

**Fessler v Wagner**

2008 NY Slip Op 30397(U)

February 6, 2008

Supreme Court, Nassau County

Docket Number: 5607-06/

Judge: Arthur M. Diamond

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**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ARTHUR M. DIAMOND**  
**Justice Supreme Court**

-----x  
**ERIC FESSLER**

**TRIAL PART: 21**  
**NASSAU COUNTY**

**Plaintiff,**

**INDEX NO: 015607/06**

**-against-**

**MOTION SEQ. NO: 01**

**RICHARD J. WAGNER and BROOKLYN  
LEGAL SERVICES CORPORATION A**

**Defendant.**

**SUBMIT DATE:1/18/08**

-----x

**The following papers having been read on this motion:**

**Notice of Motion.....1**  
**Opposition ..... 2**  
**Reply.....4**

Cross motion (seq. No. 1) by the attorneys for the defendants for an order dismissing the complaint pursuant to CPLR §3211(a)(1) and/or granting summary judgment to the defendants pursuant to CPLR §3212 is determined as hereinafter set forth.

Plaintiff Eric Fessler alleges he was defamed when defendant Richard J. Wagner, an attorney employed by defendant Brooklyn Legal Services Corporation, called Fessler a "thief" at a deposition held in a Federal lawsuit and repeated the accusation in a subsequent letter to a United States Magistrate Judge that was posted on the Court's PACER System.

By short form order dated December 5, 2007 (James P. McCormack, A.J.S.C.), the application to dismiss the complaint pursuant to CPLR 3211(a)(1) was converted to one for summary judgment (CPLR 3212), (see *Nonnon v City of New York*, 98 NY3d 825). The attorney for the plaintiff was given the opportunity to submit by December 14, 2007, in a supplemental affirmation,

any further evidence relevant to the determination of the underlying substantive issues that he may have omitted due to the service by the defendants of the amended answer, subsequent to the filing of the Notice of Motion for an award of summary judgment pursuant to CPLR 3212 in favor of the defendants against the plaintiff dismissing the complaint. Neither counsel has submitted any further pleadings addressing the summary judgment motion now before this Court.

Defendant Richard J. Wagner is an attorney and employee of defendant Brooklyn Legal Services Corporation (BLS). On September 23, 2005, Wagner was conducting a videotaped deposition of plaintiff Eric Fessler in a Federal lawsuit in the U.S. District Court, Eastern District of N.Y. (02 CIV 5410) entitled M & T Mortgage Corporation, Plaintiff, against Cedric D. Miller and Elizabeth Miller, et al., defendants, third-party plaintiffs against Better Homes Depot, Inc., Eric Fessler, et al., third-party defendants (The Federal action). While deposing Fessler, Wagner's questions contained the following language:

“and there's no reason that you weren't as big a thief in the mortgage business as you are in the home selling business” ( page 658 lines 3-6).

“See, because I believe that you are a thief.” ( page 658 lines 14-5).

“Isn't it true that you single out unsophisticated minorities who are first time homebuyers to cheat them because you are a thief? (page 659 lines 9-17).

“I'm going to show you proof that you're a thief.” (page 661 lines 15-6).

“Why won't you admit that you're a thief?” ( page 662 line 3).

Plaintiff Eric Fessler: “You're calling me a thief?”

Defendant Richard J. Wagner: “Absolutely.” ( page 661 lines 19-20).

“Why don't you admit that you're a thief?” ( page 662 lines 7-8).

“Why don't you admit you're a thief?” ( page 662 lines 10-11).

“But you are a thief.” (page 666 line 23).

“Is it not a fact that you're a thief?” ( page 669 line 23).  
(Fessler examination before trial in Federal action, Exhibit A,

plaintiff's affirmation in opposition to within motion.)

More than eight months later, Fessler's attorney electronically filed a letter application dated May 30, 2006 seeking a protective order "directing that . . . Mr. Wagner [and his co-counsel] not harass, attempt to intimidate, embarrass or otherwise act oppressively or inappropriately towards Mr. Fessler . . . at [his] upcoming deposition . . . ." The application was accompanied by "relevant portions of the deposition transcript" taken during Fessler's testimony on September 23, 2005. The enclosures included the same pages cited above, during which Wagner asked the questions, and made the statements, that are the subject of the within action. Fessler's attorney asserted that Wagner's comments were "disparaging and defamatory" and "were clearly calculated by him to incite Mr. Fessler and to harass, intimidate and embarrass him." According to Fessler's attorney "[t]here is absolutely no place in any civil deposition for any attorney to blatantly call a deponent a thief and a criminal." Pursuant to the Federal court's rules, Wagner was afforded the opportunity to respond to the application for a protective order, and by letter dated May 31, 2006, he electronically filed his response, as required, on the Court's PACER system.

