SCAN

SHORT FORM ORDER *md*

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

CROWE DEEGAN LLP,

Plaintiff(s),

-against-

MOTION DATE:2/3/06
INDEX NO.:447/04
SEQ. NO.1
CAL. NO.

PETER J. SCHMITT,

Defendant(s)

The following papers read on this motion for summary judgment:

Notice of Motion/ Order to Show Cause.....	1-7
Answering Affidavits.....	8,9
Replying Affidavits.....	10-11
Briefs:	14,15

Upon the foregoing papers, it is ordered that this motion by defendant Peter J. Schmitt for an order pursuant to CPLR 3212 awarding summary judgment dismissing the complaint is denied on the grounds that a question of fact is presented as to whether the defamatory statements made of and concerning plaintiff Crowe Deegan, LLP, a public figure, were made with actual malice.

Plaintiff Crowe Deegan LLP brings this action against Peter J. Schmitt, a Nassau County Legislator , sounding in defamation. The controversy arose out of an investigation by the Nassau County Legislature into the financial conduct of former Nassau Deputy County Executive Peter Sylver, and the agencies comprising the Economic Development Vertical (EDV) under his control.

Legislator Schmitt made statements to the media outside the legislature and outside his office and the protection of legislative immunity (**People v. Ohrenstein**, 77 NY2d 38, 54 [1990] [legislative immunity does not extend to speeches in the community, newsletters and press releases]). He made the subject statements both before legislative hearings commenced, as well as during the period they were ongoing. Specifically, on January 12, 2004, he called a press conference and issued a press release, on February 29, 2004 he made statements to Newsday, and on February 30, 2004 he appeared on Focus 55, a television broadcast.

Subjects in the legislative investigation of wrongdoing included Deputy County Executive Peter Sylver and plaintiff Crowe Deegan, LLP, a law firm which had performed legal services for several of the agencies under the control of the EDV. Crowe Deegan was instrumental in establishment of the EDV, the purpose of which was to bring all development agencies under one roof to promote, streamline and coordinate economic development in Nassau County.

Schmitt inquired during the hearings into the hiring of Crowe Deegan without a competitive process, its performance of services prior to Suozzi's election and retroactive approval of its contract, its role as architect in the flawed EDV, a system that allowed spending abuses to occur, and finally its role in securing a credit from the Garden City Hotel on Peter Sylver's County credit card at a time when an investigation into his conduct had been demanded.

The legislative hearings did not commence until January 21, 2004. On January 12, Schmitt held a press conference and issued a press release. The complaint identifies the following words in the press release as defamatory:

> 1. "How could Crowe Deegan receive this exorbitant, unauthorized amount of money for work they did not perform?"
>
> 2. "...Crowe Deegan contributed illegal money to the campaign of newly elected Nassau County Legislator David Mejias. [...] These contributions

> totaled $4,000, nearly $2,000 over the legal limit to a political race for County Legislature."

In subsequent media interviews, on February 29, 2004 and February 30, 2004, Schmitt stated:

> 3. "Then you have this Crowe Deegan law firm that goes to the Garden City Hotel in November . . . after we have called for hearings . . . and say 'that $238 bill that's on the county credit card for Peter Sylver, you pay it or wipe it off' and the Garden City Hotel does . . . . The fact is the law firm - and they have an ethical and moral and legal responsibility - they're tampering with evidence: they're sanitizing records."
>
> 4. "I'm saying to you that the revelations of the Crowe Deegan law firm tampering with evidence . . . "

Defendant Schmitt here seeks summary judgment. First he contends that his statements are protected statements of opinion. In the event his statements are found to be statements of fact, Schmitt contends that plaintiff is a public figure or a limited purpose public figure and therefore must, but cannot, prove actual malice. In the alternative he contends that the statements are the subject of public interest and are therefore privileged. Schmitt avers that there is no evidence of actual malice to defeat his limited public figure defense. Nor, he contends, is there evidence of common law malice or gross negligence to overcome the public interest privilege in the event that it is determined that plaintiff is a private rather than a public figure.

Expressions of opinion "are cloaked with the privilege of speech afforded by the First Amendment" (**Guerrero v. Carva**, 10 AD3d 105, 111 [1st Dept 2004]). "[F]alse or not libelous or not" opinion is "constitutionally protected and may not be the subject of private damage actions" (**Guerrero v. Carva**, supra, quoting **Rinaldi v. Hold Rinehart & Winston**, 42 NY2d 369 [1977], cert.

denied 434 US 969 [1977]). The court rejects the contention that defendant Schmitt's statements constitute opinion.

Whether a statement is one of fact or opinion is a question of law for the court, and depends upon "whether a reasonable reader or listener would understand the complained-of assertions as opinion or statements of fact" (**Millus v. Newsday**, 89 NY2d 840, 842 [1996], cert. den. 520 US 1144 [1997]). In determining whether a statement constitutes fact or opinion, the following factors are considered:

> (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 NY2d 146, 153 [1993] [emphasis supplied], quoting **Steinhilber v. Alphonse** , 68 NY2d 283, 292 [1986]). The last factor, the public signal factor, "lends both depth and difficulty to the analysis" (**Brian v. Richardson**, 87 NY2d 46, 51 [1995]).

