# MEDIA LAW

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## INTRODUCTION

This year's Survey covers an array of media law issues and litigants across state and federal courts in New York. Many of these cases involve high-profile disputes and high-profile litigants. These cases

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have implications on First Amendment and free speech rights. Though the Court of Appeals did not issue any significant decisions on these issues, there were many at the Appellate Division and the Second Circuit Court of Appeals. A number of cases this year focused on application of New York's anti-SLAPP statute.

## I. FIRST AMENDMENT AND PRIOR RESTRAINTS

A lawyer seeking to prevent Amazon from publishing allegedly defamatory statements in an online registry service could not secure an injunction, a federal court ruled in *Weitao Chen v. Amazon.com, Inc*.[1] The court rejected the defamation claim outright because the plaintiff could not establish any specific false and harmful language about him.[2]

The most forceful part of the opinion involved rejecting the preliminary injunction, which the court recognized as "an extraordinary and drastic remedy," especially when it involves some sort of media and expression.[3] A preliminary injunction requires the moving party to: 1) show likelihood of success on the merits; 2) likelihood of irreparable harm; 3) that the equities balance in the movant's favor; and 4) that an injunction is in the public interest.[4]

Noting the courts' antipathy for to grant injunctions in defamation cases, the court called it "blackletter law."[5] The court wrote, "[a]nd, even in those unusual circumstances where defamation cannot be remedied by damages, courts must contend with 'the First Amendment's heavy presumption against prior restraints.'"[6]

In another case, though involving modern media but no outright media parties, a state court granted an injunction. Here, a litigant's website dedicated to tracking court filings and other developments in a lawsuit between two companies was taken down after one of the litigants was granted a preliminary injunction by a state court judge in *Evaate LLC v. Portfolio BI, Inc*.[7] Though the litigants in this case are

1. Weiato Chen v. Amazon.com, Inc., No. 23-cv-05324, 2023 U.S. Dist. LEXIS 201835, at *1 (E.D.N.Y. Nov. 9, 2023).

2. *Id*. at *10–12.

3. *Id*. at *5 (quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)).

4. *Id*. at *5 (citing Am. C.L. Union v. Clapper, 804 F.3d 617, 622 (2d Cir. 2015)).

5. *Id*. at *7.

6. *Id*. at *6–7 (quoting Metro. Opera Ass'n v. Loc. 100 Hotel Emps. & Rest. Emps. Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001)).

7. Evaate LLC v. Portfolio BI, Inc., No. 650125/2022, 2023 N.Y. Misc. LEXIS 9601, at *10–11 (Sup. Ct. N.Y. Cty. Oct. 19, 2023).

not media entities, the dispute over the website is reflective of contemporary times where anyone and everyone has access to global exposure through a website.

The preliminary injunction was actually filed by the defendant in the underlying lawsuits in both New York and Delaware litigating a business consultation agreement gone bad, which included an anti-disparagement clause.[8] The novelty here also extends to the nature of many postings on the website which were either court filings, drawn from court filings or summaries of court filings, including a press release.[9] Many postings would have been protected under Section 74 as a fair and accurate report, the fact that some statements were disparaging under terms of the underlying contract.[10]

The court's analysis of the standards for an injunction presents the most critical point of discussion. A preliminary injunction requires: 1) demonstration that the party seeking the injunction establishes the likelihood of success on the underlying claim; 2) that the party will suffer immediate and irreparable harm; and 3) that the balance of equity "tips" in the party's favor.[11]

The disparaging nature of the website and its information satisfied the first prong, the court held.[12] Notably, the court wrote:

> Because the Website and the Press Release contain statements that do not appear to be subject to the protection of the litigation privilege or of Section 74 of the New York Civil Rights Act, and because the Website and Press Release contain statements that may be derogatory or disparaging, [defendant] has demonstrated a likelihood of success on the merits of the claim.[13]

The moving party posted a $10,000 bond and the website was ultimately taken down.[14]

8. *Id*. at *2.
9. *See id*. at *2, *3.
10. *See id*. at *5.
11. *See id*. at *3.
12. *Evaate LLC*, 2023 N.Y. Misc. LEXIS, at *8–9.
13. *Id.* at *9.
14. *See id*. at *10.

## II. DEFAMATION

### *A. Elements*

A doctor-activist with a large social media following and large media presence was deemed a limited purpose public figure by a trial court dismissing his defamation complaint against the online news site, Vox, which operated The Verge, in *Gu v. Verge*.[15]

The plaintiff argued a news profile had seven false statements about him, which included descriptions of alleged sexual abuse, domestic violence and workplace interpersonal disputes.[16] The statements, however, were deemed substantially true and published without the requisite level of actual malice as required for such plaintiffs with an extensive public profile, the court held.[17] The plaintiff also included an unsuccessful intentional infliction of emotional distress claim.[18]

The court granted the defendant's motion to dismiss under both CPLR 3211(a)(1) and (a)(7) for failure to state a claim and failure to provide adequate documentary proof of false and defamatory material.[19]

The court recited the prima facie elements of a defamation claim, which requires proof of publication of a false statement of fact about the plaintiff, published without privilege with either special damages or per se harm.[20] Going through each of the seven counts, the court found that many of the statements were substantially true while others were vague, possibly opinion and still other facts were drawn from public records.[21]

15. Gu v. Verge, No. 15239/2020, 2023 N.Y. Misc. LEXIS 3519, at *37 (Sup. Ct. N.Y. Cty. July 18, 2023).

16. *See id*. at *7, *37.

17. *See id*. at *37 ("Accordingly, because Dr. Gu is a limited purpose public figure for purposes of the Article, and because the amended complaint does not support an inference of actual malice, the defamation claim must be dismissed on this separate and independent ground as well.")

18. *See id*. at *37–39.

19. *See id*. at *12–13; N.Y. C.P.L.R. 3211(a)(1), (a)(7) (McKinney 2024).

20. *Gu*, 2023 N.Y. Misc. LEXIS 3519, at *13–14 (citing C.P.L.R. 3211(a)(1), (a)(7)).

21. *See id*. at *14–28. Some allegations were drawn from court records and were privileged under Section 74. *See* N.Y. CIV. RIGHTS LAW § 74 (McKinney 2024).

"Where, as here, a plaintiff cannot identify a defamatory false statement of fact, dismissal is appropriate under CPLR 3211," the court held.[22]

Further, on the issue of substantial truth, the court aptly summarized that the statements about previous domestic violence, characterized in the text and the headline or subhead, "is substantially true" because the plaintiff did not necessarily object to the content, but he did not like the inference.[23]

Finally, on the issue of actual malice, also an important factor in the dismissal, the court noted that there was no evidence that the reporter or publisher published false statements with knowledge of falsity or reckless disregard for the truth.[24] The court explained, "In order to protect speech on matters of public concern, the law of defamation distinguishes between private figures and officials and public figures—i.e., those who by their engagement with public life or public controversies expose themselves to greater criticism."[25]

The reporter's work on gathering the story, which included interviewing multiple parties, referencing public records and the plaintiff's public profile, including social media did not come close to actual malice.[26] The court added, "defendants repeatedly sought his comment, considered his side of the story, and included multiple viewpoints throughout the Article. This is the opposite of actual malice."[27]

In an appellate division case, a disgruntled tenant's sign in her window warning prospective tenants about alleged poor conditions in the building could carry a false, factual connotation, the court affirmed in *Tcharnyi v. Mendez*.[28] Though this case did not involve media entities, it presented a novel question about whether a sign could be subject of an anti-SLAPP motion for dismissal as an example of free speech "in furtherance of the exercise of the constitutional right of petition."[29]

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22. *Id*. at *16 (citing Jimenez v. United Fed'n of Teachers, 657 N.Y.S.2d 672, 673 (App. Div. 1st Dep't 1997)).

