SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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JOHN GREANEY,

Plaintiff,

-against-

FERNANDO FERRER, CLINTON ROSWELL, and PAMELA MERLO BALFOUR, in her capacity as Treasurer of FERRER '97, the designated campaign committee of FERNANDO FERRER,

Defendants.
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Index No. 404 160/98
LD # 98TT013718

Hon. Joan Madden, J.S.C.
I.A.S. Part 11

**MEMORANDUM OF LAW IN REPLY TO PLAINTIFF'S OPPOSITION TO THE MOTION OF DEFENDANTS FERRER AND ROSWELL TO DISMISS THE COMPLAINT.**

**PRELIMINARY STATEMENT**

Defendants Fernando Ferrer and Clinton Roswell (hereinafter "Ferrer" and "Roswell") submit this memorandum of law in reply to plaintiff's opposition to their motion to dismiss the complaint for failure to state a cause of action, or alternatively, for summary judgment dismissing the complaint.

## ARGUMENT

### Point One

**FERRER AND ROSWELL HAVE ABSOLUTE IMMUNITY FOR THEIR ALLEGED STATEMENTS WHICH WERE RESPONSES TO ATTACKS ON THE INTEGRITY OF A PUBLIC OFFICE. PLAINTIFF ERRONEOUSLY CONCLUDES THAT THERE IS A SPECIAL RULE FOR ALLEGED POLITICAL CAMPAIGN STATEMENTS.**

An executive officer of **a** local government is entitled to an absolute privilege for statements made during the discharge of his responsibilities about matters within the ambit of his duties. Cosine v. Town of Islip, 63 NY2d 908, 909 (1984); Clark v. McGee, 49 NY2d 613, 617 (1980); Stukuls v. State of New York, 42 NY2d 272, 278 (1978). It is similarly established that a Borough President is an officer entitled to absolute immunity. Sheridan v. Chrisona, 14 NY2d 108, 112 (1964); Hagemann v. Molinari, 14 F Supp 2d 277, 287 (EDNY 1998). Furthermore, the absolute privilege afforded to the executive officer extends to his subordinates exercising delegated powers. Ward Telecommunications and Computer Services. Inc. v. State of New York, 42 NY2d 289, 292 (1977); Gautsche v. State of New York, 67 AD2d 167, 170 (3d Dept. 1979). The subordinate also benefits from the executive's privilege where it is alleged that the executive ratified or approved the challenged communication. Lombardo v. Stoke, 18 NY2d 394, 399 (1966). Plaintiff does not dispute any of these points.

However, plaintiff would have this court believe that there is some special talismanic power where the allegation is that the alleged defamation occurred "in the course of a political campaign." (see Point One, plaintiffs memorandum of law in opposition).[1] Plaintiff readily concedes that the statement of an executive officer to the press concerning a matter of

[1] 'hereinafter referred to as (P1. memorandum at p. __)

public concern is within the scope of his official powers, and is cloaked with absolute privilege. (P1. memorandum at p. 14); Sheridan v. Chrisona, supra, 14 NY2d at 113; Schell v. Dowling, 240 AD2d 721, 722 (2d Dept. 1997); Hagemann v. Molinari, supra, 14 F Supp 2d at 287-288. Further, he does not contest that such statements to the press made in defense of the integrity of the office are afforded absolute immunity, Lombardo v. Stoke, supra, 18 NY2d at 400; Aponte v. Newmark & Lewis. Inc., 176 AD2d 502 (1st Dept. 1991), or that an attack upon high-ranking government officers is considered an attack upon the entire office. Hagemann v. Molinari, supra, 14 F Supp 2d at 288. (See P1. memorandum at Points One and Two).

