

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 157902/2019

CAYUGA NATION and CLINT HALFTOWN,

Plaintiffs,

MOTION SEQ. NO. 001

- v -

SHOWTIME NETWORKS INC., BRIAN KOPPELMAN,
ANDREW ROSS SORKIN, and DAVID LEVIEN,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 23

were read on this motion to/for DISMISS.

In this defamation action commenced by plaintiffs Cayuga Nation and Clint Halftown, defendants Showtime Networks Inc., Brian Koppelman, Andrew Ross Sorkin, and David Levien move to dismiss the complaint pursuant to 3211(a)(1) and (a)(7). Plaintiffs oppose the motion. After oral argument, and after a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from allegedly defamatory depictions of plaintiffs Cayuga Nation and Clint Halftown (“Mr. Halftown”) in the television series *Billions* (“the series”) which was broadcast by defendant Showtime Networks Inc. (“Showtime”).

Specifically, plaintiffs claim that they were portrayed on the series as being involved in an illegal casino land deal, as well as bribery of a public official and blackmail. Doc. 1 at par. 8. However, they further state in their complaint that, at the end of every episode in the series, a disclaimer is shown representing that the “events and characters depicted [in the show] are fictitious” and that “[a]ny similarity to actual persons, living or dead, or to actual events, is purely coincidental.” Doc. 1 at par. 34.

The captioned action was commenced by the filing of a summons and complaint on August 15, 2019. Doc. 1. In the complaint, plaintiffs alleged that Cayuga Nation was a sovereign Indian nation (one of six Indian nations known as the Haudenosaunee) recognized by the United States and New York State and that Mr. Halftown was a member of the Cayuga Nation Council as well as its federal representative. Doc. 1 at pars. 2, 12-13. Plaintiffs further alleged that Koppelman was the co-creator and executive producer of the series; Sorkin was the co-creator and a writer of the series; and Levien was a writer and producer of the series. Doc. 1 at pars. 15-17.

In the episode, which was aired on May 5, 2019 and seen by an audience of approximately 761,000 viewers, the character of Chuck Rhoades (“Chuck”), a

former United States Attorney¹, is portrayed as “supporting a process identified [as] ‘blockchain-based mobile voting’ and proposes a pilot program to test the efficacy of this mobile voting for elections in New York.” Doc. 1 at pars. 28, 36, 40. In an attempt to institute the mobile voting program (“the MVP”), Chuck asks his father, Chuck Rhoades, Sr. (“Rhoades Sr.”), to introduce him to an Indian tribe identified in the episode as the “Cayuga Iroquois”², with which Rhoades Sr. is depicted to have had previous connections. Doc. 1 at par. 41. Specifically, Chuck asked Rhoades Sr. to “juice [him] in with the tribe”, to which Rhoades Sr referred as “[his] casino Indians” and “[his] Indians”. Doc. 1 at par. 42. This, asserted plaintiffs, implied that Rhoades Sr. could “lend his and the ‘Cayuga Iroquois’s’ influence to the [MVP]” (Doc. 1 at par. 41); that the Cayuga Nation was “subject to [Rhoades Sr.’s] influence and even control” (Doc. 1 at par. 42); and that the Cayuga Nation and Mr. Halftown had been involved in “a casino land deal and an illegal revenue-sharing agreement.” Doc. 1 at par. 44.

Additionally, the episode contained a scene in which Chuck spoke to a character identified as “council member Jane Halftown” (“Jane”). Doc. 1 at par. 43. Although Jane was a female character, she was portrayed as a council member, such

¹ Although not mentioned in the complaint, defendants note that Chuck was elected Attorney General of the State of New York after serving as U.S. Attorney, which ostensibly explains why he was interested in promoting the MVP. Doc. 6 at 1.

² According to the complaint, “Iriquois” is a term commonly used by non-Native Americans to identify the Haudenosaunee people. Doc. 1 at par. 37.

as Mr. Halftown, and even had “his exact and unique surname.” Doc. 1 at par. 43. Jane asked Chuck why she should lobby the elections board on behalf of “the people who chiseled us on the land deal surrounding the casino?” Doc. 1 at par. 43. Chuck then replied “[c]hiseled? I thought partnership was more—” to which Jane responded that Rhoades Sr. “has tasted the fruits of our tribe in a way that makes us disinclined to trust either him or you.” Doc. 1 at par. 43. At that point, a young Native American mother appeared in the scene with a baby fathered by Rhoades Sr. Doc. 17 at 11.

Chuck then told Jane that Rhoades Sr. would “sweeten [her] piece” on a land deal to “what [she felt] was fair.” Doc. 1 at par. 43. Plaintiffs claim that this dialogue explicitly set forth a “false and defamatory narrative that the [Cayuga Nation] and [Jane] had previously been engaged in a casino land deal and an illegal revenue-sharing arrangement.” Doc. 1 at par. 44.