23. *Id*. at *18–19.

24. *See id*. at *30.

25. *Gu*, 2023 N.Y. Misc. LEXIS 3519, at *30 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)).

26. *Id*. at *34–37 (citing Biro v. Condé Nast, 963 F. Supp. 2d 255, 258 (S.D.N.Y. 2013)).

27. *Id.* at *37.

28. Tcharnyi v. Mendez, 201 N.Y.S.3d 114, 115 (App. Div. 2d Dep't 2023).

29. *Id.* (quoting N.Y. CIV. RIGHTS LAW §76-a(1)(a)(1) (McKinney 2025)).

The appellate division did not think that the underlying matter rose to the level of an anti-SLAPP suit.[30]

The court also recited the four prima facie elements for defamation: 1) a false statement of fact that exposes the plaintiff to public contempt, hatred, ridicule, aversion or disgrace; 2) published without privilege; 3) with fault; and 4) either special harm or damages or per se liability.[31]

### *B. Libel per se*

A critical online review alleging that a dog groomer's negligence led to a dog's death was not a matter of public concern as defined by the anti-SLAPP law, the appellate division affirmed in *VIP Pet Grooming Studio, Inc. v. Sproule*.[32] In 2020, the defendants, the Sproules, posted on Yelp and Google a detailed and lengthy critique of the dog groomer after their dog, Ranger, suffered a medical issue at the plaintiff's grooming business.[33] A veterinarian later determined the dog had water in its lungs, likely the result of some mishap during the bath at the groomers.[34]

This inspired dueling lawsuits: the Sproules filed a claim for damages for the dog's death and the groomer later sued them for defamation.[35] In the defamation suit, the defendants filed for dismissal based on the anti-SLAPP statute, arguing that the 2020 amendments which broadened the definition of matters of public interest and public participation applied to their online critique and characterization of the dispute with the groomer.[36]

Because the defendants' posting was published after the 2020 amendments were passed, they argued that the statute should be applied retroactively to their controversy.[37] Even though the court went through a lengthy discussion and analysis of the statute and its

30. *Id.*

31. *See id.* at 116 (citing Joo Tae Yoo v. Choi, 179 N.Y.S.3d 326, 328 (App. Div. 2d Dep't 2022)).

32. VIP Pet Grooming Studio, Inc. v. Sproule, 203 N.Y.S.3d 681, 683–84 (App. Div. 2d Dep't 2024).

33. *See id.* at 684.

34. *See id.*

35. *See id.*

36. *See id.* at 684–85.

37. *VIP Pet Grooming Studio, Inc.*, 203 N.Y.S.3d at 686.

legislative history with a review that other courts have held the statute to be retroactive,[38] the court held that it was not applicable to this case.[39]

The underlying dispute between the dog's owners and the groomer was not the type of matter of public concern intended for protection under the SLAPP statute, the court held.[40] The original 1992 statute and its 2020 amendments, though they involve a broadened application of matters of public interest, the court said it should only be applied "to matters involving only public applicants and permittees, and did not apply to a broader universe of defendants such as the Sproules."[41]

The appellate division also delved into tenets of substantive libel law, specifically addressing a nuanced element of law involving a "single instance of professional error."[42] This is part of a defense involving defamation per se, which does not require proof of damages when the defamatory statement tends to injure the plaintiff's reputation in business or trade.[43] The falsity must cause harm, which the court also recited as "a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace . . . ."[44] Most defamation claims also require proof of special damages, provable monetary loss attributable to the false published statement.[45]

The court wrote:

> Here, special damages are not specifically alleged. But accepting the facts as alleged in the complaint to be true and according to the plaintiff the benefit of every possible favorable inference, as we must, the complaint states a cause of action. The alleged defamatory statements exceed a simple allegation of mere mistake or lapse of judgment on a single occasion, as they describe

38. *See id.* at 687–88 (citing Palin v. N.Y. Times Co., 510 F. Supp. 3d 21, 27 (S.D N.Y. 2020); Sackler v. American Broadcasting Cos., Inc., 144 N.Y.S.3d 529, 532–33 (Sup. Ct. N.Y. Cty. 2021)).

39. *See id.* at 689.

40. *See id.*

41. *Id*. at 690.

42. *VIP Pet Grooming Studio, Inc.*, 203 N.Y.S.3d at 690 (applying D'Agrosa v. Newsday, 558 N.Y.S.2d 961, 966 (App. Div. 2d Dep't 1990) (requiring proof of special damages in cases alleging that a single instance or reference is false and defamatory)).

43. *See id.*

44. *Id.* at 690 (citing Bowen v. Bramer, 168 N.Y.S.3d 107, 109 (App. Div. 2d Dep't 2022)).

45. *Id.*

> the alleged causation of Ranger's death, VIP's subsequent alleged abusive behavior, and threats of legal and financial ruin allegedly made to the Sproules, thereby indicating a lack of character and unfitness by VIP in its profession.[46]

The court also rejected the defendants' opinion defense.[47]

In another case, the ongoing saga emanating from Mariah Carey's memoir, *The Meaning of Mariah Carey*, continued with another trial court ruling in *Carey v. Carey*.[48] The earlier opinion, extensively covered in last year's Survey, dismissed several counts, but let three statements proceed as libel per se.[49] This latest decision focuses on the mechanics of the litigation, including the validity of a lawyer affidavit and other filings.[50]

The court dismissed one of the remaining counts, which focused on a passage in the book detailing plaintiff's purported threat to commit an act of violence, because plaintiff did not properly plead the claim as either defamation per se or defamation with special damages.[51] The court rejected plaintiff's motion for summary judgment on the remaining count, which involved allegations of criminal activity and drug dealing because there were factual questions that should be addressed—proven or disproven—at trial, the court held.[52] There were still matters of the truth defense and whether statements were published with actual malice, the court also noted.[53]

### *C. Actual Malice*

A businessman who was subject of a ProPublica article describing a range of sexual misconduct allegations was unable to prove that statements were published with actual malice, the appellate division affirmed in *Zeitlin v. Cohan*.[54] Because the plaintiff, a CEO who had been appointed to a United Nations position and withdrew, was a public figure and involved in matters of public interest, the trial court

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46. *Id.* at 691 (citing Perez v. Lopez, 948 N.Y.S.2d 312, 313–14 (App. Div. 2d Dep't 2012)).