When assessing an opinion, a "second level of inquiry" is required concerning the "stated factual basis," if any, as only expressions of "pure opinion" are not actionable (**Jewell v. NYP Holdings**, 23 F.Supp.2d 348 [S.D.N.Y.1998]). A pure opinion is accompanied by a recitation of the facts upon which it is based, or, if the facts are not presented, the opinion must not imply that it is based upon undisclosed facts (supra).

Here a review of the challenged statements reveals an absence of issues concerning whether or not they constitute protected opinion. While the term exorbitant may constitute opinion, language stating that Crowe Deegan received an unauthorized amount

of money for "work they did not perform" and language stating that the firm contributed "illegal" money "over the legal limit" to Legislator David Mejias, is precise and capable of being proven true or false. Either Crowe Deegan did perform legal work for which it was compensated, or it did not. Crow Deegan's contribution to David Mejias' campaign was either over the legal limit or it was not. A campaign contribution can be one dollar over or one dollar under the legal limit, a more precise question is difficult to conceive.

The immediate context of the foregoing statements was a press release dated January 12, 2004, concerning a legislative investigation and hearing yet to be commenced. The headline reads, "Republican Legislators Demand Ouster of Suozzi Favored Law Firm." The headline does not demand an investigation, it demands ouster. An ordinary reader would not expect a law firm to be fired based upon opinion. Thus the first signal, the headline, indicates that the article will provide a factual basis to support the "demand" for "ouster."

The body of the press release states that a review of Crowe Deegan's billing records indicates that the firm received "over $600,000" for legal services on behalf of several EDV agencies, then proceeds to call the amount "unauthorized" and to claim that the work was not done. Schmitt indicates that the records show that Deegan Crowe "charged the County for services prior to Tom Suozzi's taking office" and made illegal campaign contributions to the Meijas campaign in a specified dollar amount (almost $2,000). Nothing in the foregoing can be understood to signal opinion to the ordinary reader, even in context.

Moreover, the "inclusion" of dollar figures, both with respect to legal services and illegal campaign contributions, "would signal any reasonable reader that assertions of fact were being conveyed" (see, **Guerrero v. Carva**, 10 AD3d 105 113 [1st Dept 2004][supporting details "signal any reasonable reader that assertions of fact [a]re being conveyed"]).

The same holds true for Schmitt's later public statements

charging that Crowe Deegan tampered with evidence. Evidence tampering is a felony (Penal Law § 215.40). Schmitt states that Crowe Deegan attempted to hide Sylver's charges to the Garden City hotel, stating, "you have this Crowe Deegan law firm that goes to the Garden City Hotel in November . . . after we have called for hearings . . . and say 'that $238 bill that's on the county credit card for Peter Sylver, you pay it or wipe it off' and the Garden City Hotel does" The language used is clearly referring to conduct of Crowe Deegan with respect to a $238 hotel bill, not opinions of legislator Schmitt. The larger social context, that the statements were made while a legislative hearing is being conducted into Sylver's conduct suggests Crowe Deegan is involved in a cover up (see, **Gross v. New York Times Co.**, 82 NY2d 146, 154 [1993] [charges that plaintiff engaged in cover-ups actionable]).

Addressing defendant's contention that the foregoing statement is true and therefore does not constitute defamation, a question of fact is presented. While Schmitt avers that the bill was withheld by the administration from legislators investigating Sylver's misconduct, Crowe Deegan has a colorable explanation for its own conduct. Crowe Deegan avers that, upon the request of the County to determine proper allocation of credit card bills, it placed a call to Sylver to determine how the Garden City Hotel bill should be charged, to a federal grant program or the County general fund. Sylver advised the firm that the hotel room was reserved for a meeting but was not used and that he was entitled to a credit. Jon Caiman, of Crowe Deegan, a former District Court Judge, called the Hotel to request a credit and one was provided. The credit card records were not altered, as both the $238 charge and the $238 credit appear on the credit card statements.

Regarding the truth of the Schmitt's statement that Crowe Deegan made an illegal campaign contribution, Crowe Deegan as a partnership was entitled to contribute approximately $2,000 per partner to a legislative candidate, thus the statement concerning "illegal money" and exceeding lawful limits is false as a matter of law. A partnership by definition includes at least two persons.

Finally with respect to Schmitt's claim that Crowe Deegan did

not perform the work for which it was paid, the contention is put forward that it was Schmitt's belief that the firm's poor performance as the EDV architect is the equivalent of not performing. Counsel for Schmitt states, "As for Mr. Deegan's belief that the providing of questionable legal advice is not the same as collecting monies for work not performed, we have a difference of opinion." With due regard, and notwithstanding the contentions of counsel, defendant Schmitt did not publicly state that Crowe Deegan performed poorly. He stated that the firm did not perform at all. In a political context, the inference could be one of a "no show" job or position.