All of the complaints filed against Mr. Fessler, including those before this Court and those that have been heard, *inter alia*, by Judge Korman, Judge Gershon, and others, allege at least one basic thesis in common, that Eric Fessler operates his business in a fraudulent and larcenous fashion in many respects. Or, to put it another way, that he is a thief. Indeed, he is a convicted felon, having pled guilty to federal tax fraud related to his mortgage business, and has served time for it in a federal penitentiary. I do consider tax fraud a species of thievery, although apparently neither Mr. Fessler nor Mr. Bagwin agree, and I consider it material and relevant to whether he has a penchant for cheating people, such as the Councils and Leo White.

I deposed Mr. Fessler for three days. In the last twenty to thirty minutes of the last day of Mr. Fessler's deposition, while inquiring about allegations related to his sister, Gail Zucker, a co-defendant in the above-actions who acted as a title closer in hundreds of Better Homes Depot/Fessler sales, I effectively repeated the accusations contained in *all* of the Federal complaints against Fessler

and Better Homes (including those in *Phillips v Better Homes Depot*, *LaBoy v Better Homes Depot*, and *Snipes v Better Homes Depot* filed by other attorneys) as well as the landmark New York State case of *Polonetsky v Better Homes Depot*, filed by the N.Y.C. Department of Consumer Affairs. Prior to that, the deposition had proceeded without incident.

As the transcript clearly shows, and the video will corroborate, Mr. Fessler virtually attacked me, not only verbally, but he jumped up and threatened me physically, shrieking “*Call it so I can end your life now.*” This can be most disconcerting when uttered by a 6’5” felon who is hovering over you with fists clenched. (See video). The very idea that Mr. Fessler would have any reason to act indignant about being questioned about his criminal behavior, *as alleged in the complaint*, is as absurd as Mr. Bagwin’s suggestion that I could intimidate *him* by either the style or content of my questioning. Rather, this is merely Mr. Bagwin acting with the same bad faith that has typified his conduct of his clients’ defense and is merely an attempt to chill me in my inquiry prior to my deposing Mr. Fessler in *this* case. I urge the Court to read the transcript and to look at the corresponding portion of the video, which we will provide under separate cover. Your Honor will have the opportunity to see and hear the real Eric Fessler as he hurls obscenities and threats in an attempt to intimidate me. Insofar as he was unsuccessful in his effort, and despite the fact that Mr. Bagwin failed to utter a single words to control his client, I elected not to bring his conduct and threats to my life to Judge Go’s or Judge Gershon’s attention.

U.S. Magistrate Judge Victor V. Pohorelsky made the following ruling:

Discussion held concerning motion for protective order by defendants Better Homes Depot and Fessler. Court directs plaintiffs’ counsel not to characterize the witness Fessler as a “thief” during his question, and to otherwise avoid needlessly inflammatory questioning techniques. Given the deposition previously given in the *Miller* action, the plaintiffs are not to ask questions concerning background and general information which was previously obtained.

The plaintiff’s defamation claim asserts two causes of action against the defendants. The first cause of action is for slander *per se* with respect to Wagner calling plaintiff a thief at the September 23, 2005 deposition. The second cause of action is for libel *per se* for alleged defamatory statement contained in Wagner’s May 31, 2006 letter to Magistrate Judge Victor V. Pohorelsky.

[ 5 ]

The complaint is dismissed on the ground that the allegedly defamatory statements made at the Fessler deposition on September 23, 2005 and in the May 31, 2006 letter to the Magistrate are protected by the absolute privilege for statements made in the course of, and relating to, judicial proceedings. Although the defendants have not argued for dismissal based on the judicial proceedings privilege, the within action will be decided on this ground because the facts that make the absolute privilege applicable appear in all pleadings before the Court and most of those facts are alleged by the plaintiff in the complaint itself and the plaintiff could not have avoided the effect of the privilege had it been raised by the defendant in their answer. (*Persky v Bank of Amer. Nat. Ass.* 261 NY 212; *Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209; *Block v Franklin Square Union Free School District*, 72 AD2d 602; *Matter of Knickerbocker Field Club v Site Selection Bd. of City of N.Y.*, 41 AD2d 539).

Judicial privilege extends to all statements pertinent to a litigation, regardless of the offending party's motive or malice in making those statements. The privilege is often described as absolute, which means it protects the person making the untrue statement, "... no matter how great the personal malice of the writer." (*Pecue v West*, 233 NY 316. In *Sexter & Warmflash, P.C. v Margrabe* [38 AD3d 163, 173, 174]), the Court stated (internal citations omitted):

"Whether a statement is 'at all pertinent to the litigation' is determined by an 'extremely liberal' test. A statement made in the course of judicial proceedings is privileged 'if, by any view or under any circumstances, it may be considered pertinent to the litigation.' Thus, 'the narrow and technical rules normally applied to determine the admissibility of evidence' are not used to determine a statement's pertinence for purposes of the privilege analysis. To be actionable, a statement made in the course of judicial proceedings 'must be so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame.' Stated otherwise, 'the possibly pertinent [for purposes of the judicial proceedings privilege] need be neither relevant nor material to the threshold degree required in other areas

of the law,' and 'the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices' to establish the offending statement's pertinence to the litigation.

