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# Freedom of Speech and Press

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## SUPREME COURT

## WESTCHESTER COUNTY

### Elite Funding Corp. v. Mid-Hudson Better Business Bureau[508]
(decided March 31, 1995)

Plaintiff, Elite Funding Corp. [hereinafter "Elite"], a mortgage brokerage, sought damages from Mid-Hudson Better Business Bureau [hereinafter "the Bureau"], to recover for defamation resulting from the Bureau's statement that the plaintiff had an "unsatisfactory" consumer rating.[509] In its defense, the Bureau claimed that the rating was an expression of opinion based upon the stated facts.[510] As a result, it was not actionable because it was protected by the privilege of "fair comment" under both the New York State[511] and Federal[512] Constitutions.[513] The court concluded that the Bureau's rating was constitutionally protected speech and granted the defendant's motion for summary judgment dismissing the complaint.[514]

The Bureau received six consumer complaints regarding the plaintiff and its operations.[515] In each instance, the Bureau

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508. 165 Misc. 2d 497, 629 N.Y.S.2d 611 (Sup. Ct. Westchester County 1995).

509. *Id.* at 500, 629 N.Y.S.2d at 613.

510. *Id.*

511. N.Y. CONST. art. I, § 8. Article one, section eight, emphatically commands: "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.*

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

513. *Elite Funding Corp.*, 165 Misc. 2d at 502, 629 N.Y.S.2d at 615.

514. *Id.* at 503, 629 N.Y.S.2d at 615. The court held that the Bureau's issuance of an unsatisfactory rating was not defamatory because it was true, and even if the statement was not true the plaintiff failed to produce the evidence of "express malice" required to prevail over the qualified "common interest" privilege and the constitutional privilege of "fair comment." *Id.* at 501, 629 N.Y.S.2d at 614.

515. *Id.* at 499-500, 629 N.Y.S.2d at 612-13. The Bureau is a not-for-profit organization supported by businesses within the community. *Id.* at 497, 629

notified Elite that a complaint had been filed against it.[516] Subsequently, the Bureau made repeated attempts to contact Elite in order to resolve each complaint.[517] Elite's failure to respond to the Bureau's inquiries resulted in the Bureau closing each complaint file with an indication that no response was ever received.[518]

On July 13, 1992, after closing the third no response file, the Bureau sent a certified letter to Elite.[519] The letter stated that if Elite failed to respond to the Bureau's inquiries by July 27, 1992, the Bureau would issue them an "unsatisfactory" business rating.[520] Elite failed to respond to this notice, and consequently received an "unsatisfactory" rating from the Bureau.[521] Subsequently, two additional complaint files were closed indicating no response.[522]

In August of 1993, the Bureau advised Elite that it would remove the "unsatisfactory" rating if Elite would either respond to the five listed complaints or provide documentation that they had been resolved.[523] Elite did not respond.[524] Subsequent to the commencement of this action, the Bureau received a sixth consumer complaint regarding Elite.[525] The Bureau again attempted to illicit a response from Elite and was once again unsuccessful.[526]

The plaintiff the instituted this action, claiming that the Bureau had "made numerous unfounded false and disparaging statements of fact against the plaintiff."[527] Elite alleged that the statements

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N.Y.S.2d at 612. The primary function of the Bureau is to resolve consumer disputes through mediation. *Id.* at 497-98, 629 N.Y.S.2d at 612.

516. *Id.* at 499, 629 N.Y.S.2d at 613.
517. *Id.*
518. *Id.*
519. *Id.*
520. *Id.*
521. *Id.*
522. *Id.*
523. *Id.*
524. *Id.* at 500, 629 N.Y.S.2d at 613.
525. *Id.*
526. *Id.*
527. *Id.*

made by the Bureau implied that Elite "was an 'unsatisfactory' company with whom to do business and/or that Elite . . . had an 'unsatisfactory' rating with the defendant's organization"[528] and that Elite was "incompetent and/or dishonest in its business practices."[529] The plaintiff further alleged that the Bureau knew the statements were false and made them with a gross and reckless disregard for the truth.[530] Elite further maintained that the statements caused the brokerage to suffer monetary damages.[531]

