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

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JOHN GREANEY, Index No. 404160/98

Plaintiff,

LD # 98TT013718

-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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MEMORANDUM OF LAW IN SUPPORT OF 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 support of 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 CONCERNING TILE ALLEGED DEFAMATORY REMARKS.

Whether particular words are defamatory presents a question of law for the court's resolution in the first instance, Weiner v. Doubleday & Co., 74 NY2d 586, *592* (1989); Aronson v.Wiersma, 65 NY2d 592, 593 (1985), and the "[a]ward of summary judgment in libel actions

... is appropriate where these are no material triable issues of fact." Rinaldi v. Holt, Rinehart & Winston, Inc., 42 NY2d 369, 384 (1977); Suozzi v. Parente, 202 AD2d 94, 100 (1st Dept. 1994).

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) (defamation action brought against town and town officials by discharged employee); Clark v. McGee, 49 NY2d 613, 617 (1980); Stukuls v. State of New York, 42 NY2d 272, 278 (1978). This absolute privilege is a creature of public policy. Barr v. Matteo, 360 US 564, 571 (1959); Clark, 49 NY2d at 618; Stukuls, 42 NY2d at 278. "The desirability of such a policy is easily recognized as essential in the conduct of official business," Sheridan v. Crisona, 14 NY2d 108, 112 (1964). This absolute privilege "is impervious to proof, and therefore to a charge, of malice." Stukuls, 42 NY2d at 275. Libel actions against public officials must be rigidly scrutinized to provide sufficient protection to government officials against vexatious actions. Aponte v. Newmark & Lewis, Inc., 176 AD2d 502, 503 (1st Dept. 1991).

(1)

A Borough President is an officer entitled to absolute immunity. Sheridan, 14 NY2d at 112 ("[T]he same general considerations of public policy, which demand absolute privilege for what is said or written by [state] executives in the discharge of official duty, must certainly apply to a municipal executive such as Borough President who is charged with substantial responsibilities[.]"); Hagemann v. Molinari, 14 F Supp 2d 277, 287 (EDNY 1998). Thus, Ferrer, the Bronx Borough President, is cloaked with absolute privilege.

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). Further, as a matter of law, the subordinate 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). Roswell, as Communications Director, and a spokesperson for Ferrer, spoke to the press on behalf of Ferrer. Plaintiff alleges that Roswell "was acting as agent of Ferrer," and that Ferrer "adopt[ed] and affirmatively accept[ed] his responsibility for the statements." (complaint, annexed as Exhibit A, paras. 39, 43). Therefore, as a matter of law, Roswell benefits from Ferrer's absolute privilege.

(2)

The statement of an executive officer to the press concerning a matter of public concern is within the scope of his official powers, and cloaked with absolute privilege. Sheridan, 14 NY2d at 113; Schell v. Dowling, 240 AD2d 721, 722 (2d Dept. 1997); Hagemann, 14 F Supp 2d at 287,288. This is equally true where the statement is made in defense of the integrity of the office. Lombardo, 18 NY2d at 400; Aponte, 176 AD2d at 502. In so defending the office, it is within the sound discretion of the executive to comment on the origin as well as the truth of the accusations. Lombardo, 18 NY2d at 40 1-402. "Moreover, since an attack upon high-ranking government employees lowers public confidence in the office in which they work, it should be considered an attack upon the entire office." Hagemann, 14 F Supp 2d at 288.

In this case, it cannot be disputed that the Bronx-Lebanon Hospital medical waste incinerator was a matter of public concern. Moreover, the statements at issue were made during the 1997 election campaign, in response to the criticism of Councilman Israel Ruiz, Jr., who was

challenging Ferrer for office. Ruiz reportedly said that it was "'outrageous' [for Ferrer] to claim credit for closing a controversial incinerator [since] it wouldn't have been built in the first place without Ferrer's approval." Frank Lombardi, "Beep has him burning mad, City pol fires barbs on incinerator," New York Daily News, July 10, 1997. (article annexed as Exhibit E to Affirmation of Maiorana in support of motion). Ruiz is further quoted as stating that Ferrer was "adding insult to injury by grandstanding on the closure of this poison-spewing incinerator" and "He should admit he screwed up." Frank Lombardi, "Beep has him burning mad, City pol fires barbs on incinerator," New York Daily News, July 10, 1997. (article annexed as Exhibit E to Affirmation of Maiorana in support of motion).

The statements attributed to Roswell were made in response to plaintiff Greaney's demand for retraction of Ferrer's comments, and threat of legal action. Daniel Gesslein, "Incinerator flip flop causes battle between BP candidates," Bronx News, July 17, 1997. (article annexed as Exhibit F to Affirmation of Maiorana in support of motion).

Clearly, these comments were direct criticism of Ferrer's conduct in office and his policies. The incinerator itself was a matter of great public concern, and an issue within the competence and concern of the Bronx Borough President, since the borough president is charged with, *inter alia*, planing for growth, improvement and development of the borough; reviewing and making recommendations regarding applications and proposals for the use, development or improvement of land within the borough; preparing environmental analyses and providing technical assistance to the community board. New York City Charter, Ch. 4, § 82(9). Moreover, Ferrer's policies and his record as the Bronx Borough President were also matters of great public concern, particularly during an election campaign. Similarly, as in Hagemann,

supra, attacks on Ferrer's integrity are properly considered as attacks on the office, and thus matters of public concern.