47. *See id.* at 691–92.

48. Carey v. Carey, No. 152192/2021, 2024 N.Y. Misc. LEXIS 1807, at *1 (Sup. Ct. N.Y. Cty. Apr. 12, 2024).

49. *See id*. at *6; *see also* Roy S. Gutterman, *2022–23 Survey of New York Law: Media Law*, 73 SYRACUSE L. REV. 849, 852–54 (2023).

50. *See Carey*, 2024 N.Y. Misc. LEXIS 1807, at *5.

51. *See id.* at *7–8.

52. *See id.* at *12.

53. *See id.* at *13–14.

54. Zeitlin v. Cohan, 197 N.Y.S.3d 211, 212 (App. Div. 1st Dep't 2023).

dismissed the claim on a pre-answer anti-SLAPP motion, which requires the plaintiff to establish that statements were published with actual malice.[55]

The reporting, which was based on interviews with multiple sources, including an accuser and the plaintiff himself who denied the allegations, did not come close to meeting the exacting standard of publication with known falsity or reckless disregard for the truth, the court held.[56] The article "flatly contradicts" actual malice while the plaintiff's denial "cuts against the allegedly defamatory implication," the court held.[57]

The court concluded:

> [P]laintiff's allegations of actual malice rest largely on his own statements – for example, his assertion that it is 'inherently improbable' that he would have 'terrorized' the woman or that he would have engaged in 'pedophilia' (a word that does not, in fact, appear in either the article or the email).[58]

A film producer and acting coach who was kicked out of a Facebook group after accusations of sexual harassment surfaced could not prove he was defamed with actual malice, a district court held in *Margolies v. Rudolph*.[59] This was the plaintiff's second amended complaint and the court held that although he established a prima facie case, he could not prove that the online comments explaining his expulsion from the Facebook group was made with knowledge or reckless disregard for the truth.[60] His denials of the accusations were not the same as knowledge of falsity.[61]

The court wrote:

> [T]here is nothing in the Facebook Post that suggests that Rudolph is referring to [the accuser's] allegations, as opposed to allegations made by another. And it is Margolies's burden to provide something—even with extrinsic evidence—that allows the Court to draw the

55. *See id.* at 212–13 (applying N.Y. CIV. RIGHTS LAW § 76-a(1)(d) (McKinney 2024)).

56. *See id.* at 632–33.

57. *Id.* (quoting Lindberg v. Dow Jones & Co., No. 20-cv-8231, 2021 U.S. Dist. LEXIS 226987, at *17 (S.D.N.Y. Nov. 22, 2021).

58. *Id.*

59. Margolies v. Rudolph, No. 21-CV-2447, 2023 U.S. Dist. LEXIS 167553, at *2–3 (E.D.N.Y. Sept. 20, 2023).

60. *See id.* at *25.

61. *See id.* at *15.

> inference that the Facebook Post is referring to [the accuser] and not some other set of allegations made by someone else.[62]

The defamation claim was dismissed as was a tortious interference with contract claim.[63]

In another case, an article in an online newspaper/website alleging a range of criminal and fraudulent activity by the plaintiff, a real estate broker, could have been published with actual malice, a state trial court ruled in *Bhuiyan v. Chinta*.[64] The online newspaper which served the Bangladeshi community was deemed a legitimate public forum covering a matter of public interest for purposes of the pre-answer SLAPP motion to dismiss.[65] The court wrote, "[t]he Article falls under the SLAPP statute because it was posted in a public forum, the internet website of the newspaper *Chinta*, and relates to a matter of public interest, the integrity of the Plaintiff as a real estate salesperson."[66]

However, the plaintiff was able to overcome the motion because he claimed that he never spoke with the reporter or anyone from the publication, despite depictions in the article intimating that he did.[67] This, the court noted could be proof of publication with known falsity or reckless disregard for the truth under the actual malice rule.[68] Thus, the plaintiff refuted the motion to dismiss.[69]

In another case, a miscaptioned photograph mistakenly identifying the plaintiff as a convicted criminal was not published with actual malice, a court ruled in *Javino v. Newsday*.[70] The court dismissed the defamation and defamation per se claims.[71]

The newspaper erroneously published plaintiff's photo, incorrectly identifying him as a different man, Timothy Juettner, a

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62. *Id.* at *18.

63. *See id.* at *31.

64. Bhuiyan v. Chinta, No. 715403/2022, 2023 N.Y. Misc. LEXIS 12928, at *12 (Sup. Ct. N.Y. Cty. 2023).

65. *See id.* at *8–9 (citing Aristocrat Plastic Surgery, P.C. v. Silva, 169 N.Y.S.3d 272, 275 (App. Div. 1st Dep't 2022)).

66. *Id.* at *9 (citing *Aristocrat Plastic Surgery, P.C.*, 169 N.Y.S.3d at 275).

67. *See id.* at *12.

68. *See id.*

69. *See Bhuiyan*, 2023 N.Y. Misc. LEXIS 12928, at *12.

70. Javino v. Newsday LLC, No. 607954/2023, 2023 N.Y. Misc. LEXIS 32486, at *7 (Sup. Ct. N.Y. Cty. Sept. 7, 2023).

71. *See id.* at *8.

fisherman and boat captain, who had just been sentenced in federal court for illegally sinking a ship in the Atlantic Ocean off Long Island.[72]

The story was clearly a matter of public interest, the court ruled, because it involved a high-profile, newsworthy criminal matter and criminal sentencing in federal court.[73] But because federal courts do not allow cameras, photography, or recording in their courtrooms or the buildings themselves, the reporter and freelance photographer had to scramble outside the building to attempt to photograph Juettner, the subject of the story, but instead mistakenly photographed the plaintiff and published his photograph in the newspaper.[74]

The court accepted the newspaper's anti-SLAPP motion and dismissed the claim because a general mistake is not the same as actual malice.[75] The newspaper also published a correction in both the print and online editions.[76] The court aptly summarized the issue: "While the mis-captioning of the photograph in the subject article is hardly the model of journalistic professionalism, based upon the submitted papers, it was a mistake, or at worst, negligence; however, a mistake and/or negligence is insufficient to demonstrate actual malice as a matter of law."[77]

In another federal case, reporters' use of confidential or anonymous sources for an investigative news article and a publisher's alleged political leanings did not amount to actual malice, the Southern District ruled in *Prince v. The Intercept*.[78] The court dismissed the defamation case.[79] This case involved a news article about the plaintiff, a former Navy SEAL and businessman, which he said depicted him as an international criminal, alleging clandestine meetings and business deals with international mercenary groups and other hostile entities.[80] The article was published by The Intercept, a news outlet founded and funded by Pierre Omidyar, the founder of eBay, who the plaintiff argued has a left-leaning political agenda.[81]

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72. *See id.* at *1, *4.
73. *See id.* at *4.
74. *See id.* at *6–7.
75. *See Javino*, 2023 N.Y. Misc. LEXIS 32486, at *7–8.
76. *Id.* at *1.
77. *Id.* at *7 (citing Palin v. N.Y. Times Co., 940 F.3d 804, 815 (2d Cir. 2019)).
78. Prince v. The Intercept, No. 21-CV-10075, 2023 U.S. Dist. LEXIS 119974, at *26, *39 (S.D.N.Y. July 12, 2023).
79. *See id.* at *39–40.
80. *See id.* at *3–6.
81. *See id.* at *3–4, *8.

