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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 Newspaper⁴¹ (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).

asserting, amongst other things, the constitutional protection of freedom of expression.⁴³ The court rejected the defendants' motion partly on the grounds that the case did not involve a free speech issue.⁴⁴

The plaintiff commenced the action against the defendants as a result of a newspaper article and accompanying photographs printed in the defendants' newspaper.⁴⁵ The report portrayed the plaintiff as a fifty-seven year old grandmother who was dying of AIDS.⁴⁶ The plaintiff believed the article was libelous in that according to the then existing Center For Disease Control [hereinafter CDC] standards, she did not, in fact, have AIDS.⁴⁷ Rather plaintiff, was infected with the HIV virus.⁴⁸

In response, the defendants contended that the more recent Center For Disease Control standards governed and that under such guidelines the plaintiff did, in fact, have AIDS.⁴⁹ The defendant further argued that if the latter Center For Disease Control standard reigned, then the plaintiff could not meet her burden of proof and the complaint should therefore be summarily dismissed.⁵⁰

The court denied the defendants' motion for summary relief. It held that triable issues of fact "existed as to the truth or falsity"

42. *Id.* In addition to the libel action, plaintiff sought to recover damages for "trespass, violation of privacy, unjust enrichment, violation of the New York Civil Rights Law and infliction of emotional distress." *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* The article published by defendant stated that "plaintiff's AIDS [had been] contracted from a philandering husband; that plaintiff suffers from tuberculosis as well; and that plaintiff ha[s] a retarded grandchild." *Id.*

47. *Id.* In 1992 the "CDC defined AIDS as the presence of HIV infection coupled with the presence of certain AIDS-defining opportunistic infections." *Id.*

48. *Id.* In addition, plaintiff denied each of the above cited allegations. *Id.*

49. *Id.* According to the 1993 CDC report "a person is deemed to have AIDS if HIV infected white T-cell count is below 200." *Id.*

50. *Id.* Defendants claim that plaintiff must demonstrate "substantial falsity" in order to overcome a summary judgment motion. *Id.* Based on the 1993 CDC report plaintiff cannot meet this burden. *Id.*

of the factual assertions in the article.⁵¹ Beginning its analysis, the *Cruz* court established that a defamatory action could exist based on the present set of facts.⁵² The court stated that “false allegations about whether one is suffering from AIDS can be held to be defamatory.”⁵³ The court reasoned that public perception is quite different between a person who is HIV infected that may lead a fairly normal life and a person who has AIDS that is facing imminent death.⁵⁴

The court further ruled that the “false statements . . . are not constitutionally protected.”⁵⁵ Moreover, New York constitutional protection of freedom of expression⁵⁶ would not protect the defendant because “there [wa]s no strong public interest in knowing the identity of someone who is HIV positive or suffering from AIDS [and that t]here is no free speech issue which the State must recognize in revealing the identity of such person.”⁵⁷

The *Cruz* court discussed the effectiveness of a free speech defense in a defamation action.⁵⁸ In *Greenberg v. CBS, Inc.*,⁵⁹

51. *Id.*

52. *Id.*

53. *Id.* See *Katapoðis v. Brooklyn Spectator, Inc.*, 287 N.Y. 17, 38 N.E.2d 112 (1941) (broadening the definition of a defamatory communication to include statements that would be likely to arouse pity or sympathy); *Kimmerle v. New York Evening Journal Inc.*, 262 N.Y. 99, 186 N.E. 217 (1933) (defining a defamatory communication as one that tends to hold a person up to hatred, contempt or ridicule, or to cause them to be shunned or avoided).

54. *Id.* See *New York State Society of Surgeons v. Axelrod*, 77 N.Y.2d 677, 572 N.E.2d 605, 569 N.Y.S.2d 922 (1991) (stating that HIV is a virus that is distinct from the disease of AIDS).

55. *Cruz*, N.Y. L.J., June 7, 1994, at 23.

56. N.Y. CONST. art. 1, § 7. Section 7 provides in 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.*

57. *Cruz*, N.Y. L.J., June 7, 1994, at 23 (quoting *Anderson v. Strong Memorial Hosp.*, 151 Misc. 2d 353, 356, 573 N.Y.S.2d 828, 831 (Sup. Ct. Monroe County 1991)).

