

16-1335-cv

Friedman v. Bloomberg L.P., et al.

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM, 2016

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9 ARGUED: OCTOBER 31, 2016

10 DECIDED: SEPTEMBER 12, 2017

11
12 No. 16-1335-cv

13
14 DAN FRIEDMAN,
15 *Plaintiff-Appellant*

16
17 *v.*

18
19 BLOOMBERG L.P., CHRISTOPHER DOLMETSCH, ERIK LARSEN, MICHAEL
20 HYTHA, ANDREW DUNN, MILLTOWN PARTNERS, PATRICK HARVERSEN,
21 D.J. COLLINS, OLIVER RICKMAN, PALLADYNE INTERNATIONAL ASSET
22 MANAGEMENT B.V., ISMAEL ABUDHER, LILY YEO,
23 *Defendants-Appellees.*
24

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26 Appeal from the United States District Court
27 for the District of Connecticut.
28 No. 15 Civ. 43 – Alvin W. Thompson, *Judge.*
29

30
31 Before: WALKER, HALL, and CHIN, *Circuit Judges.*
32
33

1 Plaintiff-appellant Dan Friedman appeals from a decision of
2 the United States District Court for the District of Connecticut (Alvin
3 W. Thompson, J.) dismissing his defamation action and entering
4 judgment in favor of the defendants-appellees. At issue in this case
5 is whether Connecticut General Statute § 52-59b—which provides
6 for long-arm jurisdiction over certain out-of-state defendants except
7 in defamation actions—violates Friedman’s First or Fourteenth
8 Amendment rights. We conclude that it does not and AFFIRM the
9 district court’s dismissal of this action as to the out-of-state
10 defendants. We also consider whether the allegedly defamatory
11 statements at issue in this case, which were reported and published
12 by the remaining defendants, are privileged under New York Civil
13 Rights Law § 74 as a fair and true report of judicial proceedings or
14 are protected expressions of opinion. We AFFIRM in part and
15 REVERSE in part the district court’s determinations regarding these
16 statements and REMAND this action for proceedings against the
17 remaining defendants consistent with this opinion.

1 ALAN H. KAUFMAN, Kaufman PLLC, New York,
2 NY (Stephen G. Grygiel, Silverman, Thompson,
3 Slutkin & White, LLC, Baltimore, MD, *on the brief*)
4 *for Plaintiff-Appellant.*

5 SHARON L. SCHNEIER (Yonatan S. Berkovits, *on the*
6 *brief*), Davis Wright Tremaine LLP, New York,
7 NY, *for Defendants-Appellees Bloomberg L.P.,*
8 *Christopher Dolmetsch, Erik Larsen, Michael Hytha,*
9 *and Andrew Dunn.*

10 DEREK J.T. ADLER, Hughes Hubbard & Reed LLP,
11 New York, NY, *for Defendants-Appellees Palladyne*
12 *International Asset Management B.V., Ismael*
13 *Abudher, Lily Yeo, Milltown Partners LLP, Patrick*
14 *Haverson, David-John Collins and Oliver Rickman.*

15
16 JOHN M. WALKER, JR., *Circuit Judge:*

17 Plaintiff-appellant Dan Friedman appeals from a decision of
18 the United States District Court for the District of Connecticut (Alvin
19 W. Thompson, J.) dismissing his defamation action and entering
20 judgment in favor of the defendants-appellees. At issue in this case
21 is whether Connecticut General Statute § 52-59b—which provides
22 for long-arm jurisdiction over certain out-of-state defendants except
23 in defamation actions—violates Friedman’s First or Fourteenth
24 Amendment rights. We conclude that it does not and AFFIRM the
25 district court’s dismissal of this action as to the out-of-state

1 defendants. We also consider whether the allegedly defamatory
2 statements at issue in this case, which were reported and published
3 by the remaining defendants, are privileged under New York Civil
4 Rights Law § 74 as a fair and true report of judicial proceedings or
5 are protected expressions of opinion. We AFFIRM in part and
6 REVERSE in part the district court's determinations regarding these
7 statements and REMAND this action for proceedings against the
8 remaining defendants consistent with this opinion.

9 **BACKGROUND**

10 This defamation action arises out of a news article published
11 by Bloomberg News that reported on a lawsuit Friedman filed
12 against his former employer, Palladyne International Asset
13 Management, and others. Friedman alleged in the lawsuit that
14 Palladyne, a purported hedge fund based in the Netherlands,
15 fraudulently induced him into working as its "head of risk" in order
16 to create the appearance that it was a legitimate company. Friedman
17 claimed that, over the course of nearly eight months, Palladyne and
18 an executive recruiting firm made numerous misrepresentations to
19 persuade him to accept this position, including that Palladyne was

1 “a diversified investment company” with a “worldwide clientele”
2 and “consistent, optimized returns.” App’x at 15, 49, 61.