The Bureau argued that, based upon the plaintiff's history and pattern of unresolved complaints, the "Bureau File Report" contained an accurate statement of their opinion: "unsatisfactory."[532] Moreover, the report specifically stated that the Bureau "does not endorse, recommend, or disapprove of any product, service or company."[533] The Bureau also maintained that they did not act with malice towards Elite.[534] It urged that the "unsatisfactory" rating was based solely upon Elite's past history with the Bureau, a history which consisted of numerous consumer complaints to which Elite continually failed to respond.[535] The Bureau maintained that the report was, therefore, true.[536]

The court concluded that the Bureau's allegedly defamatory statements were true and granted defendant's motion for summary judgment.[537] Moreover, the court stated that even if the Bureau's statements were false, the Bureau would benefit from

528. *Id.*
529. *Id.*
530. *Id.*
531. *Id.*
532. *Id.*
533. *Id.*
534. *Id.*
535. *Id.*
536. *Id.*
537. *Id.* at 501, 629 N.Y.S.2d at 614 (stating that "[i]t is well settled that truth is a complete defense to a claim of defamation").

the attachment of both a qualified privilege[538] and a constitutional "fair comment"[539] privilege.[540]

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538. *Id.* The New York Court of Appeals in discussing the qualified privilege has stated:

> A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation. "The rule of law that permits such publications grew out of the desirability in the public interest of encouraging a full and fair statement by persons having a legal or moral duty to communicate their knowledge and information about a person in whom they have an interest to another who also has an interest in such person. Such privilege is known as a 'qualified privilege.' It is qualified because it does not extend beyond such statements as the writer makes in the performance of such duty and in good faith believing them to be true." When defendant's statements are presumptively privileged the rule is that, in order to render them actionable, it is incumbent on the plaintiff to prove that (they were) false and that the defendant was actuated by express malice or actual ill will.

Shapiro v. Health Ins. Plan of Greater N.Y., 7 N.Y.2d 56, 60, 163 N.E.2d 333, 335-36, 194 N.Y.S.2d 509, 512-13 (1959) (citations omitted).

539. *Elite Funding Corp.*, 165 Misc. 2d at 501, 629 N.Y.S.2d at 614. The "fair comment" privilege was derived from the need to "protect both the right to comment on public affairs" and "the public's access to important information." Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 266, 567 N.E.2d 1270, 1288, 566 N.Y.S.2d 906, 924 (Titone, J., concurring), *cert. denied*, 500 U.S. 954 (1991). Judge Titone further stated:

> In furtherance of that concern, it is highly appropriate to consider the context, tone and character of a statement challenged as defamatory when determining whether it constitutes a privileged "fair comment" or an actionable assertion of fact. Indeed, our common-law cases have often included references to reading the challenged work 'as a whole' and in their proper context.

*Id.* (Titone, J., concurring).

540. *Elite Funding Corp.*, 165 Misc. 2d at 501, 629 N.Y.S.2d at 614. The court also considered the implications of the Bureau's use of the qualified "common interest" privilege. *Id.* "A communication is qualifiedly privileged when it is fairly made by a person in the discharge of some public or private duty upon any subject matter in which that person has an interest, and where it is made to a person or persons with a corresponding interest or duty." Hollander v. Clayton, 145 A.D.2d 605, 606, 536 N.Y.S.2d 790, 792 (2d

Prior to the Supreme Court decision in *New York Times Co. v. Sullivan*,[541] defamation cases had been decided on the basis of the prevailing state common law.[542] In *Sullivan*, the Court "injected a constitutional dimension" into the issue of defamation.[543] Moreover, the Court reaffirmed this principle in *Milkovich v. Lorain Journal Co.*,[544] holding that "a statement of opinion relating to matters of public concern which does not contain a probably false factual connotation will receive full constitutional protection."[545]

With respect to an analysis of speech using the test set out under the Federal Constitution, the primary question is whether the speech would "reasonably appear to state or imply assertions of objective fact."[546] In making this determination, the courts must consider not only the literal words used,[547] but also "the impression created by the words used as well as the general tone of the expression, from the point of view of the reasonable person."[548] As a result of the Supreme Court's application of these rules it may be said that an actionable statement may be determined as follows: "except for special situations of loose,

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Dep't 1988). In order to overcome these privileges, plaintiff must produce evidence that the Bureau acted with "express malice" or "actual ill-will." *Elite Funding Corp.*, 165 Misc. 2d at 501, 629 N.Y.S.2d at 614.

