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Touro Law Review

Volume 12
Number 3 *New York State constitutional Decisions: 1995 Compilation*

Article 35

1996

Freedom of Speech and Press

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Recommended Citation
(1996) "Freedom of Speech and Press," *Touro Law Review*: Vol. 12 : No. 3 , Article 35.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol12/iss3/35

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the circumstances and context surrounding the communication.[475] New York, on the other hand, refuses to stop at *Milkovich* and looks at the surrounding circumstances. For example, in *Immuno*, the court stated that the federal test which consists of "[i]solating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context."[476] The State of New York chose to look at the surrounding circumstances from a reasonable person perspective specifically for the purpose of giving its citizens extra protection beyond that afforded under the Federal Constitution.

Rojas v. Debevoise & Plimpton[477]
(decided October 27, 1995)

The plaintiff argued that statements made by the plaintiff's former employer to employees constituted actionable defamation.[478] In response the defendants argued that the statements were protected by a qualified privilege.[479] The court, agreeing with the defendants, held that the statements were protected by a qualified privilege, which was not overcome by a

475. *Id.* at 21.

476. *Immuno*, 77 N.Y.2d at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

477. 634 N.Y.S.2d 358 (Sup. Ct. New York County 1995).

478. *Id.* at 361-62. In addition to the cause of action for defamation, the complaint alleged a second cause of action for breach of employment relationship. *Id.* at 359. This breach of employment relationship arose out of an allegation that because the plaintiff "testified truthfully to the FBI" during the course of an investigation of her employer, she was requested to resign from her position within the law firm. *Id.* at 360. The court dismissed this cause of action because the plaintiff did not proffer any "facts . . . to show that defendants frustrated plaintiff's compliance with the core purposes of her employment" and therefore there was "no breach of contract claim stated." *Id.* at 361.

479. *Id.* at 362.

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showing of actual malice, and also were protected by the free speech provision of the New York State Constitution.[480]

In *Rojas*, the plaintiff alleged that one defendant had said to an employee that the plaintiff had stolen documents from him.[481] The plaintiff also alleged that a former co-worker said to another former co-worker that the plaintiff was "lying," "not credible," "not to be believed" and "crazy."[482]

The court began its discussion of the defamation claim by tersely concluding that the statement concerning stolen documents was subject to a qualified privilege.[483] The court found that this privilege is invoked "[w]hen a speaker communicates information on a subject matter in which he has an interest or in reference to which he has a duty and such information is communicated to a person with a corresponding interest or duty . . . ."[484] The court reasoned that these statements were subject to a qualified privilege because an employer-employee relationship existed between the defendant who made the statements and the person who received the statements.[485]

Although the court held that the statements were protected by a qualified privilege, the plaintiff argued that the statements were made with "actual malice."[486] The court noted that in order to show actual malice, the plaintiff "must plead facts showing that the statement was made with a high degree of awareness of its probable falsity or that the defendant entertained serious doubts as to the truth of the matter."[487] In reciting this high evidentiary

480. *Id.* N.Y. CONST. art. I, § 8. *Id.* Article I, section 8 provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." *Id.*

481. *Rojas*, 634 N.Y.S.2d at 361.

482. *Id.* at 362.

483. *Id.*

484. *Id.* (citing La Scala v. Dangelo, 104 A.D.2d 930, 931, 480 N.Y.S.2d 546, 547 (2d Dep't 1984) ("It is well settled that when a speaker communicates information on a subject matter in which he has an interest or in reference to which he has a duty and such information is communicated to a person with a corresponding interest or duty, a qualified privilege exists.")).

485. *Rojas*, 634 N.Y.S.2d at 362.

486. *Id.*

487. *Id.*

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standard, the court relied upon the court of appeals' decision in *Liberman v. Gelstein.*[488]

In *Liberman*, a landlord brought a defamation action against one of the members of the board of governors of the tenants association for statements made to a police officer after a criminal altercation and statements made between the tenants, and the defendant counterclaimed.[489] The court held that the statements were subject to a qualified privilege and, therefore, there had to be a showing of "actual malice," or "common law malice," in order for plaintiff to prevail.[490] The court described "common law malice" as the existence of "spite or ill will,"[491] but went on to use the "actual malice" standard under the First Amendment of the United States Constitution[492] as the standard that a plaintiff must meet in order to overcome a qualified privilege in New York.[493] In meeting this standard, "the plaintiff must demonstrate that the 'statements [were] made with [a] high degree of awareness of their probable falsity.'"[494] The *Liberman*

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488. 80 N.Y.2d 429, 605 N.E.2d 344, 590 N.Y.S.2d 857 (1992).

489. *Id.* at 432-34, 605 N.E.2d at 346-47, 590 N.Y.S.2d at 859-60. The plaintiff originally alleged five separate slander based causes of action, but by the time that the case reached the court of appeals, only the second and the fifth causes of action were alleged. *Id.* at 432, 605 N.E.2d at 346, 590 N.Y.S.2d at 859. The second cause of action alleged that the plaintiff was bribing the police in order to avoid receiving parking tickets around the building. *Id.* at 433, 605 N.E.2d at 346, 590 N.Y.S.2d at 859. In the fifth cause of action, the plaintiff alleged that the defendant stated, in the presence of the plaintiff's employees, "Liberman threw a punch at me. He screamed at my wife and daughter. He called my daughter a slut and threatened to kill me and my family." *Id.*

490. *Id.* at 437-38, 605 N.E.2d at 349-50, 590 N.Y.S.2d at 862-63.

