

REAL ESTATE BOARD OF NEW YORK

ALM

Applying Defamation Law to Belligerence In the Co-Op Arena

'Privilege' Is Key, Malice May be Necessary,
And Truth Is Still an Absolute Defense

BY ANDREW P. BRUCKER

HERE ARE CERTAIN issues that regularly confront every lawyer who represents cooperative housing corporations. Issues concerning the use and repairs of terraces are quite common. The question of who is responsible for certain repairs within the apartment is often asked. Recently, two decisions have clarified (at least to a certain degree) the two questions that have haunted attorneys who handle co-op matters: can a board do something about a sponsor who absolutely refuses to sell apartments (the answer now is a definite maybe), and can a co-op bring an action against tenant-shareholders based upon their objectionable behavior without review by a court (again, a definite maybe).

Yet another issue that invariably arises involves the belligerency that seems to be endemic in co-ops. It may take the form of a shareholder at an annual meeting making accusations against a board member,

the board itself, or even the manager. It may take the form of inflammatory statements in the cooperative newsletter by a board member against a shareholder. It may even take the form of a derogatory statement in a nominee's written statement forwarded to all shareholders against another nominee for the board. Yet the average co-op attorney knows very little of defamation law, other than the basics that may have been memorized for the bar exam.

Defamation is a tort that is defined in Black's Law Dictionary as "an intentional false communication, either published or publicly spoken, that injures another's reputation or good name." Whether the communication is verbal (slander) or written (libel), defamation as a rule is not actionable unless the plaintiff suffers special damages. The Restatement (Second) of Torts, at §575, states that special damages contemplate "the loss of something having economic or pecuniary value." The four exceptions to this rule, i.e. when special damages are not necessary in order to bring an action in defamation, are statements that (i) charge the plaintiff with a serious crime, (ii) injure someone in his trade, business or profession, (iii) claim that the plaintiff has a loathsome disease, and (iv) impute unchastity to a woman. When a statement falls within one of these exemptions, no actual damages need be

alleged or proven, as the law presumes that damages will result.¹

The threshold question that must be answered prior to bringing an action in defamation is whether the statement is an expression of opinion, which is not actionable, or an assertion of fact, which may form the basis of a viable libel or slander claim. This concept has been the issue of numerous decisions in not only the New York Court of Appeals, but in the United States Supreme Court. Though defamation has traditionally been a state law matter, the Supreme Court has entered into the fray on numerous occasions. In *Gross v. New York Times*, 82 N.Y.2d 146 (1993), the Court of Appeals noted that "[the U.S. Supreme Court has] injected a constitutional dimension into what had previously been regarded as a matter of State common law ... in order to assure the 'unfettered interchange of ideas'."

Those Troublesome Gray Areas

But quite often a comment is made or printed that is not clearly either opinion or fact. It is this gray area in which most cases are found, and it is in this quagmire that attorneys will often find themselves mired, unable to find a definite answer. The Court in *Gross* attempted to go further in separating fact from opinion, stating that

Andrew P. Brucker is a founding partner of Schechter & Brucker.

[I]n determining whether a particular communication is actionable, we continue to recognize and utilize the important distinction between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener and a statement of opinion that is accompanied by a recitation of the facts on which it is based or one that does not imply the existence of undisclosed underlying facts. The former is actionable not because they convey "false opinions" but rather because a reasonable listener or reader would infer that "the speaker [or writer] knows certain facts unknown to [the] audience, which support [the] opinion and are detrimental to the person [toward] whom [the communication is directed]." In contrast, the latter are not actionable because ... a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture. [Citations omitted]

Therefore, the courts have established what might be considered a subjective test for whether words are opinion or not: one must determine whether the audience believes the words to be opinion or not. One court, admitting that it is often difficult to distinguish fact from opinion, opined that it is a question of law for the court to determine what the average person hearing or reading the communication would take it to mean.² The Court's position there was that every communication must be "considered in the context of the entire communication and of the circumstances in which they were spoken or written."

The U.S. Supreme Court has grappled with this very question in numerous cases. One such case, *Letter Carriers v. Austin*, 418 U.S. 264 (1974), involved a labor dispute. During the turmoil, one party claimed that the others were "scabs [and] a traitor to his God, his country, his family and his class." The Court determined that when one considered the context of the communication and the type of "intemperate, abusive or insulting language" that was "commonly employed" in labor disputes, it would be impossible to interpret the words as an accusation of the crime of treason. Rather, the Court characterized the words as "merely



rhetorical hyperbole, a lusty and imaginative expression of contempt."

