Index No. **404160/98**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

X----------X

JOHN GREANEY,

Plaintiff,

-against-

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

Defendants.

X----------X

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS COMPLAINT

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS COMPLAINT

Introduction

This memorandum is submitted in opposition to the motion of defendants Fernando Ferrer ("Ferrer") and Clint Roswell ("Roswell") to dismiss the complaint herein on the grounds of absolute immunity.

Because this motion is addressed to the pleadings, for the purpose of deciding the motion, all the facts pleaded in the complaint must be accepted as true. While the moving defendants claim to understand that fact, their argument is replete with statements of fact and assumptions that are simply false. Those faulty assumptions will be dealt with in each point where relevant. Before discussing the law, however, it is important to state the facts of the case as pleaded because that is the factual context in which the motion must be decided.

Defendants' moving papers included the plaintiff's complaint and bill of particulars. The following recitation of fact will be drawn from the complaint as amplified by the bill of

particulars.[1] Because the Exhibits to the complaint were not attached to the copy of the complaint in the moving papers, they are appended to this memorandum.

Statement of Facts

Plaintiff is an experienced political consultant and public servant, well regarded, capable and conscientious (Complaint, par. 5). From 1987 to 1992, plaintiff was employed by Ferrer who held the public elective office of Bronx Borough President (Complaint, par. 6). All of plaintiffs' evaluation reports as a Ferrer employee were excellent. He organized several events for Ferrer including a Presidential debate. After one event, Ferrer complimented plaintiff with a vulgar masculine metaphor (BP, pp. 2-3, par. 3, subparas (6) and (7)).

In 1992, plaintiff resigned from the employment of Ferrer having completed five years of loyal service to Ferrer (Complaint, par. 7). Plaintiff's left Ferrer's office voluntarily and indeed, Ferrer had urged him to stay (Complaint, par. 37(e)).

The Bronx-Lebanon Hospital Waste Incineration Project

In 1987, a proposal was advanced by Bronx-Lebanon Hospital for the construction of a hospital waste incinerator (the “incinerator”) in the Port Morris area of the Bronx (Complaint, par. 11). Ferrer had long-standing personal relationship to the sponsors of the incinerator (Complaint. par. 12). On November 2, 1988, he wrote the sponsors of the incinerator supporting the construction of the incinerator. (Complaint, par. 13, Exhibit A). No official capacity for Ferrer as to the incinerator project appears in the pleadings.

In 1992, because of public clamor against the incinerator, Ferrer abandoned his previously unwavering support for the incinerator (Complaint, par. 16). In June 1992, it was discovered that Alberto Urbina, a Ferrer appointee to public office had been paid moneys by the builder of incinerator about the time that Ferrer first approved of the incineration project. At the same time, it was disclosed that the Federal Bureau of Investigation (“FBI”) and the U.S. Attorney for the Southern District of New York (U.S. Attorney) were conducting an investigation of the incinerator project (Complaint, par. 18).

[1] The bill of particulars will be cited as "BP."

Ferrer was questioned by FBI agents and subpoenaed to testify before a grand jury concerning the incinerator project (Complaint, par. 19). During the course of the federal investigation at no time was the plaintiff ever mentioned by Ferrer, or any one else, as having played any role in the approval of the incinerator project. (Complaint. Par. 20).

The simple fact is that at no time did plaintiff deal with the incinerator project during his employment by Ferrer (Complaint, par. 14). At no time did Ferrer consult with or discus the incinerator with the plaintiff (Complaint. Par. 15). Despite a wide-ranging investigation of the incinerator by federal authorities, at no time was plaintiff ever approached by the FBI or the U.S. Attorney concerning the incinerator (Complaint, par. 21).

The incinerator as constructed was subject to numerous health and safety violations and eventually closed in 1997 (Complaint., par. 22).

Context of Libel

In 1997, Ferrer was a candidate for public office, first for N.Y.C. Mayor and then, after withdrawing as a candidate for Mayor, for reelection as Bronx Borough President. In January of that year, plaintiff had been asked to obtain the services of well-known singer Tony Bennet for a fund-raiser on Ferrer's behalf, but plaintiff refused to help. (BP, pp. 2, par. 3, subpar. (3)).

Later that year, plaintiff was acting as campaign manager and political consultant to Israel Ruiz, Jr. ("Ruiz"), a candidate for Borough President who continued as a candidate after Ferrer decided to drop out of the Mayoralty election and run for reelection as Bronx Borough President. (Complaint, par. 10). Roswell was acting as spokesman for candidate Ferrer in his campaign (Complaint, par. 8, 9).

In the course of the campaign, Ferrer claimed credit for closing of the incinerator. In response, Ruiz, issued a statement pointing out that Ferrer was taking credit for killing of a project that would not have been built without candidate Ferrer's support in the first place (Complaint, paras. 23-24).