In an earlier proceeding, the court found plaintiff to be a limited purpose public figure, which would then require proof that the article was published with actual malice, either known falsity or reckless disregard for the truth.[82] Thus, the plaintiff focused his case on the publisher's political leanings and the use of the unnamed sources throughout the article.[83] The plaintiff made arguments that the bias in the article was tantamount to common law malice or ill will, which is not an element of the Constitutional rule of actual malice.[84]

The court held:

> Plaintiff's allegations regarding Cole's conduct do not rise to the level of purposeful avoidance of the truth. Despite Plaintiff's assertions, he cites no authority for the proposition that reporters must give the subject of their reporting "information upon which to verify their allegations" or otherwise expose themselves to . . . a finding of actual malice. Plaintiff does not allege any other specific faults with Cole's reporting process beyond his reliance on anonymous sources, which is also insufficient in itself to raise an inference of actual malice.[85]

### *D. Fair & Accurate Reports Under N.Y. Civil Rights Law § 74*

Television coverage and an online news story based on a Metropolitan Transit Authority press conference discussing an employee's termination was privileged under the fair and accurate report privilege, the appellate division affirmed in *Rosati v. Altice USA, Inc*.[86] The plaintiff, an assistant conductor who was suspended because of his participation in the January 6, 2021, riot at the U.S. Capitol in Washington, argued he had been defamed by the news accounts.[87]

The trial court granted the defendant's motion to dismiss under the SLAPP law, and also denied plaintiff's motion to conduct discovery, which is normally suspended for SLAPP motions.[88]

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82. *See id.* at *2, *16 (quoting Biro v. Condé Nast, 807 F.3d 541, 544 (2d Cir. 2015)).

83. *Prince*, 2023 U.S. Dist. LEXIS 119974, at *7–10.

84. *See id.* at *18–19 (quoting *Biro*, 963 F. Supp. 2d at 277).

85. *Id.* at *36.

86. Rosati v. Altice USA, Inc., 208 N.Y.S.3d 228, 230 (App. Div. 2d Dep't 2024) (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2024)).

87. *See id.*

88. *Id*. at 230–31 ("Here, the Supreme Court properly denied the plaintiff's motion for leave to conduct discovery because the plaintiff failed to satisfy the

The appellate division ruled that the MTA press conference fell under Section 74's privileging provisions for coverage of official government proceedings, which also includes judicial and legislative proceedings and their accompanying paper trail.[89] "Here, the news article and the televised news report were both substantially accurate reports of the press conference," the court added.[90]

### *E. Opinion*

Actor and personality Michael Rapaport's public dispute with a former employer, Barstool, which included a raft of insults and other offensive barbs was not defamatory and was non-actionable "pure opinion," the Second Circuit affirmed in *Rapaport v. Barstool Sports Inc*.[91] The fight across multiple media platforms, including social media, SiriusXM radio, blogs, and other media emanated from an employment dispute between Rapaport and his former employer, Barstool, a media entity known for raunchy and "unfiltered" content on politics, sports, and pop culture.[92]

Rapaport claimed he was defamed by a broad range of statements including some accusing him of criminal activity including stalking, fraud, and domestic violence as well as racist behavior and having herpes.[93]

The district court denied the plaintiff's summary judgment motion and granted the defendants, which the Second Circuit affirmed.[94] Both courts honed in on the context of the content: a modern media platform known less for its factual content and more known for providing a forum for opinions of their media personalities and for viewers and listeners.[95]

The court laid out the legal prongs for determining whether a statement is susceptible to a defamatory meaning or whether it is protected pure opinion.[96] New York applies a three prong analysis: 1)

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requirements under CPLR 3211 (g) (3) by specifying the reasons and the essential facts he could not present to justify his opposition to the defendant's motion.").

89. *See id*. at 230.

90. *Id.*

91. Rapaport v. Barstool Sports Inc., No. 22-2080-cv, 2024 U.S. App. LEXIS 556, at *14 (2d Cir. Jan. 9, 2024).

92. *See id*. at *2–3.

93. *See id*. at *6.

94. *Id*. at *1. The lower court opinion was discussed in detail in Roy S. Gutterman, *2021–22 Survey of New York Law: Media Law*, 72 SYRACUSE L. REV. 959, 967–68 (2022).

95. *See Rapaport*, 2024 U.S. App. LEXIS 556, at *8–9.

96. *See id.* at *5.

whether there is a precise, readily understood meaning; 2) whether the statements can be proven true or false; and 3) whether given the full context of the communication or the broader social context and surrounding circumstances signal to the reader (or viewer or listener) that the statements are "likely to be opinion, not fact."[97]

The Second Circuit affirmed that some published statements, such as the accusations of fraud and racism were not capable of being proven true or false and "lack a clearly defined meaning and, in this context, are incapable of being objectively proven true or false."[98]

The court paid special attention to the venue where fact and truth are not common components, but vulgar, name-calling is commonplace, writing "The nature and tone of the surrounding language can function as a strong indicator to the reasonable reader that the statement is not expressing or implying any facts."[99]

In a state appellate division decision, a building complex's manager and general superintendent could not prove that online comments about them were defamatory, the court held in *North Short Towers Apartments Inc. v. Kozminsky*.[100] Though this case did not involve media litigants, the alleged defamatory statements emerged from the defendant's postings on the website NextDoor.com, surrounding the election of the apartment building's board of directors.[101]

The opinion does not specify the exact statements at issue, but characterized the defendant's statements as non-actionable opinion, rhetorical hyperbole and statements that could not be proven true or false because they lacked precise meaning.[102] "Given the context and tone of these statements, a reasonable reader would have concluded that they were reading opinions rather than facts about the plaintiffs," the court wrote.[103]

In another case, a dentist's defamation lawsuit based on a negative online review was dismissed because not only was the case inappropriately filed as a personal injury suit in small claims court, but also

97. *Id*. at *5 (quoting Brian v. Richardson, 660 N.E.2d 1126, 1129 (N.Y. 1995)).

98. *Id*. at *7 (citing Buckley v. Littell, 539 F.2d 882, 894 (2d Cir. 1976)).

99. *Id*. at *12 (citing 600 W. 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 937 (N.Y. 1992)).

100. North Shores Towers Apartments Inc. v. Kozminsky, 193 N.Y.S.3d 310, 312–13 (App. Div. 2d Dep't 2023).

101. *See id.* at 312.

102. *See id.* at 313 (citing Bd. of Managers of Brightwater Towers Condo. v. Vitebsky, 170 N.Y.S.3d 879, 880 (App. Div. 2d Dep't 2022)).