3 In November 2011, Friedman moved to the Netherlands and
4 began working for Palladyne. According to Friedman, he soon
5 discovered that Palladyne was a “kickback and money laundering
6 operation for the former dictatorial Ghaddafi [*sic*] regime in Libya,”
7 App’x at 39, and that Palladyne’s primary purpose was to channel
8 funds at the behest of the then-head of Libya’s state-run National Oil
9 Company, who was the father-in-law of Palladyne’s chief executive
10 officer. Friedman also learned that the United States Department of
11 Justice and the Securities and Exchange Commission were
12 conducting investigations that implicated Palladyne. In February
13 2012, after Friedman voiced concerns to a colleague that Palladyne
14 was not engaging in legitimate investment activities and could face
15 criminal exposure, he was “abruptly terminated with no legally
16 cognizable explanation.” App’x at 75.

17 On March 25, 2014, Friedman sued Palladyne and the firm
18 that had recruited him for the position, as well as several of their

1 employees. Friedman asserted seven counts in his complaint,
2 including fraudulent inducement, and sought monetary damages
3 totaling \$499,401,000, plus interest, attorneys' fees and costs. He also
4 sought, as additional punitive damages, two years of the employee
5 defendants' salaries and bonuses. Friedman requested that "this
6 Court enter judgment on all Counts for the plaintiff." App'x at 88.

7 On March 27, 2014, Bloomberg L.P. published online the
8 article at issue in this case. Entitled "Palladyne Accused in Suit of
9 Laundering Money for Qaddafi," the article reported on Friedman's
10 lawsuit. Friedman responded to this article by filing the instant
11 defamation action against (1) Bloomberg L.P. and the authors and
12 editors of the article (collectively, the "Bloomberg Defendants"); (2)
13 the Netherlands-based Palladyne and two of its senior officers
14 (collectively, the "Palladyne Defendants"); and (3) Milltown
15 Partners, LLP—a public relations company based in the United
16 Kingdom that worked for Palladyne and allegedly was a source of
17 information for the article—and several of its employees
18 (collectively, the "Milltown Defendants").

1 Friedman alleged that the following statements in the article
2 were false and caused him serious and irreparable harm:

- 3 (1) A statement that “[Palladyne] was sued in the U.S. for as
4 much as \$500 million.”
5 (2) A quote from Palladyne that “[t]hese entirely untrue and
6 ludicrous allegations [in Friedman’s earlier lawsuit] have been
7 made by a former employee who has repeatedly tried to extort
8 money from the company. . . . He worked with us for just two
9 months before being dismissed for gross misconduct.”

10 App’x at 19, 37-38. Friedman further alleged that the Bloomberg
11 Defendants negligently published these statements without
12 contacting him for a response or otherwise verifying their accuracy,
13 and acted with reckless disregard by failing to correct or retract the
14 statements even after his lawyer alerted several of the Bloomberg
15 Defendants to their inaccuracy.¹

16 The Milltown and Palladyne Defendants moved to dismiss
17 this case pursuant to Federal Rules of Civil Procedure 12(b)(2) for
18 lack of personal jurisdiction and 12(b)(6) for failure to state a claim.
19 In granting the motion, the district court concluded that Conn. Gen.

¹ There is an updated version of this article in the parties’ joint appendix that includes a response from Friedman’s lawyer. Because Friedman does not mention this version or attach it to his complaint, we do not consider it for purposes of this appeal.

1 Stat. § 52-59b, which provides for jurisdiction over non-resident
2 individuals, foreign partnerships, and foreign voluntary associations
3 except in defamation cases, deprived it of personal jurisdiction over
4 the Milltown and Palladyne Defendants, all of which are foreign
5 entities. The district court further determined that even if
6 Palladyne—organized under the laws of the Netherlands as a
7 *besloten vennootschap*—were categorized as a corporation and not a
8 foreign partnership, Conn. Gen. Stat. § 33-929 would deprive it of
9 personal jurisdiction over Palladyne.

10 The Bloomberg Defendants also filed a motion to dismiss the
11 complaint pursuant to Rule 12(b)(6) for failure to state a claim,
12 which the district court granted. The district court held that the
13 statement that Friedman had sued Palladyne for “as much as \$500
14 million” was protected by N.Y. Civ. Rights Law § 74 because it was a
15 fair and true report of Friedman’s complaint and that the statement
16 that Friedman “has repeatedly tried to extort money from
17 [Palladyne],” while not covered by the same privilege, was a

1 protected expression of opinion. Friedman timely appealed the
2 dismissal of his complaint.

