had made threatening phone calls to government officials in Connecticut alleging frauds and cover-ups in the 2012 Newtown, Connecticut, school shooting tragedy.[84]

The final date for an actionable claim would have been in December

77. St. Louis v. NYP Holdings, Inc., No. 156522/2016, N.Y. Slip Op. 50276(U), at 4–5 (Sup. Ct. N.Y. Cty. Feb. 6, 2017).

78. *Id.* at 1.

79. *Id.* at 3–4 (citing Holy Spirit Assoc. for Unification of World Christianity v. N.Y. Times Co., 49 N.Y.2d 63, 67, 399 N.E.2d 1185, 1187, 424 N.Y.S.2d 165, 167 (1979)).

80. *Id.* at 1.

81. *Id.* at 1–2.

82. *St. Louis*, 2017 N.Y. Slip Op. 50276(U), at 2 (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2009)).

83. *See generally* Reich v. Hale, No. 156787/2016, 2017 N.Y. Slip Op. 30197(U) (Sup. Ct. N.Y. Cty. Jan. 20, 2017) (holding that the plaintiff's cause of action for defamation must be dismissed as time barred for failing to file the complaint within New York's one-year statute of limitations to recover for intentional torts, and for failing to show in the complaint that the defamatory article was republished in a new format by a website under the single-publication rule).

84. *Id.* at 1–2.

2014, the court held.[85] However, the plaintiff argued that a new statute of limitations was triggered because Patch.com was an internet-based publication and that new linking or any subsequent accessing should be treated as new publication, perpetuating falsehoods and new claims for defamation or libel per se.[86]

The single-publication rule, which affords a plaintiff only one viable cause of action for a claim regardless of how many issues or editions of a publication are disseminated, had been adopted to govern online, digital, or internet-based publications in *Firth v. State*, which the court applied here.[87] *Firth* established that "each 'hit' or viewing of an internet-based article should not be considered a new publication for statute of limitations purposes."[88] The court also applied Firth's two-prong analysis which would overcome the single publication rule if 1) the subsequent publication targeted and reached a new audience and 2) that the second publication was modified "in form or content" for the new audience.[89]

Because of the fluid and timeless nature of the Internet, courts have also held that "continuous access to an article posted via hyperlinks to a website is not republication."[90]

In addition to the complaint, the plaintiff sought both temporary and permanent injunctions against the publisher, demanding removal or retraction of the articles.[91] Though an injunction against a media entity could trigger concerns for possible censorship or prior restraint and questions of constitutionality under the First Amendment, the court here simply applied a three-prong analysis as it denied the plaintiff's request.[92] A successful injunction requires the plaintiff to establish: 1) a likelihood of success on the merits of the claim; 2) irreparable harm; and 3) a balance of the equities.[93] Because the plaintiff's claims fail under the statute of

85. *Id.* at 4.

86. *Id.*

87. *Id.* (first citing Gregoire v. G. P. Putnam's Sons, 298 N.Y. 119, 123, 81 N.E.2d 45, 47 (1948); and then citing Firth v. State, 98 N.Y.2d 365, 370, 775 N.E.2d 463, 465–66, 747 N.Y.S.2d 69, 71–72 (2002)).

88. *Reich*, 2017 N.Y. Slip Op. 30197(U), at 4 (citing *Firth*, 98 N.Y.2d at 370, 775 N.E.2d at 465–66, 747 N.Y.S.2d at 71–72).

89. *Id.* at 5 (citing Hoesten v. Best, 34 A.D.3d 143, 150, 821 N.Y.S.2d 40, 46 (1st Dep't 2006)).

90. *Id.* at 7 (quoting Martin v. Daily News LP, 121 A.D.3d 90, 103, 990 N.Y.S.2d 473, 483 (1st Dep't 2014)).

91. *Id.* at 6.

92. *Id.* (first citing N.Y. C.P.L.R. 6301 (McKinney 2010); and then citing Doe v. Axelrod, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 1272, 536 N.Y.S.2d 44, 45 (1988)).

93. *Reich*, 2017 N.Y. Slip Op. 30197(U), at 6 (first citing C.P.L.R. 6301; and then citing *Axelrod*, 73 N.Y.2d at 750, 532 N.E.2d at 1272, 536 N.Y.S.2d at 45).

limitations bar, he could not succeed.[94]

The court wrote:

> Here, [the] plaintiff seeks a preliminary injunction under the same theory of liability as his time-barred libel and defamation claims, namely injury and loss to his reputation. However, the court may not permit [the] [p]laintiff to allow such a claim to proceed when it is essentially duplicative of claims that are no longer actionable.[95]

