Oral Argument by
Richard A. Brummel,
15 minutes Requested

SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT
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RICHARD A. BRUMMEL,
Plaintiff-Appellant-Respondent, pro se,

-against-

Appellate Division Docket No.:
2015 - 04351

BOARD OF TRUSTEES OF THE VILLAGE OF EAST HILLS, N.Y., AND MICHAEL R. KOBLENZ, INDIVIDUALLY AND AS MAYOR OF THE VILLAGE OF EAST HILLS,
Defendant-Respondents-Appellants, *and*

BLANK SLATE MEDIA, LLC, BILL SAN ANTONIO, AND STEVEN BLANK,
Defendant-Respondents

(Nassau County Clerk Index No. 2772 / 14)

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BRIEF FOR PLAINTIFF-APPELLANT-RESPONDENT

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STATEMENT PURSUANT TO CPLR SECTION 5531

1. The index number of the case in the court below is Nassau County Index # 2772 / 2014

2. The full names of the original parties and any change in the parties are: Plaintiff Richard A. Brummel, Defendants: Board of Trustees of the Village of East Hills, N.Y.; Michael R. Koblenz; Blank Slate Media LLC, Bill San Antonio; Steven Blank.

3. The court and county in which the action was commenced are Supreme Court, County of Nassau.

4. The action was commenced on March 19, 2014.

The Complaint was served on or about July 15, 2014.

The Motion to Dismiss filed by the Board of Trustees of the Village of East Hills, N.Y.; Michael R. Koblenz (hereinafter "the Village Defendants") was served on or about August 1 , 2014.

The Motion to Dismiss filed by Blank Slate Media LLC, Bill San Antonio; Steven Blank (hereinafter "the Blank Slate Defendants") was served on or about August 15, 2014.

The Affidavit in Opposition to Motions to Dismiss filed by the Plaintiff was served on or about September 15, 2014.

The Sur-Reply filed by the Plaintiff was served on or about November 13, 2014.

5. The object of the action is to recover for damages for defamation arising from a newspaper article.

6. This appeal is from an Order and Decision entered February 9, 2015, by the Hon. Justice Angela G. Iannacci, J.S.C.

7. The appeal is being conducted on the original record with an appendix being submitted to the Court.

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Questions Raised

(1) Were the statements as published capable of being interpreted as factual and defamatory? The trial court answered in the negative.

(2) Do the facts as established and the law as it applies invest the Mayor with absolute privilege in this matter? The trial court answered in the affirmative.

(3) Do the facts as established and the law as it applies invest the Mayor with qualified privilege in this matter? The trial court answered in the affirmative.

(4) Did Plaintiff assert actual malice to defeat the Mayor's assertion of qualified privilege? The trial court answered in the negative.

Facts

The underlying matter is an action for defamation brought by Plaintiff, a 55-year-old native of the Village of East Hills, N.Y. (hereinafter "the Village"), against five parties: Michael R. Koblenz, individually and as the Mayor of the Village (hereinafter "the Mayor"); the Board of Trustees of the Village as the responsible party for the Village as an incorporated entity (hereinafter "the Board of Trustees") (Complaint, p. A25); and,

Also, against Blank Slate Media LLC (hereinafter "the Newspaper"), Bill San Antonio ("the Reporter"), and Steven R. Blank (hereinafter "the Owner/Editor") as owner, reporter, and owner/editor, respectively, with respect to the media chain that published false and defamatory statements reportedly uttered by the Mayor with regard to the Plaintiff, including in print edition called The Roslyn Times, various other localized print newspapers, and a company-wide website operating on the internet at "www.TheIslandNow.com" (Complaint, p. A25).

Plaintiff is a public figure who is known as a vigorous environmental-activist and layman litigator in the Village and throughout Nassau County, as well as elsewhere in New York State (Complaint, pp. A33-4; Affidavit in Opposition to Motion to Dismiss, pp. A228-9).

During the past roughly four years, Plaintiff, having returned to his hometown after a long absence, led about a dozen legal challenges to real estate development

projects and other environmentally-damaging activities in and around the general area of the Village (Affidavit in Opposition to Motion to Dismiss, hereinafter "Plaintiff's Affidavit in Opposition", pp. A228-9 pp. 229 *ff.*).

Since about 2011, Plaintiff has undertaken a personal campaign to organize residents and to push the Village to enforce provisions of the Village code intended to (1) "preserve the tree canopy" and (2) to maintain the "character" of the community in the face of widespread real-estate speculation, home demolitions, and over-sized redevelopment (Plaintiff's Affidavit in Opposition, pp. A228-9 *ff.*).

Plaintiff's efforts have included extensive written analysis carried on his website and in the local news as letters or press releases; written and verbal testimony to Village agencies; and the circulation of a petition in the Village that was prominently featured on the front page of a local newspaper serving the Village, (Complaint, p. A26).

Plaintiff resorted to litigation on three separate occasions against the Village and its agencies, in order to compel them to follow the Village's current environmental laws (Plaintiff's Affidavit in Opposition, pp. A229 *ff.*).

In a wide-ranging profile of Plaintiff published on or about March 22, 2013, in The Roslyn Times, both in print and online, and upon information and belief published simultaneously in other local newspapers in the Blank Slate chain of

newspapers, an article by-lined Bill San Antonio quoted the Mayor as stating that Plaintiff was disruptive at Village meetings and the police were called as a result (Complaint, pp. A27-28).

