

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JUDGE SHIRLEY WERNER KORNREICH

PRESENT: _____

PART 54

Index Number : 112604/2004

BALKANY, MILTON RABBI

vs

VILLAGE VOICE MEDIA

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 112604/04

MOTION DATE 11/8/07

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3

4, 5

6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
MAR 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/19/08

HON. SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
RABBI MILTON BALKANY,

Plaintiff,

Index No.: 112604/04

-against-

DECISION
and ORDER

VILLAGE VOICE MEDIA, INC., TOM ROBBINS,
and ALEXANDER ZAKHAROV

Defendants.
----- X

KORNREICH, SHIRLEY WERNER, J.:

This is a defamation action arising from two newspaper articles written by defendant Tom Robbins (“Robbins”) for *The Village Voice*¹ on September 3, 2003 and March 9, 2004. Robbins and *The Village Voice* now move for summary judgement pursuant to CPLR § 3212 dismissing the complaint and for an order of preclusion and sanctions pursuant to CPLR § 3126. Plaintiff opposes.

I. *Statement of Facts*

A. *Rabbi Milton Balkany*

For nearly 40 years plaintiff Rabbi Milton Balkany (“Rabbi Balkany”) has acted as dean of Yeshiva Bais Yaakov, an Orthodox Jewish day school in the Borough Park section of Brooklyn, New York. Rabbi Balkany is also the President of the Beth Yitchok Congregation. He is known for his political access and advocacy on behalf of Orthodox Jewish causes. Rabbi Balkany avers that he does in fact serve as a lobbyist although when he “do[es] lobbyist work,

¹*The Village Voice* is a weekly newspaper owned and operated by defendant Village Voice Media, Inc. For the sake of simplicity in this opinion, both will be referred to as “*Village Voice*.”

FILED
MAR 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

[he] hire[s] a lobbyist in Washington” to do the work for him. EBT of Rabbi Balkany p. 8. He refers to this work as “Ambassadorial efforts on behalf of the Jewish Community.” *Id.* at 281.

Rabbi Balkany has been the subject of much press attention relating to his political prowess and fund-raising efforts. Among those are: an August 14, 1989 article in *The LA Times* detailing his assistance to a Los Angeles yeshiva in receiving a \$1.8 million grant; a January 28, 1994 article discussing his efforts to have David Luchins (“Luchins”), an Orthodox Jewish aide to Senator Daniel Patrick Moynihan, excommunicated for causing financial harm to yeshivas inside the state of Israel; an article about his efforts in 1995 to secure the release of convicted Israeli spy Jonathan Pollard from federal prison; an April 8, 1996 article in *The Washington Post* detailing his strong ties to then Senate Majority Leader Robert J. Dole and Senator Dole’s assistance in securing federal funding for Helping Hand Heritage Centers (an umbrella association of six Orthodox Jewish groups). Rabbi Balkany’s ability to raise significant amounts of money from the Jewish community caused him to be dubbed “The Brooklyn Bundler” by *Common Cause Magazine* in its May/June 1990 issue.

Further, Rabbi Balkany has delivered numerous invocations and has officiated at approximately 40 events for President’s Reagan, George H.W. Bush and Clinton. He also has served as Guest Chaplin at the House of Representatives and Senate in June 2003 at the request of Representative Sue Kelly (R-N.Y.) and Senator Charles Schumer (D-N.Y.), respectively.

B. Affidavit of Tom Robbins

1. Daycare Voucher Controversy

Robbins, a reporter who has spent approximately 23 years covering politics in New York City, avers the following. He worked at *The Village Voice* from 1985 to 1987, followed by work

at *The New York Observer* from 1987 to 1988 and *The Daily News* from 1988 to 2000, before returning to *The Village Voice* in 2000. While still at *The Daily News*, Robbins, along with two other reporters, co-authored a front page article on January 23, 2000, entitled “Rabbi’s Big Day Care Coup - B’klyn Communities With Pull Score Most Vouchers from City” (“the January 2000 *Daily News* Article”). This piece highlighted the disproportionate number of New York City daycare vouchers that were awarded to four neighborhoods in Brooklyn.² As the article related, Rabbi Balkany was at the forefront of the campaign to secure vouchers for these four neighborhoods. He met with then Mayor Giuliani’s former Chief of Staff Bruce Tietelbaum and Mayoral Adviser Ilene Marcus and was able to obtain intimate knowledge of the program. For example, while the City usually required families to attend “eligibility screenings” before obtaining a voucher, Rabbi Balkany orchestrated a process by which the members of his community evaded the screening. As a result, Rabbi Balkany’s Borough Park neighborhood was awarded approximately five times the amount of vouchers than the Bronx or Manhattan.