E. Jurisdiction

An incarcerated pro se plaintiff's libel action against *The New York Post* newspaper was dismissed because the action was improperly filed in federal court.[96] The plaintiff, a New York resident who was incarcerated in a New York prison, failed to establish the $50 million defamation suit—based on published statements that the plaintiff made anti-gay statements and lived in a homeless shelter—was based on either a federal issue or diversity jurisdiction.[97]

III. NEWSGATHERING

A. Subpoenas

In a decision testing cutting-edge digital storage concepts for modern and social media, the Court of Appeals affirmed dismissal of Facebook's motions to quash search warrants served on the social media company in *In re 381 Search Warrants Directed to Facebook, Inc*.[98] This case tested the application of the Stored Communications Act (SCA) to social media outlets and the tension between social media entities and law enforcement investigations.[99] The SCA, a section of the Electronic Communications Privacy Act of 1986, is intended to balance the privacy rights associated with stored, electronic, or computer-based information with the investigative needs of law enforcement conducting investigations and collecting digital or computer-stored information.[100]

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94. *Id.* at 6–7 (citing Morrison v. Nat'l Broad. Co., 19 N.Y.2d 453, 459, 227 N.E.2d 572, 574, 280 N.Y.S.2d 641, 645 (1967)).

95. *Id.* (citing *Morrison*, 19 N.Y.2d at 459, 227 N.E.2d at 574, 280 N.Y.S.2d at 645).

96. Brinson v. N.Y. Post, No. 17-CV-1681(CM), 2017 U.S. Dist. LEXIS 94142, at *6 (S.D.N.Y. June 6, 2017) (citing FED. R. CIV. P. 12(h)(3)).

97. *Id.* at *2–*6.

98. 29 N.Y.3d 231, 252, 78 N.E.3d 141, 152, 55 N.Y.S.3d 696, 707 (2017) (citing N.Y. CRIM. PROC. LAW § 450.10 (McKinney 2005); and then citing N.Y. CRIM. PROC. LAW § 470.60 (McKinney 2009)).

99. *Id.* at 238, 78 N.E.3d at 142, 55 N.Y.S.3d at 697; 18 U.S.C. §§ 2701–12 (2012).

100. *Id.* at 240–41, 78 N.E.3d at 144, 55 N.Y.S.3d at 699; 18 U.S.C. §§ 2701–12.

Here, the New York County District Attorney's office sought 381 search warrants for information held by Facebook relating to an investigation for Social Security Disability fraud.[101] Facebook filed a motion to quash the warrants, arguing they were overbroad and would violate the privacy of its users.[102] The supreme court and appellate division both rejected Facebook's motions and arguments, and the Court of Appeals affirmed.[103]

Though the high court acknowledged some of Facebook's concerns and the potential impact on social media, the opinion focused on nuances of New York's criminal procedure law which bars appeals of search warrants.[104] Facebook unsuccessfully argued that the warrants were more akin to a subpoena under the SCA, which would have made them appealable.[105]

The court wrote:

> Despite the minor similarities between SCA warrants and subpoenas, in this post-digital world, we are not convinced that SCA warrants—which are required under the statute to obtain certain content-based information that cannot be obtained with a subpoena due to heightened privacy interests in electronic communications—should nevertheless be treated as subpoenas.[106]

In a case involving journalists, a newspaper reporter who conducted a jailhouse interview should not be compelled to testify or turn over her notes, the appellate division ruled in *People v. Juarez*.[107] In this case, a *New York Times* reporter, Frances Robles, interviewed a defendant who was being charged with the 1991 murder of a four-year-old girl who

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101. *Id.* at 239, 78 N.E.3d at 143, 55 N.Y.S.3d at 698.

102. *Id.*

103. *In re* Search Warrants Directed to Facebook, Inc., 2013 N.Y. Slip Op. 52346(U), at 4 (Sup. Ct. N.Y. Cty. Sept. 17, 2013); *In re* 381 Search Warrants Directed to Facebook, Inc., 132 A.D.3d 11, 23–24, 14 N.Y.S.3d 23, 32 (1st Dep't 2015); *In re 381 Search Warrants Directed to Facebook, Inc.*, 29 N.Y.3d at 252, 78 N.E.3d at 153, 55 N.Y.S.3d at 708.

104. *In re 381 Search Warrants Directed to Facebook, Inc.*, 29 N.Y.3d at 243, 78 N.E.3d at 145–46, 55 N.Y.S.3d at 700–01 (first citing Police Benevolent Assn. of N.Y. State Police v. Gagliardi, 9 N.Y.2d 803, 803–04, 5 N.E. 170, 170, 215 N.Y.S.2d 513, 513 (1961); then citing *In re* Abe A., 56 N.Y.2d 288, 293, 437 N.E.2d 265, 267, 452 N.Y.S.2d 6, 9–10 (1982); then citing *In re* Abrams, 62 N.Y.2d 183, 192, 465 N.E.2d 1, 5, 476 N.Y.S.2d 494, 498 (1984); then citing *In re* Newsday, Inc., 3 N.Y.3d 651, 652, 816 N.E.2d 561, 562, 782 N.Y.S.2d 689, 690 (2004); and then citing People v. Santos, 64 N.Y.2d 702, 704, 474 N.E.2d 1192, 1193, 485 N.Y.S.2d 524, 525 (1984)).