On or about July 9, 1997, Ferrer responded to Ruiz in a telephone interview with a reporter of the New York Daily News. Ferrer knew the Daily News reporter and knew that he was speaking for publication in a newspaper that distributed as many as a million copies a day. He

also knew that his words would be printed and distributed by the Daily News in connection with his campaign for nomination in the Democratic Party primary for Bronx Borough President (Complaint, paras. 25-27).

In his remarks to the Daily News, Ferrer attempted to excuse his support for the incinerator project by blaming his opponent's campaign manager - the plaintiff. He claimed that plaintiff had botched a review of the of the incinerator project and drafted the letter that approved the project. According to Ferrer, after he became the incinerator's strongest critic, he had forced plaintiff to quit his staff in 1992 (Complaint, par. 28). On July 10, 1997, the Daily News published Ferrer's comments just as Ferrer intended that it do (Complaint, par. 29; Exhibit B).

Ferrer made this story up out of whole cloth. It was utterly and completely false and he knew it. Plaintiff was not encouraged to resign by Ferrer but actually stayed well beyond his original separation date at Ferrer's request. Plaintiff had not botched any 1988 review of the incinerator project because he had never been asked to conduct any such review and he had played no part in, and was excluded from, all deliberations and activities of the Borough President’s office concerning the incinerator. Neither had plaintiff drafted the letter approving the incinerator. He had nothing whatsoever to do with the project. (Complaint, par. 30).

Needless to say, the controversy between Ferrer and Ruiz over incineration was grist for the media mill in its coverage of the campaign. Plaintiff promptly demanded a retraction but received no immediate response (Complaint, par. 31).

The few days later, a reporter for the Bronx News, a weekly newspaper of general circulation in the Bronx, interviewed Roswell who was Ferrer's spokesman concerning the controversy. Roswell knew that Bronx News reporter and he intended that his comments be published in the Bronx News. (Complaint, paras. 32-33)

In his conversation with the Bronx News reporter, Roswell reiterated that plaintiff had reviewed the incinerator project for Ferrer and that “he didn’t do his job well and mislead the borough president.” According to Roswell, instead of doing individual research, plaintiff had "piggybacked on letters of support from the community board." Roswell stated there were witnesses who saw Greaney make a false report (Complaint, par. 34, subparas. (a), (b) and (f)).

In relation to statement by plaintiff that he was encouraged to stay with the borough president's office, Roswell stated "[t]hat is far from the truth" and that plaintiff had been fired due to the strong urging of Ferrer. In addition, plaintiff was guilty of ethical violations. (Complaint, par. 34, subparas. (c)-(e)). Roswell also stated to Bronx News reporter, that Ferrer was looking forward to the possibility of a lawsuit over plaintiff's firing. (Complaint, par. 35). As Roswell intended, his statements were published by the Bronx News (Exhibit C).

To Roswell's knowledge, his statements to Bronx News reporter were objectively false in that: (a) plaintiff had not piggybacked on the letters of support from the community board in that he had no involvement with the incinerator project at all; (b) plaintiff had not misled the borough president; (c) plaintiff had been encouraged to stay with the borough president's office so that plaintiff's statement that he had was the truth and not "far from the truth"; (d) at no time had plaintiff violated the code of ethics, or been charged with violating the code of the ethics, in regard to the incinerator or anything else; (e) plaintiff was not fired due to the strong urging by Ferrer, he had urged the plaintiff to stay; (f) there could be no witness who saw plaintiff make "the false report" about the incinerator because he had never made any report about the incinerator. (Complaint, par. 37, 38).

Roswell and Ferrer were well aware of the falsity of their statements when they made them (Complaint, paras. 30, 38). Ferrer was acting with spite because plaintiff, a former employee of Ferrer, was supporting Ruiz and had refused Ferrer's request for assistance in obtaining Tony Bennet for a Ferrer fundraiser {Complaint, par. 45; BP, par. 3).

Retraction spurned.

On July 17, 1997, attorney Andrew M. Schnier wrote Ferrer requesting a retraction of his statements.(See Exhibit D, annexed). In response, an attorney representing Ferrer spoke with attorney Mr. Schnier and informed him that Ferrer would not retract any of the published statements and that, in relation to the threat of a law suit by plaintiff for libel, that plaintiff would "have to do what he had to do." (Complaint, paras. 41, 42).

This lawsuit is what plaintiff "had to do."

Defendant's motion

In their answer, defendants Ferrer and Roswell pleaded affirmative defenses that "[a]ny statements made by defendants were and are constitutionally potected" and that "statements complained of are absolutely and/or qualifiedly privileged." (Ferrer Answer, paras. 8, 10, p. 3). This motion to dismiss is based upon Ferrer's claim that his remarks about plaintiff were so related to the conduct of his office that he is absolutely immune, statements constituionally protected and the failure of plaintiff to plead special damages..

Issue Presented

Do incumbent candidates for public office have absolute immunity to maliciously slander their opponents?

