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Supreme Court, New York County, Themed Restaurants, Inc. v. Zagat Survey LLC

Paula Gilbert

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SUPREME COURT OF NEW YORK

Themed Restaurants, Inc. v Zagat Survey LLC[1] (decided August 19, 2004)

"Cross-dressing staff" "dirty jokes" "lap dances for dessert."[2] The use of terms like these in defendant's 2004 New York City Restaurant Survey guide ("Zagat Survey") resulted in plaintiff, a New York City restaurant owner, asserting a claim for defamation.[3] Defendant rebutted the defamation allegation by classifying its words as an expression of opinion, protected by the First Amendment of the Federal Constitution.[4] Additionally, in New York, "the free speech guarantee of the New York State Constitution is even more stringent than that of the First Amendment" providing broader protections for the dissemination of information.[5] In holding for the defendant, the court ultimately balanced the plaintiff's inadequate pleadings with the free speech rights of the defendant that were in danger of being violated.[6]

The Zagat Survey is comprised of various public opinion surveys and contains direct quotes of participants' comments.[7] The statements placed in the survey are collective opinions reflecting

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[1] 781 N.Y.S.2d 441 (N.Y. Sup. Ct. 2004).
[2] *Id.*
[3] *Id.*
[4] *Id.* at 445. U.S. CONST. amend. I, which states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."
[5] *Zagat,* 781 N.Y.S.2d. at 449. *See* N.Y. CONST. art. I, § 8, which states in pertinent part: "Every citizen may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."
[6] *Zagat,* 781 N.Y.S.2d. at 449.
[7] *Id.* at 444.

average scores from participants.[8] The review at issue in *Zagat* described a well-known Manhattan restaurant, Lucky Cheng's, as a place that "God knows 'you don't go for the food' . . . it 'can be exhausting' and 'weary well-wishers suggest they 'freshen up the menu and their makeup.' "[9] Plaintiff claimed that because its restaurant was rated so poorly — on a scale from zero to thirty, the food was given a nine and the décor/service a thirteen — "it suffered a 35% drop in business."[10] The question addressed by the court was "whether the use of. . . consumer opinions alters the traditional [defamation] legal analysis."[11] The court concluded that the existing defamation analysis was properly applicable to opinions.[12]

The court defined a pure opinion as "a statement of opinion which is accompanied by a recitation of the facts upon which it is based or does not imply that it is based upon undisclosed facts."[13] The Federal Constitution protects pure opinion from liability for defamation if the underlying facts are true.[14] To determine if what was written in the Zagat Survey was truly protected opinion, the court inquired into whether the statement contained "a potentially defamatory factual statement which is capable of being false and is

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[8] *Id.*
[9] *Id.*
[10] *Id.* at 444.
[11] *Zagat*, 781 N.Y.S.2d at 446.
[12] *Id.*
[13] *Id.* at 447 (quoting Flowers v. Carville, 310 F.3d 1118, 1129 (9th Cir. 2002)).
[14] *Id.* at 447.

claimed to be false."[15] The allegedly defamatory material was also to be examined from the standpoint of an ordinary reader.[16] It held that a reasonable reader would understand the material to express the opinion of each consumer surveyed and thus was "worthy of constitutional protection."[17] Therefore, the defendant's statements adequately expressed a subjective viewpoint and were protected by the First Amendment.[18]

In *Milkovich v. Lorain Journal Company,* the United States Supreme Court held that a separate constitutional privilege for opinion on defamation claims was not necessary.[19] *Milkovich* stated that it was not persuaded to accept that "an additional separate constitutional privilege for 'opinion' [was] required to ensure the freedom of expression guaranteed by the First Amendment."[20] In this case, a defamation action was brought against a newspaper by a former high school wrestling coach.[21] During a wrestling match, plaintiff's team was involved in a serious altercation with a competitor high school, resulting in a lawsuit requiring plaintiff's testimony.[22] In a newspaper article published by defendant, it claimed that Milkovich lied under oath at the trial.[23] The Court discussed the common law principle of

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[15] *Id.* at 447.
[16] *Zagat,* 781 N.Y.S.2d at 447 (citing Mr. Chow of N.Y. v. Jour Azur S.A. 759 F.2d 219, 224 (2d Cir. 1985)).
[17] *Id.* at 448.
[18] *Id.* at 447.
[19] 497 U.S. 1, 21 (1990).
[20] *Milkovich,* 497 U.S. at 21.
[21] *Id.* at 3.
[22] *Id.* at 4.
[23] *Id.* at 4-5.