105. *Id.* at 243, 78 N.E.3d at 146, 55 N.Y.S.3d at 701.

106. *Id.* at 244, 78 N.E.3d at 146, 55 N.Y.S.3d at 701 (citing 18 U.S.C. § 2703(a), (b)(1)(A) (2012)).

107. 143 A.D.3d 589, 590, 39 N.Y.S.3d 155, 156 (1st Dep't 2016), *lv. granted*, 29 N.Y.3d 904, 80 N.E.3d 401, 57 N.Y.S.3d 708 (2017).

became known as "Baby Hope."[108]

The newspaper published a story in 2013, which included statements and direct quotes by the defendant, which included details about his role in the murder.[109] Following publication, the New York District Attorney's Office subpoenaed the reporter seeking her testimony and notes of the interview.[110] The newspaper's motions to quash the subpoenas were denied by the trial court.[111]

The appellate division held that the reporter's information was not "critical or necessary" to the prosecution, largely because police investigators had previously obtained a videotaped confession by the defendant.[112] Further, the court found the reporter had a qualified protection under New York's reporter's shield law, Civil Rights Law § 79-h(c), which affords reporters a qualified protection for information that is not critical or necessary or not available through alternative sources.[113]

The court wrote,

> Under the circumstances, and in keeping with "the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events,'" we find that the People have not made a "clear and specific showing" that the disclosure sought from Robles (her testimony and interview notes) is "critical or necessary" to the People's proof of a material issue so as to overcome the qualified protection for the journalist's nonconfidential material.[114]

Later in the year, the Court of Appeals granted a motion for appeal.[115]

B. Access to Materials

A television news reporter's Freedom of Information Law (FOIL) request and the New York City Police Department's (NYPD) obstruction of that request compelled a supreme court justice to order a hearing to

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108. *Id.* at 589, 39 N.Y.S.3d at 156.

109. *Id.*

110. *Id.* at 590, 39 N.Y.S.3d at 156.

111. *Id.*

112. *Juarez*, 143 A.D.3d at 590, 39 N.Y.S.3d at 156.

113. *Id.* at 590, 39 N.Y.S.3d at 156–57 (quoting N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 2009)).

114. *Id.* (first quoting O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 529, 523 N.E.2d 277, 281, 528 N.Y.S.2d 1, 5 (1988); and then quoting CIV. RIGHTS § 79-h(c)).

115. People v. Juarez, 29 N.Y.3d 904, 80 N.E.3d 401, 57 N.Y.S.3d 708 (2017).

resolve the dispute.[116] A reporter for Time Warner Cable's NY1 sought 190 hours of digital video recorded by New York City police officers' body cameras involved in 1,576 interactions with police officers.[117] The NYPD argued that a sizeable portion of the information might render the information deniable based on privacy interests and then replied that complying with the request would require staff to redact the video, at cost to the news channel of $36,480.[118] The court, following opinions by the Committee on Open Government, ruled that the costs cited by the police cannot be passed on to the FOIL petitioner.[119]

The court ordered a hearing under Article 78 to determine whether the government agency should be allowed to redact significant portions of the video under the FOIL.[120] The court wrote:

> If, as a result of the hearing, the NYPD proves that it is unable to perform the redactions without unreasonable difficulty, the NYPD will be permitted to withhold videos containing exempt material in their entirety. If, on the other hand, the NYPD is unable to sustain its burden of showing that it is unreasonably difficult to perform the redactions, it will be compelled to turn over all of the videos to [the] petitioner, with redactions as necessary to prevent the disclosure of exempt material.[121]

Court records in a defamation case were improperly sealed by the trial court, the appellate division ruled in *Maxim Inc. v. Feifer*.[122] Here, two media companies, *Hearst Newspapers* and the *New York Daily News*, filed third-party motions to intervene for the sole purpose of gaining access to court records and proceedings for newsgathering or reporting purposes.[123] There is a presumption of openness to both court proceedings and records, which extends to the press, the court held.[124] The court added:

> The right of public access includes the right of the press to read and review court documents, unless those documents have been sealed pursuant to a statutory provision or by a properly issued sealing order.