The phrase was artfully rendered as follows though its defamatory meaning is as alleged in the Complaint at pp. A31 *ff*. The Roslyn Times stated:

> "If he gets really bad we've got to call the police because he's being disruptive. People don't want him to take their pictures or get abused at meetings," Koblenz said. "He goes to every [architectural review board] and zoning board meeting and tries to get access to every single filing of every little thing a resident wants to do on their home. You just can't do that."
>
> During Hurricane Sandy, Brummel said he was removed from Village Hall by police under the authority of Koblenz' declaration of an emergency situation.
>
> "I was there filing a letter demanding access to files at issue of the architectural review board, for what they'd be taking down, and was having a conversation with some of the staff there," he said. "I later read that the declaration was invalid because it wasn't put in writing, and when I did a FOIL [Freedom of Information Law] request, they didn't have anything on it."
>
> Koblenz said he remembers that day differently.
>
> "The village bought a generator and hooked it up at Village Hall to use as a shelter because we have locker rooms there and showers," he said. "We were housing and feeding displaced people there during the storm and he comes in taking pictures and handing out fliers and being very disruptive. I mean, people don't want to be bothered with that stuff right after a tree just went through their house."
>
> (Complaint, p. A28)

Parenthetically, the reports of two instances of police action actually covers

two separate incidents on different days, that were confused and conflated by the reporter (Complaint, p. A36, ¶57).

Plaintiff raised the falsity of the Mayor's statements with both the Village and The Roslyn Times seeking to have the false statements withdrawn and corrected, but neither party agreed to do so (Complaint, p. A29).

Among other actions Plaintiff undertook to correct the record, Plaintiff wrote an online rebuttal to the Mayor's alleged statements that was appended below the online article as a "comment" (Complaint, p. A28; p. A29; p. A34).

Both the original article and the comment have remained online on the Newspaper's website, and the article figures prominently in a Google search of Plaintiff's name as the fourth entry of a search of plaintiff's full name (Complaint, p. A27).

The article contains blatant falsity regarding the character of Plaintiff's participation in Village meetings (Complaint, pp. A30 *ff.*).

Plaintiff's conduct was generally critical but never disruptive, nor was his effort to document meetings by taking photographs in any way excessive, improper or unusual, and at no time were police ever called to a Village meeting regarding Plaintiff (Complaint, p. A30).

These facts have not been controverted by the Defendants: None have asserted the truth of the claim that the Mayor or others called police to meetings for alleged

disruptive behavior, abuse, etc. by Plaintiff; instead they have offered numerous and sundry other defenses.

In fact, during two meetings Plaintiff himself summoned police when Plaintiff was concerned for his own safety due to aggression directed against him from allies of the Mayor (Complaint, p. A31; Plaintiff's Affidavit in Opposition, p. A240).

An affidavit by a retired Nassau attorney present at one such meeting was submitted to the Court attesting to the threats directed at Plaintiff and the absence of any conduct by Plaintiff at meetings the affiant witnessed that warranted any action against Plaintiff, by police or otherwise (Plaintiff's Affidavit in Opposition, p. A241).

Given that the Mayor and Trustees were present at the meetings of the Village Board and should have known whether or not police were called to meetings at which they were not present, the Mayor's statements was made with knowing or reckless disregard for the truth, as a matter of fact (Complaint, pp. A34 *ff.*).

The Newspaper and the Reporter and Editor/Owner had extensive information on which to establish the falsity of the alleged statements of the Mayor, such as prior familiarity with the Plaintiff and his conduct at public meetings they observed; an awareness that the Plaintiff and the Mayor expressed substantially different recollections of the facts regarding interactions they shared; and their

awareness of the hostility articulated by the Mayor toward the Plaintiff (Complaint, pp. A34 *ff.* , Affidavit in Opposition, pp. 247 *ff.*).

As to the circumstances in which the Mayor's purported statements were communicated to the Newspaper and to the Reporter, the facts are completely unknown as a matter of legal record (Sur-Reply, pp. A351-2; Affidavit in Opposition, p. A240).

Due to the absence of any pre-trial discovery, there is complete mystery as to the circumstances surrounding the alleged Mayoral statements, e.g. whether questions were posed by the reporter about Village policy or practice, whether it was alleged that Plaintiff made allegations about Village conduct, and the substance, if any, of such allegations (Plaintiff's Memorandum of Law, p. A268).

Such questions of fact -- unanswered at this time though raised by the Plaintiff -- may be relevant to the legal question as to whether the Mayor enjoys "absolute privilege" for his statements, based on tests the Courts have established (*infra*).

Argument

1. The Mayor's Statements Carried By The Newspaper Were Susceptible of Defamatory Connotation

Plaintiff's Complaint focuses on the purported statement of the Mayor that "police" are routinely summoned to meetings at which Plaintiff is allegedly routinely disruptive -- "really bad" in the quotation attributed to the Mayor -- and

routinely harasses other residents by taking photos of them and 'abusing' them.

The quoted statements paint Plaintiff as a recognizable 'type' -- a local 'crank' -- an image which would resonate and appear 'plausible', and would thus thoroughly discredit Plaintiff in the eyes of the public as a political and/or public-policy actor (Complaint, A31-32).

Indeed, Plaintiff is aware that such impressions have taken root, in whole or in part because of the Mayor's statements on this and other occasions.

The trial Court ruled that the Mayor's statement was a type of opinion not susceptible of being defamatory based on its truthfulness or lack thereof (Decision and Order, p. A7).

But that Decision is not supported by the facts or the law.

There are clear parameters for the determination of what is subjective, unprovable as true or false, or 'opinion', and alternatively what is subject to factual and defamatory meaning, and further how the courts are to make that determination. According to the Court of Appeals:

> The dispositive inquiry, under either Federal or New York law, is whether a reasonable reader could have concluded that the articles were conveying facts about the plaintiff. Since falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action. In our State the inquiry, which must be made by the court 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.
>
> Gross v. New York Times Co., 82 N.Y.2d 146 (1993) at 152-4 (emphasis added, internal quotations and citations omitted) (where the Court held allegedly defamatory statements in an investigative article should not be shielded as 'opinion'), acc'd Loder v. Nied, 89 A.D. 3d 1197 (Third Dep't, 2011) (where published allegations of impropriety by a public official were held to be factual not 'opinion')

The Court of Appeals is very specific that the courts must look at the overall import of the words used, and their reasonable effect on the average reader:

> If the contested statements are reasonably susceptible of a defamatory connotation, then it becomes the jury's function to say whether that was the sense in which the words were likely to be understood by the ordinary and average reader. In analyzing the words in order to ascertain whether a question of fact exists for resolution upon trial, the court will not pick out and isolate particular phrases but will consider the publication as a whole. The publication will be tested by its effect upon the average reader. The language will be given a fair reading and the court will not strain to place a particular interpretation on the published words. The statement complained of will be read against the background of its issuance with respect to the circumstances of its publication. It is the duty of the court, in an action for libel, to understand the publication in the same manner that others would naturally do. The construction which it behooves a court of justice to put on a publication which is alleged to be libellous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer.
>
> James v Gannett Co., 40 N.Y.2d 415 (1976) at 419-20 (internal quotations and citations omitted) (where the Court ruled that vague or general words in an article on a belly dancer could not have imputed unchastity to her based on a close analysis of the statements and the overall article)

It must be stated to this Court with a strong degree of chagrin that the claims in the alleged statement of the Mayor are pure fiction, and it is humiliating to have the statements broadcast in the manner required here. In fact none of this litigation has even been publicized by Plaintiff due to its embarrassment and harm.