"fair comment."[24] Fair comment is "the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech."[25] This concept provided a general privilege for a statement representing the honest opinion of a speaker.[26] The privilege does not apply to a false statement of fact implied or expressed in an opinion.[27] However, even in light of this common law concept, the Court rejected the idea of a separate constitutional privilege creating a legal immunity for anything that may be labeled an opinion.[28] "Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact."[29]

The Court concluded that suitable protections guaranteed by the First Amendment already exist without an additional opinion exception.[30] Such protections include the notion that a statement on matters of public concern must be provable as false and made with knowledge of its falsity or with reckless disregard for the truth before there can be liability.[31] Also included is the

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[24] *Id.* at 13-14.
[25] *Milkovich,* 497 U.S. at 14.
[26] *Id.* at 13.
[27] *Id.* at 14.
[28] *Id.* at 18.
[29] *Id.*
[30] *Milkovich,* 497 U.S. at 21.
[31] *Id.* at 20.

protection for statements that cannot " 'reasonably be interpreted as stating actual facts about an individual.' "[32]

Mr. Chow of New York v. Jour Azur S.A.[33] involved the defendant, a restaurant reviewer, allegedly including false and defamatory statements in its review of plaintiff's restaurant.[34] Clearly, one cannot be liable simply for expressing an opinion, "however unreasonable the opinion or vituperous the expressing of it may be."[35] However, to distinguish a constitutionally protected opinion from a statement of fact is difficult.[36] The court held that it is this initial inquiry that must be viewed from the "perspective of an ordinary reader."[37] Although the court did not establish a concrete test to determine opinion from fact, it relied on examining "both the context in which the statements are made and the circumstances surrounding the statements, . . . the language itself, . . . [and whether] the statements . . . are objectively true or false."[38]

In *Brian v. Richardson*, the New York Court of Appeals discussed defamation in regard to opinions.[39] This defamation action concerned an article falsely accusing plaintiff of conspiracy that was published in the Op Ed page of the *New York Times*.[40] Traditionally, the Op Ed page has been reserved for matters of

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[32] *Id.* (quoting Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988)).
[33] 759 F.2d 219 (2d Cir. 1985).
[34] *Id.* at 221.
[35] *Id.* at 225 (quoting Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977)).
[36] *Id.* at 224.
[37] *Mr. Chow*, 759 F.2d at 224 (citing Buckley v. Littell, 539 F.2d 882, 894 (2d Cir. 1976)).
[38] *Id.* at 226.
[39] 660 N.E.2d 1126 (N.Y. 1995).

public concern and is known for containing expressions of opinion and theory.[41] The disputed article was written by defendant, a former United States Attorney General.[42] According to the article, the plaintiff was involved in a plot to use pirated software in a conspiracy scheme.[43] The trial court dismissed the complaint, asserting the Op Ed page is a space known for the "expression of opinion and the encouragement of public debate."[44] The court set forth factors to help determine whether a statement is fact or non-actionable opinion:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.[45]

Federal and New York case law seem to be incompatible on their chosen analysis of an opinion being the source of a defamation accusation. While both New York and federal courts recognize that an expression of opinion may preclude a defamation action, the path to such a conclusion is distinguishable. In New York, a determination of whether a statement is opinion or fact is

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[40] *Id.* at 1127.
[41] *Id.* at 1129.
[42] *Id.* at 1128.
[43] *Id.*
[44] *Brian,* 660 N.E.2d at 1129.
[45] *Id.* (quoting Gross v. New York Times Co. 96 N.E.2d 78, 98 (N.Y. 2001)) (internal quotations omitted).

based on certain criteria. These criteria can include the average person's understanding of the specific language, whether the statements are provable as true, and whether the language can be understood in the broader societal context to be one of an opinion and not fact. In most instances, a New York court will determine a statement to be opinion and thus not actionable. In contrast, federal courts refuse to acknowledge a separate analysis for an opinion defense to a defamation claim. This difference is based on the broader free speech protections under the New York State Constitution juxtaposed with the less stringent Federal Constitution.

Paula Gilbert

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IMPAIRMENT OF CONTRACT

United States Constitution Article I, Section 10:

No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

New York Constitution Article VII, Section 11:

Except the debts or refunding debts specified in . . . this article, no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election . . . .

NewYork Constitution Article VIII, Section 2:

No indebtedness shall be contracted by any county, city, town, village or school district unless such county, city, town, village or school district shall have pledged its faith and credit for the payment of the principal thereof and the interest thereon.