As a matter of law, were Ferrer's libels absolutely privileged even though there were uttered in the context of his reelection campaign?

Does Ferrer's premeditated character assassination come within the "single instance" rule requiring proof of special damages?

Were the defendant's attacks on plaintiff's professional competence non-actionable, or constitutionally protected, opinion?

POINT ONE

Candidates for public office, including incumbents, are not absolutely immune for libelous statements concerning their opponents or their supporters.

There is a clear distinction between the absolute privilege or immunity claimed by defendants and the qualified privilege extended to public figures involved in public debate. Thus while normally libelous statements about public figures are entitled to only "qualified privilege," in a limited number of instances public officials may be absolutely immune from liability for false, even malicious statements, in exercising the functions of their office. Compare *Clark v McGee,* 49 NY2d 613 (1980) and *Silsdorf v. Levine*, 59 N.Y.2d 8 (1983).

Although the context of this action are defamatory statements and libel made in the course of a political campaign, NONE of the cases cited in the memorandum in support of the motion to dismiss submitted by Ferrer and Roswell even remotely involve that context. In election campaign cases, it is absolutely clear that participants are entitled to only a qualified privilege for slanderous statements, not absolute immunity. *Silsdorf v. Levine*, supra; *Velella v. Benedetto,* 83 A.D.2d 465 (1st Dept. 1981) affirmed 57 N.Y.2d 788 (1982); *Arrigoni v. Velella*, 110 A.D.2d 601 (1st Dept. 1985).

In *Silsdorf*, the Court of Appeals passed upon a claim that statements in a campaign flyer about the conduct of a public official were constitutionally protected opinion. After passing upon the factual issue of whether the statements were opinion or fact,[2] the Court specifically discussed the degree of protection from libel actions campaign statements possessed:

> "We note finally that defendants' concern over undue limitations upon expression in the course of political campaigns is misplaced. Even privilege has its limitations and even a public figure in the midst of a political campaign is entitled to some degree of protection. It is true that our society places a high value on the uninhibited and open debate necessary for the responsible functioning of political processes, to the extent even of protecting some falsity to avoid creating a chilling effect upon that expression (*New York Times Co. v Sullivan, 376 U.S. 254, 279; Gertz v Robert Welch, Inc., 418 U.S. 323, 340-341,* supra). But sufficient protection is afforded defendants by virtue of the requirement that plaintiff prove

[2] See POINT FOUR, infra.

> actual malice. Plaintiff, as Mayor of the Village of Ocean Beach and participant in an election for that office, clearly is a "public official" for purposes of applying the New York Times rule. Thus, a constitutional prerequisite to plaintiff's recovery is that he prove that defendants published the defamatory statements with actual knowledge that they were false or with reckless disregard for their truth or falsity (*New York Times Co. v Sullivan, supra, at p 280).* 59 NY2d at 16-17

In weighing the appropriate standard of privilege or immunity for libelous statements in the election campaign context, New York Courts have consistently applied the *Silsdorf* actual malice standard rather than the absolute immunity claimed by Ferrer and Roswell.

Velella v. Benedetto, supra, and *Arrigoni v. Velella*, supra, involved the 1978 and 1982 campaigns of now State Senator Guy Velella for the NYS Assembly.

In *Benedetto*, Vellela's 1978 opponent Michael Benedetto had published an inflammatory flyer charging that Velella had accepted campaign contributions from an indicted landlord. The statements were technically true. Bronx Special Term had denied Benedetto's motion for summary judgment. On appeal, the Appellate Division reversed and granted summary judgment to Benedetto.

In discussing the standard to be applied to campaign libel cases, the Appellate Division applied a qualified privilege, not absolute immunity:

> "Any possible doubts on this issue are dispelled when the facts are considered in the light of the principles enunciated by the United States Supreme Court with regard to defamation actions by public officials. In *New York Times Co. v Sullivan (376 U.S. 254, 270)* the court held that such actions by public officials must be considered 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *The court held with regard to such actions by public officials that there must be established "with convincing clarity" (at pp 285-286) that the defamatory falsehood was made with "'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not*' (at p 280). (See, also, *Gertz v Robert Welch, Inc., 418 U.S. 323, 342.)"* (emphasis supplied) 83 AD2d at 467-468

In 1982, the shoe was on the other foot. As a result of reapportionment, Velella was thrown into a district with another incumbent assembly member, John Dearie. In the course of the campaign, Velella circulated a flyer accusing Dearie of accepting money from Arigoni to influence legislation. Bronx Special Term had remarkably dismissed all of Velella's claims of privilege and

granted Arigoni summary judgment. The Appellate Division reversed holding that " triable issues abound." 110 A.D.2d at 605.