In another case, *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 1970, a speaker at a meeting accused a real estate developer of blackmail, and a local paper repeated the accusation in reporting the meeting. The developer brought an action in defamation against both the speaker and the newspaper, claiming that these were accusations of a crime.

The Court reviewed the circumstances and found that it was "simply impossible to believe that a reader who reached the word 'blackmail' ... would not have understood what was meant: it was the ... [developer's] negotiating proposals that were being criticized. No reader could have thought that either the speaker ... or the newspaper ... were charging [the developer] with the commission of a criminal offense." In oft-cited language, the Court even went further and opined that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] position extremely unreasonable." In other cases, assertions that a person is guilty of "fraud" and "corruption" were also held to be opinions (and not actionable) due to the contexts in which the statements were made.³

Years later, the New York Court of Appeals attempted to create a test to be used when attempting to analyze whether words were opinion or fact: what was the impression created by the words used, as well as the general tenor of the expression, from the point of view of the reasonable person.⁴ A couple of years after that, the Court attempted to fine tune this rule, and created a more rigid, three-pronged test for analyzing how best to determine whether a statement is opinion or not.⁵ The factors to be considered are whether

(i) the specific language in question has a precise meaning that is readily understood, (ii) the statement is capable of being proven true or false, and (iii) 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" the reader or listener that what is being communicated is likely opinion, and not fact.

Clearly, "pure opinion," which is a statement of opinion accompanied by a recitation of the facts upon which it is based, is protected and is not actionable. However if the statement of opinion implies that it is based upon certain facts that justify the opinion but are unknown to those reading or hearing the statement, it is considered "mixed opinion" and is actionable. The opinion itself is not actionable, but rather 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."⁶

Privileges Can Shield

In order to encourage the exchange of ideas, which in turn serves the public interest, the courts have long recognized that certain communications should be immune from litigation. For example, public officials have long been protected, as have attorneys in a courtroom.

Another such privilege is the "common interest" privilege.⁷ It is this privilege that is commonly utilized when a statement is made relating to co-op matters. As outlined in *Lieberman*, this privilege extends to a communication made by one person to another concerning a subject in which both have an interest. This has been held to include employees of an organization, members of a committee, physicians of a health plan, and even, in the case of *Lieberman*, to tenants in a building. The theory behind this privilege is that the free flow of information between people with a common interest should not be stifled.

This privilege, however, is conditional, or qualified, in that it does not completely insulate the writer or speaker regardless of the content or the reason for the statement. The privilege is no longer available if the plaintiff can establish that the defendant spoke with "malice."

Under common law, malice meant spite

or ill will. However, the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), established an "actual malice" standard for certain cases governed by the First Amendment: "knowledge that [the statement] was false or ... reckless disregard of whether it was false or not." The plaintiff must demonstrate, under the *New York Times* definition of malice, that the "statements [were] made with [a] high degree of awareness of their probable falsity." Thus, it is not enough to show that the defendant did not know whether something was true. To overcome the privilege, the plaintiff must present sufficient evidence that the defendant entertained serious doubts as to the veracity of the statement.

Unfortunately, this only clouded the issue, and the Court itself, years after the *New York Times* decision admitted that the situation was now confusing.⁸ The result is two seemingly different definitions of malice, one prescribed by federal courts and one found in common law, and both are used today by the courts of New York. Thus malice under either the constitutional or common law standard will be sufficient to defeat the privilege.

Applying the Rules to Co-ops

"Privilege" is the key when applying all of the foregoing defamation rules and definitions to cooperatives (and condominiums). In *Wright v. Johnson*, 184 A.D. 2d 234 (1st Dept. 1992), the court was confronted with an action for defamation that had been brought by the president of a cooperative corporation against a shareholder for statements the shareholder allegedly made at a shareholders' meeting. The statement made was to the effect that the president (plaintiff) was not diligent in paying certain taxes of the corporation. The trial court granted summary judgment for the shareholder based upon the fact that the president's conclusory assertions of malice by the shareholder were insufficient to overcome the shareholder's qualified common interest privilege. The appellate court agreed, and affirmed the lower court's decision.