Independent media have been present at numerous meetings of the numerous legislative and regulatory bodies at which Plaintiff has testified, often directly challenging officials, and there have been no resulting first-hand reports that Plaintiff has ever conducted himself in a manner as alleged by the Mayor; nor have there appeared any similar allegations elsewhere.

Similarly, the cross-claim for sanctions for frivolous litigation is predicated on a maliciously calculated falsehood. When the Defendant's Brief is filed with that claim it will be fully joined, as opposing counsel has been explicitly put on notice.

On its face the assertion of the Mayor as reported is a horrendous allegation that would mark Plaintiff unsuitable for <u>any</u> position of trust or having a public profile. It paints him as unbalanced, unhinged, a menace. It could destroy him professionally (Plaintiff's Affidavit in Opposition, p. A249).

Plaintiff submitted to the trial Court an affidavit of a local resident attesting to both the falsehood of the Mayor's statements and to the meaning which the resident took from the statements (Plaintiff's Affidavit in Opposition, p. A241).

Furthermore, the Mayor states that such conduct and police response has

occurred regularly, inasmuch as he says the police are called "if he gets really bad."

The "if" and "gets" phrase implies -- to "the ordinary and average reader" (James, *supra*) -- that such misconduct is a regular problem, as in typical English-language phrases like "if it rains I get my umbrella" or "if there is a red light you stop your car", or "if the court convenes, then the stenographer makes a record" -- that is, regular, routine, repeated occurrences.

Furthermore, Plaintiff's alleged 'disruption' and 'abuse' is alleged to be of such nature that the police are involved.

This calculated detail gives the statements an entirely different factual coloration and connotation -- albeit wholly false. The alleged police involvement is the key factor in rendering the quoted statements defamatory.

It would be one thing to simply assert Plaintiff was "disruptive", but it is another to falsely invoke police responses, and routine ones at that.

The term "disruptive" is subjective and hard to pin down: It could as easily apply to a dissident or opposition member of the Board of Trustees itself who might demand constant reading aloud of minutes or the taking of polled votes rather than approval by consent, or who demands analysis of the fine-print of every Village contract; and the term could also apply to to a member of the audience screaming epithets and needing to be dragged off by the police.

And there is the rub in this case: the element of the police involvement.

What gives the quoted statements their defamatory character -- no longer being the "subjective" ones that cannot be pinned down as factual -- is the linking of the allegation of "disruptive" behavior and 'abusing' of other members of the public with the alleged police involvement, as well as the totality of the quotations.

We live in a society of great contention in many spheres. There is contention in our families, on our streets and roadways, in our political forums, on talk-radio and all other media.

The "reasonable reader" (Gross, *supra*) of an article about the local political process might not be surprised to hear a Mayor calling a political opponent "disruptive", e.g. "he always jumps up with a question", or "he is always raising his hand" or "he always accuses us of corruption", any more than the typical person would be surprised to hear a co-worker say of his neighbors "They have a lot of arguments in their family", or of his friend "He has some problems with his high-school aged son".

But if the typical person heard that the neighbors argued and "The police were often summoned," or that the family with a troubled son "Had the police there every week," that would give the circumstances a wholly different cast.

The courts have endorsed this very type of a 'comparative test': how would the statements have been construed with and without the defamatory element:

> The test of whether a statement is substantially true is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.
>
> Matovcik v. Times Beacon Record Newspapers, 46 AD 3d 636 (Second Dep't, 2007) at 638 (internal citations and quotations omitted, emphasis added) (where the court found that while some elements of the defamatory publication may have been substantiated as truth by a documentary showing in a motion to dismiss, the facts as documented did not disprove the pleaded false elements of the publication to a large enough extent to dismiss their overall defamatory effect on the mind of the reader)

In that same way, the false assertion that the Village 'routinely' has to summon police to their meetings because of the conduct of a political activist, the Plaintiff, creates an impression that is qualitatively different from the "pleaded truth" -- as must be accepted on the Motion to Dismiss (Matovcik, *supra*, at 637).

In fact, by that addition -- a concrete, factual element -- the claim not only loses its 'opinion' character as a matter of law, but far more importantly, it loses the subjective quality in the mind of the "reasonable reader". And that is the fatal mischief which renders it concrete, factual, and hence, actionably defamatory.

The context and overall meaning is rendered concrete, and substantiated by the (false) police element, and there is its defamatory character, as supported by the standards of James ("defamatory connotation") and Gross ("precise meaning") *supra*. Indeed it was for this reason Plaintiff worked so hard to have the article corrected, before resorting to litigation, as he had done with prior smears by the Village.

The further claim that Plaintiff sought to gain access to "every single filing of every little thing a resident wants to do on their home" which the Mayor inexplicably claims is something "you just can't do" (Complaint, p. A28) also suggests a kind of mania, nefarious purpose, or unlawful stalking behavior.

In fact, Plaintiff sought -- and was granted -- access to files intended for deliberation in public meetings of the Village review agencies; and the only such projects subject to public review related to major regulated activities such as home expansions, demolitions, rebuilding, and the destruction of multiple healthy trees on a property.

Thus the Mayor's entire premise regarding the review of records was knowingly deceitful and false, and the damage is done by its calculated falsehood.