Insofar as the standard to be applied, the Appellate Division held:

> "In *Maule v NYM Corp. (54 NY2d 880, 881-882,* n), holding the plaintiff in that case to be a public figure, the court left open the question "whether a plaintiff's status in an action for defamation should be determined by the court or by the jury or by both (see, e.g., *Rosenblatt v Baer, 383 U.S. 75, 88;* Restatement, Torts 2d, § 619; Prosser, Torts [4th ed], § 115, p 796)". We need not decide that issue here. It is plain that the determination that plaintiffs were not public figures, as a matter of law, was not warranted on this record. *If Arrigoni is a public figure, defendant was afforded a qualified privilege requiring that Arrigoni prove malice, in short, that the privilege has been abused* (*Toker v Pollak, 44 NY2d 211).* This is a jury question (*Hamilton v Eno, 81 NY 116, 122-123; James v Gannett Co., supra; Petrus v Smith, 91 AD2d 1190, 1191).*" (emphasis supplied) (ibid at 604)

The leading U.S. case on the impact of libel laws on constitutional guarantees of free speech is *New York Times v. Sullivan*, 376 U.S. 254 (1964). In that case, the Supreme Court carefully balanced the needs of the public for free and open debate about matter of public concern with the impediments libel laws could place on such debate. Over a vigorous dissent it reached the conclusion that critics of public officials were entitled to a qualified privilege but not absolute immunity for potentially libelous statements. It also emphasized the need for a level playing field between public officials and their critics:

> "Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In *Barr v. Matteo, 360 U.S. 564, 575,* this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo, supra, 360 U.S., at 571.* Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See *Whitney v. California, 274 U.S. 357, 375* (concurring opinion of Mr. Justice Brandeis), quoted supra, p. 270. As Madison said, see supra, p. 275, 'the censorial power is in the people over the Government, and not in the Government over the people.' It would give public servants an

> unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." 376 U.S. at 282-283

This "fair equivalent" does not mean that critics should have absolute immunity for their criticisms of incumbent candidates. That was not the holding of *Velella v. Benedetto*, supra. It does mean that each enter the debate with the same qualified privilege - they may not engage in, or be the subject of, demonstrably malicious lies which destroy not only debate, but lives and careers.

POINT TWO

The facts as pleaded do not demonstrate that Ferrer's libels of plaintiff were within the scope of his official duties. He is not absolutely immune for their utterance.

Defendants cite a plethora of cases for the proposition that that Ferrer was absolutely immune from claims of libel for his statements about plaintiff even though they were made with actual malice and spite. None of these cases involve statements made in connection with an incumbents campaign for reelection and in two of them, public official was denied absolute immunity for his libelous statements made with malice. *Stukuls v. State of New York*, 42 NY2d 272, 278 (1978); *Clark v. McGee*, 49 NY2d 613, 617 (1980).

Stukuls denied absolute immunity to the acting head of a state college for statements made to a tenure committee about the qualifications of plaintiff. The Court of Appeals found qualified privilege a sufficient protection for public officials in his place. 42 NY2d at 278.

In *Clark*, a Town Supervisor made defamatory statements to a radio station reporter about the former Secretary of the Town Board. Although a Town Supervisor is cloaked with absolute immunity for his official tasks, the Court of Appeals held that the statements at issue were not so privileged.

The Court of Appeals stated:

> "While the absolute privilege is thus a creature of strong public policies (see *Cheatum v Wehle, 5 NY2d 585), there do exist powerful countervailing considerations which preclude broad application or expansion of this privilege*. Public office does not carry with it a license to defame at will, for *even the highest officers exist to serve the public, not to denigrate its members*. Although the needs of effective government mandate that certain important officials be

> absolutely privileged with respect to statements made in the course of and concerning their public responsibilities, it is yet true that 'a balance must be struck between this objective and the right of an individual to defend himself against attacks upon his character' (*Toker v Pollak, 44 NY2d, at pp 222-223,* supra). For these reasons, *the privilege is not to be extended liberally, and instead must be carefully confined to that type of situation in which the protection provided by the privilege will serve a necessary societal function* (see *Toker v Pollak, 44 NY2d 211,* supra; *Stukuls v State of New York, 42 NY2d 272,* supra; *Cheatum v Wehle, 5 NY2d 585,* supra). Thus, even *a public official who is otherwise entitled to immunity 'may still be sued* if the subject of the communication is unrelated to any matters within his competence * * * or *if the form of the communication -- e.g., a public statement -- is totally unwarrante*' (*Lombardo v Stoke, 18 NY2d 394, 401,* supra)." (emphasis supplied) 49 NY2d at 618-619

The origins of the absolute privilege afforded to public officials was discussed in *Cheatum v. Wehle,* 5 NY2d 585 (1959). In that case, during an after dinner speech, the State Conservation Commissioner had accused plaintiff Wehle, one of his subordinates, of deliberately sabotaging one of the Conservation Department's programs. In finding that Wehle was not entitled to absolute immunity for his statements, the Court of Appeals after first noting that desirability of absolute immunity as "essential in the conduct of official business" then went on to explore whether the statements by Wehle fell within the scope of official business.