In yet another case involving cooperative corporations, *J.C. Klein, Inc. v. Forzley*, 289 A.D.2d 79 (1st Dept. 2001), a management company of a cooperative (and the owner of that management company, who also was a shareholder in that same cooperative) sued certain shareholders of the cooperative. It seemed that certain dissident shareholders sent a letter to the shareholders of the cooperative in an

attempt to discredit the current board of directors in the hope that new leadership would take over. In that same letter, the dissidents also attempted to discredit the managing agent, citing the individual plaintiff's prior criminal conviction and current difficulties with regulatory authorities. Further, the letter questioned the character of the principal of the management company.⁹ The trial court granted summary judgment to the defendants, and the plaintiffs appealed.

The Appellate Division agreed with the trial court. In reviewing the facts, the panel held that the offending comments were either not susceptible to a defamatory meaning or were just opinions as to the individual plaintiff's character based upon the recitation of the facts that were presented as well. Interestingly, no discussion of privilege was needed based upon the court's findings, but it would seem to be beyond question that had the court found otherwise, it may still have dismissed the case without proof of malice, based upon the common interest privilege.

Lest anyone believe that the common interest privilege, as it applies to cooperatives and condominiums, is limited only to shareholders (or unit owners), a rather interesting case of infighting between a co-op's professionals was before the court when a managing agent sued the attorney for the cooperative corporation for slander based upon statements the attorney made at the annual shareholders' meeting. The attorney (i.e. defendant) made a motion for summary judgment to dismiss the complaint against him, but the trial court denied his motion. On appeal, the Appellate Division¹⁰ reversed and held that not only are statements made under these circumstances protected by the common interest privilege, but that the burden is on the plaintiff to submit evidence sufficient to raise a triable issue of fact that the statements were made with malice.

In a recent case in which an attorney brought a defamation action against a tenant-shareholder in a cooperative, *Bardey v. Brooke-Hitching*, 191 A.D.2d 243 (1st Dept. 1993), the panel summarized the procedural aspects of when a qualified privilege might exist. If there is no dispute as to the facts, it is for the court, not the jury, to decide whether a qualified privilege exists. In order to defeat the privilege, the plaintiff must then demonstrate malice, "mere conclusory assertions being insufficient for that purpose." The panel also opined that, contrary to the decision of the trial court,

the issue of whether the party accused of defamation exceeded the scope of his qualified privilege is a matter for the jury. Quoting two other cases, the appellate court held that "a triable issue of fact exists as to whether defendant's statement were 'so extravagant in [their] denunciations or so vituperative in [their] character as to justify an inference of malice.'" ¹¹

In *Bell, v. The Alden Owners, Inc.*, 299 A.D. 2d 207(1st Dept. 2002), the shareholder-plaintiff had brought an action, after she was legally evicted, against the cooperative (and others) for referring to plaintiff's specific violations of her residential lease. The Appellate Division once again confirmed that there exists a qualified privilege in matters relating to a cooperative and its operations. But perhaps *Bell* should be remembered not as the latest case to confirm this, but rather as the latest case to confirm the obvious: that truth (in this case, that there was an eviction for lease violations) is a complete and absolute defense to a defamation claim.

.....●.....

(1) As noted in *Lieberman v. Gelstein*, 178 A.D.2d 215 (1st Dept. 1991), the theory of presumed damages has been found inconsistent in certain First Amendment cases. However, this issue will not be further discussed in this article.

(2) *Steinhilber v. Alphonse*, 68 N.Y.2d 283 (1986).

(3) *Gross*, supra, citing numerous cases.

(4) *Immuno AG v. J. Moor-Jankowski*, 77 N.Y.2d 235 (1991).

(5) *Gross*, supra; *Brian v. Richardson*, 87 N.Y.2d 46 (1995).

(6) *Steinhilber*, supra.

(7) See Restatement (Second) of Torts, §596.

(8) *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

(9) An action based upon tortious interference with contract was also brought, as the dissidents also sent letters to other cooperatives where the plaintiff acted as the management. This action was dismissed, for no management agreement was breached as a result of the letter sent by the dissidents.

(10) *William Stevens, Ltd v. Kings Village Corp.*, 234 A.D. 2d 288 (2d Dept. 1996).

(11) Citing *Misek-Falkoff v. Keller*, 153 A.D.2d 841, 842 (2d Dept. 1989), quoting *Ashcroft v. Hammond*, 197 N.Y. 488, 496 (1910).