Touro Law Review

Volume 11 | Number 3 Article 37

1995

Freedom of Speech and Press

FREEDOM OF SPEECH & PRESS

N.Y. CONST. art. I, § 8:

Every citizen may freely speak, write and publish his 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.

U.S. CONST. amend. I:

Congress shall make no law . . . abridging the freedom of speech . . . or of the press . . . .

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

Larchmont Professional Fire Fighters Ass'n v.
Larchmont/Mamaroneck Volunteer Ambulance Corps, Inc.[1]
(decided July 25, 1994)

Plaintiff, Larchmont Professional Fire Fighters Association, commenced an action to recover damages for defamation against Westchester Rockland Newspapers, Inc. and Marc Burell, a paid firefighter and member of the plaintiff union[2] based on an article and five letters to the editor appearing in the *Daily Times*.[3] The appellate division affirmed the lower court's decision granting the defendants' respective motions to dismiss,[4] holding that the

1. 206 A.D.2d 507, 615 N.Y.S.2d 73 (2d Dep't 1994).

2. *Id.* at 507, 615 N.Y.S.2d at 74.

3. *Id.* Westchester Rockland Newspapers, Inc. is the owner of the Daily Times. *Id.*

4. *Id.* There were two motions to dismiss for failure to state a cause of action, each made by a different defendant. *Id.*

inflammatory statements involved were protected opinion under both the State[5] and Federal[6] Constitutions.[7]

The allegedly defamatory newspaper article published in the *Daily Times* described charges[8] which were filed by the plaintiff union against defendant Marc Burrell, a paid firefighter of the City of New Rochelle.[9] Burrell stated in the article that the reason his union filed the charges was "in retaliation for a complaint he filed that the emergency medical workers from the Larchmont Fire Department were slow in calling for the Volunteer Ambulance Corps."[10] Burrell claimed that his volunteer work, which allegedly violated a union regulation, had been common knowledge for seven years[11] and referred to the charges as "sour grapes."[12]

The plaintiffs also objected to five letters to the editor published in the *Daily Times*.[13] These letters, which were in response to the allegedly defamatory article, voiced support and praise to Burrell for working as a volunteer firefighter for the Larchmont-Mamaroneck Volunteer Ambulance Corps and the Town of Mamaroneck.[14] The letters also criticized the union for instituting the charges and unfairly prosecuting Burrell.[15] In

---

5. N.Y. CONST. art. I, § 8. This section provides in relevant part: "Every citizen may freely speak, write and publish his 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." *Id.*

6. U.S. CONST. amend. I. The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. " *Id.*

7. *Larchmont*, 206 A.D.2d at 508, 615 N.Y.S.2d at 74.

8. The charges stated that Burrell violated a "union stricture" by volunteering for both the Larchmont-Mamaroneck Volunteer Ambulance Corps and the Town of Mamaroneck's volunteer firefighters. *Id.* at 507, 615 N.Y.S.2d at 74.

9. *Id.* at 507, 615 N.Y.S.2d at 74.

10. *Id.*

11. *Id.* These seven years were the amount of time Burrell had worked as a paid firefighter for the City of New Rochelle.

12. *Id.* at 508, 615 N.Y.S.2d at 74.

13. *Id.* at 507, 615 N.Y.S.2d at 74.

14. *Id.* at 508, 615 N.Y.S.2d at 74.

15. *Id.*

response to the letters and the article, plaintiffs brought an action in the New York Supreme Court, Westchester County, to recover damages from the defendants for defamation.[16] The defendants made two motions to dismiss the complaint for failure to state a cause of action.[17] The court granted both motions and the plaintiffs appealed.[18]

The Appellate Division, Second Department affirmed the orders dismissing the complaint after reviewing the statements in both the article and the letters. The court held that the speech consisted of pure opinions which were protected under the New York State Constitution.[19] The court explained that "[u]nder the New York State Constitution, expressions of pure opinion are afforded greater protection than under the Federal Constitution."[20] The court cited *Steinhilber v. Alphonse*[21] after explaining that "[a] pure opinion is 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."[22] Although the *Steinhilber*[23] court disavowed any rigid test for

16. *Id.* at 507, 615 N.Y.S.2d at 74.

17. *Id.*

18. *Id.*

19. *Id.* at 508, 615 N.Y.S.2d at 74.

20. *Id.*

21. 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986). Plaintiff, Louise Steinhilber, was a member of the Local 1120 of the Communications Workers of America union who worked during a union strike. *Id.* at 286-87, 501 N.E.2d at 551, 508 N.Y.S.2d at 902. She was fined, but never paid the fine and eventually quit the union. Plaintiff later brought suit against the union's vice-president, Richard Martini, based on a tape recording he made which directed numerous insults at the plaintiff. *Id.* at 287, 501 N.E.2d at 551, 508 N.Y.S.2d at 902. On a message played on the union's phone line, the defendant stated plaintiff lacked "talent, ambition, and initiative." *Id.* Plaintiff included the union's area representative in the suit and alleged that he displayed a banner on his pickup truck during a union picket which read "#1 SCAB LOUISE STEINHILBER SUCKS." *Id.* at 288, 501 N.E.2d at 551, 508 N.Y.S.2d at 902.

22. *Larchmont*, 206 A.D.2d at 508, 615 N.Y.S.2d at 74.