> " The rationale underlying the absolute privilege accorded official reports made in due course is not to be confused with comments made in the course of an after-dinner speech to a group of citizens who can do nothing about it in any event. To extend the absolute privilege to such activities would lead to all sorts of abuses and do great harm to individual victims without improving the service of government. This case falls within that general condemnation, since Commissioner Wehle had at hand a ready, effective, orderly and legal means of dealing with Dr. Cheatum, such, for instance, as the filing of charges and giving him an opportunity to be heard. *The speech made by Commissioner Wehle, as the Appellate Division observed, was not greatly different from a speech of a member of the Legislature speaking to his constituents, explaining his votes or berating some of his colleagues which enjoys no privilege outside the legislative halls.* The succinct comment of the learned court below is worth quoting: 'No legal or moral duty was fulfilled by the defendant in advising private citizens that plaintiff was guilty of negligence or deliberate sabotage, because the audience could do nothing about it in any event, and hence there was no qualified privilege (*Bingham v. Gaynor, 203 N. Y. 27)*' Whether such privilege existed is a question of law under the circumstances (*Ashcroft v. Hammond, 197 N. Y. 488;* 3 Restatement, Torts, § 619). (emphasis supplied) 5 NY2d at 593-594

The protection accorded by the absolute immunity doctrine is narrow: it covers comments made by public officials "during the performance of an essential part of their [official] duties," and is "limited to the speaker's official participation in the processes of government." Doran v. Cohalan, 125 A.D.2d 289, 290-291 (2d Dep't 1986).

The policy consideration addressed in *Cheatum*, also lay at the heart of the Court of Appeals analysis in *Toker v. Pollak*, 44 NY2d 211 (1978). In *Toker*, Henry Stern (now NYC Parks Commissioner) informed both the Mayor's Commission on the Judiciary and the Manhattan District Attorney's Office of an allegation that Toker, a candidate for judge, had taken a bribe to settle a case against the City when he was an Assistant Corporation Counsel some fifteen years before. Stern's lawyer, Pollak, had settled the case for Stern's mother and told Stern that he had to pay a bribe to Toker.

There were four distinct communications from Stern to the authorities at issue. In each case Stern claimed absolute immunity and each case, he failed. The first communication was an affidavit to the District Attorney's Office in lieu of Grand Jury testimony. The other three were oral statements to the Mayor's Committee, the District Attorney and the NYC Department of Investigation, respectively. None were absolutely privileged.

The toughest question was the affidavit in lieu of Grand Jury testimony. There was no question but that Grand Jury testimony itself would have been absolutely immune from claims of libel. The Court of Appeals carefully distinguished between absolute immunity and qualified privilege.

> "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. (Prosser, Torts [4th ed], § 114, n 66.) This immunity, which protects communications irrespective of the communicant's 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 (*Pecue v West, 233 NY 316)*, legislative (*Roberts v Pratt, 174 Misc 585)*, or executive proceedings (*Cheatum v Wehle, 5 NY2d 585)*. The absolute protection afforded such individuals is designed to ensure that their own personal interests -- especially fear of a civil action, whether successful or otherwise -- do not have an adverse impact upon the discharge of their public function. (Restatement, Torts [2d], § 584 et seq.)" 44 NY2d at 219.

However, while testimony before a grand jury was absolutely privileged, the statements to the District Attorney and affidavit were not.

> "Testimony before a Grand Jury is afforded absolute immunity because, by statute (CPL 190.25, subd 4), Grand Jury proceedings are secret. Disclosure of the nature and substance of testimony elicited before this body is prohibited. No such statutory directive requiring confidentiality exists with respect to communications made to a District Attorney.
>
> "Moreover, as a matter of policy, there is little reason to clothe communications to a District Attorney prior to commencement of a criminal proceeding with absolute immunity. A qualified privilege is sufficient to foster the public purpose of encouraging citizens to come forth with information concerning criminal activity. If the information is given in good faith by an individual who believes the information to be true, he is protected against the imposition of liability in a defamation action, notwithstanding that another, perhaps possessed of greater wisdom, would not have reported the information. (*Pecue v West, 233 NY, at p 322,* supra.)…" 44 N.Y.2d at 221

The rule to be drawn from these cases is that in determining whether the statements by Ferrer were absolutely or qualifiedly privileged, it is not enough to simply describe his office. The purpose, means of his communication and context of his communication must be weighed. In the instant case, the purpose, means and context all were apiece with Ferrer's campaign for reelection. As set forth in POINT ONE, supra, that purpose, means and context afford only qualified, not absolute, privilege from claims of libel.

