INDEX # 38327-08
RETURN DATE: **4-9-09**
MOT. SEQ. # **001**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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CHESTERFIELD ASSOCIATES, INC.,

Plaintiff,

-against-

NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS, OLAF J. OLSEN, Individually and as Organizer of NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS, PETER THOMASSEN, individually and as President of NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS, MICHAEL J. FORDE, INDIVIDUALLY and as Executive Secretary Treasurer of NEW YORK CITY COUNCIL OF CARPENTERS and DENNIS SHEIL III individually and as Vice President of NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS,

Defendants.

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CALENDAR DATE: June 24, 2009
MNEMONIC: MG; C/Disp.

PLTF'S/PET'S ATTORNEY:

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Riverhead, NY 11901

DEFT'S/RESP ATTORNEY:

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New York, NY 10007

Upon the following papers numbered 1 to 12 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1-8 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 9-12 ; Replying Affidavits and supporting papers ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendants pursuant to CPLR §3211 (a) (7) and (e) to dismiss the plaintiff's complaint alleging, inter alia, libel and defamation is hereby granted in its entirety and the plaintiff's action is dismissed.

This action was instituted by Chesterfield Associates, Inc. (hereinafter plaintiff), against the named defendants, New York City District Council of Carpenters, Olaf J. Olsen et al., (hereinafter Olsen) for damages arising from a claim of, inter alia, libel, defamation and injurious falsehood, because of a letter written by Olsen, dated March 18, 2008, to Thomas P. DiNapoli, the New York State Comptroller (hereinafter Comptroller). In the letter Olsen made reference to the bidding process in which the plaintiff was the low bidder on a project as indicated below and sought the Comptroller's review claiming that his office would "ultimately decid[e] who will be selected the lowest and most responsible bidder for the East Boat Basin Restoration project (contract #DOO 3745) at Robert Moses State Park" on Long Island, New York (hereinafter Robert Moses).

The plaintiff was found to be the lowest and most responsible bidder based on a contract awarded from the Office of Parks and Recreation and Historic Preservation for the Robert Moses project.

In the letter to the Comptroller, Olsen noted that:

> "Contractors have become even more competitive in their bidding because of this very tight construction market. This is reflective of how close the 2nd and 3rd bidders were to each other. We can only speculate how Chesterfield Associates was able to submit a bid that was significantly lower than the other bidders. *Maybe they will purposely cut corners and put the public at risk, like they did in Islip Township while constructing the Bay Shore Marina project (article enclosed); or maybe they will violate the State Prevailing Wage Law, as they have done on other projects (report included).*" (emphasis added).

In his letter, Olsen included an article concerning an Islip Town Bay Shore Marina project (hereinafter Islip Town) that he requested the Comptroller's office review and investigate as to the plaintiff's "deceptive bidding practice". The article stated:

> "Chesterfield Associates, which began the [Bay Shore] project in mid-March, neglected the bulkhead anchoring system, according to [Islip Town Deputy Commissioner of Public Works Nora] Detweiler. By not reinforcing the 'deadmen'—buried anchors that are attached to ropes or wires—the contracting company could have 'compromised the integrity of the new bulkheading system."

The article attached to the Olsen letter went on to state that

> "Representatives from LK McLean Associates PC confirmed that the dock building company ignored engineering blueprints that were laid out prior to construction..." and " [Islip Town Supervisor Philip] Nolan said that he and town officials 'were certainly disappointed' with the work of Chesterfield Associates."

Olsen also included a Court of Appeals decision in another case involving the plaintiff in which the Court took the plaintiff to task for violating the State's prevailing wage law and other items.

The defendants now move to dismiss the plaintiff's action pursuant to CPLR §3211 (a)(7) and 3211 (e) arguing that the Olsen letter along with the documented attachments is mere "opinion" and thus protected speech. The plaintiff argues in opposition that the March 18, 2008 letter was an unsolicited attack on the plaintiff's business reputation with the sole purpose of denying the plaintiff the Robert Moses contract.

For the following reasons, the defendants' motion to dismiss the plaintiff's action pursuant to CPLR §3211 is granted and the plaintiff's action is dismissed.

Initially, the Court notes that this lawsuit seems to qualify under the "SLAPP" suit provision of CPLR §3211 (g) in that the plaintiff's action against Olsen et al. for, inter alia, libel and defamation arises from Olsen's right of public petition in requesting the Comptroller to review the competitive bidding process prior to approval of the award to the plaintiff of the Robert Moses contract as the lowest and most responsible bidder in this case. ***T.S. Haulers, Inc. v. Kaplan***, 295 AD2d 595, 744 NYS2d 193 (2nd Dept 2002) is quite instructive wherein the Court noted:

> "In 1992 the Legislature enacted Civil Rights Law 70-a and 76-a to provide special protections for defendants in actions involving "public petition and participation," sometimes referred to as strategic lawsuits against public participation, or SLAPP suits. An action involving public petition and participation is defined as "an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission"(Civil Rights Law 76-a [1] [a]). The legislation was enacted in recognition of the damaging effect such an action can have on citizen participation in matters of public importance, even when the action lacks a substantial basis."