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116. Time Warner Cable News NY1 v. N.Y.C. Police Dep't (*Time Warner Cable I*), No. 150305/2016, 2017 N.Y. Slip Op. 30707(U), at 1 (Sup. Ct. N.Y. Cty. Apr. 7, 2017); *see* Time Warner Cable News NY1 v. N.Y.C. Police Dep't (*Time Warner Cable II*), 53 Misc. 3d 657, 658, 36 N.Y.S.3d 579, 583 (Sup. Ct. N.Y. Cty. Aug. 1, 2016).

117. *Time Warner Cable I*, 2017 N.Y. Slip Op. 30707(U), at 2.

118. *Time Warner Cable II*, 53 Misc. 3d at 658, 36 N.Y.S.3d at 583.

119. *Id.* at 678, 36 N.Y.S.3d at 597.

120. *Time Warner Cable I*, 2017 N.Y. Slip Op. 30707(U), at 4.

121. *Id.*

122. 145 A.D.3d 516, 518, 43 N.Y.S.3d 313, 316 (1st Dep't 2016).

123. *Id.* at 516, 43 N.Y.S.3d at 315.

124. *Id.* at 517, 43 N.Y.S.3d at 315 (citing Mosallem v. Berenson, 76 A.D.3d 345, 348, 905 N.Y.S.2d 575, 578 (1st Dep't 2010)).

> To allow them to assert their interests here, the proposed intervenors should be allowed to intervene in both actions for the limited purpose of obtaining access to court records . . . .[125]

The underlying litigants improperly sought to seal the records, absent a compelling interest such as trade secrets, proprietary business information, or seriously confidential material.[126]

IV. OTHER ISSUES

A. IIED

1. Commercial Speech

A federal court denied a magazine company's motions to dismiss a suit based on a Michigan law that allows a civil cause of action for the unauthorized sale of data in *Boelter v. Hearst Communications, Inc*.[127] The plaintiffs were subscribers to magazines published by the defendant company, which sold its subscription information to data miners and other companies without the plaintiffs' consent.[128]

The Michigan residents invoked the Michigan Video Rental Privacy Act[129] in New York federal court under diversity jurisdiction.[130] The defendant's motions to dismiss, arguing the statute was an unlawful restriction on its First Amendment rights under the commercial speech doctrine, were rejected, the court ruled, because the law satisfied a substantial government interest that was narrowly tailored and as broad as necessary to achieve the government's goal.[131]

The court wrote:

> The VRPA's data disclosure restrictions directly advance the state's asserted interest in protecting consumer privacy regarding the purchase or rental of videos, audio recordings, and written materials. The statute brings within its ambit the individuals who sell those goods, restricting the reasons for which they can disclose the identifying information they collect about their customers. Preventing the disclosure of consumer data to third parties by sellers—those most likely to possess and collect that information—reduces the likelihood of consumers' private details

125. *Id.* (citing Mancheski v. Gabelli Grp. Capital Partners, 39 A.D.3d 499, 501, 835 N.Y.S.2d 595, 597 (2d Dep't 2007)).

126. *Id.* at 517–18, 43 N.Y.S.3d at 316.

127. 192 F. Supp. 3d 427, 454 (S.D.N.Y. 2016).

128. *Id.* at 435–36.

129. *Id.* at 434; MICH. COMP. LAWS ANN. § 445.1712 (West 2014 & Supp. 2017).

130. *Boelter*, 192 F. Supp. 3d at 442.

131. *Id.* at 448–49, 452.

becoming public.[132]

B. Contracts, Releases, and Reality TV

A breach of contract claim by a man who appeared on the reality TV show *Dog the Bounty Hunter* was properly dismissed because the contract was not ambiguous, the Second Circuit affirmed in *Bihag v. A&E Television Networks, LLC*.[133] Determining a contract's ambiguity is a matter of law and requires the court to determine whether there are multiple meanings to terms used in the contract.[134] The plaintiff had argued that the contract and release did not reflect his intent to waive legal remedies for such causes of action as defamation, invasion of privacy, misrepresentation, or release of his private information through the course of the television show.[135]

The court wrote: "The language of the releases is not ambiguous by any stretch. To the contrary, this language is clear, broad, and dispositive. Bihag is bound by the agreements he voluntarily signed, which expressly bar the claim he has attempted to assert in this case."[136]

In another reality TV dispute, a participant's release between producers of a reality television show and a couple who appeared on the show indemnified the producers from liability for a range of torts and contract damages, a state supreme court held.[137] The plaintiffs, Mark Shoemaker and his wife Nikki Rose, were displeased by their depiction on the show *90 Day Fiancé*, which they believed depicted them falsely and harmed their reputations.[138] They filed a nine-count complaint alleging the defendants—the producers, production companies, and the cable television network that broadcast the show—harmed their reputations, engaged in fraudulent inducement, breach of contract, and intentional infliction of emotional distress.[139]

The show, aired on the TLC Network, is a reality television show that follows the experiences of foreign men and women in pursuit of the "American dream" through the "Nonimmigrant Visa for a Fiancé"

132. *Id.* at 448–49 (citing King v. Gen. Info. Servs., 903 F. Supp. 2d 303, 310 (E.D. Pa. 2012)).

