April 25, 2000

Supreme Court, New York County IA PART 11

Justice Madden

GREANEY v. FERRER - Defendants, Fernando Ferrer and Clinton Roswell move to dismiss the complaint or in the alternative, for summary judgment. Plaintiff opposes.

This is a defamation action. The complained of statements appears in two newspaper articles, published in July 1997 in the New York Daily News and the Bronx News.

Inasmuch as this is a motion to dismiss, for the purposes of this motion, the facts pleaded in the complaint are accepted as true. Plaintiff is a political consultant who was employed by Bronx Borough President Fernando Ferrer from 1987 to 1992. In 1992 plaintiff resigned voluntarily. In 1997 Ferrer was a candidate for New York City Mayor and then, after withdrawing as a candidate for Mayor, ran for reelection as Bronx Borough President. Israel Ruiz, Jr. (Ruiz), was running for Bronx Borough President and continued to run after Ferrer chose to run for reelection. Plaintiff was Ruiz's campaign manager and political consultant . In the course of the campaign Ferrer claimed credit for closing the Bronx-Lebanon Hospital Medical Waste Incinerator in the Bronx. In response, Ruiz criticized Ferrer for his handling of the incinerator issue. According to the complaint, a Ferrer appointee had been paid money by the builder of the incinerator about the time that Ferrer first approved of the incinerator, and the FBI and the United States Attorney conducted an investigation. During the course of the federal investigation plaintiff was never mentioned by Ferrer as having played any role in the approval of the incinerator project, and plaintiff was never approached by the FBI or the U.S. Attorney regarding its investigation.

In 1997 Ferrer announced the closing of the incinerator and claimed credit for its closing. Ruiz asserted that Ferrer had endorsed the incinerator project in 1988, and that it could not have been built without Ferrers support. Ruiz then attacked Ferrer for "grandstanding" on the closure of the incinerator. In response to Ruiz's criticism , Ferrer stated to a Daily News reporter that Ruiz's campaign manager, plaintiff, was encouraged to resign because he had botched a 1988 review of the incinerator and that plaintiff had drafted the November 1 988 letter signed by Ferrer endorsing the incinerator concept. In a conversation with a Bronx News reporter , Roswell, a Ferrer spokesperson, reiterated that plaintiff had reviewed the incinerator project for Ferrer and that "he didn't do his job well and mislead the borough president." He also stated that there were witnesses who saw plaintiff make a false report and that he was guilty of ethical violations.

Defendants move to dismiss the complaint on the grounds that Ferrer and his spokesman have absolute immunity as public officials, the statements are constitutionally protected opinion and therefore nonactionable , and finally that the statements complained of are not libel per se since plaintiff failed to plead special damages.

"Communications afforded an absolute privilege are perhaps more appropriately thought of as cloaked with an immunity, rather than a privilege against the imposition of liability in a defamation action. This immunity, which protects communications irrespective of the communicants motives , has been stringently

applied. In general its protective shield has been granted only to those individuals participating in a public function, such as judicial, legislative or executive proceedings" Toker v. Pollak, 44 N.Y.2d 211, 219 (1978) (citations omitted). Absolute privilege is "afforded ' an official [who] is a principal executive of State or local government or is entrusted by law with administrative or executive policy-making responsibilities of considerable dimension' Stukuls v. State of New York, 42 NY2d 272, 278), with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties (see Stukuls v. State of New York, 42 N.Y.2d 108, 113; Lombardo v. Stoke, 18 N.Y.2d 394)" Clark v. McGee, 49 N.Y.2D 613, 617 (1980).

Here, the subject matter of the alleged defamatory remarks are clearly related to Ferrer's public duties; as Borough President he is certainly concerned with an employees job performance. "This alone, however, is not necessarily sufficient justification for assertion of absolute immunity, for the particular forum in which the remarks are made also plays a part in determining the availability of the privilege" Clark v. McGee, 49 N.Y.2D 613, 619 (1980). In Clark, a Town Supervisor sought immunity with respect to a statement he made about another public servant during the course of a news conference. There, the Court of Appeals held that he was not entitled to an absolute privilege, "for the simple reason that they were not made during his performance of an essential part of his public duties," Id at 620; see also, Cheatum v. Wehle, 5 N.Y.2d 585 (absolute privilege denied a Commissioner regarding a statement he made about the ability and integrity of a member of his staff during the course of an after-dinner speech ).

Next defendants argue they are entitled to an absolute privilege as the statements complained of are a criticism of an employee's work and part of a political debate, thus they are constitutionally protected. However, plaintiff does not disagree with Ferrer's opinion that his work performance involving the incinerator was flawed, he denies he was ever involved with the incinerator project. Hence, Ferrer 's opinion of plaintiff's work is based upon fact which is either true or false, and therefore the statements are not protected opinion, see Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990); Immuno AG. V. Jankowski, 77 N.Y.2d 235, 254 (1991); Gold reyer v. Van De Wetering, 217 A.D.2d 434, 435 (1st Dept. 1995); Gross v. New York Times Company, 82 N.Y.2d 146, 154-155.

Finally, defendants seek to dismiss based upon plaintiff's failure to plead special damages, as required by the single instance rule. The single instance rule is invoked when a professional is charged with ignorance or mistake on a single occasion only, not generally. Such a statement is not actionable defamation unless special damages are pleaded, November v. Time Inc., 13 N.Y.2d 175, 178; Bowes v. Magna Concepts, 166 A.D.21d 347) ... . Gold reyer v. Van De Wetering, 217 A.D.2d 434, 437 (1st Dept. 1995). Inasmuch as plaintiff does not plead special damages, he can only maintain this action if the defendants' statements are found to be libel per se.

Here, Ferrer accused plaintiff of "botching" a review of the incinerator project, drafting Ferrer's letter approving the project, and stated that plaintiff was encouraged to resign because of that and "other problems." Roswell reiterated Ferrer's statements and also stated there were witnesses who saw plaintiff make a false report and that plaintiff was guilty of ethical violations. Plaintiff denies any involvement with the incinerator project whatsoever, and states that he resigned on good terms with Ferrer. The statements of defendants go beyond the single instance rule, and if proven false, are libel per se, such that special damages need not be pleaded, November v. Time Inc., 13 N.Y.2d 175 (1963); Goldreyer, Ltd. v. Van De Wetering, 217 A.D.2d 434 (1st Dept. 1995); Armstrong v. Simon & Schuster, 197 A.D.2d 87 (1st Dept.) affd 85 N.Y.2d 373 (1995).

Accordingly , it is hereby ORDERED that defendants' motion for summary judgment is denied and this matter is scheduled for a preliminary conference on April 28, 2000 at 9:30 A.M. at 60 Centre Street, Room 351.

This is the decision and Order of the Court.