Plaintiffs entire argument on this point centers on his proposition that alleged defamation in the course of a political campaign is subject to a special rule, and receives qualified, not absolute immunity. (P1. memorandum at pp. 7-10). Yet, the cases he relies upon are factually distinct from this case, and do not stand for the general proposition expounded by plaintiff. In Silsdorf v. Levine, 59 NY2d 8 (1983); Arrigoni v. Velella, 110 AD2d 601 (1st Dept. 1985); and Velella v. Benedetto, 83 AD2d 465 (1st Dept. 1981), none of the alleged defamatory statements were made in response to attacks on public office. In Silsdorf v. Levine, supra, 59 NY2d at 10-lithe alleged defamation was published by challengers to the Mayor of Ocean Beach. Arrigoni v. Velella, supra, 110 AD2d at 601 involved a campaign flyer charging a private person and his companies with having questionable links with defendant's opponent. Similarly, Velella v. Benedetto, supra, 83 AD2d at 465 concerned a campaign flyer published by a political challenger for a New York State Assembly seat.

These statements were not responsive to criticism, but were attempts to go on the offensive during a political campaign. The applicability of absolute privilege was not even an issue in these cases. Rather, the courts analyzed these cases solely as statements about public

officials, or on public issues, thereby triggering the rule of New York Times Co. v. Sullivan, 376 US 254 (1964) requiring proof of actual malice. Silsdorf v. Levine, supra, 59 NY2d at 17; Arrigoni v. Velella 110 AD2d at 603-604; Velella v. Benedetto, 83 AD2d at 467- 468.

Similarly erroneous is plaintiffs reliance upon Doran v. Cohalan, 125 AD2d 289 (2d Dept. 1986). In that case, the statements were made in response to queries by a newspaper regarding the cost of a video arraignment system. The newspaper, Newsday, raised questions about the excessive cost of the system and charged that the Administrative Judge of Suffolk County's District Courts aided the contractor in obtaining the contract to install the system. Id. at 290. Newsday then contacted the defendants, Peter Cohalan and Joseph Caputo, the County Executive and Comptroller, respectively, for comment. Id. These comments were allegedly defamatory. The court found absolute privilege inapplicable since the Newsday article about the Administrative Judge was not an attack on the integrity of the county government impelling a public response. The critique was made of the judiciary, but the response came from the executive.

In contrast to the cases cited by plaintiff, this case involves alleged defamation which was in response to criticism by Councilman Israel Ruiz, Jr. on the Bronx-Lebanon Hospital medical waste incinerator issue. The alleged defamation was in direct response to attacks on the integrity of the office as in Lombardo v. Stoke, supra, 18 NY2d at 400 and Aponte v. Newmark & Lewis. Inc., supra, 176 AD2d at 502-503, and are likewise entitled to absolute immunity. Similarly, the statements at issue involve responses to attacks upon a high-ranking government officer. Thus, like the statements to the press in Hagemann v. Molinari, supra, 14 F. Supp. 2d at 287-288, they are cloaked with absolute immunity.

Curiously, plaintiff argues that "[t]he incinerator was clearly not within the scope of Ferrer's executive power -- he had opposed it since 1962 [sic] and it had not closed until 1999." (P1. memorandum at p. 14). Defendants are not quite sure what this is supposed to mean. However, it does not contradict the plain statement of powers conferred upon the Borough President by New York City Charter, Ch. 4, § 82(9). Moreover, if the incinerator was not within the scope of Ferrer's executive power, it would be senseless for Ruiz to seek to use it as an issue against Ferrer.

**Point Two**

**PLAINTIFF DOES NOT CONTEST THAT STATEMENTS REGARDING HIS EMPLOYMENT PERFORMANCE ARE NONACTIONABLE OPINION, AS A MATTER OF LAW.**

Plaintiff tacitly concedes, as he must, that it is established law that statements of opinion are not defamatory as a matter of law. Brian v. Richardson, 87 NY2d 46, 51(1995); Gross v. New York Times Co., 82 NY2d 146, 152-153 (1993); 600 West 115th Street Corp. v. Von Gutfeld, 80 NY2d 130, 139 (1992). Plaintiff also puts forth no argument challenging defendant's showing that statements criticizing plaintiffs work performance, as a matter of law, are nonactionable opinion. (P1. memorandum at Point Three).