With respect to the status of Crowe Deegan, the court finds that the firm is a public figure. When sufficient facts are set forth and are undisputed, a public figure determination "should be made by the court as a matter of law" (**Curry v. Roman**, 217 AD2d 314, 319 [4th Dept 1995], lv app denied 88 NY2d 804 [1996]). The "essential element in determining public figure status is 'that the publicized person has taken an affirmative step to attract public attention'" (supra). While one may be an involuntary public figure, instances are "exceedingly rare" (**Gertz v. Robert Welch, Inc.**, 418 US 323, 345 [1974]).

The distinction between the treatment accorded public and private figures is explained in **Gertz**. "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth" (**Gertz**, supra at p 342). Public figures and officials have access to media to refute any defamatory statements. On the other hand private individuals usually do not. **Gertz** also identifies a "normative" purpose, stating that an "individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs" (**Gertz**, supra at p 344).

In the public figure calculus is included such considerations as whether the figure ever held a "remunerative public office" ,

held "news conferences" or affirmatively made an issue public, or engaged in purposeful activity which amounted to "a thrusting of [one's] personality into the 'vortex' of an important public controversy" (**Gertz v. Robert Welch, Inc.**, 418 US 323, 351 [1974]; **O'Neill v. Peekskill Faculty Ass'n**, 120 AD2d 36 [1986], app dsmd 69 NY2d 984 [1987]; **Dameron v Washington Magazine**, 779 F.2d 736 [D.C. Cir. 1985], cert denied 476 US 1141[1986]). Such a figure normally commands "sufficient continuing public interest" and has "sufficient access to the means of counter-argument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements" (**Dameron**, supra at p 741).

With regard to even prominent attorneys, legal representation of a client, standing alone, does not establish public figure status (**Gertz v. Robert Welch, Inc.**, supra). "To hold otherwise would place an undue burden on attorneys who represent famous or notorious clients' " (**O'Neil v. Peekskill Faculty Ass'n**, 120 AD2d 36 [1986], app dsmd 69 NY2d 984 [1987], quoting **Marcone v. Penthouse Intl. Mag. For Men**, 754 F2d 1072, 1081, 1085, cert denied 474 U.S. 864 [1985]).

With respect to a particular controversy, there is a framework for determining whether one is a limited purpose public figure, that is, one who holds public status "only for the particular controversy she thrusts herself into" (**James v. Gannet Co.**, 40 NY2d 415, 423 [1976]). The framework includes plaintiffs

> (1) who "'thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,'" * * * (2) who "'invite attention and comment'" by "tak[ing] an affirmative step to attract public attention" with respect to the subject of the allegedly defamatory commentary
> * * * (3) who "project" their "name and personality" * * * before the community or "into the limelight" * * * as a "leading authority" on the subject of the litigation . . . and (4) who maintain "continuou[s]" contact with the press or media.

(**Lee v. City of Rochester**, 174 Misc.2d 763, 770 [1997], affd 254 AD2d 790 [4th Dept 1998]).

Defendant has submitted sufficient evidence of ongoing media attention to Crowe Deegan with respect to its development work for municipalities in the area of Brownfields grants for redevelopment and cleanup of industrial areas, in particular, the waterfront clean up in the City of Glen Cove. Glen Cove was designated by a consortium of federal agencies as one of sixteen "Brownfields Showcase Communities." Indeed a Long Island Business News article identifies Crowe Deegan as the "go to" firm "for economic development throughout Long Island."

Crowe Deegan has issued press releases, and its partners and members have held public office. Just to note certain media highlights in the supporting papers, Jon Kaiman was a former District Court Judge and is now the Supervisor of the Town of North Hempstead. Francis Deegan was a former mayor of Sea Cliff and a member of the Village Board of Trustees in Glen Cove. Former partner Robert A. Benrubi served as the Executive Director of the Glen Cove Community Development Agency, and as the Director of Brownfields Redevelopment for Nassau County. Of counsel Charlie King was an executive for the New York New Jersey Region of HUD, engaged in extensive campaign work in New York State, and formed a political action committee. Based upon the foregoing, and in the absence of controverting evidence, the court finds as a matter of law that Crowe Deegan is a public figure.

The standard applicable to establish defamation against a public person is the New York Times actual malice standard, i.e., to be actionable the statement must be made "with knowledge that it was false or with reckless disregard of whether it was false or not" (**New York Times Co. v. Sullivan**, 376 US 254, [1964]; **Millus v. Newsday**, 89 NY2d 840, 843 [1996]). Reckless disregard has been held to include "a high degree of awareness of . . . probable falsity" (**Gertz v. Robert Welch Inc.**, supra) and "serious doubts as to the truth of [the] publication" (**Liberman v. Gelstein**, 80 NY2d 429, 438 [1992], quoting **St. Amant v. Thompson**, 390 US 727, 731 [1968]).

Where an internal investigation is ongoing, a jury may infer

malice, i.e., reckless disregard, where a "news release, which implied that plaintiff had committed numerous improprieties, was published prior to the completion of defendant's internal investigation" (**Stanwick v. Meloni**, 158 AD2d 944 [4th Dept 1990]).

Accordingly, summary judgment is denied.

Dated: APR 12 2006

J.S.C.

crowe