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PISCATAWAY DEMOCRATIC ORGANIZATION, et al.,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
	:	MIDDLESEX COUNTY
Plaintiffs,	:	
	:	DOCKET No: L-7118-04
Vs.	:	
	:	Civil Action
PISCATAWAY REPUBLICAN ORGANIZATION, et al,	:	
	:	BRIEF
	:	
Defendants.	:	

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a public official defamation case, arising out of statements made during a political campaign and published on campaign signs.

Plaintiffs are the Piscataway Democratic Organization, the Democratic candidates for office in the recent local election, and Democratic members of the Piscataway Township Council.

Defendants are the Piscataway Republican Organization, the

corresponding local Republican candidates, and two campaign officials.

The signs at issue contained the following statement: "Bribery. Corruption. Indictment. Had Enough???" They also contained a picture of a broom, the phrase "Vote the Merolla Team" and the names of the individual Republican candidates.

The signs did not mention plaintiffs. Nevertheless, plaintiffs claim the language falsely accused them of criminal or corrupt conduct and of having been indicted. They have filed a two-count complaint alleging "libel" and "defamation per se."

The matter is before the Court on defendants' motion to dismiss the complaint. R. 4:6-2(e). The motion should be granted for the following reasons:

First, the constitution requires that the sign's language be read as a general statement about the prevailing political ethos, and not as a specific accusation "of and concerning" the individual plaintiffs. Both the First Amendment and state law prohibit plaintiffs from transmuting this impersonal criticism of government into a libel claim.

Second, the language is non-actionable as a matter of law. Under the First Amendment, it is unverifiable political rhetoric, which cannot be the subject of a public official defamation claim. Plaintiffs' attempt to have these statements

deemed "defamation per se" gets this constitutional imperative exactly backward.

II. STATEMENT OF FACTS

For purposes of this motion only, defendants accept the facts as set forth in plaintiffs' complaint. Attached to this brief as Exhibit A is a photograph of the allegedly defamatory campaign sign that is the subject of the complaint.

III. ARGUMENT

A motion to dismiss must be granted if, after accepting all the well-pleaded averments of the complaint as true, a court finds that plaintiff can prove no set of facts in support of his claims entitling him to relief. See Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739, 746 (1989).

Moreover, this is a public official defamation case. It involves speech at the very core of the First Amendment, which embodies

a 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 government and public officials.

New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

To avoid "chilling" this debate, New Jersey law encourages early judicial scrutiny of public official defamation cases.

"An early paring of plaintiff's claims is appropriate" to

protect free speech about public affairs and to minimize the threat of self-censorship. See Maressa v. New Jersey Monthly, 89 N.J. 176, 196-8 (1992).

When those principles are applied here, they mandate dismissal of the complaint.

A. As A Matter of State and Federal Law, The Allegedly Defamatory Statement Is Not "Of and Concerning" Plaintiffs.

New Jersey requires a defamatory statement be "of and concerning" the plaintiff. Gnapinsky v. Golwyn, 23 N.J. 243, 254-55 (1957). Although it need not expressly name the plaintiff, the statement must at least reasonably identify him to its readers as the person defamed. Wilson v. Grant, 297 N.J. Super. 128, 135 (App. Div. 1996), certif. den. 149 N.J. 34, cert. den., 522 U.S. 844 (1997).

Furthermore, the "of and concerning" requirement has a constitutional dimension, applicable to public official defamation cases like this one. The First Amendment does not allow a public official to transmute impersonal criticism of government, or of the political ethos, into a claim that he has been personally defamed by that criticism. Rosenblatt v. Baer, 383 U.S. 75, 80-82 (1966); New York Times Co. v. Sullivan, 376 U.S. at 288-92 (1964).

The plaintiff in New York Times was the Montgomery, Alabama, police commissioner. He claimed that an advertisement critical of police action against civil rights demonstrators defamed him personally, even though the advertisement did not specifically name him.

Despite extensive testimony that Montgomery residents read the advertisement to refer to plaintiff, the Court rejected plaintiff's argument, on First Amendment grounds:

[Sullivan's argument] would ... transmuted criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. ... Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on ... strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and since there was not other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

New York Times, 376 U.S. at 292.

Similarly, in Rosenblatt v. Baer, the former manager of a public ski resort claimed that a newspaper column critical of

the resort's finances during plaintiff's tenure implicitly imputed "mismanagement and speculation" to him. The article did not name plaintiff, but witnesses testified they read the article that way.

The Court rejected the argument. "A theory that the column cast indiscriminate suspicion on the members of the group responsible for this governmental operation is tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient." 383 U.S. at 83.

These principles govern this case. Plaintiffs sue over language that is not "of and concerning" them. It does not name them. It does not accuse them of anything. It does not describe conduct that is attributed, or attributable, to them.

To the contrary, the allegedly defamatory language is an impersonal comment on, or criticism of, government. It is a general, non-personalized statement about what the speakers believe is the prevailing governmental ethos.

To read that impersonal statement as a libel on the individual plaintiffs would be to subvert the First Amendment. It would permit plaintiffs to convert impersonal comment on a public issue into personal invective. "Public authorities must not be permitted to stifle commentary concerning their conduct simply by substituting individuals in a defamation action."

Edgartown Police Patrolmen's Ass'n v. Johnson, 522 F. Supp. 1149, 1153 (D. Mass. 1981).