The January 2000 *Daily News* Article also reported, for the first time, that “Balkany charged low income Jewish families in Brooklyn fees to process applications for the daycare voucher program.” Robbins avers that Rabbi Balkany himself was the source of this information. He further avers that he confirmed this fact through his interview with Nicholas Scoppetta, the then Commissioner of Administration for Children’s Services. Scoppetta was quoted as saying he did not have a problem with Rabbi Balkany charging fees and that it was not illegal for him to do so. However, the article also stated that Scoppetta later changed his opinion

²The vouchers were awarded as follows: Staten Island - 382; Manhattan - 484; Bronx - 562; Queens - 1,688; Brooklyn - 8,901.

and referred the matter to the Department of Investigation ("DOI").

Following this publication, numerous other news outlets picked up the story, including *The New York Times*, *Associated Press*, *Newsday*, *The New York Post*, *Amsterdam News* and national Jewish newspaper *Forward*. The *Newsday* article, which appeared on January 26, 2000, reported, "In an interview yesterday, Balkany said he had helped Borough Park parents apply for the vouchers for use at other neighborhood schools and acknowledged he had charged them a fee - it was unclear how much. But he said the fee was legal and insisted that city officials had given him a go-ahead to process the applications." The *New York Post* article, published on January 26, 2000, stated, "The Department of Investigations is looking into fees that Balkany admits he charged to process applications for the program." The *Associated Press* article, published on January 24, 2000, related, "Balkany himself has charged families and schools a fee for processing voucher applications." Robbins avers that Rabbi Balkany never challenged the accuracy of these statements, told him directly that he charged families a fee for processing their voucher applications and never questioned the allegations' accuracy.

2. *The First Village Voice Article*

On August 26, 2003, Rabbi Balkany was arrested on charges alleging that he misappropriated a HUD grant of approximately \$700,000. The complaint detailed four felony counts: theft of government property; false claims; wire fraud; and obstruction of justice. Robbins avers he first learned about these charges from a press release issued by the U.S. Attorney's Office for the Southern District of New York. An unsealed copy of the criminal complaint was issued with the press release.

Robbins wrote an article for the September 3-9, 2003 issue of *The Village Voice* entitled

“Rabbi Bunco” (the “First Voice Article”). Robbins avers that, in writing the article, he relied on various sources including previously published reports, the U.S. Attorney’s press release, the criminal complaint, his own observations from the day Rabbi Balkany was arraigned in federal court, his conversation with Rabbi Balkany’s defense attorney Ben Brafman and comments that Brafman made to the gathered media following arraignment.

In addition, Robbins details some of the more specific research that he did in preparation for the First Voice Article. The criminal complaint referred to two unpaid mortgages on Rabbi Balkany’s yeshiva that should have been paid off with the HUD grant. Robbins avers that he went down to the Supreme Court in Brooklyn to see the court filings regarding these two mortgages. Moreover, he avers that the court documents stated that there indeed were two unpaid mortgages on the yeshiva and foreclosure proceedings had already been initiated.

The First Voice Article began by providing background information about Rabbi Balkany’s numerous invocations, campaign contributions, how he became known as the “Brooklyn Bundler,” his efforts on behalf of Luchins and incidents that helped him obtain his political clout. Robbins used previous articles he had written for *The Daily News* regarding the school voucher scandal. While explaining what he had previously reported in The January 2000 *Daily News* Article, the First Voice Article states :

The [Daily] News revealed that Balkany helped corral for Orthodox Jews more than half the city’s total allocation of vouchers. Balkany offered a full-service operation charging families fees to fill out applications for the vouchers, which were in desperate demand all over the city. Nicholas Scoppetta, at the time serving as commissioner of children’s services, was sufficiently disturbed by events to refer the matter to the city’s Department of Investigation, which opened a probe that was later joined by federal investigators...As of last week, however, that probe was still unresolved...

