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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 . . . .

COURT OF APPEALS

600 West 115th Street Corp. v. Robert Von Gutfeld[431]
(decided October 20, 1992)

Defendant claimed, *inter alia*, that his statements, made in opposition to plaintiff's application for a building permit during a public hearing conducted by a New York City community board, were opinion and thus constituted protected speech under both the state[432] and the Federal Constitution.[433] The court held that the statements were "opinion and advocacy and not a presentation alleging objective fact," and thus were protected under both constitutions.[434]

Plaintiff owned a restaurant on the ground floor of the building consisting of commercial condominiums and residential coopera-

431. 80 N.Y.2d 130, 603 N.E.2d 930, 589 N.Y.S.2d 825 (1992).

432. N.Y. CONST. art. I, § 8.

433. U.S. CONST. amend. I. The First Amendment provides in pertinent part that "[c]ongress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.*

434. *Von Gutfeld*, 80 N.Y.2d at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833.

tives.[435] Defendant lived in the building for over thirty years.[436] Plaintiff proposed to open a sidewalk cafe next to its restaurant and applied to the City Department of Consumer Affairs (Department) for a permit to do so.[437] Defendant, who was president of the condominium's Board of Managers (Board), which governed the building, opposed this proposition, and the proposal did not get the Board's approval.[438] Plaintiff then submitted to the Department an affidavit of consent from the building's landlord.[439] Upon receipt of the consent, the Department, acting on the presumption that the consent was valid, advised the Board that it was starting to process plaintiff's application.[440] The Department subsequently discovered its error and reversed plaintiff's application.[441]

During this time, the Community Board held a public hearing on plaintiff's proposal.[442] At the hearing, defendant, who was then a member of the Board's Building Committee, but no longer the president of the Board, spoke against accepting plaintiff's proposal.[443] The statements he made at the meeting, and which the plaintiff claims were defamatory,[444] were that the restaurant "denigrated" the building,[445] that "[plaintiff's] entire lease and proposition [were] fraudulent . . . . and smell[ed] of bribery and corruption,"[446] and that plaintiff's lease was illegal.[447]

The supreme court found these statements not to be absolutely privileged and that they could be construed as factual by the av-

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435. *Von Gutfeld,* 80 N.Y.2d at 133-34, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

436. *Id* at 134, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

437. *Id.* at 133-34, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

438. *Id.* at 134, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.* at 135, 603 N.E.2d at 932, 589 N.Y.S.2d at 827.

445. *Id.* at 134, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

446. *Id.* at 135, 603 N.E.2d at 932, 589 N.Y.S.2d at 827.

447. *Id.* at 134, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

erage audience.[448] Therefore, defendant's motion for summary judgment was denied, and a divided appellate division affirmed.[449] The court of appeals reversed.[450]

The court of appeals began its analysis of the defendant's claim that his statements were opinion protected by the state and federal constitutions, by first noting that under *Immuno AG. v. Moor-Jankowski*,[451] the court of appeals has acknowledged that the constitutional rules governing protected speech are different under the federal and state constitutions.[452] However, the court stated that under both federal and state law, "the dispositive question [before the court] is whether a reasonable listener could have concluded that [the defendant] was conveying facts about the plaintiff."[453] While the court of appeals acknowledged that it and the Supreme Court "diverge" as to the "test or method . . . applie[d] to whether the challenged statement implies facts,"[454] it nonetheless concluded that its "determination that the order must be reversed rests on [its] conclusion that defendant's statements cannot be construed to allege facts under either analysis."[455]

Judge Simons, writing for the court, followed the course it took in *Immuno AG. v. Moor-Jankowski*, analyzing the claim under the federal standard[456] articulated in *Milkovich v. Lorain Journal*

448. *Id.* at 135, 603 N.E.2d at 932, 589 N.Y.S.2d at 827.

449. *Id.*

450. *Id.* at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833.

451. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991).

452. *Von Gutfeld*, 80 N.Y.2d at 136, 567 N.E.2d at 932, 589 N.Y.S.2d at 827.

453. *Id.* at 139, 567 N.E.2d at 934, 589 N.Y.S.2d at 829.

454. *Id.*

455. *Id.* at 136, 567 N.E.2d at 932-33, 589 N.Y.S.2d at 827-28.

456. *Von Gutfeld*, 80 N.Y.2d at 142-45, 603 N.E.2d at 936-38, 589 N.Y.S.2d at 831-33.

Co.,[457] and then proceeding with the state analysis[458] guided by the standard established in *Steinhilber v. Alphonse*.[459]

In addressing the federal constitutional analysis, Judge Simons revisited the *Milkovich* standard as applied in *Immuno*.[460] The *Immuno* court found that *Milkovich* "truncat[ed] the widely used methodology first laid out in *Ollman v. Evans*."[461] The four part *Ollman* test requires the court to (1) "analyze the common usage or meaning of the allegedly defamatory words . . . [;]"[462] (2) "assess[] whether the challenged statements are facts, rather than opinion[,] . . . [by] consider[ing] the degree to which the statements are verifiable . . . [;]"[463] (3) "examine the context in which the statement occurs[;]"[464] and (4) "examine . . . the broader social context into which the statement fits."[465] The Supreme Court in *Milkovich* omitted the last two parts of the *Ollman* test,[466] thus context was not considered.[467] Instead, the Court focused on the "type of speech."[468] The "type of speech"

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457. 497 U.S. 1 (1990).

458. *Von Gutfeld*, 80 N.Y.2d at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833.

459. 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986).

460. *Von Gutfeld*, 80 N.Y.2d at 139, 603 N.E.2d at 934, 589 N.Y.S.2d at 829.

461. *Id.*; *Ollman v. Evans* 750 F.2d 970, *cert. denied*, 471 U.S. 1127 (1984), *cert. denied*, 471 U.S. 1127 (1985).

462. *Ollman*, 750 F.2d at 979-80.

463. *Id.* at 981.

464. *Id.* at 982.

465. *Id.* at 983.

466. *Von Gutfeld* 80 N.Y.2d at 139, 603 N.E.2d at 934-35, 589 N.Y.S.2d at 829-30.

467. *Id.* at 140, 603 N.E.2d at 935, 589 N.Y.S.2d at 830. *See also* Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 244-45, 567 N.E.2d 1230, 1275, 566 N.Y.S.2d 906, 911, *cert. denied*, 111 S. Ct. 2261 (1991); Milkovich v. Lorain Journal Co., 497 U.S. 1, 28 (1990) (Brennan, J., dissenting) ("Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact.").

468. *Von Gutfeld*, 80 N.Y.2d at 139, 603 N.E.2d at 935, 589 N.Y.S.2d at 830. *See Milkovich*, 497 U.S. at 16; *Immuno*, 77 N.Y.2d at 244, 567 N.E.2d at 1274, 566 N.Y.S.2d at 910.

that the Supreme Court considered to be non-actionable consisted of language that was loose, hyperbolic, or figurative.[469]

In *Milkovich*, the Supreme Court relied upon *Hustler Magazine v. Falwell*,[470] *Greenbelt Coop. Publishing Association, Inc. v. Bresler*,[471] and *National Association of Letter Carriers v. Austin*[472] to define loose, hyperbolic, or figurative non-actionable statements:[473] In *Falwell*, defendant's ad parody depicted a drunken Reverend Falwell engaged in sexual activity with his mother in an outhouse.[474] In *Bresler*, the word at issue was "blackmail," which was used to describe Bresler's negotiating tactics.[475] In *Austin*, the alleged defamatory words were "traitor" and "definition of a scab" used against non-union members.[476] The *Milkovich* Court stated that the "*Bresler - Letter Carriers - Falwell* line of cases provided protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual.[477]

The court of appeals also analyzed the alleged defamatory statements under its interpretation of the analysis endorsed in *Milkovich*.[478] The court found that the "relevant circumstances were that (1) . . . the speakers were citizens, (2) the debate was heated, and (3) the forum was an official governmental session."[479] Thus, the test under *Milkovich*, as outlined by Judge

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469. *Immuno*, 77 N.Y.2d at 244, 567 N.E.2d at 1274, 566 N.Y.S.2d at 910. *See also Von Gutfeld* 80 N.Y. 2d at 139, 603 N.E.2d at 935, 589 N.Y.S.2d at 830.

470. 485 U.S. 46 (1988).

471. 398 U.S. 6, 7, 13 (1970) (real estate developer described as using "blackmail" tactics in bargaining, did not have action in defamation since description was rhetorical hyperbole).

472. 418 U.S. 264, 284 (1974) (term "traitor" used in labor strike situation was not actionable).

473. *Milkovich*, 497 U.S. at 16-17.

474. *Falwell*, 485 U.S. at 48.

475. *Bresler*, 398 U.S. at 7.

476. *Letter Carriers*, 418 U.S. at 284, 286.

477. *Milkovich*, 497 U.S. at 17 (citing *Falwell*, 485 U.S. at 50).

478. *Von Gutfeld*, 80 N.Y.2d at 140, 603 N.E.2d 930, 935, 589 N.Y.S.2d 825, 830.

479. *Id.* at 141, 603 N.E.2d at 936, 589 N.Y.S.2d at 831.

Simons, only utilizes the first two prongs of the *Ollman* test, the "type of speech" test, and the "general tenor" analysis.

In accordance with the federal guidelines,[480] the court determined that the first statement, that the restaurant "denigrated" the building, could not be ascertained, and therefore failed the first prong of analysis.[481] The second statement, "the lease . . . is as fraudulent as you can get and it smelled of bribery and corruption" did not rise to the level of an criminal activity because of the general tenor of these statements.[482] The court maintained that a reasonable audience at a heated hearing listening to Von Gutfeld passionately oppose plaintiff's proposal and watching Von Gutfeld slapping the table would not take that to mean as factual or as implying hidden facts.[483] Moreover, the phrase "smells of bribery and corruption . . ." is figurative and can only underscore suspicions.[484] The court found that the third statement, alleging "that plaintiff's lease was 'illegal' because it 'said they could take the sidewalk,'" would only be actionable if a reasonable listener could conclude that plaintiff somehow engaged in an illegal activity. However, this would require the reasonable listener to accept the premise that a private lease could govern a public sidewalk, and if so, that the plaintiff's acceptance of the lease was illegal. The court concluded that "[a]t worst, the statement alleges nothing more than the lease provision is unenforceable."[485]

Finding that the statements were protected under the Federal Constitution, the court concluded that they were protected under the New York State Constitution as well. The court of appeals based its opinion on the fact that the New York State Constitution affords greater protection to free speech than its federal counterpart.[486] The court noted that New York's analysis, which is guided by *Steinhilber v. Alphonse*, looks at the communication as

480. *Id.* at 142, 603 N.E.2d at 936, 589 N.Y.S.2d at 831.
481. *Id.*
482. *Id.* at 143, 603 N.E.2d at 937, 589 N.Y.S.2d at 832.
483. *Id.*
484. *Id.*
485. *Id.* at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833.
486. *Id.*

a whole, thus affording more expansive free speech rights than the "narrow" federal approach. The analysis differs in that New York considers the "'context, tone, and purpose' of the communication"[487] as opposed to the "fine parsing" under *Milkovich*.[488]

However, since the court determined that the outcome would be the same under either the state or federal analysis, it did not conduct a full state analysis because '[n]o useful purpose would be served in articulating the difference between the two approaches."[489]

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Gross v. New York Times Co.[490]
(decided June 16, 1992)

The plaintiff, Dr. Elliot Gross, brought a libel action against the New York Times[491] claiming its series of investigative reports criticizing his performance as Chief Medical Examiner of New York City constituted actionable fact and not opinion protected by the free speech provision of the New York[492] and

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487. *Id.*

488. *Id. See also* Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 255, 567 N.E.2d 1270, 1281, 566 N.Y.S.2d 906, 917, *cert. denied*, 111 S. Ct. 2261 (1991).

489. *Von Gutfeld*, 80 N.Y.2d at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833.

490. 180 A.D.2d 308, 587 N.Y.S.2d 293 (1st Dep't 1992).

491. Doctor Gross also sued the individuals who were interviewed by the New York Times.

492. N.Y. CONST. art. I, § 8. Section 8 states 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.*