103. *Id*. (citing *Bd. of Managers of Brightwater Towers Condo.*, 170 N.Y.S.3d at 880).

because it attempted to hold a critic liable for a protected opinion, a trial court ruled in *Benievi v. Rukal*.[104]

The Google Review was deemed protected opinion and not actionable under defamation law and was also dismissed under the anti-SLAPP law, the court ruled.[105] The court held that the type of punitive action generated by this type of lawsuit "is the very type of litigation proscribed by" the anti-SLAPP law and the critique was an expression of protected opinion regarding dental treatment, also protected under the statute.[106]

### *F. Section 230/Social Media*

A court's designation of social media platforms as products rather than communicative platforms was central in the denial of a motion to dismiss a lawsuit seeking to hold social media entities like Facebook responsible for facilitating the racist mass shooting at a Buffalo supermarket in 2022, a trial court held in *Patterson v. Meta Platforms, Inc*.[107] The shooter, the plaintiffs claimed, was indoctrinated and incited by racist postings on social media.[108]

The plaintiffs invoked a broad slate of tort liability theories and causes of action including strict products liability for defective design and failure to warn, negligence, invasion of privacy and negligent and intentional infliction of emotional distress.[109]

The court rejected the platforms' motion to dismiss based on Section 230 of the Communications Decency Act, which affords interactive computer services, such as social media platforms, immunity for liability for material posted by third-party users.[110]

The characterization of the social media platforms as "products," is a novel approach to the framing and liability, which could remove Section 230 immunity.[111]

The court wrote:

> Many of the social media/internet defendants have attempted to establish that their platforms are mere

104. Benlevi v. Rukaj, No. SC-000806-24/NY, 2024 N.Y. Misc. LEXIS 2304, at *5–6 (N.Y. Civ. Ct. N.Y. Cty. May 21, 2024).

105. *See id.*

106. *See id.*

107. Patterson v. Meta Platforms, Inc., No. 805896/2023, 2024 N.Y. Misc. LEXIS 2312, at *1, *11 (Sup. Ct. Erie Cty. Mar. 18, 2024)

108. *See id*. at *2.

109. *See id*. at *2–3.

110. *Id*. at *3; s*ee* 47 U.S.C § 230(b)(5) (West 2024).

111. *See id*. at *7.

> message boards and/or do not contain algorithms subjecting them to the protections of the CDA and/or First Amendment. This may ultimately prove true. In addition, some defendants may yet establish that their platforms are not products or that the negligent design features plaintiffs have alleged are not part of their platforms. However, at this stage of the litigation the Court must base its ruling on the allegations of the complaint and not "facts" asserted by the defendants in their briefs or during oral argument and those allegations allege viable causes of action under a products liability theory.[112]

Thus, basic tort questions of proximate causation and duty of care need more evidence for review, the court held.[113]

In another social media case, *Lama v. Meta Platforms*, the defendant, Instagram, successfully argued for Section 230 immunity in a case of alleged cyberbullying on its site.[114] The plaintiff here sued for negligence and strict product liability, arguing Instagram did not properly police its site or enforce any child protective safeguards.[115] They argued that Instagram was "foreseeably weaponized."[116]

The court held that the claims being litigated fell within the immunity protections under Section 230 and that the defendant was an interactive computer service as defined by the statute, as well.[117] The court wrote that its decision followed a line of precedent within the Second Circuit regarding how social media platforms operate and host third-party content.[118] Again, the immunity conferred by Section 230 attaches to interactive computer services, nowadays, social media platforms, where third parties post content.[119]

The court explained:

> Although Plaintiff attempts to argue that his claims are not "based upon the content of the vile text messages" posted to Instagram, he promptly shows that he cannot sustain that argument by stating that the claim is

112. *Patterson*, 2024 N.Y. Misc. LEXIS 2312, at *8–9.

113. *See generally id.* at *9–13

114. Lama v. Meta Platforms, Inc., 732 F. Supp. 3d 214, 223 (N.D.N.Y. 2024).

115. *See id.* at 216.

116. *Id.*

117. *See id.* at 220.

118. *See id.* (citing Mosha v. Facebook Inc., No. 20-cv-2608, 2021 U.S. Dist. LEXIS 12306, *6 (S.D.N.Y. Jan. 22, 2021)).

119. *Lama*, 732 F. Supp. 3d at 219 (quoting 47 U.S.C. § 230(c)(1)) (emphasis in the original).

> premised on the theory that "the Instagram "App" is faulty, dangerous, and lends itself to horrid, dreadful and destructive use, with no safeguards." Even in attempting to argue otherwise, Plaintiff himself cannot escape admitting that it was that "horrid, dreadful, and destructive use" (i.e., the comments posted by third-party users) that caused his harm, and the only defect is that Instagram facilitates users to post such things. Try as he might to make his claims about the way Instagram is designed, his claims are inherently grounded in third-party content posted to the app. Plaintiff further makes no arguments and includes no allegations in the Amended Complaint to suggest that Defendants either created or developed that content as opposed to merely hosting it as a social media site.[120]

### *G. Privileges*

A lawyer's pre-litigation comments to a newspaper fell under the qualified privilege for defamation, a state trial court held in *Loeb v. Gerwitz*.[121] The case emanates from a fight at a party, which resulted in injuries and a separate civil lawsuit, as well as tabloid media attention.[122] The defendant is the mother of the injured man and she and her lawyer made comments to the media.[123]

Though no media entities were named in the defamation suit, this case presents an important note of caution for sources who speak to the press and their protections for potentially defamatory statements they make.

Determining whether a statement falls under either the absolute privilege or the qualified privilege depends on the speech's context.[124] The absolute privilege attaches to statements made in public records, public meetings, or judicial proceedings and court papers.[125] The qualified privilege attaches to statements made in "good faith," even in pre-litigation statements.[126]

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120. *Id.* at 15–16.

121. Loeb v. Gerwitz, No. 613169/2019, 2023 N.Y. Misc. LEXIS 31920, at *2–3, *12 (Sup. Ct. Suffolk Cty. Dec. 1, 2023).

122. *See id.* at *1–2.

123. *See id.*

124. *See id.* at *8–9 (citing Park Knoll Assocs. v. Schmidt, 451 N.E.2d 182, 184 (N.Y. 1983)).

125. *See id.* at *9 (citing Front, Inc. v. Khalil, 28 N.E.3d 15, 18 (N.Y. 2015)).

126. *Loeb*, 2023 N.Y. Misc. LEXIS 31920, at *9.