As stated above, the decisions have been very clear: the role of the courts in determining, as a matter of law, the threshold issue of the possible defamatory character of statements is to evaluate the statement as a whole, and in light of the reading a normal person would give it, and to accept that reading if the phrases are "reasonably susceptible" (James, *supra*) of such a meaning.

In this case the phrases clearly meet such a standard.

It is noteworthy that over some years of waxing and waning hostility and disparagement in print by the Mayor and the Defendant Newspaper, Plaintiff did not previously sue for defamation, because the phrases used against Plaintiff were

generally 'protected', or arguably so.

Instead Plaintiff responded with letters to the editor ad other such refutations of similarly untrue and odious, but non-actionable, statements.

Plaintiff was attacked by the Mayor in a letter carried by another local newspaper claiming Plaintiff was just a trouble-maker only interested in causing discord in the community -- not in defending the environmental and community character as specifically supported by Village law (Affidavit in Opposition, pp. A243-4).

Defendant Newspaper published a prominent lead editorial -- possibly across all its roughly ten publication and its website -- claiming Plaintiff was a "Tree Lover Gone Wild" due to an Article 78 proceeding in which the Court determined that a prior decision constituted collateral estoppel on Plaintiff, a nuance, contested by Plaintiff to the Appellate Division, that was however lost on the Defendant (Complaint, p. A32).

Plaintiff is a former hard-hitting reporter, editor and publisher, and the originator of a short-lived community newspaper, and is well aware of the practice of responsible and aggressive journalism, and the laws of defamation.

Plaintiff knew that the highly distorted but subjective claims of the letter and editorial (*supra*) were most likely unactionable, but by the same recognized the ugly and reckless falsehoods in the article at issue here were defamatory, because

of the factual grounding they falsely claimed.

The trial Court, instead of examining the defamatory phrases as a whole -- including especially the claim of police involvement -- chose to "pick out and isolate particular phrases" (James, *supra*). The trial Court omitted any mention of the claimed police involvement, thus proceeding diametrically opposite the rules set out by the Court of Appeals. Furthermore the Court of Appeals rulings on holistic analysis of phrases was specifically raised by the Plaintiff (Memorandum of Law, pp. A273-4).

Thus the phrases subject to this action were indeed susceptible to a defamatory reading, and the trial Court failed accurately to apply the standard of review for the analysis of such statements, and the Decision should be reversed on that point.

2. The Action Should Not Have Been Dismissed Based On The Mayor's Assertion Of Absolute Privilege

The Courts in New York have clearly established that absolute privilege from action for defamation may be available to executive officials, including the mayor of a village. However, they have also set clear limits on that absolute immunity and defined the circumstances when it may be asserted -- but more often denied.

The proper inquiry of the trial Court was thus not whether a mayor may assert the privilege, but whether this Mayor may assert the privilege in the specific circumstances of the present matter. This the trial Court failed to do; it failed to

even acknowledge the arguments Plaintiff presented to refute the Mayor's claim (Decision and Order, p. A7).

Many of the appellate cases in the past 30 years have denied absolute privilege to executives with respect to their statements to the press.

The Second Department denied absolute privilege for comments made by a county executive to a local newspaper, even though the issues raised were found to be relevant to the discharge of his official duties:

> The subject matter of the allegedly defamatory comments made by the defendants was related to their public duties. The defendants Cohalan and Caputo as Suffolk County Executive and Comptroller, respectively, were concerned with the expenditure of public funds and the possibility that fraud had been committed upon the county (cf. Clark v McGee, *supra*, at p 621). However, their comments were public and not made during the performance of an essential part of their duties (cf. Clark v McGee, *supra*, at p 620). We find unpersuasive on this record the defendants' contention that the Newsday article series constituted a direct attack upon the integrity of the county government impelling a public response by them (cf. Lombardo v Stoke, 18 N.Y.2d 394, 400).
>
> Doran v. Cohalan, 125 AD 2d 289 (Second Dep't, 1986) at 290-1 (internal quotations and citations omitted) (where the alleged suspect influence of the Plaintiff on a public contract was raised by another official, who was ruled not protected by absolute privilege for his statements to a newspaper)

The Court of appeals denied absolute privilege to a town supervisor giving interviews to the press:

> In the instant case, defendant seeks immunity with respect to a statement he made about another public servant during the course of a news conference.... The absolute immunity with which we are here

> concerned... is aimed more directly at the protection of that speech which is necessary to the efficient operation of the government. In short, this type of immunity is designed in large part to foster forthright discussions within the apparatus of the government .... Thus, the guiding principle in determining the availability of this privilege must be the relationship between the speaker's fulfillment of his public duties and the circumstances of his speech.
>
> So viewed, defendant's comments are not entitled to an absolute privilege, for the simple reason that they were not made during his performance of an essential part of his public duties. In short, a public accusation of this nature is not a central part of defendant's public responsibilities. Although there do exist strong reasons for protecting such speech, the absolute immunity at issue on this appeal was not intended to serve such a function, and there exists no reason to stretch it out of shape in order to accommodate such situations....
>
> Clark v. McGee, 49 NY 2d 613 (1980) at 617-21 (where a town supervisor was denied absolute privilege for comments made to a radio interviewer regarding alleged fraud by a government official under his authority)

The Second Department denied a motion for summary judgement and remanded the case for discovery to establish whether absolute privilege was in fact applicable:

> ...[D]efendants normally enjoy an absolute immunity from all defamation claims (Stukuls v State of New York, 42 N.Y.2d 272, 279; Smith v Helbraun, 21 AD2d 830). However, this immunity only protects defendants in discharging their responsibilities (Smith v Helbraun, *supra*)....Plaintiff, however, alleges that defendants republished their charges by repeating them to the aforementioned outside organizations. Such a republication could have been outside the scope of the defendants' duties.... [P]laintiff should be allowed to conduct discovery to ascertain whether the alleged defamatory remarks were repeated to specific outside organizations and officials, the relationship of those organizations and officials to the defendants, and the circumstances under which such remarks, if any, were made.