The Olsen letter, even though written on the stationery of the New York City District Council of Carpenters, is clearly a citizen's request that the bidding process involving the plaintiff for the Robert Moses renovation be reviewed with reference to the Islip Town project, the Court of Appeals findings and the significance of the plaintiff's winning bid and whether that would result in the best and most economical result. The mere fact that the letter stated deceptive bidding practice does not make it so. The letter merely expresses Olsen's opinion as he alleges no factual basis to support his claims. As noted in ***Todd Layne Cleaners, LLC v. Maloney***, 17 Misc3d 1114 (A), 851 NYS2d 67 (2007) the Court said:

> "Mere words of general abuse, however opprobrious, ill-natured, vexations, or discourteous, whether written or spoken, do not constitute a basis for an action for defamation, in the absence of an allegation and showing of special damages." 43A N.Y. Jur, Defamation and Privacy § 12. See also, ***Landy v. Norwegian America Line Agency, Inc.***, 26, AD2d 923, 274 NYS2d 687 (1st Dept. 1966). Furthermore, "[s]ince only false assertions of facts can properly be the subject of an action for defamation, an expression of pure opinion' is not actionable as defamation, regardless of how offensive, vituperative, or unreasonable it may be." 43A N.Y. Jur, Defamation and Privacy § 13, ***Steinhilber v.***

Alphonse, 68 NY2d 283, 289, 508 NYS2d 901, 903 (1986).

'A pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be pure opinion' if it does not imply that it is based upon undisclosed facts." ***Steinhilber v. Alphonse***, 68 NY2d 283, 289, 508 NYS2d 901, 903 (1986). *See also,* 43A N.Y. Jur, Defamation and Privacy §§ 13 and 14. An expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be (*citing* ***Rinaldi v. Holt, Rinehart Winston, Inc.***, 42 NY2d 369, 380, 397 NYS2d 943, 950 (1977). ***Steinhilber v. Alphonse***, supra. However, where the statement of opinion implies that [it] is based on facts which justify the opinion, but is unknown to those reading or hearing it, it is a "mixed opinion" and may be actionable. 43A N.Y. Jur, Defamation and Privacy § 14. The issue of whether the statement is one of a pure opinion or mixed opinion is a question of law for determination by the court. ***Steinhilber v. Alphonse***, *supra,* 43A N.Y. Jur, Defamation and Privacy § 15."

A more recent pronouncement on this issue appears in ***Hariri v. Amper***, 51 AD3d 146, 854 NYS2d 156 (1st Dept. 2008) wherein the Court went into a detailed analysis of the SLAPP suit difficulties stating:

"The New York State Legislature, in 1992, enacted Civil Rights Law §70-a and §76-a to provide heightened protections for defendants in actions which involve "public petition or participation," often referred to as SLAPP suits. Shortly after the SLAPP legislation was enacted, the Court of Appeals, in ***600 W. 115th St. Corp. v. Von Gutfeld***, 80 NY2d 130, 589 NYS2d 825, 603 N.E.2d 930 [1992], cert. denied 508 US 910, 113 S. Ct. 2341, 124 L. Ed 2d 252 [1993] commented:

' In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards. Termed SLAPP suits-strategic lawsuits against public participation-such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future (*see, e.g.,* ***Westfield Partners v. Hogan***, 740 F. Supp.

523; Pring and Canan, *Strategic Lawsuits Against Political Participation,* 35 Soc. Probs. 506). In response, New York State enacted a law specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation ...(80 NY 2d at 137 n. 1, 589 NYS2d 825, 603 N E.2d 930).'

The Legislature, in the introductory paragraph of the new law, which was entitled "Legislative findings and purpose," stated:

'The legislature hereby declares it to be the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence. The laws of the state must provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern.'

'The legislature further finds that the threat of personal damages and litigation costs can be and has been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs.' (L. 1992 ch. 767; *see also Long, Slapping Around the First Amendment: an Analysis of Oklahoma's Anti-SLAPP Statute and its Implications on the Right of Petition, 60 Okla. L. Rev. 419, 420-421 {2007]* ['(t)he primary objective of SLAPP suits is not to win. Instead of achieving victory in court, SLAPP suits are designed to intimidate the petitioners into dropping their initial petitions due to the expense and fear of extended litigation ... (T)he primary motivation behind filing SLAPP suits is to retaliate against successful opposition and prevent future opposition']; Johnson, Regulating Lobbyists: Law, Ethics, and Public Policy, 16 Cornell J L & Pub. Pol'y 1, 7-8 [2006] _ ["Anti-SLAPP statutes make it easier for courts to dismiss defamation suits and other retaliatory claims filed against persons who speak out on public issues. America's commitment to the open debate of public issues logically extends beyond discussions among the citizenry to include communications between citizens and public officials or employees. The interests of democracy cannot be served by requiring those who petition the government to do so with trepidation or excessive caution ... The right to petition, along with the related rights of association, speech, and press, must be interpreted in a manner that invites vigorous, and sometimes controversial, discussion of public affairs"] [footnotes omitted])'.