3 **DISCUSSION**

4 Friedman argues on appeal *inter alia* that (1) the district court
5 has personal jurisdiction over the individual Milltown and
6 Palladyne Defendants pursuant to Conn. Gen. Stat. § 52-59b because
7 the statute's exclusion of defamation actions is unconstitutional²; (2)
8 the "for as much as \$500 million" statement is defamatory because it
9 fails to clarify that he could not have been awarded this amount
10 even if his lawsuit were successful; and (3) the "repeatedly tried to
11 extort money" statement suggests that he engaged in criminal
12 conduct and implies undisclosed facts that are detrimental to his
13 character.

14 **I. Connecticut General Statute § 52-59b**

15 We review *de novo* an appeal from a district court's dismissal
16 for lack of personal jurisdiction. *Whitaker v. Am. Telecasting, Inc.*, 261

² Friedman also asserts that the lower court had jurisdiction over the corporate defendants under Conn. Gen. Stat. § 33-929. However, he fails to raise any arguments on this point and, therefore, we do not address the district court's determination to the contrary.

1 F.3d 196, 208 (2d Cir. 2001). The plaintiff bears the burden of
2 demonstrating that the court has personal jurisdiction over each
3 defendant. *Id.* In determining whether such jurisdiction exists, a
4 court “must look first to the long-arm statute of the forum state. . . .
5 If the exercise of jurisdiction is appropriate under that statute, the
6 court must decide whether such exercise comports with the
7 requisites of due process.” *Id.* at 208 (citation omitted). The
8 relevant long-arm statute, Conn. Gen. Stat. § 52-59b(a), provides:

9 [A] court may exercise personal jurisdiction over any
10 nonresident individual, foreign partnership or foreign
11 voluntary association . . . who in person or through an
12 agent . . . (2) commits a tortious act within the state,
13 except as to a cause of action for defamation of
14 character arising from the act; (3) commits a tortious act
15 outside the state causing injury to person . . . within the
16 state, except as to a cause of action for defamation of
17 character arising from the act.³

18 Based on the plain language of Conn. Gen. Stat. § 52-59b, the
19 district court did not have personal jurisdiction in this defamation
20 action over the individual Milltown and Palladyne Defendants, who

³ Section 52-59b(a)(1) provides jurisdiction over certain out-of-state defendants who “[t]ransact[] any business within the state.” Friedman did not appeal the district court’s decision that this provision does not apply.

1 are not Connecticut residents. Friedman argues, however, that the
2 long-arm statute's exclusion of out-of-state defendants in
3 defamation actions violates his First Amendment right to petition
4 and Fourteenth Amendment right to equal protection. We disagree.

5 The First Amendment provides, in relevant part, that
6 "Congress shall make no law . . . abridging . . . the right of the
7 people . . . to petition the Government for a redress of grievances."

8 U.S. CONST. amend. I. The right to petition, which applies to the
9 states through the Fourteenth Amendment, "extends to all
10 departments of the Government, including the courts." *City of N.Y.*

11 *v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008) (citation and
12 internal quotation marks omitted). A plaintiff's "constitutional right

13 of access to the courts is violated where government officials
14 obstruct legitimate efforts to seek judicial redress." *Id.* (citation and

15 brackets omitted); *see also Christopher v. Harbury*, 536 U.S. 403, 413
16 (2002) (noting right-of-access concerns are implicated when

17 "systemic official action frustrates a plaintiff or plaintiff class in
18 preparing and filing suits at the present time"); *Bounds v. Smith*, 430

1 U.S. 817, 828 (1977) (requiring prison authorities to provide inmates
2 with adequate law libraries or legal assistance to permit meaningful
3 litigation of appeals).

4 A plaintiff's right of access to courts is not violated when, as
5 here, a state's long-arm statute does not provide for jurisdiction over
6 certain out-of-state defendants. Indeed, "[t]here is nothing to
7 compel a state to exercise jurisdiction over a foreign [defendant]
8 unless it chooses to do so, and the extent to which it so chooses is a
9 matter for the law of the state as made by its legislature." *Brown v.*
10 *Lockheed Martin Corp.*, 814 F.3d 619, 626 (2d Cir. 2016) (quoting
11 *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 222 (2d Cir. 1963) (en
12 banc)). In *International Shoe Co. v. Washington*, the Supreme Court
13 held that, under the Due Process Clause of the Fourteenth
14 Amendment, state courts could exercise jurisdiction over out-of-
15 state defendants if the defendants had "certain minimum contacts
16 with [the forum state] such that the maintenance of the suit does not
17 offend 'traditional notions of fair play and substantial justice.'" 326
18 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463