541. 376 U.S. 254 (1964).

542. Gross v. New York Times, 82 N.Y.2d 146, 152, 623 N.E.2d 1163, 1166-67, 603 N.Y.S.2d 813, 816-17 (1993) (discussing the distinction between "expressions of opinion which are not actionable, and assertions of fact, which may form the basis of a viable libel claim"). *See also* Rappaport v. VV Pub. Corp., 163 Misc. 2d 1, 8, 618 N.Y.S.2d 746, 750 (Sup. Ct. New York County 1994) (noting that "[t]he New York State Constitution is decidedly more protective of statements than its federal equivalent").

543. *Gross*, 82 N.Y.2d at 153, 623 N.E.2d at 1166, 603 N.Y.2d at 816.

544. 497 U.S. 1 (1990).

545. *Id.* at 20. The court further noted that "speech earns no greater protection simply because it is labeled 'opinion.'" Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 243, 567 N.E.2d 1270, 1273, 566 N.Y.S.2d 906, 909, *cert denied*, 500 U.S. 954 (1991).

546. *Id.*

547. *Id.*

548. *Id.* at 243, 57 N.E.2d at 1273-74, 566 N.Y.S.2d at 909.

figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable."[549]

The Supreme Court, in establishing the standards for an evaluation of the First Amendment protection of freedom of speech, has set "only the minimum standards [to be] applicable throughout the nation."[550] Conversely, a state law analysis of freedom of speech traditionally involves a combination of state common law and state constitutional law.[551] The state courts are charged with the responsibility of supplementing the federal standards in order to "meet local needs and expectations."[552]

The State of New York, with its reputation as a "cultural center for the nation,"[553] has a tradition of encouraging and protecting the free expression of ideas.[554] This tradition was recognized and protected in the "free speech guarantee of the New York State Constitution," which was adopted in 1821.[555] The language of this guarantee provides evidence of the State's desire to offer a broader protection of speech "than the minimum required by the Federal Constitution."[556]

Regardless of whether a court is applying the New York or Federal Constitution, the dispositive inquiry is whether a statement can be reasonably interpreted as stating or implying facts about the plaintiff, because only those statements which are objectively provable as true or false are actionable.[557] The New York Court of Appeals has adopted a similar but "decidedly more protective" view under the New York State Constitution.[558] In New York, the inquiry stated by the court of appeals requires the court to determine:

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549. *Id.* at 245, 57 N.E.2d at 1275, 566 N.Y.S.2d at 911.
550. *Id.* at 248, 57 N.E.2d at 1277, 566 N.Y.S.2d at 913.
551. *Id.*
552. *Id.*
553. *Id.* at 249, 57 N.E.2d at 1277, 566 N.Y.S.2d at 913.
554. *Id.*
555. *Id.*
556. *Id.* at 249, 57 N.E.2d at 1278, 566 N.Y.S.2d at 914.
557. Rappaport v. VV Pub. Co., 163 Misc. 2d 1, 8, 618 N.Y.S.2d 746, 750 (Sup. Ct. New York County 1994).
558. *Id.*

> (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."[559]

Despite this new trend in constitutional analysis, New York continues to utilize the traditional common law categories for actionable and non-actionable statements.[560] In all cases, the court is obliged to consider the communication as a whole to determine whether the reasonable listener or reader is likely to understand the remark as an assertion of provable fact.[561] A statement of opinion that implies a basis in fact is actionable when those facts are not known or knowable to the audience.[562] Such statements may cause a reasonable listener to infer that the speaker knows certain facts, unknown to the audience, which support the opinion and are detrimental to the person toward whom the statement is directed.[563] Conversely, a statement of opinion that is accompanied by a recitation of the facts on which

559. *Id.* at 9, 618 N.Y.S.2d at 750 (citing Gross v. New York Times, 82 N.Y.2d 146, 153, 623 N.E.2d 1163, 1167, 603 N.Y.S.2d 813, 817).