133. 669 F. App'x 17, 19 (2d Cir. 2016).

134. *Id.* at 18 (first citing Albany Sav. F.S.B. v. Halpin, 117 F.3d 669, 672 (2d Cir. 1997); and then citing Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y., 375 F.3d 168, 173 (2d Cir. 2004)).

135. *Id.*

136. *Id.*

137. Shoemaker v. Discovery Commc'ns, LLC, No. 101802/2016, 2017 N.Y. Slip Op. 51208(U), at 3 (Sup. Ct. N.Y. Cty. May 22, 2017).

138. *Id.* at 1.

139. *Id.* at 1–2.

program.[140] The plaintiffs' story of how Nikki emigrated from the Philippines to Maryland to meet Mark, was the subject of at least two episodes of the show's third season.[141] The plaintiffs auditioned for the show and were paid $1,000 for every episode they appeared on.[142]

Prior to their appearance on the show, the "[p]laintiffs signed a 'Participant Agreement and Appearance Release,'" which the court found to contain a valid, comprehensive and general release to hold the producers harmless for liability, damages or claims by the plaintiffs.[143]

The court wrote:

> [T]he Agreement/Release granted [the] Defendants broad rights, authority and discretion to film, edit, dub, alter or combine the material in any manner. By signing the Agreement/Release, [the] Plaintiffs also acknowledged that the show might reveal material that is personal, intimate, embarrassing and could depict them in an unfavorable light and [the] Plaintiffs consented to grant [the] Defendants the right and sole discretion to include such material in their show.[144]

The court rejected the plaintiffs' arguments that they were misled in the lead-up to the show as well as the nature of their agreement with the producers.[145] The court based its dismissal of the complaint on the documentary evidence: the contract between the parties.[146] Further, the court found no evidence of fraud or fraudulent inducement or evidence of bad faith in contract negotiations or in the defendants' representations of its show.[147]

Even on the libel claim, the plaintiffs failed to establish the prima facie elements of the tort.[148] However, the contract again indemnified the defendants from liability.[149] Further, the court held:

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140. *Id.* at 2.

141. *Id.*

142. *Shoemaker*, 2017 N.Y. Slip Op. 51208(U), at 2.

143. *Id.*

144. *Id.*

145. *Id.* at 3–4.

146. *Id.* at 3.

147. *Shoemaker*, 2017 N.Y. Slip Op. 51208(U), at 4 (first citing N.Y.C. Transit Auth. v. Morris J. Eisen, PC, 276 A.D.2d 78, 86, 715 N.Y.S.2d 232, 237 (1st Dep't 2000); and then citing Tierney v. Capricorn Inv'rs, LP, 189 A.D.2d 629, 631, 592 N.Y.S.2d 700, 703 (1st Dep't 1993)).

148. *Id.* at 5. To recover for libel, a plaintiff must prove that the defendants published a false, unprivileged statement about the plaintiff with negligence that causes special harm to the plaintiff's reputation or published in a per se category, such as exposing the plaintiff to contempt or ridicule. *Id.* (first quoting Epifani v. Johnson, 65 A.D.3d 224, 233, 882 N.Y.S.2d 234, 242 (2d Dep't 2009); and then quoting Matovcik v. Times Beacon Record Newspapers, 46 A.D.3d 636, 637, 849 N.Y.S.2d 75, 77 (2d Dep't 2007)).

149. *Id.*

> Here, [the] Plaintiffs' failed to demonstrate a prima facie case for either defamation per se or libel and based on the circumstances of this case, such allegations are not actionable. Furthermore, the Agreement/Release signed by [the] Plaintiffs clearly warned [the] Plaintiffs that the show might reveal material that is personal, intimate and embarrassing and [the] Plaintiffs consented to grant [the] Defendants the right and sole discretion to include any such material in their show.[150]

V. INVASION OF PRIVACY

A. Legislative Action—Right to Be Forgotten

The New York legislature has dipped into the potential constitutional quagmire of the so-called right to be forgotten. Bills were introduced in both the Senate[151] and the Assembly[152] proposing modifications to the Civil Rights Law that would create a right to be forgotten in New York. Though no votes have been taken on the proposed legislation, the senate version was stricken while the assembly bill has been referred to the Government Operations Committee.[153]

The proposed legislation would alter the state's invasion of privacy law, creating § 50-f, which would afford plaintiffs a civil cause of action if search engines, indexers, publishers, or online entities did not remove or take down certain content within thirty days of a request.[154] The proposed law allows for actual monetary loss or a $250 fine, which would be administered through the Secretary of State.[155]

The bill would rectify an individual's reputation that was wrongly diminished through inaccurate information found on the internet.[156] The bill's justification statement states: "This bill seeks to rectify damaged reputation of individuals whose lives have been affected through inaccurate information found online."[157]

Specifically, the bill states content "about the requester, shall

150. *Id.*

151. N.Y. Senate Bill No. 4561, 240th Sess. (2017) (stricken).

152. N.Y. Assembly Bill No. 5323, 240th Sess. (2017).

153. *See* A. 5323 (showing the bill was referred to Governmental Operations); S. 4561 (stricken).