> Supan v. Michelfeld, 97 AD 2d 755 (Second Dep't, 1983) at 757 (emphasis added) (where the Court held that, in a motion for summary judgement, whether the members of a board of education who enjoyed absolute immunity in the direct proceedings of the board still enjoyed such immunity with respect to statements they may or may not have made to the press is a determination that must be based on a factual determinations that require discovery; and furthermore if facts are in dispute or different inferences may be drawn from given facts, then summary judgement must be denied)

The Court of Appeals only allowed absolute privilege in a press statement where an attack on a government entity was widely-reported and thus urgently needed to be addressed:

> Absolute privilege does not, of course, mean that a public official can always defame with impunity. He may still be sued if the subject of the communication is unrelated to any matters within his competence (see James v. Powell, 14 N Y 2d 881) or if the form of the communication — e.g., a public statement — is totally unwarranted.
> .....
> Considering the widespread newspaper coverage given to the charges of bias, the propriety, indeed the necessity, of a public statement by the board may hardly be doubted. Nor may it properly be said that the board went beyond the sound exercise of its discretion in choosing to comment on the origin as well as the truth of the accusations. That being so, it follows, as we wrote in the Sheridan case (14 N Y 2d 108, 112-113, *supra*), that the board was 'acting within the scope of [its] official powers [and] must be accorded the protection of absolute privilege'.
>
> Lombardo v. Stoke, 18 NY 2d 394 (1966) at 401-2 (emphasis added, internal quotations and citations omitted) (Where the officials of a public college were held to enjoy absolute immunity for their press statement rebutting widely-reported claims of religious bias)

All the decisions cited that built on Lombardo (decided in 1966) demonstrate

that the *nature* of an "attack" on the government (Doran (1986) and Clark (1980)) or the *relation* of the speech at issue to the government function (Doran, Clark and Supan (1983)) are critical subjective questions and tests that require facts to establish, and must therefore be answered with facts to determine whether absolute immunity applies.

Such factual questions, which are missing or in dispute in this matter, were beyond the scope of the motion to dismiss before this trial Court, which conducted no such factual inquiry, and clearly in any event beyond resolving by the facts on the record at this point in the present action.

Plaintiff repeatedly indicated that the facts were not available to determine whether or not the Mayor's statements were "unwarranted" (Lombardo, *supra*) or "an essential part of [his] duties" (Doran, *supra*) or "an essential part of his public duties" (Clark, *supra*), as required for such immunity. Plaintiff raised numerous open questions as to what the Mayor was asked and what the nature of any "attack" might have been presented to him (Memorandum of Law, p. A268, A. 272).

In fact, Plaintiff was likely too generous in offering even the possibility that the facts could support absolute immunity in a 'best case' scenario, because in Lombardo -- the rare case permitting absolute immunity for a press statement -- the circumstances were wholly different.

In Lombardo, claims of religious discrimination against a public university were widely reported and widely known (*supra*), and the need for some response by the university was on that specific basis deemed proper by the court.

> The affidavit, charging that the appointment and promotional processes at Queens College were tainted with religious bias and prejudice, received exceedingly widespread coverage in the press.
>
> Confronted with this adverse publicity, the President of the college, the defendant Stoke, decided that it was necessary to defend the school against the attack and to issue a public explanation of the situation.
>
> Lombardo, *supra*, at 397 (emphasis added)

In the present case there are ***no facts or claims*** that any such criticism or "attack" on the Village or its officials was widely-reported -- or even reported at all, at the time of the defamatory statements potentially made 'in reply'.

Plaintiff has offered the hypothetical case that if Defendant Mayor could show that the Reporter asked about an allegation made by Plaintiff then perhaps the absolute privilege might be argued, but only after such facts were established -- which they were not (Memorandum of Law, p. A268, A. 272).

But clearly given the later cases (Clark and Doran, *supra*), and their direct rejection of such press statements from the cloak of absolute immunity, or the rejection of such a presumption absent discovery (Supan, *supra*), such a 'benefit of the doubt' now appears to Plaintiff unwarranted in this matter.

The Courts have been careful to ration the reach of absolute immunity, far

more careful than the trial Court in the present matter. The Court of Appeals has stated:

> Communications afforded an absolute privilege are perhaps more appropriately thought of as cloaked with an immunity, rather than a privilege against the imposition of liability in a defamation action. This immunity, which protects communications irrespective of the communicant's motives, has been stringently applied. In general, its protective shield has been granted only to those individuals participating in a public function, such as judicial, legislative, or executive proceedings.
>
> Toker v. Pollak, 44 NY 2d 211 (1978), at 219 (emphasis added, internal citations and quotations if any omitted) (where the Court refused to grant absolute immunity to any of the communications made to investigatory bodies regarding a judicial candidate who was possibly a corrupt public official) acc'd Silverman v. Clark, 35 AD 3d 1 (First Dep't, 2006) (where an attorney whose former colleague sued him for sending disparaging letters to former clients he felt the former colleague 'poached' was denied qualified privilege with respect to those letters)

Given the facts as presently established, and the law, the Mayor cannot claim absolute privilege in making the defamatory statements at issue here.

None of the tests established to show the statements were essential to the government function, and related to an attack on the integrity of government, have been met. In fact, the current facts establish the contrary.

3. The Action Should Not Have Been Dismissed Based On The Mayor's Assertion Of Qualified Privilege, and

4. The Record Shows Plaintiff Made Allegations Of Malice Sufficient To Defeat A Motion To Dismiss Based On Qualified Privilege

It is questionable on the thin record of facts presently established whether the Mayor was even eligible for qualified privilege in his interaction with the Newspaper.

But it is all but incontrovertible that the elements of "malice" extensively alleged by Plaintiff created a solid basis to deny the Motion to Dismiss on the basis of qualified privilege, certainly at the present stage of the action -- prior to discovery.

The granting of qualified privilege must be based on facts as to the relation of the parties among whom the defamatory statement was shared, and the privilege is dependent on an absence of malice in the expression of the defamatory statement.