491. *Id.* at 437, 605 N.E.2d at 349, 590 N.Y.S.2d at 862.

492. U.S. CONST. amend. I. The First Amendment emphatically commands: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*

493. *Liberman*, 80 N.Y.2d at 438, 605 N.E.2d at 350, 590 N.Y.S.2d at 863.

494. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)). In *Garrison*, the Supreme Court grappled with the question of whether the truth defense to a charge of defamation should be negated "on a showing of malice in the sense of ill-will." *Garrison*, 379 U.S. at 71-72. The charge of defamation arose after a dispute between the appellant, a district attorney of

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court held that the plaintiff had failed to properly raise the issue of malice and thus could not overcome the qualified privilege.[495]

Once the court in *Rojas* explained the standard of "actual malice," the court plainly stated that the plaintiff did not plead facts which constituted "actual malice" and the mere pleading of the word "malice" was not sufficient to overcome the qualified privilege.[496] In addition, the court explained that the defendant who made the statement about stolen documents admitted not having any proof that the documents were actually stolen.[497] However, the court rejected this as a basis for malice by stating, "[t]here is a critical difference between not knowing whether something is true and being highly aware that it is probably false. Only the latter establishes malice."[498]

The remaining statements directed at the credibility of the plaintiff were summarily dismissed by the court in holding that those statement were not actionable because "statements of opinion [are] protected by the broad free speech provision of the

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Louisiana, and certain state court judges at which time appellant made certain disparaging statements at a press conference against the judges to the effect that the judges were, inter alia, ineffective, lazy and hampered the district attorney's efforts at enforcing the vice laws. *Id.* at 64-66. The Court determined that the "ill-will" standard set forth in the Louisiana defamation statute was "constitutionally invalid . . . in the context of criticism of the official conduct of public officials." *Id.* at 77. Thus, the Court reversed appellant's conviction under this statute holding that a showing of malice in the sense of ill-will cannot negate the truth defense. *Id.* at 78-79. However, those statements made with "knowledge of their falsity or in reckless disregard of whether they are true or false" will be subject to a charge of defamation. *Id.*

495. *Liberman*, 80 N.Y.2d at 439, 605 N.E.2d at 350, 590 N.Y.S.2d at 863.

496. *Rojas*, 643 N.Y.S.2d at 362 (citing Doherty v. New York Tel. Co., 202 A.D.2d 627, 628, 609 N.Y.S.2d 306, 307 (2d Dep't 1994) (holding that "the alleged defamatory statements were clearly entitled to a qualified privilege, which was not overcome by the plaintiff's conclusory allegations that the statements were published with actual malice.")). *See also* Buckley v. Litman, 57 N.Y.2d 516, 521, 443 N.E.2d 469, 471, 457 N.Y.S.2d 221, 223 (1986) (finding that no proof of malice on the part of the defendant was offered by plaintiff to establish a cause of action for liable).

497. *Rojas*, 634 N.Y.S.2d at 362.

498. *Id.*

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New York State Constitution."[499] In reaching this conclusion, the court relied upon the court of appeals case of *Immuno AG. v. Moor-Jankowski*,[500] where a libel action was brought against the editor of a magazine which printed a letter critical of an article and the persons within the article.[501] The *Immuno* court held that the statements did not constitute actionable defamation because they amounted to opinions which were strongly protected by the New York State Constitution.[502] The court in *Immuno* stated that "the protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution."[503] The court reasoned that the difference in the language protecting speech within the State Constitution and the Federal Constitution, which was ratified thirty years prior to New York's Constitution, demonstrated an intent by New York to treat free speech differently from the federal government.[504] Furthermore, New York has had a long and rich history of protecting the liberty of the press even prior to the application of the First Amendment of the United States Constitution to the States.[505] Even with the existence of differences in the protection of free speech, the court of appeals held that the tradition of liberty guaranteed under both the New York State Constitution and the Federal Constitution

499. *Id.* (citing Polish Am. Immigration Relief Comm., Inc. v. Relax, 189 A.D.2d 370, 374, 596 N.Y.S.2d 756, 758 (1st Dep't 1993) ("The words at issue here are clearly rhetorical hyperbole and vigorous epithet, and thus constitute non-actionable expressions of opinion under Federal or State Constitutional standards.")). *See also* Goetz v. Kunstler, 164 Misc. 2d 557, 562, 625 N.Y.S.2d 447, 451 (Sup. Ct. New York County 1995) (stating that a statement of opinion which does not imply facts about the person described is not actionable).

500. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991).

501. *Id.* at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

502. *Id.* at 257, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918.

503. *Id.* at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914 (citations omitted).

504. *Id.* at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

505. *Id.*

required a dismissal of the claim as non-actionable opinion.[506] Thus, in relying on the court's holding in *Immuno*, the *Rojas* court drew on the distinction between the New York State and Federal Constitutions in its analysis of protection of speech which constitutes mere opinion, by relying solely on the New York State Constitution.[507]

In conclusion, the court in *Rojas* has afforded a large measure of protection to speech that comes under a qualified privilege under both the New York State and Federal Constitutions. However, in its analysis of opinionated speech, the court only relies on the broader protection afforded to such speech under the New York State Constitution.

506. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

507. *Rojas,* 634 N.Y.S.2d at 362. The court in Rojas held that "the comments that plaintiff is 'crazy' 'lying' and 'not credible' are non-actionable statements of opinion protected under the broad free speech provision of the New York State Constitution." *Id.*