

**Sklover v Sack**

2011 NY Slip Op 34201(U)

October 28, 2011

Supreme Court, Nassau County

Docket Number: 12868/08

Judge: Roy S. Mahon

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

**ALAN L. SKLOVER,**

**Plaintiff(s),**

**- against -**

**JONATHAN SACK and SACK & SACK,**

**Defendant(s).**

**TRIAL/IAS PART 6**

**INDEX NO. 12868/08**

**MOTION SEQUENCE  
NO. 12 & 13**

**MOTION SUBMISSION  
DATE: August 10, 2011**

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

<b>Notice of Motion</b>	<b>X</b>
<b>Notice of Cross Motion</b>	<b>X</b>
<b>Affidavit in Support</b>	<b>X</b>
<b>Memorandum of Law in Support</b>	<b>XX</b>
<b>Memorandum of Law in Opposition</b>	<b>X</b>

Upon the foregoing papers, the motion by the Plaintiff for an Order pursuant to CPLR §3212 granting Plaintiff summary judgment on the issue of the Defendants' liability in this action, and dismissing Defendants' affirmative defenses and the cross-motion by the Defendants for an Order pursuant to CPLR § 3212 granting summary judgment in favor of Defendants against Plaintiff, dismissing Plaintiff's complaint in its entirety, are both determined as hereinafter provided:

The Plaintiff is an attorney who previously represented a non-party to this action in a certain Federal Court action allegedly involving an employment action against an employer. In the context of that action the Plaintiff received a certain fee for legal services. After certain motion practice and conferences in the Federal action the Plaintiff was relieved as counsel and representation undertaken by the Defendants. In the context of settlement discussions in the Federal action the Defendants requested that the Plaintiff return the legal fees received from the non-party. In relation to this demand a number of letters and e-mail correspondences were exchanged between the Plaintiff and the Defendants. On July 10, 2008 the Defendant Jonathan Sack sent the Plaintiff the following e-mail:

"If not for my opening salvo demanding re-payment of the retainers Mr. Magnus previously paid to you, you would have continued to

[\* 2]

remain hibernating in that cave of yours, prowling for other client-suckers to rip off. You were happy selling Mr. Magnus on some whacko strategy and legal theories which do not exist. Then, you stole \$20,000 from him, hit and run styled.

For a few months you were so happy running that little clock on your desk, churning up fees for memos and letters which did nothing to advance the client's interests. Instead, you shocked any sense of reasonableness with your preposterous RICO-diculous Austin Powersesque \$1 BILLION demand! Were you for real? Had you bothered to read Mr. Magnus' written contract (which provided for a liquidated amount of \$150,000 upon his termination not for cause), you would know that you were never going to obtain a \$1 BILLION award in this case, or any other, for that matter.

Then, to make matters worse, you wrote libelous letters, exposing Mr. Magnus to defamation claims. You even went after the Jackson Lewis lawyer. How do you justify getting paid for putting Mr. Magnus in a worse situation than he was in prior to your involvement?

Aside from being in complete denial and a fog as to what went on in this matter, you need to accept the fact that you are no longer driving this process; I am. You are about to be on the receiving end of an embarrassing litigation, which will publicly expose you for the arrogant fraudster jackass and serial screw-up you really are. This legal malpractice stuff will get you great press on the first page of the Law Journal.

The reality is, you will never see a penny from Mr. Magnus.

We are going to try this, in good faith, just once: You will have until Monday, July 14, 2008, to deliver to me a check in the amount of \$20,000 made payable to "Daniel Magnus." We can work out whatever release agreements you need, and I will not turn over the settlement check to my client unless we get the papers signed.

If I do not receive payment by next Monday, you will suffer the consequences as a defendant in a miserable litigation. And of course, all bets are off, which means that the settlement proposal offered to you in this note will be withdrawn with prejudice, and of no effect.

In this civilized society of ours, we do not pay the mechanic who breaks the car we brought in for service. We do not pay the lawyer who makes the case worth less. Stop the madness now. Recognize that you screwed Mr. Magnus. Promptly return the fees he paid to you in good faith to prosecute his claims, which you miserably failed to do. Quit while you are behind. Pay up and then do the public a favor and retire."

[\* 3]

The Plaintiff maintains amongst other things that the foregoing e-mail constitutes libel per se and the Defendants amongst other things maintain that the Defendants' e-mail is privileged.

In examining this issue the Court in *Steinhilbar v. Alphonse*, 68 NY2d 283, 508 NYS2d 901 stated:

"In addressing the decisive question, whether the statements are opinions and thus privileged, we observe that in framing the issue both parties have assumed the applicability of *Gertz v. Robert Welch, Inc.* (418 US 323). 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" (418 US, at pp. 339-340, *supra*).