154. A. 5323.

155. *Id.*

156. N.Y. Assembly Bill No. 5323, 240th Sess., Legislative Memorandum of Assemb. Weprin (2017).

157. *Id.*

remove information, articles, identifying information and other content about such individual that is 'inaccurate,' 'irrelevant,' 'inadequate,' or 'excessive.'"[158] The bill acknowledges that the torts of defamation and invasion of privacy have a one-year statute of limitations, which, the justification intimates is unworkable in the modern internet age.[159]

The right to be forgotten has gained traction in Europe and polls suggest Americans support the concept.[160] But scholars believe that such laws' First Amendment implications might render them unconstitutional under American law.[161]

B. Appropriation

Signing a release, cashing checks, and compensating actors for their appearance in a television commercials for a national tutoring/learning center provided sufficient evidence that a contract existed and the plaintiffs consented to being in the commercials, the Second Circuit ruled in *Comolli v. Huntington Learning Centers, Inc.*[162] The Southern District had granted summary judgment, which the appellate court affirmed.[163]

After some difficulty, the defendants were able to submit the releases, which constituted a three-paragraph agreement in the form of a business letter, which included a greeting, "Ladies and Gentlemen" and a complimentary closure, "Very Truly Yours."[164] The document also left spaces for the releasor's name, address, and phone number as well as a space for signatures for guardians should the actor be a minor.[165] More importantly, though, the document's text provides language "categorically consenting" to "use of the releasor's likeness and recorded

158. A. 5323.

159. A. 5253, Legislative Memorandum of Assemb. Weprin (2017).

160. *See* Mario Trujillo, *Public Wants 'Right to Be Forgotten' Online*, HILL, (Mar. 19, 2015), http://thehill.com/policy/technology/236246-poll-public-wants-right-to-be-forgotten-online.

161. *See* Hannah L. Cook, *Flagging the Middle Ground of the Right to Be Forgotten: Combatting Old News with Search Engine Flags*, 20 VAND. J. ENT. & TECH L. 1, 14 (2017) ("In short, Europeans have taken the problem of truthful but misleading information about individuals very seriously, often forcing search engines to remove the links from searches of an individual's name to protect her privacy. Short of rewriting its Constitution, it seems unlikely the United States will follow suit. US law prizes the free flow of information and preserves past reporting of truthful facts even if the availability of the information causes significant harms to individuals.").

162. 683 F. App'x 27, 29–30 (2d Cir. 2017).

163. *Id.* at 28; Comolli v. Huntington Learning Ctrs., Inc., 180 F. Supp. 3d 284, 290 (S.D.N.Y. 2016).

164. *Comolli*, 683 F. App'x at 28.

165. *Id.*

voice."[166]

Applying basic contract law, the court found the signed releases constituted a "valid binding contract[]" through which the plaintiffs consented to the use of their images and likenesses in the commercials.[167] The plaintiff's cashing of the $500 payment check also constituted "objective evidence" of an existing contract, which released the defendants from the strictures of Civil Rights Law §§ 50–51.[168]

Section 50 makes it a misdemeanor to use an image for commercial, advertising, or trade purposes without having first obtained the written consent of each person or guardian of a minor.[169] Further, § 51 grants plaintiffs a private cause of action for such a violation or use of plaintiff's image, likeness, name, portrait, or picture without consent.[170]

The court wrote:

> Whatever the meaning of the Disputed Signature Line, it would be unreasonable for a person printing her name below the valediction to believe that she was not agreeing to the substance of the release. Moreover, Comolli and Williams participated in the commercial, invoiced the producer for their work, and cashed checks in the amount of $500 without reservation, all of which constitutes further objective evidence of their intent to be bound. No reasonable jury could find otherwise.[171]

In state court, a video game with multiple story lines and characters could not be considered advertising for purposes of an invasion of privacy claim under Civil Rights Law § 51, the appellate division ruled in two cases against Take-Two Interactive Software.[172] The appellate division consolidated its ruling, dismissing claims brought by two separate plaintiffs—celebrities Karen Gravano, a reality television star and daughter of a famous organized crime figure, and actress Lindsay Lohan—alleging that the video game Grand Theft Auto V used their likenesses, voices, and images.[173]

Because the video game has a fictional setting (Los Santos) and offers players a variety of characters and eighty storylines, compounded

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166. *Id.*

167. *Id.* at 29.