One type of qualified privilege is among those with a "common interest":

> The Court of Appeals has upheld the application of the common interest privilege with respect to communications between board members of a tenants' association (Liberman, 80 NY2d at 437), between a college administrator and members of a faculty tenure committee (Stukuls v State of New York, 42 NY2d 272 [1977]), and between constituent physicians of a health insurance plan (Shapiro v Health Ins. Plan of Greater N.Y., 7 NY2d 56 [1959]). The rationale in applying the privilege in these circumstances is that "so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded" (Liberman, 80 NY2d at 437).

Silverman, *supra,* at 10 (emphasis added)

Qualified privilege has also been ruled to cover a government official who has a 'duty' to deal with the press, but it is limited to truthful expressions and it is limited to the connection to 'governmental affairs', in an echo of the limits on absolute immunity, *supra*. Thus:

> Where a defendant has a duty to impart certain information to another person, the communication is qualifiedly privileged provided the communicator has a good-faith belief that the information is true. Following this rule, qualified immunity has been bestowed upon press statements made by governmental representatives concerning governmental affairs.
>
> Feldschuh v. State, 240 AD 2d 914 (Third Dep't, 1997) at 915 (emphasis added) (where a defamation case was dismissed by summary judgement because the plaintiff had not defeated by a showing of malice the qualified privilege of the defendant to release public records)

The Mayor may have considered himself a spokesman for the Village, but he had no "duty" (Feldschuh) to comment on Plaintiff's conduct at public meetings, particularly when the comments he allegedly provided were so at variance to the truth.

It is not clear from any record that the reporter even asked about police issues, or about Plaintiff's alleged conduct at meetings, as the Mayor is alleged to have characterized.

Thus, whether or not the Mayor's alleged comments were responsive to a

legitimate issue, and thus subject to qualified privilege, is an open question at best that cannot be answered at this stage of the proceeding without more facts.

But the central disqualification for qualified privilege in this matter arises from the absence of "good-faith belief" (Feldschuh, *supra*) with which the Mayor's statements were expressed.

The statements were made with both a constitutional malice -- related to their knowing falsity, and common-law malice -- related to their ill-motivation.

Malice disqualifies qualified privilege:

> In order to overcome the qualified privilege, a plaintiff must demonstrate by tender of proof in evidentiary form that a defendant acted with malice. This, in turn, requires a showing that the statements were made with a high degree of awareness of their probable falsity (the constitutional standard of malice) or that malice was the one and only cause for the publication (the common-law standard). In regard to the latter, malice may be inferred where the statements go beyond those necessary for the purpose of the privileged communication or are gratuitously extravagant or vituperative.
>
> Hoyt v. Kaplan, 263 AD 2d 918 (Third Dep't, 1999) at 919, (internal quotations and citations omitted) (where the Court affirmed dismissal of a defamation action because plaintiff could not defeat qualified privilege among members of an organization in an election by a showing of malice through foreknowledge of the falsity of a statement or its extravagance under the circumstances)

Plaintiff furnished extensive fact-based allegations of malice with respect to the Mayor's statements, both in the Complaint (pp. A34-5) and in the Affidavit in Opposition (pp. A242-44).

As noted in Plaintiff's Memorandum of Law (p. A259), Plaintiff had the right to add to the Complaint at the Motion to Dismiss stage through affidavit and did so to address claims levelled in the Defendants' Motions to Dismiss:

> ...[I]in instances in which a motion to dismiss made under CPLR 3211 (subd [a], par 7) is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint....
>
> Rovello v. Orofino Realty Co., 40 NY 2d 633 (1976) at 636, (where the Court overturned the grant of a motion to dismiss in a contractual dispute because it ruled unless the matter is converted to summary judgement and the parties given the opportunity to make a factual presentation by affidavit, the facts of the Complaint and any affidavits in support must be accepted as true on a motion to dismiss), acc'd Blue Diamond Group v. Klin Construction, 73 AD 3d 958 (Second Dep't, 2010); Palestine Monetary Auth. v. Bank of N.Y., 2012 NY Slip Op 30012(U) Supreme Court, N.Y. Cty., (Kornreich, J.); Ashirov v. Ashirov, 2009 NY Slip Op 32957(U), Supreme Court, Queens Cty., (Lane, J.); Manela v. Barkow, 2012 NY Slip Op 33369(U), Supreme Court, N.Y. Cty., (Fried, B.J., J.)

Inexplicably, the trial Court stated in its Decision and Order that Plaintiff had not made any such allegations (p. A7).

In Plaintiff's Affidavit in Opposition, the following allegations were stated with respect to evidence of common-law malice of the Mayor:

> The Mayor has demonstrated on numerous occasions in in numerous ways common law malice toward the Plaintiff, which provides probative value as to constitutional malice.
>
> During a public hearing in April 2012, as Plaintiff was lawfully testifying, the Mayor chimed in with disorderly hecklers: Resident: "You're not even a resident." Mayor Koblenz: "You don't even live here okay? So it's enough already." (Plaintiff's Exhibit 9, Transcript

of Village Hearing, p. 132)

Following that hearing, as Plaintiff spoke to police he had summoned to assure his orderly exit in the face of violent hostility from some allies of the Mayor and the administration, the Mayor falsely alleged to the officers that Plaintiff had been "disruptive, very disruptive" at the hearing.

Plaintiff went to the Sixth Precinct that night to swear out a complaint of false report by the Mayor.

The Mayor also has on at least two occasions directly tried to interfere with Plaintiff's attempts to communicate with residents on village property including once telling him not to distribute a flyer in the pool area and threatening to call police, and on another occasion calling the police when Plaintiff handed out a flier after Hurricane Sandy. -- a similar copy of which is appended. (Plaintiff's Exhibit 10, Flier to Protect Trees).

The Mayor also humiliated Plaintiff by using police to escort him out of Village Hall for no valid reason during Hurricane Sandy, the action having occurred with almost no warning as Plaintiff was chatting pleasantly with staff over the course of several minutes after inquiring about documents for an impending meeting which had not been cancelled to Plaintiff's knowledge because the extended duration of the hurricane's disruption was not yet known.