The other cases cited by defendants have little authority to offer the instant case. In three of the cases the alleged libel was contained in official documents and reports themselves which were only subsequently reported. See *Ward Telecommunications and Computer Services, Inc. v. State of New York*, 42 NY2d 289, 292 (1977); *Cosme v. Town of Islip*, 63 NY2d 908, 909 (1984) (affirming 102 A.D.2d 717 (1st Dept. 1984)); *Sheridan v. Crisona*, 14 NY2d 108, 112 (1964). In *Gautsche v. State of New York*, 67 AD2d 167, 170 (3d Dept. 1979) the alleged libelous statement was a press release explaining the filing of a law suit.

In *Barr v. Matteo*, 360 US 564, 571 (1959), the alleged libelous statement was a press release by Acting Director of the Office of Rent Stabilization explaining why he intended to suspend two other officers of the agency.

In *Aponte v. Newmark & Lewis, Inc*., 176 AD2d 502, 503 (1st Dept. 1991)., the integrity of the agency was attacked in two page advertisement purchased by the Department. The response to that attack on the agency was absolutely privileged. However, the Appellate Division also noted that even if it applied only a qualified privilege, the agency head would have survived because there was no proof of actual malice. Similarly, in *Lombardo v. Stoke*, 18 NY2d 394, 399 (1966) a College President was absolutely privileged for comments in a press release defending Queens College against charges of Anti-Catholic bias. He was in fact acting on behalf of defendant Board of Higher Education.

Lombardo v. Stoke, supra, a press release was issued defending Queens College against charges of Anti-Catholic bias. The president of college acting on behalf of defendant Board of Higher Education. Similarly, in *Schell v. Dowling*, 240 AD2d 721 (2d Dept. 1997), the controversy surrounding handling of tuberculosis cases in a local school immunized statements of Health Department officials dealing with that controversy. " Considering that the Health Department's handling of the tuberculosis incident had become a matter of public controversy, the forum in which the statements were made was sufficiently connected to the defendant's official duties to warrant the protection provided by the privilege (see, *Lombardo v Stoke, 18 NY2d 394;* cf., *Clark v McGee, supra, at 621)*" . *Schell v. Dowling*, supra, 240 AD2d at 722. Similarly. *Hagemann v. Molinari*, 14 F Supp 2d 277, 287 (EDNY 1998).

As noted above, none of the other cases took place in the context of an election campaign. However, in each case, there were involved an attack on the institution of the government agency which then replied to that attack. There was a discernible institutional, as distinguished from personal, interests at stake. In the case at bar, the statement that engendered the ire of Ferrer was simply that Ferrer had originally supported the failed incinerator project.

In the case at bar, the libel was not contained in any official document that was then reported to the public. The incinerator was clearly not within the scope of Ferrer's executive power - he had opposed it since 1962 and it had not closed until 1999. Ruiz did not attack the integrity of any government office or agency. He merely pointed out Ferrer's hypocrisy. The context of the entire interchange was the election contest between Ferrer and Ruiz for which both could claim qualified, but not absolute, privilege.

POINT THREE

Defendants' attacks on plaintiff's professional conduct were neither constitutionally protected, nor non-actionable opinion. Defendants have made assumptions and asserted facts that have not been pleaded, and are in fact false, to support their claim.

Defendants have cited to the court several cases for the proposition that the statements of Ferrer and Roswell about the plaintiff were only non-actionable opinions about plaintiffs conduct and thus protected by the New York State Constitution. (Defendants' Memorandum, pp. 5-6).

Their argument, like their libels, asserts as fact matters that are objectively false and the arguments must per force fall on that falsity:

> "Plaintiff was employed by Ferrer from 1988 to 1992. This action focuses on Ferrer's expressed dissatisfaction with plaintiff's review and recommendation of the incinerator proposal. The statements at issue are criticisms of plaintiff's work performance, which, as a matter of law, are expressions of opinion and nonactionable." Defendants' Memorandum, p. 7

The simple fact is that plaintiff NEVER reviewed the incineration project and never made a recommendation. It's Kafkaesque. Defendants publicly assert that in a review of the incinerator project, plaintiff gave a false report to Ferrer and committed unethical acts. But there wasn't any involvement by plaintiff in the incineration project. The defendants claims about his participation are pure myth. Nonetheless, they now defend their falsehoods by claiming they are only the expression of an opinion about the quality of plaintiffs performance of a task that they know he didn't do.

Fortunately, the law doesn't support such nonsense.. The statements that plaintiff participated in Ferrer's decision to support the incinerator are objectively false and an opinion knowingly expressed on the basis of objectively false facts is not protected opinion but actionable libel. *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 18-19 (1990); *Immuno AG. v. Jankowski*, 77 N.Y.2d 235, 254 (1991); *Goldreyer v. Van de Wetering*, 217 A.D.2d 434, 435 (1st Dept. 1965); Gross v. New York Times Company, 82 NY2d 146, 154-155; *Sildsdorf v. Levine*, supra, 59 NY2d at 15-16; *Steinhilber v. Aphonse*, 68 N.Y.2d 283, 289-290.