168. *Id.* at 29–30.

169. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009).

170. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009).

171. *Comolli*, 683 F. App'x at 29–30.

172. Gravano v. Take-Two Interactive Software, Inc., 142 A.D.3d 776, 777, 37 N.Y.S.3d 20, 22 (1st Dep't 2016) (citing Costanza v. Seinfeld, 279 A.D.2d 255, 255, 719 N.Y.S.2d 29, 29–30 (1st Dep't 2016)); *see* CIV. RIGHTS § 51.

173. *Gravano*, 142 A.D.3d at 776–77, 37 N.Y.S.3d at 21.

by the lack of any commercial or advertising elements, the court held that the plaintiffs' arguments failed to meet the standards under § 51.[174] The court also found support from the U.S. Supreme Court's *Brown v. Entertainment Merchants Association*, which equated modern video games with literature, theater, and films to garner protection under the First Amendment.[175] "This video game's unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire," the court wrote.[176] Even an "incidental or ancillary" use of Lohan's image would not be construed as commercial or advertising.[177]

The appellate division also found a convicted murder's appropriation claim against producers of a film based on his case should not have been dismissed by the trial court because the film was not substantially fictionalized, in *Porco v. Lifetime Entertainment Services, LLC*.[178] The plaintiff's conviction for killing his father and attempted murder of his mother was the basis for the Lifetime movie *Romeo Killer: The Christopher Porco Story*.[179] The trial court dismissed the case and a restraining order because the film was deemed newsworthy, even as a fictionalized account of the high-profile criminal case.[180]

Correspondence between a producer and the plaintiff's mother, who was also a victim of the crime, raised questions about whether the film was a fictionalized account of a true story, which would have had constitutional immunity.[181]

Considering the foregoing and the standard of review on a motion to

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174. *See id.* at 776–77, 37 N.Y.S.3d at 21–22 (citing *Costanza*, 279 A.D.2d at 255, 719 N.Y.S.2d at 30–31); CIV. RIGHTS § 51.

175. *Gravano*, 142 A.D.3d at 777, 37 N.Y.S.3d at 22 (quoting 564 U.S. 786, 790 (2011)).

176. *Id.*

177. *Id.* at 778, 37 N.Y.S.3d at 22 (citing *Costanza*, 279 A.D.2d at 255, 719 N.Y.S.2d at 30–31). The Court of Appeals granted Lohan's motion for leave to appeal, though it did not publish an opinion. Gravano v. Take-Two Interactive Software, Inc., 28 N.Y.3d 915, 74 N.E.3d 678, 52 N.Y.S.3d 293 (2017).

178. *See* 147 A.D.3d 1253, 1255–56, 47 N.Y.S.3d 769, 772 (3d Dep't 2017) (first citing Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 129, 233 N.E.2d 840, 843, 286 N.Y.S.2d 832, 836 (1967); and then citing Binns v. Vitagraph Co. of Am., 210 N.Y. 51, 56, 103 N.E. 1108, 1110 (1913)).

179. *Id.* at 1253, 47 N.Y.S.3d at 770 (citing People v. Porco, 71 A.D.3d 791, 791–92, 896 N.Y.S.2d 161, 162 (2d Dep't 2010)).

180. Porco v. Lifetime Entm't Servs., LLC, 48 Misc. 3d 419, 423, 9 N.Y.S.3d 567, 571 (Sup. Ct. Clinton Cty. 2015) (denying the defendant's motion to dismiss).

181. *Porco*, 147 A.D.3d at 1255–56, 47 N.Y.S.3d at 772 (first citing *Spahn*, 21 N.Y.2d at 129, 233 N.E.2d at 843, 286 N.Y.S.2d at 836; and then citing *Binns*, 210 N.Y. at 56, 103 N.E. at 1110).

> dismiss, we cannot say that [the] plaintiff has failed to sufficiently allege the same degree of fictionalization or the same degree of [the] defendant's knowledge of such fictionalization as that which has been found to violate the statutory right of privacy without running afoul of constitutional protections of speech,

the court held.[182]

A federal court rejected a strip club's motion to dismiss a far-reaching complaint by a group of fifty models and actresses who say their images and likenesses were misappropriated in promotional materials used by the strip club.[183] The court did dismiss a number of counts on a variety of claims including defamation, negligence, conversion, unjust enrichment, and quantum meruit.[184]

The plaintiffs complained that their images—107 in all—were used without consent on the strip club's websites and social media, creating a false impression that the plaintiffs danced, appeared, or endorsed the Scores Club, either in New York or other locations.[185] The court rejected the defendants' argument that the case should be dismissed under the one-year statute of limitations.[186] The court also questioned the defendants' procedural arguments because the digital images appeared on the internet, not necessarily in New York, "[g]iven their ubiquitous availability in the State of New York."[187]