The Mayor at numerous village meetings mocked scolded or refused to call on Plaintiff during public speaking sessions, although those practices have been interspersed with notably more cordial conduct in the past year.

The Mayor also wrote one or more noxious letters to The Roslyn News insulting and castigating Plaintiff by name, and falsely painting him as a nuisance making no constructive contribution: "Even in the face of continued rancor created by Richard Brummel we seek not hostility....[W]e continue to be confronted...by an individual's concentrated efforts to create discord". (Plaintiff's Exhibit 11, Mayor's Letter to The Roslyn News).

(Plaintiff's Affidavit in Opposition, pp. A242 *ff.*)

(Similar evidence of common-law malice was documented with respect to the Defendant Newspaper and its staff (Plaintiff's Affidavit in Opposition pp. A244-46)).

Plaintiff's Memorandum of Law also described the bases upon which constitutional malice was evident on the part of the Mayor, i.e. the knowing falsity of the statements:

> The Mayor and Board of Trustees knew very well that police had never been called to any meetings, except twice by Plaintiff himself, and that the statement as reported was completely false.
>
> The Mayor was present at all or most of the sessions of the Village Board attended by Plaintiff, and knew for a fact that police were never summoned because of any of the alleged misconduct that Plaintiff allegedly engaged in or any other reason by anyone other than the Plaintiff, on two occasions.
>
> The Mayor and Board also knew the untruth of the allegations that Plaintiff abused residents in meetings or took photos in such a way as to require police intervention, or behaved in a manner recognized as "very bad" in a police context.
>
> (Plaintiff's Memorandum of Law, p. A277)

Further, the Complaint described the untruth of the the Mayor's allegations in its statement of the facts of the case (Complaint, pp. A30-31).

As noted before the trial Court, Memorandum of Law, pp. A282-3, the law permits an inference of malice from the refusal of parties to correct falsities once they are brought to their attention:

> The Restatement of Torts also discusses the effect of the defendant's refusal to retract a statement after it has been demonstrated to him to be both false and defamatory stating, "Under certain circumstances evidence to this effect might be relevant in showing recklessness at the time the statement was published." The Restatement further recognizes that a state might constitutionally treat a deliberate refusal to retract a clearly false defamatory statement as meeting the knowledge-or-reckless-disregard standard, even though the conduct occurred subsequent to the publication. Restatement (Second) of Torts § 580A, cmt. d (2006). The Fifth Circuit Court of Appeals did just that in Zerangue v. TSP Newspapers Inc., 814 F.2d 1066, 1071 (5th Cir.1987), where it held that refusal to retract an exposed error tends to support a finding of actual malice.
>
> Weaver v. Lancaster Newspapers, Inc., 926 A. 2d 899, Pennsylvania Supreme Court (2007) at 906 (internal quotations and citations omitted) (where the ultimate state Court held that at the summary judgment phase of a defamation action the lower court should have allowed a jury to consider the question of malice as evidenced by an alleged grant of permission to re-publish a controverted allegation)

The same element of the Restatement of Torts was referenced with support in Celle v. Filipino Reporter Enterprises Inc., 209 F. 3d 163 (Second Circuit Court of Appeals, 2000) at 187, (where the Court found adequate evidence of malice and recklessness with regard to false newspaper accounts by a party in a contentious relationship with the complaining party in order to let the jury verdict stand with respect to two of three articles complained of).

(Celle provides an extensive overview of defamation law, in the New York context, and is further cited quoted below.)

The New York Courts have taken ruled in a similar vein on matters of retraction:

> That a retraction was promptly published might be considered evidence of lack of malice in certain instances but would not be sufficient as a matter of law for that purpose.
>
> Kerwick v. Orange Co. Publ'n, 53 NY 2d 625 (1981) at 627 (where the Court reversed the summary dismissal of an action for defamation despite a fulsome admission of error by the publication)(emphasis added)

As stated in Plaintiff's Memorandum of Law (pp. A278-9), at the present stage, a motion to dismiss before discovery, Plaintiff is only required to show there is evidence of such actual malice that may be further revealed in discovery.

The Court of Appeals has determined that in some ways this is a factual determination that requires discovery and cannot be disposed of before then:

> ...[T]he U.S. Supreme Court has instructed that a plaintiff must be held to the burden of adducing clear and convincing evidence of actual malice at the summary judgment stage so long as there has been a full opportunity to conduct discovery....
>
> Kipper v. NYP Holdings, 12 N.Y.3d 348 (2009) at 357 (internal quotations and citations omitted) (where the Court ruled that an essentially erroneous statement, willingly retracted upon request, could not in the absence of any clear evidence of malice by a newspaper be the basis to defeat summary judgment in a defamation action) acc'd Loder, *supra*, at 1201.

In the instant case, we are only at the stage of a motion to dismiss, prior to any such discovery as Kipper said the Supreme Court mandated.

A case cited by both Plaintiff and Defendant Village, Stukuls, also speaks of the role of discovery in eliciting the facts of malice prior to dismissal:

> ...[I]t cannot be said in advance of discovery that Dr. Stukuls will not

> be able to raise an issue of fact. That Dr. Corey uttered the defamatory matter before the committee does not necessarily mean that he was doing so to advance its interests. He may have been acting duplicitously while motivated solely by his ill will towards Dr. Stukuls.
>
> Stukuls v. State of New York, 42 NY 2d 272 (1977) at 282 (internal quotations and citations omitted)(where the Court denied absolute immunity and remanded the question of qualified immunity based on possible malice for university officials in a tenure determination meeting)

In this context the purpose of discovery is to determine if the elements of actual malice exist as meet the Court's test as outlined here:

> ...[T]o cross the constitutional threshold of actual malice, there must be clear and convincing evidence that the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of probable falsity. The inquiry is thus a subjective one, focusing upon the state of mind of the publisher of the allegedly libelous statements at the time of publication.
>
> Kipper, *ibid.,* at 354-5

Similarly, malice is to be inferred from evidence:

> Although actual malice is subjective, a court typically will infer actual malice from objective facts. ....These facts should provide evidence of negligence, motive and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice.
> .....
> Actual malice can be established through the defendant's own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story [among] other circumstantial evidence.
> .....
> Evidence of ill will combined with other circumstantial evidence indicating that the defendant acted with reckless disregard of the truth

> or falsity of a defamatory statement may also support a finding of actual malice.
>
> Celle, *supra*, at 183 (emphasis added)

On the motion to dismiss, Plaintiff's allegations must be accepted as true, thus for argument's sake at this stage of the proceeding, the Mayor's statements must be assumed false as Plaintiff has repeatedly alleged (Complaint, A30-33). The Courts have held:

> It is well settled that on a motion to dismiss a court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. The court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint.
>
> D'Amico v. Correctional Medical Care, 120 AD 3d 956, 4th Dept. 2014 (Fourth Dep't, 2014) at 960 (internal citations and quotations omitted, emphasis added) (where the Court ruled inter alia that an amended complaint sufficiently alleged facts required to state a cause of action for defamation to defeat a motion to dismiss)

Also:

> As a general rule, on a motion to dismiss the complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Here, the article and editorial asserted that the plaintiff engaged in misconduct in the course of his employment as a teacher at MPHS, and the plaintiff alleged in the amended complaint that the defamatory facts set forth in the article and editorial were false. Accepting the allegations of the amended complaint as true, the plaintiff stated a legally cognizable cause of action to recover damages for libel.

> Matovcik, *supra*, at 637-8 (internal citations and quotations omitted, emphasis added)

The Village was fully on notice in the present case at very least by the timely filing of a Notice of Claim for the reported false and defamatory statements of the Mayor (Complaint, p. A29).

Plaintiff also followed up about three months later with a letter to the Village demanding that the statements be retracted and the damage be rectified (Complaint, p. A29).

The failure of the Village or Mayor to respond in any manner (Complaint, p. A29) let alone to retract the false statements provides a probative element of "actual malice" by the reasoning in Weaver, and arguably as a corollary of Kerwick.

If it is argued that the Village had no obligation to consider the statements false, and thus its actions had no probative value because it believed them to be true, Plaintiff would counter that regardless, the Court is obliged at this stage of the proceeding to accept that having alleged such malice by the Village, the allegation must be accepted as true, and the Defendant's behavior viewed in such a light as is predicated on that allegation.

The factual reality is up to a jury -- or up to the Court after pre-trial discovery has provided adequate facts to make such conclusions.

Thus the elements of malice were clearly argued before the trial Court, and

create a valid probative basis for finding common-law and constitutional malice such that qualified immunity -- even if otherwise appropriate -- would be defeated.

Thus there is no basis for granting the Motion to Dismiss on the basis of qualified privilege of the Mayor with respect to the reported defamatory statements.

Conclusions

As any defamation case involving a newspaper, a government figure, and a public figure, this case has many complexities with respect to the press and the First Amendment protections, the privilege and immunity enjoyed by officials in some circumstances, and the high standard of defamation for a public figure.

But while Plaintiff is a *pro se* non-attorney litigant, Plaintiff is also a former journalist, comfortable in the public policy and legal realms, and a capable researcher based on education, vocational experience, and current activities.

The case presented to the trial Court was thoroughly researched in numerous points of law, down to whether statements made to a newspaper verbally would in any event be considered libelous (yes, pp. A294 *ff.*), and whether the statements could be considered slander based on the Penal Code (yes, pp. A296 *ff.*).

The granting of the Motion to Dismiss was completely unwarranted.

The perfunctory Decision and Order failed to engage any of the legal points Plaintiff brought to bear on the questions that were ruled on: the construction of

defamatory phraseology; absolute immunity; and evidence of malice as disqualifying qualified immunity, or even the availability of qualified immunity in the instant circumstances in any case.

In this Brief, therefore, Petitioner has once again presented the laws as they apply to the construction of defamatory phraseology, absolute immunity, qualified immunity, and the strict rules governing the determination of a Motion to Dismiss, among other issues.

Plaintiff has shown how the facts of the case in no way support dismissal at this stage of the action, because (1) absolute immunity for flagrantly unjustified statements such as the Mayor reportedly made about matters not yet in discussion in the public domain -- by any demonstrated facts -- are not protected by absolute immunity; and (2) Plaintiff clearly asserted and factually demonstrated both common law and constitutional malice such that a dismissal of the case based on qualified immunity was also unwarranted at this stage of the action; and (3) the words spoken by the Mayor, as reported, painted a concrete, factual image, one buttressed and molded by the alleged involvement of police, such that far from being whimsical opinion they were in fact a devastating -- albeit false -- indictment.

Furthermore Plaintiff showed that he was fully within his right to augment and repair any defects in the Complaint by the Affidavit in Opposition to the Motion to

Dismiss, and that his factual allegations were required to be given full credence in the course of the determination of the Motion to Dismiss.

This is a highly regrettable exercise for Plaintiff, who as he writes this Brief is literally obliged to delay urgent other business related to his environmental protection efforts upon which many people are counting, among other vocational work and life necessities.

Furthermore the damage caused by the false and malicious allegations has festered on the Internet for over two and a half years, causing not only untold damage but palpable anguish for Plaintiff as he contemplates its effect on potential allies and supporters, on residents and neighbors in the Village who have read it or heard of it, and those strangers far afield from the Village whom he works to recruit or engage in various environmental battles he wages.

This critical legal action to clear Plaintiff's name and to repair the damage should never have been derailed by the trial Court. Neither fact nor law dictated the outcome.

It thus remains for this present Court to restore the rule that malicious character assassination, particularly by those who have a public voice due to their public office, has no place in the arena of public policy and will be rectified by the legal system when all else fails.

To do any less is to permit political malpractice -- character assassination,

intimidation, harassment -- to fester, and for the laws of defamation intended to rectify such corrupt behavior to themselves be flouted, by both the political actors and their enablers.

January 1, 2016
Nassau County, N.Y

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Statement of Compliance

This Brief was prepared on a computer in Times New Roman font, Fourteen Point size, Double-spaced spacing, and the Word Count is 10,136.