> Civil Rights Law §76-a (1)(a) defines an action involving public petition and participation as "an action, claim, cross claim or counterclaim for damages that is brought by a *public applicant or permittee,* and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission" (emphasis added). A "public applicant or permittee," the definition of which is at the heart of this matter, "shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission." See also, ***Novosiadlyi v. James***, 70 AD3d 793, 894 NYS2d 521 (2nd Dept. 2010)."

Here, the Olsen letter asserts as the writer's opinion that the Comptroller's office should do its due diligence in reviewing this bidding award and prior to giving its statutory approval by noting, inter alia, the finding by Islip Town of shoddy workmanship in which the plaintiff was alleged to have "cut corners" and failed in its contract with Islip Town to put in the bulkhead anchoring system and upon excavation "approximately 18 gaps were discovered– some up to seven feet wide." The Olsen letter also as a "public petition and participation" seeks to bring to the attention of the Comptroller the findings in a 2005 Court of Appeals decision. The case, ***Matter of Chesterfield Associates v. New York State Department of Labor***, expressed concerned with the plaintiff herein fulfilling its obligations under the prevailing wage law.

If the plaintiff seeks to "hang its hat" on the use of the phase in the Olsen letter of "deceptive bidding practices" that is also unavailing. The use of this term amounts to nothing more than hyperbole by Olsen seeking the Comptroller's office to act on its statutory duty to review and ensure that a deceptive business practice was not involved in the awarding of the Robert Moses contract. The term is merely Olsen's opinion based upon the fact pattern he submitted with reference to the Islip Town restoration project and the Court of Appeals decision. There is nothing malicious nor does the plaintiff establish " the cause of action has a substantial basis in law" CPLR §3211 (g). See, ***Redeye Grill, LP v. Restaurant Opportunities Center of New York, Inc.***, 13 Misc2d 1212 (A), 824 NYS2d 758 (2006).

"The laws of the state must provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." ***Street Beat Sportswear, Inc. v. National Mobilization against Sweatshops et al.***, 182 Misc2d 447, 698 NYS2d 820 (1999) citing to L. 1992, ch. 767, §1, as quoted in ***Allan and Allan Arts Ltd v. Rosenblum***, 201 AD2d 136, 143-144, 615 NYS2d 410, lv to app den. 85 NY2d 921, 627 NYS2d 319, 650 NE2d 1321, cert den. 516 US 914, 116 S Ct. 301, 133 Led2d 207. The Court must be ever mindful of the power and repressive effect of lawsuits initiated in the nature of libel, slander and/or defamation when a citizen complains or presents information to a government entity charged

with reviewing the awarding of contracts on a public project.

The plaintiff argues that Olsen statements that "Maybe they will purposely cut corners... like they did in Islip Township..." or "Maybe they will purposely... put the public at risk ..like they did in Islip Township..." (p.8 aff. in support) are defamatory and then argues that such statements are clearly false. However, the Court disagrees and draws the opposite conclusion. Olsen, in support of his opinion and statements, then submitted the statement of Islip Town officials who found deficient work by the plaintiff in its bulkhead restoration project and that it neglected to reinforce the "deadmen— buried anchors that are attached to ropes or wires—the contracting company could have 'compromised the integrity' of the new bulk heading system, added [Town Supervisor Philip] Nolan." Further the article notes that representatives from LK McLean Associates, PC "*confirmed that the dock building company ignored engineering blueprints that were laid out prior to construction*" (emphasis added) and finally, the statement that "*the failure to follow the design specification could result in an unstable bulkhead, vulnerable to collapse.*"

These statements by a citizen requesting that the Comptroller's office conduct its statutory duty and review the award of the Robert Moses project (contract #D003745) to the "lowest and most responsible bidder" together with the issues Olsen raises about the Islip Town project and the Court of Appeals case are protected speech. The statements were not made with malice but opined that the plaintiff might be the lowest bidder but "was it the most responsible bidder?" and these issues should be known in the Comptroller's review process. The Olsen statements are protected. ***Steinhilber v. Alphonse***, 68 NY2d 283, 289, 508 NYS2d 901, 903 (1986).

Accordingly, the defendants' motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 (a) (7) and §3211 (e) and (g) is hereby granted in its entirety and the plaintiff's complaint is dismissed.

The foregoing constitutes the decision of this Court.

Date: March 30, 2010

Peter Mahon

J.S.C.