Invoking a person's name in the course of an ongoing verbal feud between hip-hop artists playing out on a live radio show was not sufficiently commercial to constitute an invasion of privacy under New York law, a federal court ruled.[188] The lawsuit here emanated from a dispute between the plaintiff, a former radio host and hip-hop star, who was involved in a verbal spat that played out on a radio show interview between the defendant, a rapper named Jayceon Taylor, known as The

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182. *Id.* (first citing *Spahn*, 21 N.Y.2d at 129, 233 N.E.2d at 843, 286 N.Y.S.2d at 836; and then citing *Binns*, 210 N.Y. at 56, 103 N.E. at 1110).

183. Voronina v. Scores Holding Co., No. 16-cv-2477(LAK), 2017 U.S. Dist. LEXIS 1858, at *19 (S.D.N.Y. Jan. 5, 2017).

184. *See id.* at *19. The plaintiffs were unable to successfully argue that the claims were libelous per se because the facts did not fit into any of the claim's categories. They argued that their reputations were injured by a false affiliation with the strip clubs. Further, the plaintiffs were unable to establish that extrinsic facts would support their claims for defamation either. Thus, the count was dismissed without prejudice. *Id.* at *18–*19.

185. *Id.* at *14.

186. *Id.* at *14; *see* N.Y. C.P.L.R. 215(3) (McKinney 2003 & Supp. 2018).

187. *Voronina*, 2017 U.S. Dist. LEXIS 1858, at *15.

188. Torain v. Casey, No. 16-cv-2682(VEC)(JCF), 2016 U.S. Dist. LEXIS 127681, at *21–*22 (S.D.N.Y. 2016) (dismissing based on Federal Rule of Civil Procedure 12(b)(6)); Torain v. Casey, No. 16-cv-2682(VEC)(JCF), 2016 U.S. Dist. LEXIS 157693, at *1 (S.D.N.Y. 2016) (order adopting report and recommendation).

Game, and the radio station and network, iHeart Media.[189] The plaintiff was referred to by his name by the defendant, who also made several threatening comments toward the plaintiff.[190] The plaintiff also filed a police report regarding the threats of violence.[191] In the exchange with the interviewer, the defendant said, among other things, "Dude, I'll break your jaw dude."[192]

The civil privacy matter, however, proved unavailing for the plaintiff, because the court could not find that invocation of his name on the air was a commercial or advertising use.[193] Most directly, the court wrote,

> [N]ot every unauthorized use of an individual's name in connection with trade or advertising constitutes a violation of [§] 51. To trigger liability, the use of the name must not only be "sufficiently related to a commercial end or mercantile rewards," but must also play a significant role in the "purpose and subject of the work."[194]

The plaintiff's intentional infliction of emotional distress claim was also dismissed because he was unable to establish that the on-air comments violated the tort's prima facie elements of "(1) extreme and outrageous conduct; (2) intent to cause emotional distress; (3) [with] a causal connection. . .[to] the injury; and (4) severe emotional distress."[195] The court said "the defendant's actions do not approach the type of egregious conduct necessary to support a claim for intentional infliction of emotional distress."[196]

189. *Torain*, 2016 U.S. Dist. LEXIS 127681, at *2–*3.

190. *Id.* at *3.

191. *Id.* at *4.

192. *Id.* at *3–*4.

193. *Id.* at *7–*8 (quoting Beverley v. Choices Women's Med. Ctr., Inc., 78 N.Y.2d 745, 751, 587 N.E.2d 275, 278, 579 N.Y.S.2d 637, 640 (1991)); *see* Morse v. Studin, 283 A.D.2d 622, 622, 725 N.Y.S.2d 93, 94 (2d Dep't 2001).

194. *Torain*, 2016 U.S. Dist. LEXIS 127681, at *10 (quoting Preston v. Martin Bregman Prods., Inc., 765 F. Supp. 116, 119 (S.D.N.Y. 1991)) (first citing N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009); then citing Damron v. Doubleday, Doran & Co., 133 Misc. 302, 303, 231 N.Y.S. 444, 445 (Sup. Ct. N.Y. Cty. 1928); and then citing Zoll v. Jordache Enters., No. 01-Civ-1339(CSH), 2003 U.S. Dist. LEXIS 6991, at *55 (S.D.N.Y. 2003)).

195. *Id.* at *11 (citing Guan N. v. N.Y.C. Dept. of Educ., 11-Civ-4299(AJN), 2013 U.S. Dist. LEXIS 2204, at *74 (S.D.N.Y. 2013)).

196. *Id.* at *12.