1 (1940)). The Supreme Court described the extent to which it would
2 be constitutionally permissible for state courts to exercise
3 jurisdiction over these defendants; it did not hold that state courts
4 were required to exercise such jurisdiction. *See id.* Relying on this
5 principle, state legislatures enacted long-arm statutes setting forth
6 the terms under which their courts could exercise jurisdiction over
7 out-of-state defendants. *See* Robert D. Sack, *Sack on Defamation: Libel,*
8 *Slander, and Related Problems*, § 15.1.2A (4th ed. 2012). Although
9 many states' long-arm statutes provide for jurisdiction that is
10 coextensive with the limits of the Due Process Clause, some do not
11 permit the exercise of jurisdiction to the full extent allowed by the
12 federal Constitution. *Id.*; *see Best Van Lines, Inc. v. Walker*, 490 F.3d
13 239, 244-45 (2d Cir. 2007).

14 The Connecticut long-arm statute at issue here, which
15 precludes its courts from exercising jurisdiction over certain foreign
16 defendants in defamation actions,⁴ does not provide for jurisdiction

⁴ We note that Conn. Gen. Stat. § 52-59b(a)(1) does permit jurisdiction over out-of-state defendants in defamation actions if the defendant "[t]ransacts any business within the state."

1 to the limits of due process. *See* Conn. Gen. Stat. § 52-59b; *see also*
2 *International Shoe*, 326 U.S. at 316. The statute's limitation does not,
3 however, violate Friedman's First Amendment right of access to
4 courts. As we have noted, "[t]here is nothing to compel a state to
5 exercise jurisdiction over a foreign [defendant] unless it chooses to
6 do so," *Brown*, 814 F.3d at 626, and Friedman does not have any
7 right to assert a claim against a foreign entity in the absence of a
8 long-arm statute that provides jurisdiction over such an entity. *See*
9 *Whitaker*, 261 F.3d at 208; *see also George v. Strick Corp.*, 496 F.2d 10, 12
10 (10th Cir. 1974) ("[P]ertinent federal cases do not compel state courts
11 to open their doors to every suit which meets the minimum contacts
12 requirements of the due process clause of the federal constitution.");
13 *Jennings v. McCall Corp.*, 320 F.2d 64, 68 (8th Cir. 1963) ("[A] state
14 court is free to choose for itself the standards to be applied in
15 determining the circumstances under which a foreign [entity] would
16 be amenable to suit, assuming of course that minimum due process
17 requirements are met. . . . [It is] a state's privilege to impose its own
18 jurisdictional limitations."). Friedman, therefore, has failed to show

1 that this statute violates his First Amendment right of access to
2 courts.⁵

3 Conn. Gen. Stat. § 52-59b also does not violate Friedman's
4 equal protection rights under the Fourteenth Amendment.
5 Friedman argues that, applying strict scrutiny, the statute violates
6 the Equal Protection Clause by "restricting the rights of defamation
7 plaintiffs as a class without utilizing the least restrictive means."
8 Appellant's Br. at 44-45. However, we apply strict scrutiny only
9 when the challenged statute either (1) burdens a fundamental right
10 or (2) targets a suspect class. *See Heller v. Doe*, 509 U.S. 312, 319
11 (1993). Friedman has not shown that his claim falls within either
12 category. As we have discussed, a state is not required to extend its
13 courts' jurisdiction over specific foreign defendants and, in the
14 absence of a long-arm statute providing for such jurisdiction, a

⁵ Friedman also states, without explanation, that the long-arm statute's exception for out-of-state defendants in defamation actions violates his due process rights. Federal due process, however, does not compel a state to provide for jurisdiction over out-of-state defendants. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440 (1952) ("The suggestion that federal due process compels the State to open its courts to such a case [against a foreign defendant] has no substance."). Instead, the Due Process Clause *limits* the extent to which a state court may exercise jurisdiction over such defendants. *See International Shoe*, 326 U.S. at 316.

1 plaintiff does not have a fundamental right to bring an action
2 against those foreign defendants. Further, Friedman does not argue
3 that state residents defamed by out-of-state entities are a suspect
4 class.

5 Under rational basis review, which is applicable here, “we are
6 required to defer to the legislative choice, absent a showing that the
7 legislature acted arbitrarily or irrationally.” *Gronne v. Abrams*, 793
8 F.2d 74, 77 (2d Cir. 1986). The party challenging the law, therefore,
9 “must disprove every conceivable basis which might support it.”
10 *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (citation and
11 internal quotation marks omitted), *aff’d*, 133 S. Ct. 2675 (2013).
12 Friedman argues that the statute’s legislative history does not state a
13 rational basis for excluding defamation actions. A legislature,
14 however, “need not actually articulate at any time the purpose or
15 rationale supporting its classification. . . . Instead, a classification
16 must be upheld against [an] equal protection challenge if there is
17 any reasonably conceivable state of facts that could provide a

1 rational basis for the classification.” *Heller*, 509 U.S. at 320 (citations
2 and internal quotation marks omitted).