Rabbi Balkany alleges that the sentence from this paragraph which states he “charg[cd] families fees to fill out applications for the vouchers” (the “First Fee Statement”) is defamatory.

The First Voice Article then discusses the criminal complaint. At the end, it includes quotes from Mr. Brafman refuting the charges and proclaiming his client’s innocence.

3. *Deferred Prosecution Agreement and Connection to Prison Bribery Scheme*

On or about February 23, 2004, Rabbi Balkany entered into a deferred prosecution agreement (“the Agreement”) with the government, regarding the criminal charges levied against him. Pursuant to the Agreement, if Rabbi Balkany adhered to all of the outlined terms and conditions for six months and received a satisfactory report from his supervising Pretrial Services Officer, the U.S. Attorney’s office would not prosecute him any further. The Agreement contained three “special conditions”, two of which, were directly related to Rabbi Balkany’s conduct regarding the misappropriation of HUD funds. The third, however, seemingly had nothing to do with these charges, stating:

As a special condition, henceforth, you shall not contact, lobby, or cause any other person to contact or lobby, any official or employee of the United States Bureau of Prisons with regard to any matter, including, but not limited to, any matter involving a federal inmate or any other person charged or convicted of a federal crime.

(The “Special Lobbying Condition”). Robbins avers that this caught his attention and is what eventually led to the publication of the second allegedly defamatory article.

During his research into the Special Lobbying Condition, Robbins avers he came across two articles in *The Daily News* connecting Rabbi Balkany to a prison bribery scheme. The first article, written by Robert Gearty, was published on December 23, 2003. This article, entitled

“Two Link Rabbi to Jails Scheme,” discussed a bribery ring where inmates in federal prison would pay bribes in order to be moved to “country club prisons.” The article further describes two men, Alexander Zakharov and Sam Kaplun, who were arrested in 2001 and subsequently pled guilty to involvement in the prison bribery ring. According to *The Daily News*, both men implicated a rabbi who would take the bribe money and distribute it to those who could arrange for the inmates to be transferred. According to *The Daily News*, “law enforcement officials said that Rabbi is Milton Balkany.” The second *Daily News* article entitled “Rabbi Under Fire Cuts 700G Deal”, published on February 24, 2004, explicitly ties the Special Lobbying Condition to the prison bribery scheme. This article states that Rabbi Balkany “was implicated - but never charged - in a scheme to bribe prison officials to get inmates transferred to cushy ‘Club Fed’ type prison camps from tougher lockups.” This article contains two direct quotes from Rabbi Balkany in which he thanked God for his “vindication” noting that he “personally never took a penny improperly, and today’s court action reflects that very clearly.”

4. *The Second Voice Article*

Robbins wrote an article for the March 3-9 issue of *The Village Voice* entitled “Jail Breaks - Influential Rabbi Barred from Lobbying Federal Prison Officials (the “Second Voice Article”). The article contains the following allegedly defamatory statements:

[Rabbi Balkany] acknowledged collecting fees from parents to help fill out applications for the vouchers. (Second Fee Statement).

Among those [Rabbi Balkany] said he helped cope with their prison time are hotel queen Leona Helmsley and online electronics chain-store mogul “Crazy Eddie” Antar. (Helmsley/Antar Statement).

[Quoting Joel Davis], [Rabbi Balkany] would speak to a congressman, and the congressman would speak to the Bureau of Prisons, that’s how it worked. (Congressman

Statement).

[Joel Davis added that] Balkany even arranged for his appeals brief to be read by a federal judge. (Appeals Brief Statement).

The roots of the prohibition [Special Lobbying Condition], however, appear to lie in a criminal case in Manhattan federal court, first reported by *The Daily News*' Robert Gearty. That case involves a pair of Russian immigrants who have admitted they engaged in a bribery conspiracy to pay off a Borough park rabbi who would, in turn, arrange for another imprisoned Russian to be transferred to a less restrictive prison camp facility. The name of the rabbi has not been revealed in the case, but according to Alexander Zakharov, a 43-year-old ex-limousine driver who admitted serving as a go-between in the bribe effort, the money was supposed to go to Balkany.