Rather, plaintiff argues that a non-defamatory statement somehow transforms the opinion statements into actionable statements. Plaintiff argues that the statements at issue are "objectively false" because "plaintiff NEVER reviewed the incinerator project and never made a recommendation." (P1. memorandum at p. 15) (emphasis in the original). However, a statement pertaining to whether plaintiff reviewed and made recommendations concerning the incinerator project is not defamatory. The tort of defamation affords recovery for invasions to a person's reputation. Restatement (Second) of Torts, § 559 ("A communication is defamatory

if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."). See also Harper, James & Gray, The Law of Torts (Second), § 5.1. Whether plaintiff reviewed or made recommendations concerning the incinerator project clearly does not tend to harm plaintiff's reputation. Thus, plaintiff's complaints that the statements at issue imply that he reviewed and made recommendations regarding the incinerator are simply not defamatory.

The statements which plaintiff claims to be defamatory all involve criticisms of plaintiff's work performance. (complaint, annexed as exhibit A to Maiorana affirmation in support of motion, paras. 28 and 34). They are themselves non-actionable expressions of opinion, as a matter of law. Aronson v. Wiersma, 65 NY2d 592, 593-594 (1985); Ott v. Automatic Connector. Inc., 193 AD2d 657, 658 (2d Dept. 1993); Miller v. Richman, 184 AD2d 191, 192-193 (4th Dept. 1992); Williams v. Varig Brazilian Airlines, 169 AD2d 434, 438 (1st Dept. 1991); Goldberg v. Coldwell Banker, 159 AD2d 684, 685 (2d Dept. 1990); Noble v. Creative Tech. Servs., 126 AD2d 611, 612 (2d Dept. 1987). Thus, contrary to plaintiff's argument the statements of which plaintiff complains are not defamatory and cannot become defamatory by means of a non-defamatory implication.

## Point Three

### THE FULL CONTEXT OF THE ALLEGEDLY DEFAMATORY STATEMENTS REVEALS THEM TO BE NON-ACTIONABLE OPINION.

In Steinhilber v. Alphones, 68 NY2d 283 (1986) the Court of Appeals set forth four factors for consideration in determining whether a statement is opinion: "(1) an assessment of whether the specific language in issue has **a** precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) **a** determination of whether the statement is capable

of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might 'signal readers or listeners that what is being read or heard is likely to be opinion, and not fact."' Id. at 292.

Plaintiff makes no reference to the full context of the statements at issue, and offers no argument that the context renders the statements anything other than pure opinion. His sole exercise is to complain of the implication that he reviewed and recommended the incinerator, an argument addressed in Point Two, supra.

However, it is clear that the full context of the challenged statements reveals them to be pure opinion. The statements at issue were published in newspaper stories which presented statements from Ruiz and plaintiff in addition to statements from Ferrer and Roswell. The statements of Ferrer and Roswell were simply responses to statements by Ruiz and plaintiff, who were advancing their election campaign by attacking Ferrer's record on the incinerator project. The articles containing the statements at issue constituted a public debate, providing a forum for the expression of robust and non-actionable opinion. See 600 W. 115th St. v. Von Gutfeld, 80 NY2d 130, 138 (1992). Applying the Steinhilber test, when viewed in their social context, the statements are clear expressions of opinion. 600 W. 115th St. v. Von Gutfeld, supra, 80 NY2d at 141, 143. In denying a legal remedy for expressions of pure opinion, the courts acknowledge that the remedy for disagreeable expressions of opinion is the expression of responsive opinion. In this manner, the constitutional protection afforded free speech is fully realized.

## Point Four

**THE "SINGLE INSTANCE RULE BARS PLAINTIFF'S ACTION, SINCE THE STATEMENTS AT ISSUE DO NOT SHOW A COMPLETE UNFITNESS.**

Plaintiffs argument tacitly concedes that if the "single instance" rule applies, the complaint must be dismissed for failure to plead and prove special damages. (P1. memorandum at Point Four). Plaintiff merely claims that the single instance rule does not apply since the statements at issue "show[I such a lack of character that the plaintiff would be unfit for his profession." (P1. memorandum at p. 17). However, this argument ignores the language at issue in the applicable precedents construing the single instance rule.