58. See *Greenberg v. CBS, Inc.*, 69 A.D.2d 693, 699, 419 N.Y.S.2d 988, 991 (2d Dep’t 1979) (weighing the competing values and interests present in defamation suits against the media in order to insure that there be no deterrent to the vigorous and fruitful exercise of First Amendment freedoms); Le

the court held that “[h]it and run journalism is no more protected under the First Amendment, than speeding on a crowded sidewalk is permitted under a valid driver’s license.”⁶⁰ On the issue of summary judgment the *Greenberg* court commented that:

[W]e also realize that motions for summary judgment in defamation actions are invaluable devices to insure the free and uninhibited debate of matters of public concern by obviating the necessity for protracted and expensive litigation where there are no factual issues. However, solicitude for first amendment freedoms was not intended to abrogate the fundamental rules governing the administration of summary judgment. If a material, triable issue of fact exists in a libel action, summary judgment must be denied.⁶¹

Furthermore, in *Le Mistral, Inc. v. Columbia Broadcasting Systems*,⁶² the court proclaimed that “crimes and torts committed in news gathering are not protected.”⁶³ The *Le Mistral* court commented that “[t]here is no threat to a free press in requiring its agents to act within the law.”⁶⁴

The *Cruz* court’s analysis was consistent with the federal standard that is applied to defamation cases.⁶⁵ The court found that since the plaintiff was a private individual⁶⁶ and the article was a matter of private concern,⁶⁷ it was not necessary that the

Mistral, Inc. v. Columbia Broadcasting Sys., Inc., 61 A.D.2d 491, 493, 402 N.Y.S.2d 815, 816-17 (1st Dep’t 1978) (considering whether, despite the tort committed, the “defendant is insulated from any damage award by virtue of the First Amendment to the United States Constitution”).

59. 69 A.D.2d 693, 419 N.Y.S.2d 988 (2d Dep’t 1979).

60. *Id.* at 700, 419 N.Y.S.2d at 991 (citations omitted).

61. *Id.* (citations omitted).

62. 61 A.D.2d 491, 402 N.Y.S.2d 815 (1st Dep’t 1978).

63. *Id.* at 494, 402 N.Y.S.2d at 817. “The court recognize[d] that the exercise of the right of . . . free press . . . mandates the observance of the coequal duty not to abuse such right.” *Id.*

64. *Id.* (“The First Amendment is not a shibboleth before which all other rights must succumb.”).

65. *Cruz*, N.Y. L.J., June 7, 1994, at 23.

66. *Gertz v. Welch*, 418 U.S. 323 (1974).

67. *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

plaintiff prove actual malice on the part of the defendant.⁶⁸ In deciding the defamation issue, the *Cruz* court cited *Galella v. Onassis*.⁶⁹ In *Galella*, the court held that the First Amendment does not establish a wall of immunity which protects news persons from any liability for their conduct while gathering news.⁷⁰

Since under both New York and federal analysis the *Cruz* court did not find that freedom of speech would act as an absolute defense and since triable issues of fact existed, the defendants motion for summary judgment was denied.

WESTCHESTER COUNTY

Glendora v. Kofalt⁷¹
(decided July 28, 1994)

Plaintiff alleged that her state constitutional guarantees of freedom of speech⁷² and freedom of expression⁷³ had been violated when the defendant, Cable Systems Corporation, refused to broadcast the plaintiff's program material.⁷⁴ The Supreme Court, Westchester County, dismissed plaintiff's claims and held that the defendant was not a state actor and the constitutional guarantees complained about would merely "protect the individual against action by governmental authorities, not by

68. *Cruz*, N.Y. L.J., June 7, 1994, at 23.

69. 487 F.2d 986, 995 (2d Cir. 1973) (stating that social needs may warrant some intrusion of privacy, but the interference may be no greater than that necessary).

70. *Id.* (stating that crimes and torts committed in news gathering are not protected by the First Amendment).

71. 162 Misc. 2d 166, 616 N.Y.S.2d 138 (Sup. Ct. Westchester County 1994).

72. *Id.* at 168, 616 N.Y.S.2d at 140.

73. *Id.*

74. *Id.*