'That is who I was supposed to see, at his yeshiva,' Zakharov said in a phone interview last week.

Indeed, after his arrest by FBI agents in August 2001, Zakharov said he met twice with Balkany at the Borough Park girls' school. (Together "Zakharov Statements").

In his affidavit, Robbins explains the sources and reasoning behind the publication of each allegedly defamatory statement.

Robbins avers that during his research, he was provided with names of people whom Rabbi Balkany had assisted while they were in prison. Three of the names Robbins came across were Leona Helmsley, "Crazy" Eddie Antar and Joel Davis. Regarding the Appeals Brief and Congressman Statements, Robbins avers that he spoke with Davis, who had served time at Fort Dix in the 1980's for an arson insurance scam. Davis confirmed that Rabbi Balkany had helped him as well as other Jewish inmates at Fort Dix. He provided Robbins with the Congressman and Appeals Brief Statements as illustrations of the kind of assistance he was provided. Robbins states that these two quotes were in reference to "straight forward prison advocacy work" Rabbi Balkany provided Davis. In fact, a quote from Rabbi Balkany stating, "[He] always came in on a fair case...Whether it was to provide prayer books or kosher food" appears directly after these two allegedly defamatory statements. Robbins avers that there is nothing wrong in asking a

congressman for help to obtain kosher food or assistance during religious holidays. Congruently, Robbins further avers that in regard to the Appeals Brief Statement he neither interpreted Davis to mean that Rabbi Balkany had done anything improper or unethical nor did he report that there was anything wrong with having a judge read and comment on Davis' appellate brief.

As to the Helmsley/Antar Statement, Robbins avers that to properly understand its meaning the entire paragraph must be read in context. It states:

Balkany said his advocacy for white-collar criminals has always been altruistic, aimed at helping Jewish prisoners obtain kosher food and assistance on religious holidays. Among those he said he helped cope with their prison time are hotel queen Leona Helmsley and online electronics chain-store mogul "Crazy Eddie" Antar.

Therefore, Robbins avers that he was describing the 'altruistic' assistance Rabbi Balkany provided Jewish inmates and did not report this work on behalf of prisoners to be criminal, corrupt, or unethical. Moreover, Robbins avers that during an interview he had with Rabbi Balkany prior to the publication of the Second Voice Article, he asked him whether or not he received any contributions from Antar or Helmsley in exchange for his assistance. Rabbi Balkany stated that following his arrangement for Helmsley to be briefly released from prison to visit family members' graves prior to Yom Kippur, she made a contribution to his Yeshiva. It was later discovered during his deposition that Helmsley donated \$1 million to his school in 1992.

Regarding the Zakharov Statements, Robbins avers that he did not simply rely on *The Daily News*' reporting. He claims that he obtained a copy Zakharov's October 30, 2003 hearing transcript in federal court before Judge Allen Hellerstein. At the hearing, Zakharov detailed the specifics of his involvement in the bribery scheme. The transcript quotes Zakharov as stating

that from January to August 2001, he along with Vadim Kaplun (Sam Kaplun's son) collected money from federal inmates for the purpose of moving them from one federal facility to another. He claimed he then gave the money to Sam Kaplun, who would give it to a rabbi for the purpose of conveying the money to officials inside the federal government. Zakharov did not identify the rabbi, but he described him as being associated with a Jewish school in the Borough Park area of Brooklyn. Judge Hellerstein then asked Assistant United States Attorney Evan Barr if the government knew who the rabbi was. Mr. Barr stated that the government did know the identity of the rabbi.

Robbins next avers he was independently able to verify Rabbi Balkany as the rabbi named in the prison bribery scheme by tracking down Zakharov in Florida and interviewing him on or about February 24, 2004. During the interview, Zakharov told him that Rabbi Balkany was the rabbi referred to at his hearing before Judge Hellerstein and that the money he gave to Sam Kaplun was supposed to go to Rabbi Balkany and then onto federal officials. According to Robbins, this interview served to independently corroborate what was originally reported in *The Daily News* from its "law enforcement sources".