In Larson v. Albany Medical Center, __AD2d__, 676 NYS2d 293 (3d Dept. 1998), the plaintiff nurses alleged that the publication of "the insubordination and unprofessional conduct charges against them" was defamatory. However, the court found that "[t]he statements involved alleging that plaintiffs were insubordinate or engaged in unprofessional conduct are subject to the single instance exception because such charges did not suggest that plaintiffs were incompetent as nurses." Id.

Bowes v. Magna Concepts. Inc., 166 AD2d 347 (1st Dept. 1990). was an action by a former magazine editor, who had authored an article which contained certain inaccuracies. Plaintiff alleged defamation based upon a retraction written by a subsequent editor which stated that the plaintiff "had her facts jumbled and failed to investigate those facts." Id. at 348. The Appellate Division reversed the denial of defendant's motion, finding the single instance rule applicable, and stated "that the language complained of here merely implies that plaintiff was careless in one particular instance ..." Id.

In Casamassima v. Oechsle, 125 AD2d 855 (3d Dept. 1986), plaintiff, a court reporter, took home a typewriter to complete transcripts. Plaintiff alleged defamation based upon a statement by the defendant, the executive assistant to the Administrative Judge, charging that plaintiff did not have permission to remove a typewriter from the courthouse. Defendant further contemplated filing a felony complaint against plaintiff for removing the typewriter. However, the court affirmed the dismissal of the complaint, finding that "[a]t most, defendant's letter accuses plaintiff ... of impropriety or other unprofessional conduct on a single occasion only and does not accuse him of general ignorance or lack of skill." Id. Despite implying criminal conduct, the single instance rule applied to the statement.

Lyons v. New American Library. Inc., 78 AD2d 723 (3d Dept. 1980) concerned statements in a book about the so-called "Son of Sam" serial-killer case. As recounted in this book, the New York City detectives sought to rule out a handgun matching the one used by the killer which was registered to a person in Malone, New York, and requested that the Sheriff in Malone conduct a ballistics test on the gun. The Sheriff purportedly told the detectives that he had no way to obtain a sample. When told that he could merely fire the weapon down a pipe into a tube of water, he supposedly responded that the detective should send him a pipe. Id. at 724. Despite this portrayal of professional incompetence, the court dismissed the complaint for lack of special damages based upon the single instance rule.

At issue in Amelkin v. Commerical Trading Co., Inc., 23 AD2d 830 (1st Dept. 1965), aff'd, 17 NY2d 500 (1966), was a letter charging the plaintiff, an insurance agent, with improperly safeguarding an insured's interests. However, the Appellate Division dismissed the complaint finding that "[a]t best, what plaintiff is charged with is that he acted improperly on a single occasion ..." Id. at 831. Thus, the statement charging a breach of a fiduciary

obligation "is not broad enough to accuse [the plaintiff] of general incompetence or ignorance." Id.

Certainly, charging nurses with insubordination and unprofessional conduct, an editor with having facts jumbled and failing to investigate her facts, a court reporter with theft, a Sheriff with lacking rudimentary forensic knowledge, and a fiduciary with having neglected to safeguard the principal's interest, could be construed as substantial allegations of unfitness for the particular professions. Yet, the courts in each of these instances applied the single instance rule finding that the allegations merely charged. ignorance, neglect, unprofessional conduct or malfeasance on one occasion. The statements that are the subject of this case are indistinguishable, and therefore suit should be precluded by the single instance rule.

## CONCLUSION

**THE DEFENDANTS HAVE AN ABSOLUTE PRIVILEGE, THE STATEMENTS ARE EXPRESSIONS OF OPINION, AND THE COMPLAINT FAILS TO PLEAD SPECIAL DAMAGES. THUS THE COMPLAINT SHOULD BE DISMISSED.**

Respectfully submitted,

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By
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July 28, 1999

Matthew J. Maiorana
*of counsel*