The pertinence of a statement made in the course of judicial proceedings is a question of law for the court. In answering that question, any doubts are to be resolved in favor of pertinence. Pertinence is properly determinable on a motion to dismiss addressed to the pleadings and documentary evidence alone.

The absolute privilege is not limited to statements made on the record during oral testimony or argument, or set forth in formal litigation documents such as pleadings, affidavits and briefs.

In the interest of 'encourag[ing] parties to litigation to communicate freely in the course of judicial proceedings,' the privilege is extended to all pertinent communications among the parties, counsel, witnesses, and the court. Whether a statement was made in or out of court, was on or off the record, or was made orally or in writing, the rule is the same—the statement, if pertinent to the litigation, is absolutely privileged [party's unsworn statement in open court]; [letter from attorney to witness subpoenaed for trial]; [letter from witness to judge]; [letter from attorney to judge]; [communications among parties to a matrimonial action and their respective counsel]; [statement at settlement conference]; [out-of-state verbal exchange between attorneys]; [off-the-record statement by attorney to adverse party in court clerk's office, in presence of others]; [statements by party's representatives to potential trial witnesses. . .]."

In the context of a litigation, an action for libel or defamation does not exist unless the subject statement is not pertinent. (*Fabrizio v Spencer*, 248 AD2d 351). The alleged defamatory statements in the within action were made in the context of the Federal actions and relate to the alleged fraudulent sales of homes. Counsel refer to *Polonetsky v Better Homes Depot*, (96 NY2d 711), and its progeny, a civil action commenced in New York Supreme Court that alleged Fessler violated the New York City Consumer Protection Law in connection with his business of acquiring residential properties and then marketing and reselling the properties to consumers. Fessler asserts that the Polonetsky action was settled with no admission of liability or wrongdoing. Counsel also refers to *M & T Mortgage Corp. v Miller*, 2007 U.S. Dist. Lexis 60610 (E.D.N.Y. Aug. 17, 2007)

and *M & T Mortgage Corp. v White*, 2007 U.S. Dist. 72775 (E.D.N.Y. Sept. 28, 2007). The *Miller* actions were removed from state court. The Millers allege that Fessler engaged in a pattern and practice of fraudulently inducing first-time, low-income, minority home buyers to purchase houses at inflated prices. Fessler contends these actions are being litigated and vigorously defended. Fessler asserts that “to date, nothing more than allegations of civil complaints have been filed against . . . [him] . . . . No case has gone to trial and there have never been any adverse findings of fact against . . . [him].” Fessler Affidavit in Opposition sworn to July 26, 2007. In the *Miller* actions, the Magistrate Judges sanctioned Fessler for failing to preserve documents from the *Polonetsky* litigation in June 1999 that are relevant in the *Miller* actions. The U.S. Magistrate Judge sanctioned Fessler and found that he admitted he failed to produce or intentionally destroyed documents concerning the sale and repair of various properties which he was obligated to retain and provide to the Court. “You may infer from these circumstances and the evidence presented that . . . Eric Fessler made no or minimal repairs to some or all of these properties before they were sold. . . You may make these inferences against . . . Eric Fessler notwithstanding any other evidence that any party may have produced regarding repairs.” *M & T Mortgage Corp. v White*, 2007 U.S. Dist. Lexis 72775 (Sept. 28, 2007). Under the circumstances, the alleged defamatory statements made by Wagner cannot be considered so outrageously out of context as to permit one to conclude from the mere fact that the statements were uttered, that they were motivated by no other desire than to defame Fessler. See *Fabrizio v Spencer, supra; Martirano v Frost*, 31AD2d 931.

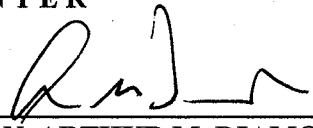
Counsel are admonished that lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses. ( See *Standards of Civility for the New York State Unified Court*

System). The preclusion order of the Magistrate Judge will end any perceived abuse of the plaintiff by Wagner. Should Wagner violate the preclusion order, then plaintiff's remedy would be to seek sanctions, costs and attorney's fees in the Federal action.

The complaint is hereby dismissed in its entirety. This decision and order of the Court terminates all proceedings under Index No. 015607/06.

DATED: February 6, 2008

ENTER



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J.S.C.

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FEB 08 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**