Robbins also avers that he obtained the transcript of Sam Kaplun's appearance before Magistrate Judge Gabriel Gornstein on November 24, 2003. This transcript details Kaplun's guilty plea to conspiracy to bribe a public official and outlines how he collected money and passed it on to a rabbi in an effort to secure the transfer of inmates from one federal prison to another. Robbins interviewed Rabbi Balkany for the story and included the rabbi's denial of the allegations and his statement that Zakharov and Kaplun both implicated him in order to receive leniency from prosecutors.

Finally, in support of this motion, Robbins submits the allocution transcripts of Sam Kaplun and Zakharov, both of which took place after the Second Voice Article was published. During their allocutions, both Kaplun and Zakharov identify Rabbi Balkany as the rabbi who solicited bribes in connection with the requests to have prisoners transferred. In fact, during Zakharov's allocution, Judge Hellerstein stated that Rabbi Balkany was the "major culprit" in the plan and expressed his disappointment that the government did not charge him.

C. EBT of Rabbi Balkany

Rabbi Balkany submits his deposition testimony, in which he stated that he never charged families fees for the processing of the daycare voucher applications. He testified that he charged institutions fees in order to "hire lobbyists" and that before charging any fee, he asked Commissioner Scopetta for permission. He further testified that he kept no records regarding the fees. He simply dealt with each institution on an *ad hoc* basis. In addition, Rabbi Balkany stated that the DOI never formally charged him with distributing any vouchers improperly.

Moreover, Rabbi Balkany testified that he did help Leona Helmsley while she was in prison by providing her with traditional Rosh Hashanah meals and helping her get released from prison temporarily to visit her son's grave the day before Yom Kippur. In reference to Antar, Rabbi Balkany stated that he never helped Antar directly and that he only met Antar once in a kitchen during the tour of a prison. Rabbi Balkany claimed that he actually helped Antar's cousin, who was in prison around the same time. When asked whether providing Antar with kosher food and assistance on religious holidays reflected poorly on him, Rabbi Balkany stated it did not.

Regarding the Congressman and Appeals Brief Statements made by Davis, Rabbi

Balkany admitted that he helped Davis attend his son's Bar Mitzvah. He contended that he never spoke to any congressman and detailed the process by which he attained Davis' release. See EBT of Rabbi Milton Balkany pp. 426-427; 445-449. Rabbi Balkany denied arranging for Davis' appeals brief to be read by a federal judge. However, he stated that he did meet with the Maryland U.S. Attorney, and that he may have received some paperwork from Davis prior to the meeting. However, he further stated that he was not sure he read the paperwork, and, did not state whether or not he brought these papers with him to his meeting with the Maryland U.S. Attorney.

Regarding the Zakharov Statements and the prison bribery scandal, Rabbi Balkany testified that he never met with Zakharov, but did meet with Sam Kaplun and helped his son Vadim get transferred to another federal prison. He denied that he met with or spoke to Vadim, stating he merely spoke with Rabbi Laskin who helped arrange for Vadim to receive prayer books, food, etc. Following this assistance, Sam Kaplun made a \$5,000 donation to Rabbi Balkany's yeshiva. Rabbi Balkany claimed he provided Kaplun with a receipt and thank you letter. Finally, Rabbi Balkany testified that he did not ask for the donation from Kaplun in return for helping his son.

II. Conclusions of Law

A party moving for summary judgment must make a prima facie showing of entitlement to judgement as a matter of law by tendering sufficient evidence in admissible form, to demonstrate the absence of any material issues of fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). Once movant has made the requisite showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form, sufficient to establish the

existence of a triable issue of material fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003).

For a public figure to prevail in a defamation action it must prove, by clear and convincing evidence, that the statement was made with actual malice, i.e., with knowledge that it was false or with reckless disregard for the truth. *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466, 474 (1993), citing *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Harte Hanks Communications v. Connaughton*, 491 U.S. 657 (1989). This rule reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on [public figures]." *Prozeralik*, 82 N.Y.2d at 474 quoting *New York Times*, 376 U.S. at 270.