The court wrote that the defendant and her lawyers were "subject to qualified privilege, as they were made in good faith anticipation of litigation, they were pertinent to the anticipated litigation, and were based on his client's recollection and opinion of the events that occurred on the night of the alleged allegation."[127]

### *H. Anti-SLAPP*

A defamation suit with additional tort claims against an online news outlet covering a contentious high-profile divorce proceeding involving a CEO and socialite was properly dismissed under New York's SLAPP law, CPLR 3211(a)(7) and 3211(g)(1), the appellate division affirmed in *Reeves v. Associated Newspapers, Ltd*.[128] The defendant, The Daily Mail, based its reporting on divorce records, police reports detailing the plaintiff's five arrests, and other publicly-available information.[129] In addition to claiming the article was false and defamatory, the lawsuit also included a slate of additional and inappropriate causes of action including intentional infliction of emotional distress, negligent infliction of emotional distress, tortious interference with contract, tortious interference with prospective business relationships, and prima facie tort.[130]

The reporting in question was privileged under Section 74 as a fair and accurate report of judicial proceedings and public records.[131] Just as important, however, was the finding that the story involved matters of public interest and the lawsuit was aimed at intimidating or chilling the media entity into their self-censorship or retracting the story altogether, thus triggering New York's SLAPP law.[132]

The SLAPP law affords defendants with not only an opportunity for a pre-trial dismissal if the claims do not rise to the higher level of publication with known falsity or reckless disregard for the truth, but

127. *Id.* at *10 (citing Tacopina v. O'Keefe, 645 Fed. App'x 7 (2d Cir. 2016); *Front, Inc*., 28 N.E.3d at 18).

128. Reeves v. Associated Newspapers, Ltd., 210 N.Y.S.3d 25 (App. Div. 1st Dep't 2024).

129. *See id*. at 28, 30.

130. *See id*. at 29.

131. *See id*. at 30.

132. *See id*. at 33 (citing Gillespie v. Kling, 192 N.Y.S. 3d 78, 80 (App. Div. 1st Dep't 2023); Aristocrat Plastic Surgery, P.C. v. Silva, 169 N.Y.S.3d 272, 273, 276 (App. Div. 1st Dep't 2022); Balliet v. Kottamasu, 175 N.Y.S.3d 678, 690 (N.Y.C. Civ. Ct. Kings Cty. 2022))

also shifts the burden of proof back to the plaintiff to prove that the lawsuit has a "substantial basis" to overcome the motion.[133]

The court's extensive recitation of the SLAPP law's legislative history from 1992 as well as detailed discussion of 2020 amendments, found that the trial court properly applied the law and that the award of attorneys' fees to defendant was appropriate under the "mandatory" award requirement.[134]

The court closely applied the "substantial basis" requirement, which allows the plaintiff to challenge the SLAPP motion with proof that the complaint has merits and "could not be supported by a substantial argument" that the plaintiff was actually defamed by publication of knowingly false material.[135]

The court wrote:

> [A] complaint which fails to state a claim under CPLR 3211 (a) (7) necessarily lacks a 'substantial basis in law' for purposes of CPLR 3211(g). Here, the complaint must be dismissed for failure to state a claim. Plaintiffs failed to show that their claims have a substantial basis; they cannot state a claim or raise an issue of triable fact. It should further be noted that plaintiffs never sought to avail themselves of the evidence-gathering framework set out in CPLR 3211(g).[136]

In affirming the dismissal, the appellate division remanded to the trial court to determine what the appropriate attorneys' fees should be.[137]

A woman whose photo was mistakenly used in a magazine article, identifying her as one of the women who recently gave birth to Elon Musk's baby could not prove the photo was published with actual malice or was an unlawful appropriation of her image and likeness for commercial purposes, a federal court held in *Bloom v. A360 Media LLC*.[138] Plaintiff, Amanda Bloom, who was once roommates with one of the women who gave birth to Musk's children in 2021, argued that her reputation was damaged when US Weekly inadvertently published

133. *Reeves*, 210 N.Y.S.3d at 32 (citing N.Y. CIV. RIGHTS LAW § 70-a(1)(a) (McKinney 2024)).

134. *Id*. at 28, 32.

135. *Id*. at 31 (quoting CIV. RIGHTS § 70-a(1)(a)).

136. *Id*. at 36–37 (citing 215 W. 84th St. Owner LLC v. Bailey, 191 N.Y.S.3d 368, 369 (App. Div. 1st Dep't 2023)).

137. *Id*. at 37.

138. Bloom v. A360 Media LLC, 735 F. Supp. 3d 466, 469 (S.D.N.Y. 2024).

her photo to illustrate the tabloid-type story.[139] The plaintiff argued that as a married woman with her own child, this false publication not only harmed her reputation but the photo was also a commercial appropriation of her image and likeness without her permission.[140] The magazine corrected its story online, found an accurate photograph to accompany the story and published a correction.[141]

Though a seemingly straight-forward legal dispute, the court had to analyze and rule on both the defamatory impact of the erroneous photo and the privacy implications under Section 50-51, whether the unauthorized and erroneous use of the photograph invaded plaintiff's privacy.[142] The answer, which also required applying New York's Anti-SLAPP law, was no.

First, the mistake, though glaring and highly embarrassing to a reasonable person like the plaintiff, was not made with the requisite level of actual malice under both New York Anti-SLAPP law and Supreme Court precedent of *New York Times Co. v. Sullivan*, which requires a false statement to be published with known falsity or reckless disregard for the truth.[143] A common or ordinary mistake does not rise to the level of actual malice.[144] Even a publication's failure to investigate whether the photograph was indeed the plaintiff would not be proof of actual malice, the court noted.[145]

The magazine's editorial choices, including the selection of the wrong or misidentifying photograph does not mean that the editors or staff knew the photograph was of the wrong person, the court wrote.[146] This type of mistake does not rob the publication of the actual malice protection or in the alternative open the publication up to liability under New York's privacy law for unlawful appropriation.[147]

Though there is no precedent directly addressing this issue, the district court had to extrapolate and predict how the state's high court

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139. *See id.* at 470.

140. *See id.*

141. *See id.*

142. *See id.* at 471.

143. *Bloom*, 735 F. Supp. 3d at 472–73 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 287 (1964)).

144. *See id.*

145. *See id.* at 474 ("Nor can defendant's alleged failure to investigate whether the photograph was of Zilis save plaintiff's claim from dismissal. That is because it is well-established that in general a failure to investigate in and of itself is insufficient to show actual malice.") (citing Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989); St. Arrant v. Thompson, 390 U.S. 727, 733 (1968)).

146. *See id.*

147. *See id.*

would rule on the issue.[148] The court rejected the privacy claim and explained its rationale and citations in two footnotes, in particular writing:

> The Court notes that as a constitutional matter, it is clear that actual malice is required to succeed on a Section 51 claim, where a defendant has appropriated the likeness of a limited purpose public figure and that likeness bears no real relationship to the article or the article as infected with substantial fictionalization. That, however, does not answer the question of the required level of fault for a private plaintiff.[149]

The court further explained that the article in question did not meet the standards under the anti-SLAPP laws and the magazine was "engaging in conduct in furtherance of its constitutional right of free speech: publishing an article on a newsworthy topic."[150] Even with a significant factual error, the underlying content did not lose its actual or constitutional protection.[151]

In another case, allegations about a restaurant's cleanliness, which may have been based on questionable sourcing, were able to rebut an anti-SLAPP motion, a state trial court held in *Chiabola, Inc. v. Yong Feng Situ*.[152] Though restaurant health and safety is a matter of public interest under the SLAPP statute, there were enough questions raised in the complaint to move forward, the court held.[153]

### *I. Procedural*

A series of New York Times stories and a podcast detailing a Canadian citizen's abusive use of the litigation system to punish and harass critics and enemies could not satisfy standards of defamation, a

148. *See Bloom*, 735 F. Supp. 3d at 476.