560. Brian v. Richardson, 211 A.D.2d 413, 621 N.Y.S.2d 48, 49 (1st Dep't 1995) (citing *Gross*, 82 N.Y.2d at 153-54, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818). In *Gross*, where a former medical examiner brought an action in defamation against the New York Times Co., the New York Court of Appeals held that in determining if a statement is defamatory, there is a distinction between an actionable and inactionable statement of opinion. *Gross*, 82 N.Y.2d at 153-54, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818. In an actionable statement of opinion, there is an implication that the opinion is based on facts which are not disclosed to the reader. *Id.* In an inactionable statement of opinion, there is an opinion accompanied by the disclosure of the underlying facts. *Id.* Where there is an actionable statement of opinion, a reasonable listener or reader may infer that the speaker knows facts which support the opinion and these facts are detrimental to the subject. *Id.* However, where there is an inactionable statement of opinion the hypothesis is understood by the audience to be simply conjecture. *Id.*

561. *Id.* at 153, 622 N.E.2d at 1168, 603 N.Y.S.2d at 818.

562. *Id.*

563. *Id.*

it is based, or one that does not imply the existence of undisclosed underlying facts, is not actionable because a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture.[564]

The court in the current case concluded that because the Bureau's "unsatisfactory" rating was a statement of opinion and was based upon stated facts,[565] it was protected by the New York and Federal Constitutions.[566] In reaching this conclusion, the court stated that under both the New York State and Federal Constitutions, "such opinions are absolutely protected."[567] Moreover, the court stated that even if the privilege of fair

564. *Id.*

565. *See, e.g.*, Brian v. Richardson, 211 A.D.2d 413, 413, 621 N.Y.S.2d 48, 49 (1st Dep't 1995) (stating that an opinion which is based upon stated facts is not actionable because the basis for the formation of such hypothesis is likely to be understood by the audience); Rothman v. Sternberg, 207 A.D.2d 438, 439, 615 N.Y.S.2d 748, 750 (2d Dep't 1994) (holding that in determining whether an opinion is actionable, the key issue to determine is whether the statements reasonably appear to contain assertions of objective fact); Hollander v. Clayton, 145 A.D.2d 605, 606, 536 N.Y.S.2d 790, 791-92 (2d Dep't 1988) (finding that statements made by defendant at a professional staff meeting constituted non-actionable opinion because the statements were ambiguous, could not be characterized as true or false and were accepted by the audience as opinion rather than as fact); Wehringer v. Newman, 60 A.D.2d 385, 390, 400 N.Y.S.2d 533, 536 (1st Dep't 1978) (stating that "[o]pinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth"); *see also* Held v. Pokorny, 583 F. Supp. 1038, 1039 (S.D.N.Y. 1984) (stating that an expression of opinion cannot be subjected to the test of truth or falsity and is, therefore, entitled to protection from liability under the First Amendment).

566. *Elite Funding Corp.*, 165 Misc. 2d at 502, 629 N.Y.S.2d at 615. *See* Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 239, 567 N.E.2d 1270, 1271, 566 N.Y.S.2d 906, 907 (concluding that statements of opinion are entitled to the absolute protection of both the state and federal constitutional free speech guarantees), *cert. denied*, 500 U.S. 954 (1991); Rappaport v. VV Pub. Corp., 163 Misc. 2d 1, 8, 618 N.Y.S.2d 746, 750 (Sup. Ct. New York County 1994) (stating that under both the New York and Federal Constitutions, only those publications which may be found to state or imply facts about the plaintiff which are provable as true or false are actionable).

567. *Elite Funding Corp.*, 165 Misc. 2d at 502, 629 N.Y.S.2d at 615.

comment is said to be a qualified one, the plaintiff would have to establish evidence of malice on the part of the defendant.[568] The court held that the plaintiff failed to produce evidentiary facts sufficient to support a showing of malice by the Bureau.[569]

568. *Id.* at 502-03, 629 N.Y.S.2d at 614.
569. *Id.*