Malice requires the plaintiff to demonstrate either that the defendant realized the statement was false or subjectively entertained serious doubts as to its truth. *Prozeralik*, 82 N.Y.2d at 474. The standard turns on the subjective mind of the reporter; recklessness may not be inferred from failure to investigate further. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). (reckless conduct not measured by whether reasonably prudent man would have published, or investigated, but by whether sufficient evidence permits conclusion that defendant in fact entertained serious doubts as to truth of publication); *Mahoney v. Adirondack Pub. Co.*, 71 N.Y.2d 31, 39, 517 N.E.2d 1365, 523 N.Y.S.2d 480 (1987) (dismissing complaint against public figure where no evidence showed that reporter or publisher knew or suspected falsity of article).

A. *Public Figure*

In a defamation action, where the facts are not in dispute, the issue of whether a plaintiff is a public figure is one for the court to determine. *Krauss v. Globe International*, 251 A.D.2d

191, 192 (1st Dept 1998); *O'Neill v. Peekskill Faculty Assn.*, 120 A.D.2d 36, 43 (2nd Dept 1986); *see also Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Maule v. NYM Corp.*, 54 N.Y.2d 880, 881-882 (1981). The Supreme Court in *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974) created two subclassifications of public figures. The first, general public figures, are those who have obtained "general fame or notoriety in the community, and pervasive involvement in the affairs of society." *Krauss*, 251 A.D.2d at 191 *quoting Gertz*, 418 U.S. at 352. The second, limited-purpose public figures, are those who affirmatively inject themselves into a public controversy to influence its resolution. *Id.*; *Gertz*, 418 U.S. at 351; *Samules v. Berger*, 191 A.D.2d 627, 630 (2nd Dept 1993). To qualify as a public controversy, the outcome of the dispute must affect the general public or some portion of it in an appreciable manner. *Krauss*, 251 A.D.2d at 192. "When one assumes a position of great influence within a specific area and uses that influence to advocate and practice controversial policies that substantially affect others, he becomes a public figure for that debate." *White v. Berkshire-Hathway*, 195 Misc.2d 605, 608 (Sup Ct Erie County 2003) *quoting Waldbaum v. Fairchild Publs.*, 627 F.2d 1287, 1300 (DC Cir 2001).

Here, it cannot be disputed that Rabbi Balkany is at a minimum a limited purpose public figure. Throughout the course of his tenure, he has affirmatively injected himself into the limelight as evidenced by the numerous press articles relating to his political access and advocacy on behalf of Orthodox Jewish causes. *See p. 2 infra*. In reference to the matters at issue here, the daycare voucher controversy impacted parents and students of all five boroughs of New York City, specifically, the members of Rabbi Balkany's Borough Park community. In addition, his arrest on federal charges were not only widely covered, but served to sharpen public awareness of his political influence and access and his controversial "ambassadorial efforts" on behalf of Jewish inmates in federal prison. Rabbi Balkany admitted to his role when he stated,

“I’m a public person in terms of helping the community.” EBT of Rabbi Milton Balkany p. 225.

The court could not agree more.

B. The Voucher Statements

Plaintiff argues that the First and Second Voucher Fees Statements are defamatory, contending that a DOI investigation following the publication of the January 2000 *Daily News* Article failed to find him guilty of any wrongdoing, and, therefore, Robbins should have realized that he never charged families fees to process the voucher applications. Plaintiff alleges that if Robbins had simply investigated the matter appropriately, he would not have published the Second Fees Statement. However, the facts here show that Robbins had no reason to doubt the accuracy of either statement.

When Robbins published the January 2000 *Daily News* Article, reporting that Rabbi Balkany charged families a fee to process daycare voucher applications, Rabbi Balkany is quoted extensively. At no point, did he challenge the veracity of the statement. In addition, *The Associated Press*, *Newsday* and *The New York Post* all reported and quoted Rabbi Balkany as admitting that he charged families a fee to fill out the voucher applications.