The rule to be applied may be simply stated. 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 (*see, Rinaldi v. Holt, Rinehart & Winston, supra*, at p 380; *Gertz v. Robert Welch, Inc., supra*, at pp 339-340). 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 (*see, Ollman v Evans*, 750 F2d 970, 976 [DC Cir], *cert denied* 471 US 1127; *Buckley v. Littell*, 539 F2d 882, 893 [2d Cir], *cert denied* 429 US 1062; Restatement [Second] of Torts §566 comment c). When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a "mixed opinion" and is actionable (*see, Hotchner v. Castillo-Puche*, 551 F2d 910, 913 [2d Cir], *cert denied sub nom. Hotchner v. Doubleday & Co.*, 434 US 834; *cf. Cianci v. New Times Pub. Co.*, 639 F2d 54, 64 65 [2d Cir]. The actionable element of a "mixed opinion" is not the false opinion itself — it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking. (*Rand v New York Times Co.*, 75 AD2d 417, 422; *cf. Silsdorf v Levine*, 59 NY2d 8, 14, where the complaint alleged not only that the opinion was defamatory but that the accompanying recitation of facts upon which it was based was either a "gross distortion" or "misrepresentation of fact".)

While it is clear that expressions of opinion receive absolute constitutional protection under *Gertz*, determining whether a given statement expresses fact or opinion may be difficult. The question is one of law for the court and one which must be answered on the basis of what the average person hearing or reading the communication would take it to mean (*see, Rinaldi v Holt, Rinehart & Winston, supra* at p

[\* 4]

381; *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F2d 219, 227-228). There is no definitive test or set of criteria (see, *Mr. Chow of N.Y. v Ste. Jour Azur S.A.*, *supra*, at pp. 225-226). The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion (see, Restatement [Second] of Torts § 566 comment c).

While the Supreme Court in *Gertz* did not focus on the distinction between fact and opinion, the court, in a case decided on the same day as *Gertz*, *Letter Carriers v. Austin* (418 US 264, *supra*), has provided a helpful precedent. In *Letter Carriers*, involving a newsletter sent out during a labor dispute, the question involved libel judgments based on references to plaintiffs as "scabs" followed by a quoted description of a "scab" as "a traitor to his God, his country, his family and his class" attributed to author Jack London. In reversing the judgments and holding that the "scab" description was absolutely protected under the National Labor Relations Act, the court considered both the context of the entire communication and the type of "intemperate, abusive, or insulting language" (*id.*, at p. 283) that would commonly be employed in the particular social setting of a labor dispute. It concluded that no reader of the newsletter would have understood the union "to be charging the appellees with committing the criminal offense of treason" and that London's words were "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join" (*id.*, at p 285, 286). (See also, *Greenbelt Pub. Assn. v Bresler*, 398 US 6, 14, relied on in *Letter Carriers v Austin*, *supra*, where the court weighed the broader social context in considering news reports of statements made at a public zoning meeting characterizing plaintiff's negotiating position as "blackmail" and concluded that "even the most careless reader must have perceived that the word ['blackmail'] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable".)

We eschew any attempt here to reduce the problem of distinguishing fact from opinion to a rigid set of criteria which can be universally applied. The infinite variety of meanings conveyed by words — depending on the words themselves and their purpose, the circumstances surrounding their use, and the manner, tone and style with which they are used — rules out, in our view, a formalistic approach. A court must have the flexibility to consider the relevant factors and to accord each the degree of importance which the specific circumstances warrant. It should be noted, however, that in adopting various approaches to separating fact from opinion, some courts have emphasized specific criteria and set forth general guidelines. (See, e.g., *Mr. Chow of N.Y. v Ste. Jour Azur S.A.*, 759 F2d 219, 225-226 [2d Cir], *supra*, adopting and applying analysis set

forth in plurality opn in en banc decision in *Ollman v Evans*, 750 F2d 970, *cert denied* 471 US 1127, *supra*; *Ollman v Evans*, at pp 977-984, majority opn, Starr, J., positing a four-factor analysis [discussed *infra*]; *but see*, *Ollman*, concurring opn, Bork, J., at pp 993-1010, rejecting any "mechanistic rule" based on the semantic nature of the assertion in favor of a determination on "totality of the circumstances"; and *see also*, *Ollman*, concurring opn MacKinnon, J., at p 1016, and *Ollman*, dissenting in part opn, Robinson, Ch. J., at pp 1021-1028 *Information Control Corp. v Genesis One Computer Corp.*, 611 F2d 781 [9<sup>th</sup> Cir], adopting a multifactor, totality of circumstances test; *Hotchner v Castillo-Puche*, 551 F2d 910, 913 [2d Cir], *cert denied sub nom. Hotchner v Doubleday & Co.*, 434 US 834, *supra*, emphasizing the verifiability *vel non* of the statement in issue; *Buckley v Littell*, 539 F2d 882, 895 [2d Cir], *cert denied* 429 US 1062, *supra*, concentrating on the context of the statement and whether the concept conveyed was "loosely definable", and "variously interpretable".) (*Steinhilbar v. Alphonse*, *supra* at 289-292)."

The Court finds from a review of the respective submissions that the Defendants e-mail of July 10, 2008 does not contain opinion but rather contains expressions of fact as to the Plaintiff's allegedly stealing money from his former client and the Plaintiff's professional abilities.

Based upon the foregoing the Plaintiff's application for an Order granting plaintiff summary judgment on the issue of the Defendants' liability in this action and dismissing Defendants' affirmation defenses is **granted** and the Defendants motion for an Order granting summary judgment in favor of Defendants against Plaintiff, dismissing plaintiff's complaint in its entirety, is **denied**.

SO ORDERED.

DATED:

10/28/2011

.....  
*Roy S. Blakemore*  
 J.S.C.

**ENTERED**

NOV 10 2011

**NASSAU COUNTY  
 COUNTY CLERK'S OFFICE**