149. *Id.* at 476 n.6 (citing Davis v. High Soc'y Mag., Inc., 457 N.Y.S.2d 308, 315–16 (App. Div. 2d Dep't 1982); Quezada by Delamota v. Daily News, 501 N.Y.S.2d 971, 975 (App. Div. 1st Dep't 1986)).

150. *Id.* at 477 (citing generally Trump v. Trump, 189 N.Y.S.3d 430 (Sup. Ct. N.Y. Cty. 2023); Howell v. N.Y. Post Co., 612 N.E.2d 699 (N.Y. 1983); Groden v. Random House, Inc., 61 F.3d 1045, 1051 (2d Cir. 1995)).

151. *See id.* at 478 ("The Court accordingly concludes that here plaintiff is required to plead actual malice for the Section 51 claim to proceed forward. Because for the reasons explained above the amended complaint fails to adequately plead actual malice, the Section 51 claim must also be dismissed.")

152. *See* Chiabola, Inc. v. Yong Feng Situ, No. 152270/2023, 2024 N.Y. Misc. LEXIS 395, at *1 (Sup. Ct. N.Y. Cty. Jan. 19, 2024).

153. *See id.* at *7–8.

federal court ruled in *Atas v. New York Times Co*.[154] Mirroring identical claims in an earlier unsuccessful defamation lawsuit in Canada, plaintiff argued that the newspaper in its stories and podcast as well as the reporters and sources defamed her in editorial content detailing her history.[155]

There were multiple reasons to dismiss the lawsuit, the court held, including substantive truthfulness and the procedural doctrine of collateral estoppel.[156] The case was also deficient based on the fair report privilege because the stories were largely based on court documents from plaintiff's similar litigation in Canada[157] and it failed to establish actual malice as required by New York's Anti-SLAPP law.[158]

The most critical rationale for dismissal here focused on the civil procedural doctrine of collateral estoppel with regard to a libel lawsuit.[159] The court laid out the four elements: 1) whether the same or "identical" issue was central to a previous proceeding; 2) whether the issue in the previous proceeding was litigated and decided; 3) whether the party had "a full and fair opportunity to litigate the issue;" and 4) whether the earlier proceeding involved a final resolution of the matter.[160]

In addition to weighing the substantial truth of the underlying account, the court also held that the news reports constituted a fair and accurate report of the earlier legal proceedings and should be privileged under New York Civil Rights Law Section 74.[161] The court wrote:

> The articles and reporting in question made clear that The Times was reporting on judicial proceedings against Atas . . . An ordinary reader would understand the Times's reporting on Atas to be premised on records of the Canadian civil and criminal proceedings in which she was involved. Atas's claims therefore fall to the extent that they are premised on The Times

154. *See* Atas v. N.Y. Times Co., No. 22-CV-853, 2023 U.S. Dist. LEXIS 156239, at *1–2 (S.D.N.Y. Sept. 5, 2023).

155. *See id.*

156. *See id.* at *7–9.

157. *See id.* at *4–5.

158. *See id.* at *11.

159. *Atas*, 2023 U.S. Dist. LEXIS 156239, at *7–8.

160. *Id.* at *8–9.

161. *See id.* at *9–10.

> Defendants' reporting on the Canadian judicial proceedings . . . .[162]

*J. Procedural – Statute of Limitations*

The continuous online accessibility of a police blotter news story from 2009 did not trigger a new statute of limitations and was thus time-barred and properly dismissed, the appellate division affirmed in *D'Arata v. New York Post*.[163] In dismissing the libel claim, both the trial and appellate courts reiterated that the one-year statute of limitations for libel claims had long since expired and that the single publication rule was also in play, meaning the plaintiff could only sue the original publication during the original publication time in 2009.[164]

The court also added that the underlying news story, which was based on police reports, would have been privileged under the fair and accurate report privilege afforded by Civil Rights Law Section 74.[165]

*K. Defamation – Miscellaneous*

The last-minute settlement of a defamation claim against Fox Corp. in a Delaware case was not grounds for any summary judgment action in a similar case in New York, *Smartmatic v. Fox Corp.*, a court held.[166] The court had also earlier dismissed the defendant's motion to dismiss based on the anti-SLAPP law.[167] This complicated $2.7 billion defamation case emanates from the 2020 election and Fox's broadcasting of accusations that Smartmatic's voting machinery and software was defective.[168]

The plaintiffs argued that the court rulings and subsequent settlement of the *Dominion Voting Systems v. Fox Corp.* case in Delaware in 2023 for $787 million should influence the New York case.[169] The

162. *Id.* at *10–11.

163. D'Arata v. N.Y. Post, 210 N.Y.S.3d 384, 384 (App. Div. 1st Dep't 2024).

164. *Id.* at 385 (applying N.Y. C.P.L.R. 215(3) (McKinney 2024)).

165. *Id.* at 386 ("Plaintiff's conclusory allegation that defendant's publication of his arrest in its police blotter section was 'malicious,' without more, is insufficient to allege actual malice, which is fatal to his defamation per se claim.") (citing Cohn v. Nat'l Broad. Co., 414 N.Y.S.2d 906, 909 (App. Div. 1st Dep't 1979)).

166. Smartmatic USA Corp. v. Fox Corp, No. 151136/2021, 2024 N.Y. Misc. LEXIS 384, at *8–9 (Sup. Ct. N.Y. Cty. Jan. 23, 2024).

167. *Id.* at *1.

168. *See id.* at *1–2.

169. *Id.* at *2; *see also* David Bauder, Randall Chase & Geoff Mulvihill, *Fox, Dominion Reach $787M Settlement Over Election Claims*, THE ASSOCIATED PRESS (Apr. 18, 2023, 8:32 PM), https://apnews.com/article/fox-news-dominion-lawsuit-trial-trump-2020-0ac71f75acfacc52ea80b3e747fb0afe.

court wrote: "Moreover, as the Dominion action was settled and discontinued before trial, any decision rendered therein has no collateral estoppel effect."[170]

Thus, there is still a matter of fact regarding whether Fox broadcast and published the statements at issue with actual malice.[171]

### *L. Libel in Fiction*

Several scenes in a Netflix series on the highly-charged saga of the "Central Park Five" could be susceptible of defamatory meaning with actual malice, a federal court ruled in *Fairstein v. Netflix*.[172] This defamation litigation falls under a subcategory known as libel in fiction.