Moving forward to basis of this action, the First Fee Statement appears in a paragraph where Robbins is summarizing the January 2000 *Daily News* Article. In republishing an original work, an author is entitled to rely on the research of the original publisher so long as there is no substantial reason to question its accuracy. *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 550 (1980). Following the First Fees Statement, Robbins noted that the DOI probe into Rabbi Balkany remained unresolved. The Second Fees Statement again is merely a summary of the first. However, following the Second Fees Statement, Robbins again referenced the DOI probe this time noting that no charges were filed. Robbins appears to have investigated the matter

thoroughly. Even if he had not investigated this issue to fruition, the failure to investigate is insufficient to establish actual malice. *Suozzi v. Parente*, 202 A.D.2d 94, 102 (1st Dept 1994) *citing Thompson*, 390 U.S. at 731-733. As a result, the First and Second Fees Statements are dismissed.

C. *The Helmsley/Antar, Congressman and Appeals Brief Statements*

Rabbi Balkany testified that he helped Leona Helmsley while she was in prison. The truth of a statement is a complete defense in a civil defamation action. *Commonwealth Motor Parts, Ltd. v. Bank of Nova Scotia*, 44 A.D.2d 375, 378, 355 N.Y.S.2d 138 (1st Dept 1974), *affirmed* 37 N.Y.2d 824, 339 N.E.2d 888, 377 N.Y.S.2d 482 (1975). Therefore, the court will only analyze the Antar portion of the Helmsley/Antar Statement.

It is the courts responsibility to ascertain whether a publication is amenable to the defamatory meaning ascribed to it. *Suozzi*, 202 A.D.2d at 99-100 *citing Tracy v. Newsday, Inc.*, 5 N.Y.2d 134, 136 (1959); *Regent v. Liberation Publs*, 197 A.D.2d 240 (1st Dept 1994). While a court should not strain to find defamation where none exists, it also should not strain to interpret language in its most mild and inoffensive sense so as to hold it nonlibelous. *Regent*, 197 A.D.2d at 242-243; *citing James v. Gannett Co.*, 40 N.Y.2d 415, 420 (1976); *Mencher v. Chelsea*, 297 N.Y. 94, 99 (1947). To determine whether an article is susceptible to a defamatory interpretation, it is important to note the context in which it was published. *Suozzi*, 202 A.D.2d at 101. Consequently, the court reads the three statements at issue here together, to determine their context in relation to the article as a whole. *See Gannett*, 40 N.Y.2d at 419.

The statements read:

Balkany said his advocacy for white-collar criminals has always been altruistic, aimed at helping Jewish prisoners obtain kosher food and assistance on religious holidays. Among those he said he helped cope with their prison time are hotel queen Leona Helmsley and online electronics chain-store mogul "Crazy Eddie" Antar.

Joel Davis, a Maryland accountant who served a federal sentence for an arson insurance scam, told the Voice that Balkany was helpful to him and other Jewish inmates at Fort Dix prison in the 1980's. "He would speak to a congressman, and the congressman would speak to the Bureau of Prisons, that's how it worked," he said, adding that Balkany even arranged for his appeals brief to be read by a federal judge.

"I always came on a fair case," Balkany told the Voice. "Whether it was prayer books or Kosher food."

Regarding Antar, Rabbi Balkany avers that he never helped him directly, only met him once, and actually helped his cousin. Robbins avers that in the course of his research for the Second Voice Article, he was given Antar's name as someone who Rabbi Balkany helped. The only reasonable reading that could be ascribed here is that Rabbi Balkany helped Antar receive kosher food and prayer books while he was in prison. At most, Robbins may have misinterpreted his source to mean that Rabbi Balkany assisted Antar when in fact, he had helped his cousin. Actual malice cannot be established by the mere misinterpretation of a source. *Suozzi*, 202 A.D.2d at 102 citing *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