3 Conn. Gen. Stat. § 52-59b was modeled after a nearly identical
4 provision in New York state’s long-arm statute. *See* N.Y. C.P.L.R. §
5 302; *Savin v. Ranier*, 898 F.2d 304, 306 (2d Cir. 1990). We have
6 previously noted, in the context of the New York statute, that one
7 rational basis for excluding defamation actions against out-of-state
8 defendants is “to avoid unnecessary inhibitions on freedom of
9 speech” and that “[t]hese important civil liberties are entitled to
10 special protections lest procedural burdens shackle them.” *Best Van*
11 *Lines*, 490 F.3d at 245 (quoting *Legros v. Irving*, 38 A.D.2d 53, 55 (N.Y.
12 App. Div. 1st Dep’t 1971)); *see also* *SPCA of Upstate N.Y., Inc. v. Am.*
13 *Working Collie Ass’n*, 18 N.Y.3d 400, 404 (2012) (“Defamation claims
14 are accorded separate treatment to reflect the state’s policy of
15 preventing disproportionate restrictions on freedom of
16 expression.”). The New York state exception for defamation actions
17 was initially intended, at least in part, to ensure that “newspapers
18 published in other states [would not be forced] to defend themselves

1 in states where they had no substantial interests.” *Best Van Lines*,
2 490 F.3d at 245 (quoting *Legros*, 38 A.D.2d at 55).

3 For the first time in his reply brief on appeal, Friedman
4 challenges this rational basis by arguing that “[t]he internet . . .
5 dramatically changes the impact of the long arm defamation
6 exclusion” and “creates a wide defamation liability-free zone for out
7 of state publishers,” such as Bloomberg L.P., if they publish
8 defamatory statements online. Appellant’s Reply Br. at 25-30. At
9 issue in this appeal, however, is the statute’s defamation exception
10 with respect to the individual Milltown and Palladyne Defendants,
11 who are the alleged sources for the challenged statements in the
12 Bloomberg article. As we described earlier, one conceivable basis
13 for affording special protection to out-of-state defendants in
14 defamation actions is to avoid any unnecessary inhibition on their
15 freedom of speech. *See Best Van Lines*, 490 F.3d at 245; *see also*
16 Vincent C. Alexander, Practice Commentaries, N.Y. C.P.L.R. § 302, at
17 C302:10 (McKinney 2008) (“The [New York State long arm statute’s]
18 exclusion . . . recognizes the ease with which a written or oral

1 utterance may occur in New York, thereby subjecting numerous
2 individuals . . . to suit in New York despite their potentially remote
3 connection to the state.”). Because Friedman fails to counter this
4 rational basis, we conclude that his equal protection argument is
5 unavailing. *See Windsor*, 699 F.3d at 180.

6 In sum, we agree with the district court that Conn. Gen. Stat. §
7 52-59b does not violate Friedman’s First or Fourteenth Amendment
8 rights. We therefore affirm the district court’s dismissal pursuant to
9 this statute of Friedman’s defamation claim against the Milltown
10 and Palladyne Defendants for lack of personal jurisdiction.

11 II. The Allegedly Defamatory Statements

12 Because the parties do not dispute that we have personal
13 jurisdiction over the Bloomberg Defendants for their allegedly
14 defamatory statements, we turn to the district court’s dismissal of
15 Friedman’s claim against those defendants for failure to state a
16 claim. We review *de novo* a district court’s grant of a motion to
17 dismiss under Rule 12(b)(6), accepting as true the factual allegations

1 in the complaint and drawing all inferences in the plaintiff's favor.
2 *Biro v. Conde Nast*, 807 F.3d 541, 544 (2d Cir. 2015).

3 **a. The “For As Much As \$500 Million” Statement**

4 We first address the Bloomberg Defendants’ argument that
5 the article’s statement that Friedman sued Palladyne “for as much as
6 \$500 million” is protected under N.Y. Civ. Rights Law § 74. This
7 statute provides that “[a] civil action cannot be maintained against
8 any person, firm or corporation, for the publication of a fair and true
9 report of any judicial proceeding.” N.Y. Civ. Rights Law § 74. New
10 York courts adopt a “liberal interpretation of the ‘fair and true
11 report’ standard of . . . § 74 so as to provide broad protection to news
12 accounts of judicial . . . proceedings.” *Becher v. Troy Publ’g Co.*, 183
13 A.D.2d 230, 233 (N.Y. App. Div. 3d Dep’t 1992). A statement is
14 deemed a fair and true report if it is “substantially accurate,” that is
15 “if, despite minor inaccuracies, it does not produce a different effect
16 on a reader than would a report containing the precise truth.”
17 *Karades v. Ackerley Grp. Inc.*, 423 F.3d 107, 119 (2d Cir. 2005) (citations
18 omitted).