The case emanates from a highly publicized attack in New York's Central Park in 1989 in which a female jogger was brutally beaten and raped.[173] Five young men were convicted and subsequent DNA evidence exonerated them.[174] The case garnered rabid local and international news coverage and has been the subject of dozens of books and articles before Netflix and writer, director and producer Ava DuVernay produced the series.[175]

The plaintiff complained that her depiction in the series painted her as a villain, and was false and harmed her reputation, which included tangential loss by being dropped by her book publisher and literary agent, stepped down from several boards and suffered a raft of public criticism in the media and social media.[176]

The court opinion here discussed the difficulties of defamation claims and the actual malice requirement based on fictionalized content or dramatizations, as content at issue is.[177]

This case involved a nuanced analysis because the series was pitched and produced as a dramatization based on real, truthful events

170. *Smartmatic*, 2024 N.Y. Misc. LEXIS 384, at *8 (citing Bacon & Seiler Constructors, Inc. v. Solvay Iron Works, Inc., 128 N.Y.S.3d 380 (App. Div. 4th Dep't 2020)).

171. *Id.* at *9.

172. Fairsetein v. Netflix, Inc., No. 20-cv-8042, 2023 U.S. Dist. LEXIS 166561, at *10, *54. (S.D.N.Y. Sept. 19, 2023).

173. *Id.* at *7–10.

174. *See id.*

175. *See id.* at *3.

176. *See id.* at *16–17, *22–23.

177. *See Fairstein*, 2023 U.S. Dist. LEXIS 166561, at *30–39.

with real people at the center of the story.[178] The writers and producers based the series on extensive source material.[179]

The court denied motions for summary judgment to dismiss the claims based on five specific scenes in the series which focus on the plaintiff's role in police investigation and prosecution.[180] To summarize the detailed scene-by-scene analysis, the court held that there might be enough of a factual question to let a jury determine whether the plaintiff was defamed with actual malice.[181]

The court explained the difficult question here: "But actual malice may be present when a dramatization or fictional work includes a description of a real-life person that is contradicted by the source material."[182]

## III. NEWSGATHERING

The confidentiality agreement among Trump family members that was purportedly broken to provide content for a book and newspaper articles should be subject to a trial-level factual inquiry, the appellate division held in *Trump v. Trump*.[183] This is the latest opinion in the family drama surrounding President Donald Trump and his niece, Mary Trump, who wrote a tell-all book partially relying on material subject to a confidentiality agreement.[184]

The trial court denied the defendant's motion to dismiss, and the appellate division affirmed, though acknowledging the material involved matters of public interest about a public figure and public official.[185]

The denial turned on contract law, which the court wrote should not be deemed "unenforceable on the grounds of public policy" just because the content involved public people involved in matters of public interest.[186]

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178. *See id.*

179. *See id.* at *5.

180. *See id.* at *55, *62, *71, *80, *90.

181. *See id.*

182. *Fairstein*, 2023 U.S. Dist. LEXIS 166561, at *36.

183. *See* Trump v. Trump, 212 N.Y.S.3d 323, 325 (App. Div. 1st Dep't 2024).

184. *Id.*; Roy S. Gutterman, *2023–24 Survey of New York Law: Media Law*, 74 SYRACUSE L. REV. 779, 780–81 (2024).

185. *See Trump*, 212 N.Y.S.3d at 325.

186. *See id.* (citing Trump v. Trump, No. M21756, 2020-05027, 2020 N.Y. App. Div. LEXIS 5683 (App. Div. 2d Dep't 2020)).

Thus, basic contractual interpretation, including determining whether there are ambiguous statements about the confidentiality terms and duration are matters of fact, the court held.[187]

> Issues of fact exist as to whether the information disclosed by defendant (that is the subject of this suit) or plaintiff's prior statements (that are relied upon by defendant) are subject to the confidentiality provision. Because the confidentiality agreement contains no fixed duration, the court must "inquire into the intent of the parties" and determine—"if a duration may be fairly and reasonably fixed by the surrounding circumstances and the parties' intent."[188]

### *A. Invasion of Privacy*

A fashion model's invasion of privacy suit surrounding a documentary film was properly dismissed because the film fit firmly into the privacy statute's newsworthiness exception, the appellate division affirmed in *Khozissova v. Ralph Lauren Corp*.[189] The plaintiff argued that her thirty-eight-second appearance in the 108-minute HBO film and once-second appearance in the ninety-second preview trailer constituted an advertising, trade or commercial use under New York Civil Rights Law Sections 50–51.[190]

"Plaintiff failed to state a claim upon which relief can be granted as against HBO because the film fell within the newsworthiness/public interest exception to liability under Civil Rights Law §§ 50 and 51," the court held.[191]

Thus, the trial court properly dismissed the claim under a pre-answer SLAPP motion with an award of attorneys' fees.[192]

In another case, a woman who appeared in the background of a photograph used on a boutique's website which was then endorsed by a Kardashian was not a commercial or advertising use under Sections 50–51, the appellate division affirmed in *Barbetta v.*

187. *See id.*

188. *Id.* (quoting Haines v. City of New York, 364 N.E.2d 820, 822 (N.Y. 1977)).

189. Khozissova v. Ralph Lauren Corp., 214 N.Y.S.3d 331, 333 (App. Div. 1st Dep't 2024).

190. *See id.* at 334.

191. *See id.* at 333.

192. *See id.*

*NBCUniversal*.[193] "Here, the plaintiff failed to allege that Kardashian, NBCUniversal or any of NBCUniversal's employees used the plaintiff's name, portrait, picture, or voice within this state for advertising purposes."[194]

### *B. Miscellaneous*

A model who claimed her photos were misused without her consent and in breach of her contract lost her case on a motion to dismiss but was given the opportunity to amend and refile her multi-faceted complaint, a district court ruled in *Bendit v. Canva, Inc*.[195] After deciding to retain jurisdiction of the case following removal and a motion to remand, the court then dismissed the case based on a Rule 12(b)(6) motion.[196] The plaintiff also sued for a battery of other claims including defamation, intentional infliction of emotional distress, and invasion of privacy under Sections 50–51 because she did not consent to the alleged use of her image and likeness in sex-industry related advertisements and websites.[197]

The court recited the four prongs applied to determine whether a contract was breached at the motion to dismiss phase: "(1) the existence of an agreement[;] (2) adequate performance of the contract by the plaintiff[;]" (3) whether there was a breach of the contract by the defendants; and (4) what kinds of damages the plaintiff suffered.[198]

The court did not find the plaintiff's arguments specific enough regarding whether the contract and release with the photographer was actually violated.[199]

193. Barbetta v. NBCUniversal Media, LLC, 212 N.Y.S.3d 135, 137 (App. Div. 2d Dep't 2024).

194. *See id.* at 139 (citing Wojtowcicz v. Delacorte Press, 374 N.E.2d 129, 130 (N.Y. 1978); DiMaruo v. Advance Publ'ns, Inc., 139 N.Y.S.3d 627, 629 (App. Div. 2d Dep't 2021)).

195. Bendit v. Canva, Inc., No. 23-CV-473, 2023 U.S. Dist. LEXIS 148973, at *30 (S.D.N.Y. Aug. 22, 2023).

196. *Id.*

197. *See id.* at *1.

198. *Id.* at *14 (quoting Habitzreuther v. Cornell Univ., No. 5:14-cv-1229, 2015 U.S. Dist. LEXIS 112209, at *14 (N.D.N.Y. Aug. 25, 2015)).

199. *See id.* at *14–16.