Regarding the Congressman and Appeals Brief Statements, plaintiff argues that suggesting he accepted money in exchange for assisting criminals exposes him to hatred and resentment by members of his community. In the absence of a clear declaration of criminality, an accusation of corruption is not defamatory. *Suozzi*, 202 A.D.2d at 101; see also *Arrigoni v. Velella*, 110 A.D.2d 601, 603 (1st Dept 1985) (absent assertion of criminality accusation of political influence to gain some benefit from government not defamatory and does not constitute libel per se). In addition, Rabbi Balkany testified that he helped Davis. He averred that he did not speak to a congressman, rather, he spoke to several government officials including the Maryland U.S. Attorney, head of the Bureau of Prisons, Attorney General Janet Reno, and finally, White House counsel Amber Mikva. If Robbins were deemed negligent due to his failure

to accurately determine who Rabbi Balkany spoke to on Davis' behalf it would still not be enough for the court to find actual malice. *See Suozzi*, 202 A.D.2d at 102 *citing Thompson*, 390 U.S. at 731-733 (actual malice cannot be established merely because reliance on a source's information is negligent). In addition, there is no statement in the article that Rabbi Balkany was paid for the assistance he provided Davis. More importantly, nowhere in the Second Voice Article does Robbins accuse Rabbi Balkany of any corrupt or criminal conduct relating to the assistance he provided Davis. All three of these statements read together state that Rabbi Balkany helped three individuals with various problems and issues they encountered in federal prison. Accordingly, the claims that the Helmsley/Antar, Congressman and Appeals Brief Statements were libelous are dismissed.

D. Zakharov Statements

Civil Rights Law § 74 prohibits a civil action alleging injury from the publication of a fair and true report of any judicial proceeding. *Fishof v. Abady*, 208 A.D.2d 417 (1st Dept 2001). A publication will be considered fair and true within the meaning of Section 74 if the substance of the article is substantially accurate. *Misek-Falkoff v. American Lawyer Media, Inc.*, 300 A.D.2d 215, 216 (1st Dept 2002) *citing Holy Spirit Assoc. for the Unification of World Christianity v. New York Times, Co.*, 49 N.Y.2d 63, 67 (1979) ("When determining whether an article constitutes a 'far and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision. A newspaper article is, by its very nature, a condensed report of events that must reflect to some degree the subjective viewpoint of its author").

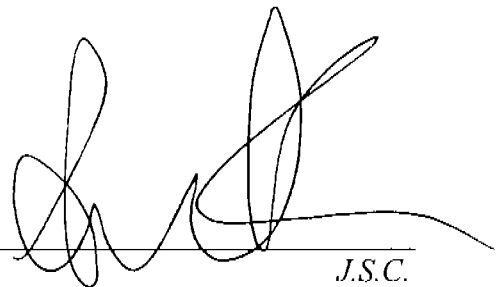
Here, the first paragraph of the Zakharov Statement is a substantially accurate summary of the transcripts of Zakharov's and Kaplun's hearings in federal court, explaining their involvement in the prison bribery scheme. *See Holy Spirit*, 49 N.Y.2d at 67 (exact words of

every proceeding need not be given if substance is substantially stated). Therefore, it is subject to complete immunity under Section 74. The final three sentences of the Zakharov Statement are direct quotes that Zakharov made to Robbins concerning the criminal charges pending against him. These comments concern the litigation, specifically the transcripts of the plea allocutions which identified Rabbi Balkany, and thus are protected under Section 74. *See Mulder v. Donaldson, Lufkin & Jenrette*, 208 A.D.2d 301, 310 (1st Dept 1995) (defendant's statement to press substantially accurate description of its position in arbitration proceeding and thus privileged); *see also Lipin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 202 F.Supp.2d 126 (SDNY 2002) (under New York law, in context of legal proceeding, statements by parties and attorneys are absolutely privileged if, by any view, under any circumstance, they are pertinent to litigation); *Black v. Green Harbor Homeowners' Ass'n, Inc.*, 19 A.D.3d 962 (3rd Dept 2005) (statements by parties to legal proceeding absolutely privileged in defamation context if statements are in any way pertinent to litigation and test of pertinency is extremely liberal to embrace anything that may possibly or plausibly be relevant or pertinent). Accordingly, it is

ORDERED that defendants' motion for summary judgement is granted and the complaint is dismissed with prejudice as against defendants Village Voice Media, Inc., Tom Robbins and Alexander Zakharov.³

FILED
ENTER
MAR 25 2008
NEW YORK
COUNTY CLERKS OFFICE

DATE: March 19, 2008
New York, NY


J.S.C.

³Since the court has awarded summary judgment and dismissed the action it need not address the portion of defendants motion to preclude and for sanctions pursuant to CPLR 3126.