1 Here, the Bloomberg Defendants' statement that Friedman's
2 suit was "for as much as \$500 million" was a fair and true report of a
3 judicial proceeding. The statement was a description of the prayer
4 for relief in Friedman's complaint, which requested that "the Court
5 enter judgment on all Counts for the plaintiff," totaling \$499,401,000,
6 exclusive of attorneys' fees and costs. App'x at 89. Nowhere did the
7 complaint state that Friedman was pleading any counts in the
8 alternative or that the damages could not be aggregated. Even
9 though some of these damages would be barred as duplicative if
10 Friedman were successful in his lawsuit, it was not necessary for this
11 explanation to be included in the article. The Bloomberg
12 Defendants' characterization of the damages sought was an accurate
13 description of what was written in the complaint. *See Lacher v. Engel*,
14 33 A.D.3d 10, 17 (N.Y. App. Div. 1st Dep't 2006) ("Comments that
15 essentially summarize or restate the allegations of a pleading filed in
16 an action . . . fall within § 74's privilege."). As the district court
17 noted, "[t]o the extent there was an inaccuracy here, it is found in

1 the language [Friedman] used in the prayer for relief.” Special
2 App’x at 31.

3 Friedman argues, however, that the statement was neither fair
4 nor substantially accurate because Bloomberg L.P. did not contact
5 him for a response and, as a sophisticated media company, it should
6 have known that Friedman would not have been able to recover as
7 much as \$500 million. Friedman cites no case law in support of his
8 argument that the Bloomberg Defendants were compelled to seek
9 his response in order for an accurate report of the language of his
10 complaint to be “fair.” And the outcome that Friedman requests—
11 that we require “sophisticated” reporters to determine the legal
12 question of whether claims asserted in a complaint are duplicative
13 even if they are not pled in the alternative—would be excessively
14 burdensome for the media and would conflict with the general
15 purpose of § 74. *Cf. Becher*, 183 A.D.2d at 234 (“Newspapers cannot
16 be held to a standard of strict accountability for use of legal terms of

1 art in a way that is not precisely or technically correct by every
2 possible definition.” (citation omitted)).⁶

3 Accordingly, because we find that § 74 applies, we affirm the
4 district court’s dismissal of Friedman’s defamation claim based on
5 the “as much as \$500 million” statement.

6 **b. The “Repeatedly Tried to Extort” Statement**

7 We next address Palladyne’s quote in the Bloomberg article
8 that Friedman “has repeatedly tried to extort money from the
9 company.” App’x at 38. Friedman argues that this statement is
10 reasonably susceptible to a defamatory meaning—that he engaged
11 in criminal conduct—and implies the existence of undisclosed facts
12 that are detrimental to his character. We agree that the district court
13 erred in dismissing Friedman’s claim based on this statement.

⁶ Friedman further argues that he is entitled to discovery to determine the source of this statement. However, “once it is established that the publication is reporting on a judicial proceeding, how a reporter gathers his information concerning a judicial proceeding is immaterial provided his or her story is a fair and substantially accurate portrayal of the events in question.” See *Cholowsky v. Civiletti*, 69 A.D.3d 110, 115 (N.Y. App. Div. 2d Dep’t 2009) (citations and brackets omitted). We therefore find this argument unpersuasive.

1 Under New York law, which the parties do not dispute
2 applies here, a plaintiff must establish the following elements to
3 recover a claim for libel:

4 (1) a written defamatory statement of fact concerning the
5 plaintiff; (2) publication to a third party; (3) fault (either
6 negligence or actual malice depending on the status of the
7 libeled party); (4) falsity of the defamatory statement; and (5)
8 special damages or per se actionability.

9 *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000).

10 With respect to the first element of this cause of action, which is the
11 focus of this appeal, we must consider whether (1) “the challenged
12 statements reasonably imply the alleged defamatory meaning” and
13 (2) “if so, whether that defamatory meaning is capable of being
14 proven false.” See *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144,
15 150-51 (2d Cir. 2000). A defendant is not liable for “statements that
16 cannot reasonably be interpreted as stating actual facts about an
17 individual, including statements of imaginative expression or
18 rhetorical hyperbole.” *Id.* (citation and internal quotation marks
19 omitted).