23. The *Steinhilber* case is the leading authority in New York for determining protected speech. *See* Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991).

distinguishing fact from opinion, it did suggest four factors cited in *Ollman v. Evans*[24] which should be considered:

> (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 to readers or listeners that what is being read or heard is likely to be opinion, not fact.'[25]

The *Steinhilber* court concluded the expressions at issue to be non-actionable opinion based on the full context of the expressions in their surrounding circumstances.[26] The court in *Larchmont* held the statements therein were pure opinions and therefore protected under the New York State Constitution.[27] The court explained its reasoning, by stating that "the expressions of opinion in the newspaper article and letters to the editor were adequately supported by the statement of the underlying facts, and did not imply that they were based on undisclosed facts." [28]

The court also held that the speech was not reasonably susceptible to a defamatory meaning under the First Amendment of the United States Constitution.[29] In reaching its decision, the court judged the statements based on federal defamation standards,[30] citing *Immuno A.G. v. Moor-Jankowski.*[31] In

---

24. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

25. *Steinhilber*, 68 N.Y.2d at 292, 501 N.E.2d at 554, 508 N.Y.S.2d at 905 (quoting *Ollman*, 750 F.2d at 983).

26. *Id.* at 293-94, 501 N.E.2d at 554, 508 N.Y.S.2d at 906. The expressions were made during a heated union strike. *Id.*

27. *Larchmont*, 206 A.D.2d at 508, 615 N.Y.S.2d at 74.

28. *Id.*

29. *Id. See* U.S. CONST. amend. I.

30. *Larchmont*, 206 A.D.2d at 508, 615 N.Y.S.2d at 74. Although the opinion of the court did not explicitly state that both the federal and state standards for defamation were applied, it is clear from the terms used and the cases cited that the court had specifically used first the federal and then the

Immuno A.G., the court began its defamation inquiry with the federal test, stating the key question is whether the "challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact."[32] The *Immuno A.G.* court added that the impression created by the statements and the general tone of the expressions must be considered as viewed by the reasonable person.[33] After factoring the case of *Milkovich v. Lorain Journal Co.*[34] into its current understanding of the federal test for defamation, the court in *Immuno A.G.* stated: "[E]xcept for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable."[35] Although the *Immuno A.G.* court ultimately held that the plaintiff failed to satisfy his burden of proving the defendant's statement

---

state test for protected speech in deciding this case. For example, when initially discussing the court's review of the statements in the article and letters, the court referred to them as "rhetorical hyperbole rather than objective fact," using language from Milkovich v. Lorain, 497 U.S. 1 (1990), thus indicating the statements had met the federal standard for protected speech. *Larchmont*, 206 A.D.2d at 508, 615 N.Y.S.2d at 74.

31. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991). The plaintiff brought suit for libel based on a letter to the editor published in the Journal of Medical Primatology, a journal co-founded and edited by the defendant Dr. J. Moor-Jankowski. *Id* at 240, 567 N.E.2d at 1227, 566 N.Y.S.2d at 908. The letter criticized the plaintiff's planned use of chimpanzees to conduct hepatitis research in Africa. *Id.* The letter stated that plaintiff's plan was motivated by a desire to avoid restrictions on the importation of chimpanzees which could eventually decimate the wild chimp population, and could spread hepatitis to the whole chimpanzee population. *Id.* at 241, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908. Plaintiff also objected to an article in another magazine in which defendant is quoted as criticizing the plaintiff's plan. *Id.* at 241, 567 N.E.2d at 1272-73, 566 N.Y.S.2d at 908-09.

32. *Id.* at 243, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909.

33. *Id.* at 243, 567 N.E.2d at 1273-74, 566 N.Y.S.2d at 910.

34. 497 U.S. 1 (1990). *Immuno A.G.* was on remand from the United States Supreme Court for the purpose of evaluating that case in light of the recent *Milkovich* decision.

35. *Immuno A.G.*, 77 N.Y.2d at 245, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911.

to be false,[36] the court in *Larchmont* did not have to inquire as deeply because it found the statements in the article and letters to be constitutionally protected opinion and not statements of objective fact.[37]

When the assertion of an alleged opinion is being analyzed by the courts in order to determine whether it is protected speech, it is given greater deference by the New York State test than it is afforded under the federal test for defamation.[38] The State of New York chose this test specifically for the purpose of giving its citizens extra protection beyond that afforded under the federal test.[39] The New York State courts accomplish this goal by evaluating the expression in the full context in which it was made, whereas the federal courts tend to isolate the statements more when deciding defamation cases.[40]

SUPREME COURT

BRONX COUNTY

Cruz v. Latin News Impacto Newspaper[41]
(printed June 7, 1994)

The plaintiff claimed that a newspaper article written about her was libelous.[42] The defendants moved for summary judgment

36. *Id.* at 246, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912.

37. *Larchmont*, 206 A.D.2d at 508, 615 N.Y.S.2d at 74.

38. *See generally* 600 West 115th Street Corp. v. Von Gutfeld, 80 N.Y.2d 130, 145, 603 N.E.2d 930, 938, 589 N.Y.S.2d 825, 833 (1992).

39. *See* Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 249, 567 N.E.2d 1277, 566 N.Y.S.2d 913, *cert. denied*, 500 U.S. 954 (1991).

40. The New York State Court of Appeals disagrees with the dissection of expressions at issue in defamation cases because that process "may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context." *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

41. N.Y. L.J., June 7, 1994, at 23 (Sup. Ct. Bronx County 1994).