Ferrer was the Bronx Borough President speaking to the press on matters of public concern. Roswell was acting under the authority of Ferrer, as plaintiff concedes in the complaint, in speaking to the press on an issue of public concern. As a matter of law, Ferrer and Roswell have an absolute privilege, and this action must be dismissed.

Point Two

THE CHALLENGED STATEMENTS CONSTITUTE NONACTIONABLE OPINION.

Statements of opinion are protected by the New York Constitution, Article I, §8, and cannot give rise of an action for defamation. 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). The New York State Constitution affords even broader protection to speech than the United States Constitution. 600 West 115th Street Corp., 80 NY2d at 138; Immuno AG v. J Moor-Jankowski, 77 NY2d 235, 249 (1991). It is for the court to determine in the first instance whether a challenged publication is nonactionable opinion. Gross, 418 NY2d at 153; 600 West 115th Street Corp., 80 NY2d at 139; Steinhilber v. Alphones, 68 NY2d 283, 290 (1986).

The Court of Appeals has 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."' Steinhilber, 68 NY2d at 292. Accord Brian, 87 NY2d at 51; Gross, 82 NY2d at 153; 600 West 115th Street Corp., 80 NY2d at 145; Immuno AG, 77 NY2d at 252.

Applying the Steinhilber test, the courts evaluate the content of the communication as a whole, along with its tone and apparent purpose, rather than sifting through it for the purpose of isolating and identifying assertions of fact. Brian, 87 NY2d at 51; Immuno AG, 77 NY2d at 254. The court should not engage in "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion[.]"' Immuno AG, 77 NY2d at 256. See also Gross, 82 NY2d at 156. The words must be construed in the context of the entire statement or publication as a whole. Brian, 87 NY2d at 51; Aronson v. Wiersma, 65 NY2d 592, 594 (1985).

(1)

Statements criticizing plaintiff's work performance, as a matter of law, are nonactionable opinion. Aronson, 65 NY2d at 593-594 (letter expressed dissatisfaction with [plaintiff's] performance,' [and] explained that certain chores she had been directed to undertake had not been completed"); Ott v. Automatic Connector. Inc., 193 AD2d 657, 658 (2d Dept. 1993) (termination was changed to reflect that it was with cause "due to the manner in which [plaintiff] performed certain duties); Miller v. Richman, 184 AD2d 191, 192-193 (4th Dept. 1992) (employee described as "one of worst secretaries at the firm," "her work habits are bad, "[her] performance is bad," and "[plaintiff] is not what you are looking for"); 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).

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.

(2)

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 an election campaign by attacking Ferrer's record on the incinerator project. The articles containing the statements at issue represent a robust debate on public issues between opposing camps, containing point and counter-point. Applying the Steinhilber test, when viewed in their social context, the statements are clear expressions of opinion.

Similar language has been held to be nonactionable opinion. Amodei v. NYS Chiropractic Assoc., 160 AD2d 279, 281 (1st Dept. 1990) ("unprofessional conduct"); Hollander v. Cayton, 145 AD2d 605, 606 (2d Dept. 1988) ("immoral," "unethical," "mismanaged cases").

Point Three

THE COMPLAINT MUST BE DISMISSED FOR FAILURE TO SET FORTH SPECIAL DAMAGES.

Under the "single instance rule," plaintiff cannot recover for alleged libel, without proof of special damages, where the challenged statement relates to plaintiff's performance on a single occasion. November v. Time Inc., 13 NY2d 175. 178 (1963); Larson v. Albany Medical Center, __AD2d__, 676 NYS2d 293 (3d Dept. 1998) (charging nurses with "unprofessional conduct"); 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, 78 AD2d at 724-725 (Sheriff's failure to conduct ballistics test); 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); 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 a particular patient causing teeth to be exposed, a cavity in the roof of the patient's mouth and disease of the gums and jaw).

In this case, plaintiff seeks recovery for statements all relating to his review and recommendation of the proposed incinerator. They relate to how he handled one particular

assignment. As in Larson, *supra,* where nurses were charged with "unprofessional conduct" and in Bowes, *supra,* where an editor was said to have jumbled facts and "failed to investigate those facts," this action involves application of the single-instance rule.

The complaint does not plead special damages. Plaintiff's bill of particulars specifically states: "No claim of special damages." (bill of particulars, annexed as Exhibit G to Affirmation of Maiorana in support of motion, para. 4). This is an informal judicial admission and thus, evidence that there are no special damages. Richardson on Evidence, § 8-219 (11th Ed, Farrell).

As a general rule, alleged defamation is not actionable unless the plaintiff pleads and proves special damages. Liberman v. Gelstein, 80 NY2d 429, 434 (1992). Special damages contemplate the loss of something having economic or pecuniary value. Liberman, 80 NY2d at 434-435; Matherson v. Marchello, 100 AD2d 233, 235 (2d Dept. 1984). This loss must flow directly from the injury to reputation caused by the defamation, and not from the effects of defamation. Matherson, 100 AD2d at 235. Further, special damages must be fully and accurately identified with sufficient particularity to identify actual losses. Id. "[M]erely contend[ing] in conclusory fashion, as herein, that his reputation was injured by the publicity[,]" is insufficient. Duci v. Daily Gazette Co., 102 AD2d 940, 941 (3d Dept. 1984). Lost income does not qualify as special damages. Vasarhelyi v. New School for Social Research, 230 AD2d 658, 660 (1st Dept. 1996).

Plaintiff has not plead special damages, and has admitted that there are no special damages. Therefore, the complaint must be dismissed.

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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June 7, 1999

Matthew J. Maiorana
of counsel