Later in the episode, Jane, Chuck, and Rhoades Sr. were shown meeting with Hap Halloran (“Halloran”), the commissioner of the election board, to persuade him to institute the MVP. Doc. 1 at par. 46. Jane convinced Halloran to approve the MVP by stating “Don’t make me have my people put these [headdresses] on. Thirty of my compatriots in full regalia. Don’t make me give interviews about how you are refusing us the vote. Don’t make me stage a sit-in at your office.” Doc. 1 at par. 47. In Jane’s presence, Chuck then hands Halloran an envelope containing airline

tickets and hotel reservations for Halloran and his wife to vacation in Aruba. Doc. 1 at par. 48. Plaintiffs claim that Jane’s “participation in the activities depicted [in that scene] attribute[d] criminal conduct to Mr. Halftown.” Doc. 1 at par. 54.³ Thus, assert plaintiffs in their first cause of action, defendants committed defamation per se. Doc. 1 at pars. 57, 60-63.

As a second cause of action, plaintiffs allege that defendants defamed them by stating that they participated in an illegal land deal. Doc. 1 at pars. 65-68.

As and for their third and final cause of action, plaintiffs claim that defendants misappropriated their likenesses for the purposes of profit and marketability. Doc. 1 at pars. 70-74.

Defendants now move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint. Docs. 5-15. In support of the motion, defendants allege that the Cayuga Nation is a sovereign nation and thus cannot bring a defamation claim. They further assert that the claims by Mr. Halftown must be dismissed because he was not defamed in the episode and the episode was not unmistakably about him. Defendants further maintain that plaintiffs’ misappropriation claim must be dismissed as a matter of law.

³ Specifically, plaintiffs claim that the scene portrays Jane as having been involved in the crimes of coercion (Penal Law §135.60), receiving unlawful gratuities (Penal Law §200.35), and honest services fraud (18 U.S.C. §1346).

In opposition, plaintiffs claim that the Cayuga Nation is not barred from bringing a defamation suit because it is a governmental entity. Doc. 17. They further maintain that the depiction of them in the episode was clearly defamatory insofar as it unmistakably portrayed Mr. Halftown and showed he and the Cayuga Nation committing the crimes enumerated in the complaint as well as participating in “an illicit land deal.” Doc. 17 at 9, 12-13. Additionally, plaintiffs urge that they state a claim for misappropriation of likeness.

In reply, defendants reiterate their argument that the Cayuga Nation cannot sue for defamation. They further assert that they did not defame plaintiffs since “the [e]pisode can only reasonably be understood as showing how [Rhoades Sr.] duped the Cayuga Nation into entering a bad land deal, impregnated a young [Cayuga] Nation member, leaving her alone to raise the baby, and how . . . Jane sought to rectify these wrongs while also obtaining access to voting for the Cayuga Nation.” Doc. 18 at 6. Further they insist that Jane is not shown to be complicit in Chuck’s payoff to Halloran, since only Chuck and Rhoades Sr. were involved in that act. Doc. 18. Additionally, defendants claim that Mr. Halftown cannot maintain a defamation claim because plaintiffs did not allege that the average viewer would understand Jane’s character as conveying actual facts about him. Doc. 18 at 14. Finally, defendants argue that plaintiffs’ misappropriation claim must fail as a matter of law. Doc. 18 at 16-18.

LEGAL CONCLUSIONS

The Cayuga Nation's Defamation Claim

Initially, as defendants assert, the defamation claim by the Cayuga Nation must be dismissed since the allegedly defamatory material was “directed against a governing body and how it governed, rather than against its individual members” and the episode did not portray “the Tribal Council members [as] individually corrupt or individually promoting a criminal enterprise (*see New York Times Co. v Sullivan*, 376 US 254, 292, 84 S Ct 710, 11 L Ed 2d 686 [1964]; *Rosenblatt v Baer*, 383 US 75, 82-83, 86 S Ct 669, 15 L Ed 2d 597 [1966]).” *Lazore v NYP Holdings, Inc.*, 61 AD3d 440, 440 [1st Dept 2009]) (defamation action dismissed where defendant had stated in an editorial that a Native American tribe should not be permitted to operate a proposed casino because it “amounts to a criminal enterprise”). Although plaintiffs claim that the episode portrays Mr. Halftown as a corrupt or criminal member of the council, this Court disagrees and, for the reasons set forth below, finds that he, too, has no viable defamation claim.

Mr. Halftown's Defamation Claim

In order to establish a prima facie case of defamation, plaintiffs must show that the matter published is "of and concerning" them (*Julian v American Bus. Consultants*, 2 NY2d 1, 17 [1956]). Although it is not necessary for the plaintiffs to be named in the publication, they must plead and prove that the statement referred to them and that a person

hearing or reading the statement reasonably could have interpreted it as such (*see id.*; Prosser & Keeton, Torts § 111 at 783 [5th ed 1984]). This burden is not a light one, and the question of whether an allegedly defamatory statement could reasonably be interpreted to be "of and concerning" a particular plaintiff is a question of law for the courts to decide (*see Springer v Viking Press*, 60 NY2d 916, 917 [1983]; *Carlucci v Poughkeepsie Newspapers*, 57 NY2d 883, 885 [1982]).

Three Amigos SJJ Rest., Inc. v CBS News Inc., 28 NY3d 82, 86-87 (2016).