In *Milkovich*, Chief Judge Rhenquist, writing for the majority explained the interrelationship of fact and opinion with this example:

> "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly stated: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.' ' See *Cianci, supra, at 64.* It is worthy of note that at common law, even the privilege of fair comment did not extend to 'a false statement of fact, whether it was expressly stated or implied from an expression of opinion.' Restatement (Second) of Torts, § 566, Comment a (1977)." 497 U.S. at 18-19.

The New York State Constitution provides no cover for defendants' semantic exercises. In *Immuno AG v. Jankowski*, supra, the New York Court of Appeals took great pains to distinguish New York's constitutional protection of free speech as distinguished from the federal protection. Nonetheless, " [f]alse statements are actionable when they would be perceived as factual by the reasonable person." *Immuno AG. v. Jankowski*, supra, 77 N.Y.2d at 254.

Immuno dealt with opinions published in the most sacred depository of opinion - letters to the editor. In *Goldreyer*, the Appellate Division dealt with statements about the professional abilities of a libel plaintiff published in the Wall Street Journal. As to the Wall Street Journal's claim that its hatchet job was only opinion, the court noted:

> "As with Time's statements referring to the Ministry of Justice report, the opinion privilege does not apply to the statements complained of in the Journal article, which were not pure opinion, but opinion based upon fact, and therefore actionable since there were implications of additional undisclosed facts . . .. The article does not quote the Ministry of Justice report in detail and the portions of the article cited by plaintiffs, when read in context, suggest that there has been an investigation and that the reporters are in possession of undisclosed details from the report that support the assertions they make against plaintiffs." 217 AD2d at 436

The basic inquiry in New York is "to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff…" *Immuno AG v. Jankowski*, supra, 77 NY2d at 254.

The defendants cite several cases for the proposition that opinions about job performance are non-actionable opinion. Their problem is that the unalterable fact is that plaintiff had no job performance as to the incinerator. The assertion that he had such job performance remains what it was when first uttered by defendant Ferrer and amplified by Roswell: a bald faced lie.

POINT FOUR

Because of the malicious libel of plaintiff's professional standing and competence, he does not have to prove special damages to sustain a recovery. The facts as pleaded do not fall within the "single instance" exception to that rule.

Ferrer and Roswell charged plaintiff with serious misconduct in his chosen profession. According to them, he was guilty of ethical violations and made a false report that was witnessed by others. Because of his conduct, Ferrer forced the plaintiff to resign. None of that was true. However, plaintiffs competence and integrity has been clearly defamed in his chosen profession. Under long standing precedent, the statements of Ferrer and Roswell are libelous per se and actionable without proof of special damages.

A publication is libelous per se if it imputes to plaintiff incompetence, incapacity or unfitness in the performance of his trade, occupation or profession *Mattice v Wilcox,* 147 NY 624 (1895). A cause of action based on a publication that is defamatory per se need not include an allegation of special damages. In such cases, injury to reputation is presumed from the bare fact of the publication and there is no need to plead or prove specific injury or loss as a consequence. *Hinsdale v Orange County Publ*., 17 NY2d 284, 288 (1966); *Van Lengen v. Parr,* 136 A.D.2d 964 (4th Dept. 1988); *Goldreyer, Ltd. v. Van de Wetering*, supra, 217 AD2d at 437; *Armstrong v Simon & Schuster,* 197 AD2d 87, 91 (1st Dept.) affd 85 NY2d 373 (1995).

Defendants seek to invoke the "single instance" rule which holds that pleading and proof of special damages are necessary where the language at issue charges a professional with ignorance or mistake on a single occasion only and does not implicate his general competence or character. See *November v Time Inc.,* 13 NY2d 175, 178 (1963). However, the single instance rule has no application to an accusation of a single instance where that single instance shows such lack of character or skill that the plaintiff would be unfit for his profession. *November v Time Inc.,* supra; *Goldreyer, Ltd. v. Van de Wetering*, 217 A.D.2d 434, 437 (1st Dept. 1995); *Armstrong v Simon*

& Schuster, 197 AD2d 87, 91 (1st Dept.) affd 85 NY2d 373 (1995); *Mason v Sullivan*, 26 AD2d 115, 117 (1st Dept. 1966); *Rutman v Giedel*, 67 AD2d 662 (2d Dept. 1979).