20 Here, the district court found that, based on the context in
21 which Palladyne’s statement was made, a reasonable reader would

1 understand Palladyne's use of the word "extort" to be "rhetorical
2 hyperbole, a vigorous epithet . . . reflect[ing] Palladyne's belief that
3 an upset former employee had filed a frivolous lawsuit against
4 Palladyne in order to get money." Special App'x at 44. In
5 dismissing Friedman's claim, the district court relied in particular on
6 *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). There,
7 the Supreme Court determined that statements in a newspaper,
8 reporting that attendees of city council meetings had characterized
9 the plaintiff's negotiations with the city as "blackmail," were merely
10 "rhetorical hyperbole" and were not actionable defamatory
11 statements. *Id.* The Court dismissed the defamation claim,
12 concluding that:

13 It is simply impossible to believe that a reader who reached
14 the word "blackmail" in either article would not have
15 understood exactly what was meant: it was [plaintiff's]
16 public and wholly legal negotiating proposals that were
17 being criticized. No reader could have thought that either
18 the speakers at the meetings or the newspaper articles
19 reporting their words were charging [plaintiff] with the
20 commission of a criminal offense. On the contrary, even the
21 most careless reader must have perceived that the word
22 was no more than rhetorical hyperbole, a vigorous epithet
23 used by those who considered [plaintiff's] negotiating
24 position extremely unreasonable.

1 *Id.* (footnote omitted). On appeal, the Bloomberg Defendants also
2 cite to several New York state cases in which courts have held that,
3 in certain contexts, a defendant's use of the term "extort" may be
4 "rhetorical hyperbole" that is not actionable.

5 In *Melius v. Glacken*, for example, the then-mayor of Freeport
6 stated in a public debate that the plaintiff's lawsuit against him and
7 other officials, alleging that they had conspired to take away the
8 plaintiff's property, was an attempt to "extort money" because the
9 plaintiff was seeking an amount "far in excess of the appraised
10 value" of the property. 94 A.D.3d 959, 959-60 (N.Y. App. Div. 2d
11 Dep't 2012). After the plaintiff sued the mayor for defamation, the
12 court determined that based on the context in which the challenged
13 statements were made—in response to a question about the
14 plaintiff's lawsuit and in a "heated" public debate—a reasonable
15 listener would have understood that the mayor was stating his
16 opinion about the merits of plaintiff's lawsuit and not accusing the
17 plaintiff of criminal conduct. *Id.* at 960. The court held that the
18 statement was not actionable because the mayor had explained the

1 factual basis for his belief that the plaintiff was attempting to extort
2 money—that the plaintiff sought an amount “far in excess of the
3 appraised value” of the property—and therefore his statement did
4 not imply the existence of undisclosed facts that were detrimental to
5 the plaintiff’s character. *Id.* at 960-61; *see also Sabharwal & Finkel, LLC*
6 *v. Sorrell*, 117 A.D.3d 437, 437-38 (N.Y. App. Div. 1st Dep’t 2014)
7 (defendant’s statement that plaintiff had broached topic of
8 settlement “to ‘extort’ money” not actionable because reasonable
9 readers would understand it was an “opinion[] about the merits of
10 the lawsuit and the motivation of [the] attorneys, rather than [a]
11 statement[] of fact”); *G&R Moojestic Treats, Inc. v. Maggiemoo’s Int’l,*
12 *LLC*, No. 03 CIV.10027 (RWS), 2004 WL 1172762, at *1-2 (S.D.N.Y.
13 May 27, 2004) (defendant’s quote in article characterizing plaintiff’s
14 lawsuit as “approaching extortion” not actionable because “no
15 reasonable reader could understand [the] statements as saying that
16 plaintiff committed the criminal act of extortion”); *Trustco Bank of*
17 *N.Y. v. Capital Newspaper Div. of Hearst Corp.*, 213 A.D.2d 940, 942

1 (N.Y. App. Div. 3d Dep't 1995) (defendant's use of the word
2 "extortion" to describe lawsuit filed against him not actionable).

3 Here, the Bloomberg article discussed Friedman's lawsuit and
4 then included the following quote from Palladyne: "These entirely
5 untrue and ludicrous allegations have been made by a former
6 employee who has repeatedly tried to extort money from the
7 company. . . . He worked with us for just two months before being
8 dismissed for gross misconduct." App'x at 38. As in the cases cited
9 by the district court and the Bloomberg Defendants, the article
10 clearly indicated that Palladyne made these statements in the
11 context of a "heated" dispute. *See Melius*, 94 A.D.3d at 959-60. The
12 article described Friedman's allegations that Palladyne was "nothing
13 more than a façade created to conceal criminal transactions" and
14 noted that Friedman alleged that he had been fired by Palladyne
15 with "no legally cognizable explanation" after voicing his concerns
16 to a colleague about the firm's criminal exposure. App'x at 37-38.