“Where, as here, the work claimed to be defamatory is fictional, the court's task necessarily entails a search for similarities and dissimilarities so as to determine whether a person who knew plaintiff and who has [seen the episode] could reasonably conclude that [Mr. Halftown] was [Jane].” *Springer v Viking Press*, 90 AD2d 315, 319 (1st Dept 1982).

Because the "of and concerning" inquiry is so fact specific, New York courts have failed to carve out consistent guidelines for determining how similar the plaintiff and the fictional character must be. *Compare Geisler v. Petrocelli*, 616 F.2d 636, 639-40 (2d Cir. 1980) (same name and similar physical characteristics found sufficient to withstand a motion to dismiss), and *Fetler v Houghton Mifflin Co.*, 364 F.2d 650, 651-62 (2d Cir 1966) (similar family composition and history held sufficient to present an issue of fact to a jury), *with Springer*, 90 A.D.2d at 320 (similarities in name, physical height, weight, build, incidental grooming habits, and recreational activities held insufficient to establish the "of and concerning" element in light of the "profound" dissimilarities "both in manner of living and in outlook"), and *Carter-Clark v. Random House, Inc.*, 196 Misc. 2d 1011, 1014-15 (Sup. Ct. N.Y. County 2003) (different names and occupations and "very sketchy physical characterization" held insufficient to establish the "of and concerning" element), *aff'd*, 17 A.D.3d 241 (1st Dep't 2005). Further complicating the issue is the counterintuitive nature of a libel by fiction

claim. The plaintiff must simultaneously assert that the character is "of and concerning" him and her because of their similarities, but also must deny significant aspects of the fictional character, *i.e.*, the defamatory aspects of the character. Accordingly, New York courts have required the plaintiff in a libel by fiction case to show that the "description of the fictional character . . . [is] so closely akin to the real person claiming to be defamed that a reader [or viewer] of the [alleged defamatory work], knowing the real person, would have no difficulty linking the two. Superficial similarities are insufficient" *Springer*, 90 A.D.2d at 320.

Greene v Paramount Pictures Corp., 138 F Supp 3d 226, 234-235 (EDNY 2015).

Here, there has been no demonstration that Jane's character is "of and concerning" plaintiff (*see Allen v Gordon*, 86 AD2d 514, 515 [1st Dept 1982], *affd* 56 NY2d 780 [1982] such that the description of Jane's fictional character "is so closely akin to [Mr. Halftown that a viewer of the episode who knew him] would have no difficulty linking the two." *Springer v Viking Press*, 90 AD2d 315, 320 (1st Dept 1982), *affd* 60 NY2d 916 (1983). Here, the most obvious difference between the fictional character of Jane and Mr. Halftown is that the former is a female and the latter a male. Additionally, there is no indication in plaintiffs' motion papers that Mr. Halftown was ever involved in any land deals or discussions with a voting commissioner regarding the implementation of a MVP or any other electoral issue.

Although the fictional Jane and Mr. Halftown have the same surname, and are both members of a tribal council, these are superficial similarities insufficient to

establish that Jane's character represents Mr. Halftown. *See Carter-Clark v. Random House, Inc.*, 17 AD3d at 241-242 citing *Springer*, 60 NY2d at 916. Indeed, as defendants argue, plaintiffs "have failed to sufficiently allege that the [e]pisode's depiction of Jane would be understood by the average viewer as conveying actual facts about [Mr. Halftown]." Doc. 18 at 14. Moreover, as noted above, and as conceded by plaintiffs in their complaint, a disclaimer is played during the credits of each episode of the series representing that "[t]he events and characters depicted in [the series] are fictitious" and that "[a]ny similarity to actual persons, living or dead, or to actual events, is purely coincidental." Doc. 1 at par. 34.

Thus, this Court concludes that plaintiffs have failed to establish as a matter of law that the fictional episode was "of and concerning" Mr. Halftown and his defamation claim must thus be dismissed.

Misappropriation Claim

Plaintiffs claim that defendants misappropriated their likenesses during the episode, without written consent, and that this constituted a violation of New York Civil Rights Law §51.⁴ That statute provides, in relevant part, that:

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the

⁴ Although a violation of this statute is not alleged in the complaint, plaintiffs argue in their opposition to the motion that it applies herein. Doc. 17 at 17-19.

written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use . . .

Section 51 is to "to be narrowly construed and 'strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.'" *Guerrero v Carva*, 10 AD3d 105, 115-116 (1st Dept 2004) quoting *Messenger v Gruner + Jahr Printing & Publ.*, 94 N.Y.2d 436, 441 (2000). Since the Cayuga Nation is clearly not a living person, the claim against it pursuant to section 51 must be dismissed. Additionally, since "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade'", the claim by both plaintiffs pursuant to section 51 must be dismissed. *Hampton v Guare*, 195 AD2d 366, 366 (1st Dept 1993), *lv denied* 82 NY2d 659 (1993).

The parties' remaining contentions are either without merit or need not be addressed given the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion of defendants Showtime Networks Inc., Brian Koppelman, Andrew Ross Sorkin, and David Levien to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants,

and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order, with notice of entry, upon counsel for plaintiffs, as well as on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of the court.

7/17/2020

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE