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SHORT FORM ORDER

INDEX No. 02-21651

SUPREME COURT - STATE OF NEW YORK
D.C.M.-J PART - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Justice of the Supreme Court

MOTION DATE 11-20-02
Mot. Seq. # 001 - MotD

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BRONWYN M. BLACK-KELLY,

Plaintiff,

- against -

CHRISTOPHER MARILEY,

Defendant.

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SPIZZ & COOPER, LLP
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Upon the following papers numbered 1 to 23 read on this motion ~~to dismiss, etc.~~; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; 23 - 25; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 26 - 28; 29 - 31; Replying Affidavits and supporting papers 32 - 33; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the branch of this motion by the defendant to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied with respect to the first cause of action, and it is further

ORDERED that the branch of this motion by the defendant to dismiss the complaint pursuant to CPLR 3211(a)(7) is, with respect to the second cause of action, deemed a motion for summary judgment and it is granted, and it is further

ORDERED that the branch of this motion by the defendant to dismiss the complaint pursuant to CPLR 3211(g) is denied, and it is further

ORDERED that the branches of this motion by the defendant for an award of costs and attorneys' fees pursuant to Civil Rights Law §§ 70-a and 76-a, and CPLR 8303-a are denied.

This is an action to recover damages for alleged defamation of the plaintiff by the defendant. The defendant has moved to dismiss the complaint pursuant to CPLR 3211(a) (7) "and/or 3211(g),"

or in the alternative for summary judgment pursuant to CPLR 3211(c). In addition, the defendant seeks to recover attorney's fees pursuant to Civil Rights Law §§ 70-a and 76-a, and CPLR 8303-a.

The current action arises out of the fact that the plaintiff served as counsel to a petitioner in a proceeding for the appointment of a Mental Hygiene Law article 81 guardian for the defendant's mother, Alice Marley, and the fact that the plaintiff was a candidate for the Town Council of the Town of Huntington.

The underlying Mental Hygiene Law article 81 proceeding itself arose out of yet other litigation, a divorce proceeding between Alice Marley and her husband. In that case, in view of the deteriorating mental condition of Alice Marley, the Justice presiding, Hon. Paul J. Baisley, Jr., held a conference on June 15,2001. As indicated by Hon. W. Bromley Hall in his decision and order dated September 3,2002 in the article 81 proceeding, present at the conference were: Kevin J. Fitzgerald, **Esq.,** who was counsel for Alice Marley in the divorce action; Arnold Firestone, **Esq.,** counsel for Ralph Marley (Alice's husband) in the divorce action; Douglas K. McNally, **Esq.,** an attorney who represented Ralph Marley with respect to the guardianship issues; and Chas Cancellare, **Esq.,** who had been appointed as guardian ad litem for Alice Marley in the divorce action. The consensus of those at the conference was that a Mental Hygiene Law article 81 proceeding should be commenced to secure the appointment of a guardian to represent the interests of Alice Marley in the matrimonial litigation. They agreed, as reflected in Justice Hall's decision, that the plaintiff in the article 81 proceeding would be Kevin J. Fitzgerald, **Esq.** The present plaintiff, Bronwyn M. Black-Kelly, Esq., served as counsel to Mr. Fitzgerald in the article 81 proceeding.

Things did not go as planned in the article 81 proceeding. The order to show cause commencing the proceeding therein was signed on July 19,2001. It was alleged before Justice Hall, by the family members, that Alice Marley's physical condition had deteriorated significantly before that order to show cause was presented to the Court. She was near death on the return date, August 15,2001. According to Justice Hall's decision, the current plaintiff, Bronwyn M. Black-Kelly, declined a request made by Douglas K. McNally, **Esq.,** in late July 2001, for an adjournment of the proceeding.[1]

After a conference on the return date, Alice Marley's daughter was appointed as Temporary Guardian for the personial needs of Alice Marley with the power, ***inter alia,*** to make medical decisions on her behalf. The proceeding was adjourned for other purposes. No decision was ever made on the full merits of the petition inasmuch as Alice Marley died on August 19,2001.

The basis of the bad feelings of the defendant directed toward the current plaintiff are explained in Justice Hall's decision as follows:

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[1] However, Justice Hall stated further: **"As** counsel for the petitioner Bronwyn **M.** Black, Esq. was free to express her consent or lack of consent to an adjournment. The question of whether there should be an adjournment, however, was for the Court pursuant to Mental Hygiene Law § 81.13 and not for counsel. Thus, neither the petitioner nor Bronwyn M. Black, **Esq.** were responsible for initial lack of an adjournment, which any party was free to seek 'for good cause shown.' "

> The objecting family members assert that before the Mental Hygiene Law article 81 proceeding was commenced, physicians at Mather Memorial Hospital, where Alice Marley was hospitalized in her final days, had worked with family members in making medical decisions. After the proceeding was commenced, the hospital wanted clarification as to who had authority to make decisions on behalf of Alice Marley. The objecting family members assert that by August 15,2001, (when the order to show cause and petition were returnable), there would have been no need for the appointment of the temporary guardian for personal needs to make medical decisions except for the "confusion" generated by the commencement of the article 81 proceeding. This is the essential basis for the argument of the objecting family members that the continued prosecution of the article 81 proceeding was unnecessary and done solely for the purpose of generating fees.

Justice Hall ultimately determined that the current plaintiff, Bronwyn M. Black-Kelly, was entitled to the attorney's fees she sought in the article 81 proceeding.

As noted above, in the meantime the current plaintiff, Bronwyn M. Black-Kelly, was a candidate for a seat on the Huntington Town Council running in the November 2001 election. The complaint alleges that on November 3,2001 the defendant "caused a mailing of a writing to all of the registered voters in the Town of Huntington" entitled "AN ELDER CARE ALERT!" This publication stated:

> **My mother died on August 19,2001, three days after my family and I were summoned to appear in court by Bronwyn Black-Kelly** and another attorney. Ms. Black-Kelly filed a petition to be appointed my mother's guardian, and sought to overlook the wishes of my mother expressed to our family before her illness and in an executed health care proxy.
>
> Only after my mother entered Mather Memorial Hospital for emergency surgery to correct conditions that led to her death, and she lay dying, did Attorney Black-Kelly file her petition!
>
> On barely one week's notice, my two sisters and I joined my father and my mother's two sisters (my aunts) in opposing Ms. Black-Kelly's efforts to take control of my mother's affairs. Fortunately, **the judge rejected Black-Kelly's petition. Despite the judge's decision, Bronwyn Black-Kelly returned to court, demanding almost $8,000 from my mother's estate.** These legal fees for the unnecessary and unauthorized services of Black-Kelly, and other fees associated with her petition, are now being opposed in the State Supreme Court.
>
> A self-proclaimed elder law "specialist", Bronwyn Black-Kelly is currently running for Town Council. I paid the costs of sending you this letter because from my experience, I believe that Black-Kelly should not be elected to any public office. **On November 6th, please vote to defeat Bronwyn Black-Kelly.**

The complaint further alleges that on October 15,2001 the defendant issued a writing styled "Press Release," which was issued to members of the press and the public at large. This writing stated:

> Bronwyn Black-Kelly, candidate for the Huntington Town council for the un-expired two year term left by Representative Steve Israel, markets herself to the Huntington electorate as the attorney-'protector' of the elderly. However, her representation of an overreaching attorney-petitioner in a guardianship proceeding attempting to separate a dying 'woman from her family, three days before her death and on her hospital bed belies her claim. (See, In the matter of the application of KEVIN J. FITZGERALD ESQ. for the appointment of a Guardian for the Person and Property of Alice: Marlev. an alleged incapacitated person .
>
> Three days before Alice Marley's death, her family, consisting of two daughters, Dr. Eileen Marley and Kathleen Marley, her son, Christopher Marley, her sisters Margaret Brown and Gloria Keenan, and husband, Ralph Marley, were summoned before Suffolk Supreme Court at Federal Plaza, Central Islip by Bronwyn Black-Kelly. Ms. Black-Kelly sought to have herself appointed guardian of Alice Marley. Black-Kelly delayed notifying the family of her application to the Suffolk County Supreme Court asking to be appointed the guardian for Alice Marley for one week. On August 15,2001, the Supreme Court Justice W. Bromley Hall rejected Black-Kelly's request to be appointed and Dr. Eileen Marley was appointed as temporary guardian instead.
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> Bronwyn Black-Kelly recently lost her spot on the Independence Party line after an appellate court nullified her petition saying it contained several forged signatures, including that of a dead man, Craig Olsen who appeared to have signed the petition in June, but died about three months earlier. Bronwyn Black-Kelly is an attorney in private practice since 1990 with Black & Black . . . concentrating in Elder Law that encompasses guardianship proceedings. She serves as the director of the bar association and is a former chairman of the surrogate court committee.
>
> Alice Marley died August 19,2001. Following the death of Mrs. Marley, Bronwyn Black-Kelly seeks to be paid at least $7,304.14 by the late Alice Marley's family for her services she claims to have provided. This matter is pending before the Supreme Court, Suffolk County.
>
> "As a resident of Huntington, I want all voters to know about what Ms. Black-Kelly did to my family since it goes to the issue of character. How can we expect her on the Town Board to fight for the elderly, especially those Senior citizens who are vulnerable and need help from their government, if she so carelessly disregards their rights and needs'? How can she say she respects "family values" when her record in this case shows she cavalierly reject [sic] family's wishes during their time of grief just so that she can obtain a legal fee?" Christopher Marley stated.

> Lawyers are siphoning off millions of dollars in fees from the assets of helpless elderly New Yorkers they are sworn to protect. The Daily News reported "the issue of inflated fees was re-ignited last year when two Brooklyn attorneys wrote a letter to District Democratic leaders saying they'd been frozen out of key court appointments despite unquestioned loyalty to the party. After the letter surfaced, the state's chief judge, Judith Kaye, empanelled a commission on fiduciary appointments and opened an investigation into whether judges have rewarded cronies with plum assignments. A report expected to recommend legislative changes. will be issued later this year.

The said "Press Release" was accompanied by copies of four articles from the Daily News regarding apparent abuses of the guardianship statute resulting in exorbitant fees to lawyers. None of the articles referenced the plaintiff herein in any fashion.

The complaint alleges that the allegations in both the "Elder Care Alert" and the "Press Release" are untrue, and injured plaintiffs reputation in general and, in particular, in her profession as an attorney. It asserts;that the defendant was "actuated by actual malice" in that he knew that the matters in the writings were false and untrue or were published with reckless disregard of whether they were false and untrue. With respect to the newspaper articles attached to the "Press Release" the complaint alleges:

> The effect of the attachment of the news articles to the matters contained in the Press Release was defamatory to the plaintiff by innuendo in that, although none of the articles mentioned plaintiff, and although plaintiff was not a court-appointed guardian in In the Matter of the application of Kevin J. Fitznerald Esq., for the appointment of a guardian for the uerson and Property of Alice Marlev. an alleged incapacitated person . . . , the Press Release and articles released together further injured the reputation of plaintiff in general and in particular as an attorney.
>
> The complaint seeks punitive damages.

In his moving papers the defendant acknowledges that he is responsible for the publication of the statements in issue. He indicates that he "sought to bring to the voters [sic] attention [his] personal opinion regarding Ms. Black-Kelly's candidacy for office, based on [his] recent experience with her." He notes further, " I urged her defeat at the polls. I acted with no malice towards her. The statements I made in the mailing and the press release constituted my opinion, based upon the facts stated therein, all of which I believed, and still believe to be true."

In arguing for dismissal the defendant contends that the statements in issue are not actionable as they constitute his opinion. Further, he contends that inasmuch as the plaintiff has alleged no special damages, and because the statements were made in the context of a political campaign the action should be dismissed. He also asserts that the statements are subject to a qualified privilege and are protected in the absence of "actual malice." In opposition to the motion the plaintiff asserts that the statements were: false statements of fact, and constitute libel *per* se, thus dispensing with the need to prove special damages. She contends that in the present case the question of whether there was actual malice is for the jury.

The parties dispute the defendant's right to costs and fees.

At the outset, the Court notes the defendant's citation to ***Lasky v Kempton*** (285 AD 1121, 140 NYS2d 526 [1955]), in challenging the sufficiency of the complaint, for the proposition that "references to entirety of article, without pleading which part is false and defamatory, is insufficient." The Court, however, declines to accept the defendant's assertion that the complaint should be dismissed on this ground. The alleged libelous material can be easily located and defendants are not prejudiced by annexation of the entire writing. Moreover, greater specification, if warranted, can be obtained in a bill of particulars *(see,* ***Pappalardo v Westchester Rockland Newspapers,*** 101 AD2d 830,475 NYS2d 487 [2d Dept 19841, *affd* 64 NY2d 862,487 NYS2d 325 [1985]).

As a candidate for public office the plaintiff was a "public figure" ***(see, Millus v Newsday,*** (89 NY2d 840,652 NYS2d 726 [1996], *cert. denied* 520 *US* 1144[1997]) and possibly a public official ***(Monitor Patriot Co. v Roy,*** 401 US 265 [1971]). Accordingly, the statements in issue are afforded a qualified privilege ***(Suozzi v Parente,*** 202 AD2d 94,616 NYS2d 355 [1st Dept 19941). This means the defendant may be held liable for false statements regarding the plaintiff only if the defendant acted with actual malice - that is, with knowledge that the allegedly defamatory statement was false or with reckless disregard for the truth or falsity of the statement ***(New York Times Co. v Sullivan*** (376 US 254 [1964]).

As a general principle, only statements relevant to the subject matter for which the plaintiff is deemed a public figure are governed by the ***New York Times Co. v Sullivan*** standard. Whether the statements in issue are relevant to the subject matter for which the plaintiff is deemed a public figure is a question for the Court to decide ***(Monitor Patriot Co. v Roy,*** 401 US 265 [1971]). In this case, the issue is readily determined. The United States Supreme Court has plainly indicated that in the context of an election for public office there is little about the candidate that is not relevant. Relevant matter is anything which might touch on an official's fitness for office ***(see, Monitor Patriot Co. v Roy,*** 401 US 265 [19711). Moreover, "[t]he New York Times rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed" ***(Monitor Patriot Co. v Roy,*** 401 US 265 [1971]). Thus, the statements in issue here are to be measured against the ***New York Times Co. v Sullivan*** "constitutional malice" standard.

The determination that a qualified privilege applies does not resolve the present matter. As stated by the New York Court of Appeals in ***Silsdorf v Levine*** (59 NY2d 8,462 NYS2d 822 [1983], *cert. denied* 464 *US 831* [19831): "Even privilege has its limitations and even a public figure in the midst of a political campaign is entitled to some degree of protection. It is true that our society places a high value on the uninhibited and open debate necessary for the responsible functioning of political processes, to the extent even of protecting some falsity to avoid creating a chilling effect upon that expression (New York Times Co. v Sullivan, 376 U.S. 254,279; Gertz v Robert Welch, Inc., 418 U.S. 323,340-341, supra). But sufficient protection is afforded defendants by virtue of the requirement that plaintiff prove actual malice."

The Court has been cited to no case that compels dismissal of the defamation complaint of a candidate for public office where the candidate might be able to persuade the finder of fact, by the

requisite clear and convincing evidence (see, e. ***g., Freeman v Johnston,*** 84 NY2d 52, 614 NYS2d 377 [1994], cert. denied513 US 1016 [1994]; ***Suozzi v Parente,*** 202 AD2d 94,616 NYS2d 355 [1st Dept 1994]), that the alleged defamatory comments were false or published with reckless disregard for the truth or falsity of the statement. Here the defendant was a party to the underlying article 81 proceeding. He relied on no third-party sources to ascertain the truth of the "facts" that he published about the plaintiff. The essential false allegation is that Justice Hall "rejected" the plaintiffs petition. In fact, the Court did not reach the merits of the petition and the defendant cannot credibly argue that this was a fact of which he was unaware' (see generally, ***St. Amant v Thompson,*** 390 US 727 [1968]; see also ***Prozeralik v Capital Cities Communications.,*** 82 NY2d 466,605 NYS2d 218 [1993], quoting (Bose Corp. v Consumers Union of U. S., 466 US 485,511, n 30 (" 'The burden of proving "actual malice" requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement' "); ***Rinaldi v Holt, Rinehart & Winston,*** 42 NY2d 369,397 NYS2d 943 [19771, cert. denied 434 US 969 [19771("Newfield did undertake a certain amount of investigation and there is no proof that he published his allegation of probable corruption knowing that allegation to be false or in reckless disregard of its truth. . . . ¶As to Holt, Rinehart & Winston, the case is even stronger. The publisher placed its reliance upon Newfield's reportorial abilities and there is no showing that Holt, Rinehart & Winston had, or should have had, substantial reasons to question the accuracy of the articles or the bona fides of its reporter")).

In addition to his other arguments, the defendant seeks dismissal asserting that the statements on which this action is predicated are expressions of "pure opinion." Pure opinion, "is an opinion either accompanied by a recitation of the facts upon which it is based or an opinion which does not imply that it is based on undisclosed facts ***(Howlett v Bloom,*** 239 AD2d 389,657 NYS2d 433 [2d Dept 19971). The applicable rule was recited by the Court of Appeals in ***Steinhilber v Alphonse*** (68 NY2d 283,508 NYS2d 901 [1986]) in which, citing ***Gertz v Robert Welch, Inc.*** (418 US 323 [19741) it said: "Under Gertz, if the statements are held to be expressions of opinion, they are entitled to the absolute protection of the First Amendment by virtue of the Supreme Court's categorical statement that: 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' " Notwithstanding subsequent changes by the United States Supreme Court in the interpretation of the First Amendment following the ***Gertz*** decision (see, ***Milkovich v Lorain Journal Co.,*** 497 US 1 [1990]) the rule remains in New York under the New York State Constitution that the expression of pure opinion cannot give rise to damages in a defamation action (see, ***Brian v Richardson,*** 87 NY2d 46, 637 NYS2d 347 [19951; ***Gross v New York Times Co.,*** 82 NY2d 146,603 NYS2d 813 [1993]; ***Immuno AG v Moor-Jankowski,*** 77 NY2d 235,566 NYS2d 906 [1991]).

'This inaccuracy in the recitation of the "facts" of the subject Mental Hygiene Law article 81 proceeding renders the protection afforded by Civil Rights Law § 74 unavailable to the defendant (***see, Schaffran v Press Publishing Co.,*** 258 NY 207 [1932]; ***Fraser v Park Newspapers,*** 246 AD2d 894,668 NYS2d 284 [3d Dept 19981).

The Court concludes, however, that the statements in the Elder Care Alert were not pure opinion. "Whether a potentially actionable statement is one of fact or opinion is a question of law [citation omitted], and depends on 'whether a reasonable reader or listener would understand the complained-of assertions as opinion or statements of fact' -- [citation omitted] ***(Millus v Newsday,*** 89 NY2d 840,652 NYS2d 726 [1996], *cert. denied* 520 *US* 1144 [1997]; *accord, see* ***Silsdorf v Levine,*** 59 NY2d 8,462 NYS2d 822 [1983], *cert. denied* 464 *US* 831 [19831). "In our State the inquiry, which must be made by the court [citations omitted] entails an examination of the challenged statements with a view toward (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" ' [citations omitted]" ***Gross v New York Times Co.,*** 82 NY2d 146, 603 NYS2d 813 [1993]). Included in the recitation of "facts" in the Elder Care Alert are the assertions that the plaintiffs services were "unauthorized," and that she "sought to overlook the wishes of my mother expressed to our family before her illness and in an executed health care proxy," and a reference to her "efforts to take control of my mother's affairs." Moreover, the Elder Care Alert states, "the judge rejected Black-Kelly's petition." This is more than an expression of pure opinion. Here, the expression that "the judge rejected Black-Kelly's petition" has a precise meaning that must be readily understood to mean that it was considered by the judge on the merits and thereupon dismissed or denied. Further, the disposition of the petition is capable of being proven true or false. Finally, while the alleged defamatory statements were included in political literature intended to influence the outcome of an election, and thus incorporated in a document plainly understood to reflect the writer's opinion, here, even in this context, the alleged objective fact as to the disposition of the petition cannot reasonably be construed as an opinion.

In addition to making the determination as to whether the words in issue constitute pure opinion, "it is for the court to decide whether the statements complained of are 'reasonably susceptible of a defamatory connotation', thus warranting submission of the issue to the trier of fact [citations omitted]. The entire publication, as well as the circumstances of its issuance, must be considered in terms of its effect upon the ordinary reader" ***(Silsdorf v Levine,*** 59 NY2d 8,462 NYS2d 822 [1983], *cert. denied* 464 *US* 831 [19831; *accord, see,* ***Armstrong v Simon & Schuster, 85*** NY2d 373,625 NYS2d 477 [1995]). In undertaking this task it has been said that "[w]hile a court should not reach to place a particular construction on the language complained of [citation omitted], it should similarly 'not strain to interpret [words] in their mildest and most inoffensive sense to hold them nonlibelous' " [citation omitted] (***Suozzi v Purente,*** 202 AD2d 94,616 NYS2d 355 [1st Dept 19941, ***lv*** *dismissed in part and lv denied in part* 85 NY2d 923,627 NYS2d 321 [1995]). The alleged defamatory statements must be viewed in the context of the entire publication *(see* ***Mahoney v Adirondack Pub. Co.,*** 71 NY2d 31,523 NYS2d 480 [1987] ("Although it might be argued that the quoted language [i.e. cursing and abusive language] is not unexpected or out of character for a football coach, the thrust of the article was to the contrary -- that such conduct should be condemned. The false attribution of such language to the plaintiff, when viewed in the context of the article as a whole, cast doubt on the plaintiffs fitness for his profession"); ***Fraser v Park***

Newspapers, 246 AD2d 894,668 NYS2d 284, [3d Dept 1998] (Where the defendant erroneously reported that the plaintiff had pleaded guilty to a charge of public lewdness before receiving an adjournment in contemplation of dismissal the Court said: "The primary argument advanced by defendant is that the defamatory 'sting' of the article resulted not from the statement that plaintiff had pleaded guilty to the charge of public lewdness but from the description of the conduct that precipitated his arrest, the truth of which, defendant maintains, plaintiff does not dispute. As defendant perceives it, given the degree to which plaintiffs reputation would have been damaged by any account of the allegedly lewd acts which formed the basis of the charge, its error in reporting the disposition of the case could have had no further appreciable effect on his reputation. We disagree. ¶ The defamatory potential of a particular false statement is to be ascertained by considering the challenged publication in its entirety; only after doing so can one then determine whether, and to what extent, the falsehood affects the over-all impression left on the average reader".)

The noted language in the Elder Law Alert need not be strained to lead the Court to its conclusion that in context it accuses the plaintiff of proceeding without authority to do so, to overlooking the wishes of the defendant's mother and to attempting to take control of her affairs, and then suggesting that such efforts were thwarted by the Court's rejection of the petition. The import of the Elder Care Alert is to cast doubt on the plaintiffs ethics and her fitness for her profession as an attorney, particularly as an attorney with a practice concentrating in the field of Elder Law. It is, thus, reasonably susceptible of a defamatory connotation.

The Court, however, reaches a different conclusion with respect to the Press Release. While, it is indisputable that the defendant intended to cast the plaintiff in a negative light, the Press Release does not convey the same impression of the plaintiffs actions as does the Elder Care Alert. In the article 81 proceeding the plaintiff did offer to serve as the guardian for Alice Marley. The timing of the events is accurately stated and on August 15,2001 Justice Hall appointed Dr. Eileen Marley as temporary guardian. The claim that Justice Hall "rejected" the plaintiffs "request to be appointed" does not, in the context of the Press Release, involve the same defamatory implications as does the description of events in the Elder Care Alert. Indeed, it does not strain the words in the Press Release to surmise that what is being conveyed is that Justice Hall appointed Dr. Eileen Marley as temporary guardian rather than the plaintiff. This is essentially accurate. Nor does the use of the verb "summoned" give rise to a defamation action. It was the order to show cause and petition drafted by the petitioner that brought on the article 81 proceeding before Justice Hall and an appearance was required to oppose the petition. The loose use of the word summoned to describe this circumstance is not a basis for deeming the Press Release defamatory. Nor, moreover, do the references to the attached newspaper articles, which make no reference to the plaintiff, serve as a predicate for the current action ***(see, Gilberg v Goffi,*** 21 AD2d 517, 251 NYS2d 823 [2d Dept 19641). Although not perfectly applicable to the case at bar, in some respects it may be concluded that the Press Release should be construed under the principle stated in ***Velella v Benedetto (83*** AD2d 465,445 NYS2d 447 [1st Dept 19811, *affd* 57 NY2d 788,455 NYS2d 597 [1982]), in which the Court, in reviewing an allegedly defamatory publication distributed in the course of a political campaign said: "What is presented here is a campaign leaflet, all too typically unfair in its treatment of an opponent, which is essentially accurate in its factual statements, which might well not be

actionable even if the statements were false, and as to which there is nothing in the record to establish that the single material inaccuracy was made with actual malice."

Another ground urged as the basis for dismissal of the complaint is the plaintiff's failure to plead actual or special damages. The Court concludes, however, that the failure of the complaint to plead special damages, and its pleading instead, in effect, that the publication is libelous on its face, does not warrant dismissal. A statement that disparages a person in her profession is defamatory (see, ***Scott v Cooper,*** 215 AD2d 368,625 NYS2d 661 [2d Dept 19951,*lv dismissed* 86 NY2d 812, 632 NYS.2d 497 [1995]; *cf.*, ***Jessel Rothman, P.C. v Sternberg,*** 207 AD2d 438,615 NYS2d 748 [2d Dept 19941). Even if the complaint charges only a single instance of misconduct the special harm requirement is obviated if it imputes general incompetence, lack of integrity, or lack of fitness for plaintiffs trade, office, profession or calling *(see,* PJI 3:24.1, *citing* ***November v Time, Inc.,*** 13 NY2d 175,244 NYS2d 309 [1963]; ***Daniel Goldreyer, Ltd. v Van De Wetering,*** 217 AD2d 434,630 NYS2d 18 [1st Dept 1995]). The defamatory language in this case imputes to the plaintiff lack of integrity and lack of fitness for her trade as an attorney-at-law. Public officials and public figures are entitled to recover presumed damages where the defamation takes the form of libel on its face without proof of actual harm ***(see,*** PJI 3:29, *citing* ***New York Times Co. v Sullivan,*** 376 US.254, and ***Curtis Pub. Co. v Butts,*** 388 US 130, (ovrld by ***Gertz v Robert Welch, Inc.,*** 418 US 323) and (ovrld by ***St. Amant v Thompson,*** 390 US 727). Accordingly, the complaint need not plead special damages ***(see,*** PJI 3:23; 3:24; *cf.*, ***Wehringer v Allen-Stevenson School,*** 46 AD2d 641,360 NYS2d 429 [1st Dept 19741, *affd* 37 NY2d 864,378 NYS2d 46 [1975], *cert denied* 424 US 924 [1976]). In the Comments to PJI 3:29 the authors note that where the defamation takes the form of libel on its face presumed or punitive damages can be awarded where constitutional malice is part of the plaintiff's prima facie case, such as in an action by a public official or public figure.

Ordinarily, when a motion to dismiss pursuant to CPLR 3211(a)(7) is addressed to the complaint in its entirety.,such as the present motion, the motion should be dismissed in its entirety if any of the causes of action are found to be sufficient *(see,* ***Canavan v Chase Manhattan Bank, N.A.,*** 234 AD2d 494,651 NYS2d 916 [2d Dept 19961). In the present case, however, the complaint includes two causes of action. The first is based on the Elder Care Alert and the second is based on the Press Release. Because the Court has determined that an action for defamation may be predicated on the Elder Care Alert, but not on the Press Release, in this instance the motion to dismiss is denied with respect to the first cause of action and granted with respect to the second cause of action. Moreover, because dismissal of the second cause of action is based solely on a question of law, and inasmuch as the defendant has requested that the motion be treated as one for summary judgment, the Court has granted summary judgment dismissing the second cause of action (see *generally,* ***Mihlovan v Grozavu,*** 72 NY2d 506,534 NYS2d 656 (1988); ***Four Seasons Hotels v Vinnik,*** 127 AD2d 310,515 NYS2d 1 [1st Dept 19871). No factual material beyond the face of the complaint has been considered except for the September 3,2002 decision of Justice Hall, which, although apparently being the subject of an appeal, does not involve any factual issues precluding its consideration upon the pending application. The Court has reviewed the parties' respective affirmations, but the outcome of this decision is not dependent upon any factual representations

therein.[3] In any event, the dismissal of the second cause of action is based on the purely legal conclusion that the Press Release did not constitute actionable defamation of the plaintiff.

Further, inasmuch as the present action to recover damages for defamation is not a case involving public petition and participation the branch of the motion to dismiss the complaint pursuant to CPLR3211(g) is denied ***(see, Long Island Assn. for Aids Care v Greene,*** **269** AD2d 430, 702 NYS2d 914 [2d Dept 20001). Similarly the branches of the motion to recover costs and attorneys fees pursuant to Civil Rights Law §§ 70-a and 76-a are denied. In addition, the branch of the motion for an award of costs and attorneys' fees on the ground that the complaint has no substantial basis in law and is not supported by a substantial argument for the extension, modification, or reversal of existing law is denied. The Court has concluded that the first cause of action adequately pleads a cause of action, thus defeating the argument in support of the awards sought pursuant to CPLR 8303-a.

Dated: JAN 27 2003

J.S.C.

——FINAL DISPOSITION _____NON-FINAL DISPOSITION

[3]Both parties, who are attorneys, have supported their positions with affirmations. As they are parties to the action such affirmations do not have the probative value of affidavits to support a summary judgment application (see, CPLR 2106; ***Sassower v Greenspun, Kanarek, Jaffe & Funk,*** 121 AD2d 549, 504 NYS2d 31 [2d Dept 19861).