17 However, unlike the cases cited by the district court and the
18 Bloomberg Defendants, a reasonable reader could interpret

1 Palladyne's use of the word "extort" here as more than just
2 "rhetorical hyperbole" describing Palladyne's belief that the lawsuit
3 was frivolous. *See Flamm*, 201 F.3d at 150-51. Palladyne did not
4 simply state that Friedman's *lawsuit* was an attempt to extort money
5 from the company. Instead, Palladyne stated that Friedman
6 "repeatedly" tried to extort money from them. This statement can be
7 read as something other than a characterization of Friedman's
8 underlying lawsuit against Palladyne and is reasonably susceptible
9 to a defamatory meaning—that Friedman actually committed the
10 criminal act of extortion—a statement that is capable of being
11 proven false. *Id.*

12 This interpretation also is reasonable when the statement is
13 read in the context of Palladyne's entire quote. After asserting that
14 Friedman had "repeatedly" tried to extort money from them,
15 Palladyne went on to state that Friedman was "dismissed for gross
16 misconduct." App'x at 38. Palladyne did not explain whether there
17 was a connection between these two statements. A reasonable
18 reader, therefore, could have believed that Friedman's "gross

1 misconduct” consisted of multiple attempts to “extort” money and
2 that Friedman was fired for engaging in this criminal conduct.

3 Further, even if a reasonable reader could interpret the word
4 “extort” as hyperbolic language describing Friedman’s conduct, and
5 not an assertion that Friedman had committed the criminal act of
6 extortion, this statement still would be actionable. A statement of
7 opinion is actionable under New York law if it implies that “the
8 speaker knows certain facts, unknown to his audience, which
9 support his opinion and are detrimental to the person about whom
10 he is speaking.” *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290 (1986); *see*
11 *also Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977)
12 (“Liability for libel may attach . . . when a negative characterization
13 of a person is coupled with a clear but false implication that the
14 author is privy to facts about the person that are unknown to the
15 general reader.”). Here, Palladyne’s statement can be read to imply
16 the existence of undisclosed facts that would be detrimental to
17 Friedman’s character. *See Hotchner*, 551 F.2d at 913. Palladyne
18 indicated that Friedman had taken prior actions that were attempts

1 to “extort” money from the company, but Palladyne did not explain
2 what those prior acts were or provide any details that would shed
3 light on its use of the word “extort,” whether outside of the context
4 of Friedman’s lawsuit or as a reference to it. *See Melius*, 94 A.D.3d at
5 961.

6 The Bloomberg Defendants argue that the article makes clear
7 that Palladyne’s statement refers to the fact that Friedman voiced
8 concerns about the firm’s criminal exposure and then filed this
9 lawsuit in an attempt to extract money from Palladyne. We disagree
10 that it is clear. Although the article stated that Friedman was fired
11 after “relating his concerns about the firm’s criminal exposure to a
12 colleague,” App’x at 37, a reasonable inference remains, based on
13 Palladyne’s statement that Friedman had “repeatedly” attempted to
14 extort the company, that there were multiple acts that Friedman had
15 taken which rose to the level of “extortion.”

16 Thus, even if Palladyne was asserting an opinion about
17 Friedman’s prior conduct, Palladyne’s statement can still be read as
18 conveying a negative characterization of Friedman without stating

1 sufficient facts to provide the context for that characterization.
2 Under New York law, such a statement is actionable. *See Hotchner*,
3 551 F.2d at 913. We therefore reverse the district court's dismissal
4 of Friedman's defamation claim based on this statement.

5 On remand, it will be up to the jury to decide both (1) whether
6 readers understood Palladyne's statement—"repeatedly tried to
7 extort"—to mean that Friedman engaged in criminal conduct and
8 (2) whether that statement in fact defamed Friedman. *See Sack on*
9 *Defamation* § 2:4.16 ("Once the judge has determined that the words
10 complained of are capable of a defamatory meaning, that is, are not
11 nondefamatory as a matter of law, it is for the jury to determine
12 whether they were so understood and whether they in fact defamed
13 the plaintiff.") (footnotes omitted)). We express no view as to how
14 those issues should be decided by the fact finder.

15 CONCLUSION

16 For the reasons stated above, we AFFIRM the district court's
17 dismissal of Friedman's claims against the Milltown and Palladyne
18 Defendants, and AFFIRM in part and REVERSE in part the dismissal

1 of his claims against the Bloomberg Defendants. We REMAND the
2 case to the district court for further proceedings consistent with this
3 opinion.