In *Goldreyer*, the plaintiff was a restorer of expensive art work whose restoration of masterpiece was savagely criticized by the Wall Street Journal. Dow Jones, the parent company of the Journal, claimed that its article referred to only a "single instance" of professional neglect and thus was not actionable without proof of special damages: The Appellate Division rejected the contention:

> "Contrary to Dow Jones' assertion, plaintiffs' failure to plead special damages here is not fatal to their claim. The "single instance" rule, wherein language charging a professional with ignorance or mistake on a single occasion only, not generally, is not actionable defamation unless special damages are pleaded (*November v Time Inc., 13 NY2d 175, 178; Bowes v Magna Concepts, 166 AD2d 347),* may not be invoked here by Dow Jones, because it does not apply to an accusation of conduct showing such lack of character that the plaintiff would be unfit for his profession (see, *Rutman v Giedel, 67 AD2d 662; Mason v Sullivan, 26 AD2d 115, 117).* The Journal article stated that plaintiff performed a 'restoration' on a million dollar abstract masterpiece using a roller brush and house paint and implied that the results warranted possible criminal charges after an official investigation. *In the context of plaintiffs' profession, this must be seen as an intolerable commission of 'highly unprofessional conduct'* (*Armstrong v Simon & Schuster, 197 AD2d 87, 91,* affd *85 NY2d 373).* This is libel per se requiring no special damages (see, *Puranmalka v Puranmalka, 149 AD2d 493, 494-495),* and precluding the 'single instance' defense (see, *Rutman v Giedel, supra; Mason v Sullivan, supra)*." .(emphasis supplied) 217 AD2d at 437.

None of the cases cited by the defendant in support of the single instance rule involve the substantial allegations of unfitness that are alleged in by the complaint at bar. Larson v. Albany Medical Center, __AD2d__, 676 NYS2d 293 (3d Dept. 1998) concerned nurses who cited for "unprofessional conduct" for refusing to assist in abortions. The court held that these charges of did not suggest that the plaintiffs were incompetent as nurses. The Appellate Division said:

> "As to plaintiffs' cause of action for defamation, we find the pleadings deficient. Plaintiffs alleged that the insubordination and unprofessional conduct charges against them were broadcast to other employees of the Albany Medical Center, that these allegations were false and known to be so, and that having been reduced to writing constituted per se defamation.
>
> "Although statements which injure a person's reputation or his or her professional standing are defamatory per se . . . there exists a 'single instance' exception to this

> per se rule 'where a publication charges a professional person with a single error in judgment, which the law presumes not to injure reputation' . . .. The 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 . . . ″ 676 N.Y.S.2d at 296.

Certainly, charging a public employee and political consultant with having made a false report and engaging in unethical conduct directly suggest that plaintiff is "incompetent" in his profession.

The other "single instance" cases cited by defendants fit into the same pattern as *Larson*. The courts found as a matter of fact that an isolated allegation that did not go to the individuals general competence.[3]

Ferrer and Roswell did not charge plaintiff with merely botching-up one report. They charged him with making a "false report" and unethical conduct. His conduct was so grievous that Ferrer forced him to resign. The charges by Ferrer and Roswell of unethical behavior, making a false reoprt and being driven from public office are all objectively false statements and all go to plaintiff's general fitness to pursue his chosen profession. They do not charge a single, isolated event.

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[3] See *Bowes v. Magna Concepts, Inc.*, 166 AD2d 347, 348 (1st Dept. 1990) (stating that editor published article while having her “facts jumbled” and “failed to investigate those facts”); *D’Agrosa v. Newsdav, Inc.*, 158 AD2d 229 (2d Dept. 1990) (article reporting the doctors were liable in malpractice for treatment of patient); *Tufano v. Schwartz*, 95 AD2d 852 (2d Dept. 1983) (statement to newspaper that cabinets were a “total misfit”); *Lyons v. New American Library, Inc.*, 78 AD2d at 724-725 (Sheriff’s failure to conduct ballistics test in a single case) *Shaw v. Consolidated Edison Rail Corp.*, 74 AD2d 985 (3d Dept. 1980) (mishandling of United Parcel cars on one tour of duty); *Bernhard & Co., Inc. v. Finance Publishing Corp.*, 32 AD2d 516 (1st Dept.), aff’d, 25 NY2d 712, 714 (1969) (single instance of “mistaken exercise of business judgment”); *Amelkin v. Commercial Trading Co.*, 23 AD2d 830, 831 (1st Dept. 1965), affd, 17 NY2d 500 (1966) (failure of insurance agent to represent insured’s interest on one occasion); *Twiggar v. The Ossining Printing and Publishing Co.*, 161 App. Div. 718, 719-720 (2d Dept. 1914) (article stated that the dentist performed unskillful dental work to one particular patient causing teeth to be exposed, a cavity in the roof of the patient’s mouth and disease of the gums and jaw).

CONCLUSION

The premeditated attack on plaintiff, the campaign manager of the defendant Ferrer's political opponent was neither absolutely privileged nor constitutionally protected opinion. The motion to dismiss the complaint must be denied.

Dated: New York, New York
July 22, 1999

Respectfully submitted,

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APPENDIX OF COMPLAINT EXHIBITS

EXHIIBT A: **Ferrer letter of support**

EXHIBIT B: **Daily News Article**

EXHIBIT C: **Bronx News article**

EXHIBIT D: **Demand for Retraction**