Plaintiffs may argue that the context of the statement - a local political election campaign - necessarily implies an accusation specifically against them.

The argument proves too much. If accepted, it would permit a political candidate to sue for defamation any time an opponent sought to comment on the performance of government, the ethical standards of the opposing party, or the existing political ethos or climate under the current political status quo. The First Amendment does not tolerate so great a "chill" on speech.

This is particularly true for political campaigns: the expression at issue here is "core" political speech, part of the robust debate on public issues that lies at the heart of the First Amendment. New York Times, 376 U.S. at 270. "The constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor-Patriot v. Roy, 401 U.S. 265, 272 (1971); see Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300 (1971).

New Jersey vigorously endorses this principle:

A statement made in the heat of an election contest supplies the paradigm for that commitment to free debate. "When a candidate enters the political arena, he or she must expect that the debate will sometimes be rough and personal." Readers

know that statements by one side in a political contest are often exaggerated, emotional and even misleading.

Lynch v. NJEA, 161 N.J. 152, 166 (1999) (quoting Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 687 (1989)).

Defendant's campaign strategy, reflected in its campaign signs, was simple and straightforward: "Vote Republican and change the political climate."¹ Such appeals - even if considered unsavory or misleading by the other side - are a staple of campaign rhetoric.

To make such language the basis for candidate-vs.-candidate defamation suits would unduly, and unconstitutionally, constrict political dialogue. Were the Court to allow plaintiffs to maintain this suit, it would sanction a defamation action any time a candidate alleged he was the target of an opponent's generalized statement about the political ethos, or the political status quo.

For example, were a candidate to claim she embodies "good morals and high ethical standards," her opponent could claim he

¹ Although not directly relevant to this motion, it is worth noting that defendants' allusion to a "corrupt" governmental ethos was particularly appropriate in Piscataway Township, which was the site of a farm at the center of a bribery scandal that afflicted the McGreevey administration in 2004. McGreevey fundraiser David D'Amiano was indicted in connection with this scandal. Among the public officials identified in D'Amiano's indictment were "State Official #1 (later identified as Gov. McGreevey); "Middlesex County Official #1 (later identified as Middlesex County Freeholder David Crabiel); and "a certain Piscataway Township Official" (to date unidentified). Moreover, the Piscataway scandal was one of several corruption scandals that beset the McGreevey administration in 2004.

was defamed by the negative implication that he is immoral and unethical. No "principled standard" exists to distinguish this case from that one. Cf. Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) (under the First Amendment, no "principled standard" exists to distinguish offensive ad parody from political cartoons).

"State defamation laws, therefore, whether civil or criminal, cannot constitutionally be converted into laws against seditious libel." Rosenblatt, 383 U.S. at 91-92 (Stewart, J. concurring). That is what this lawsuit seeks to do, and that is why it must be dismissed.²

B. The Language In Suit Is Non-Actionable As A Matter of Both State and Federal Law.

Count I of plaintiffs' complaint alleges "Libel." Count II alleges "Defamation Per Se." This manner of pleading demonstrates a misapprehension of defamation law: the second count alleges a non-existent cause of action and should be dismissed on that basis alone.

Moreover, by asking the Court to declare the campaign signs defamatory as a matter of law, plaintiffs underscore the second

² For independent but related reasons, the Piscataway Democratic Organization should be dismissed as a plaintiff. First, as a political party, it is a quasi-governmental entity. See Petition of Soto, 236 N.J. Super. 303, 320 (App. Div. 1989). It therefore cannot maintain an action for libel. See Philadelphia v. The Washington Post Co., 482 F. Supp. 897, 899 (E.D. Pa. 1979). Second, New Jersey does not recognize a cause of action for "group libel," as opposed to a libel against an identifiable member of the group. See Mick v. American Dental Ass'n, 49 N.J. Super. 262 (App. Div. 1958).

reason why their complaint must be dismissed in its entirety: far from being "per se" defamatory, the statement of which they complaint is non-actionable as a matter of law.

"Defamation per se" is not a cause of action separate from libel. It is rather a description of "a statement whose defamatory meaning is so clear on its face that the court is not required to submit the issue to the jury." Biondi v. Nassos, 300 N.J. Super. 148, 153 n.2, citing Lawrence v. Bauer Pub. & Printing, Ltd., 89 N.J. 452, 459, cert den., 459 U.S. 999 (1982).

Since plaintiffs' defamation claim is based on written rather than spoken words, and thus sounds in libel rather than slander, it follows that Count II is duplicative of Count I; and should therefore be dismissed for that reason alone.

By adding this second count, plaintiffs may be seeking to avail themselves of the presumptions of falsity and damages that arise under the common law when an allegation of "slander per se" is made. See Ward v. Zelikovsky, 136 N.J. 516, 540 (1994).

If so, plaintiffs have confused libel with slander. And in any event, presumed falsity and presumed damages are unconstitutional in a public official defamation case, whether the defamation is libel or slander. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-76 (1984); Gertz v. Robert

Welch, Inc., 418 U.S. 323, 349 (1974); Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

Beyond that, when read in context, the language plaintiffs claim is "per se" defamatory cannot, as a matter of both state and federal law, be made the basis of a public official defamation suit. The complaint should be dismissed for this reason as well.

A defamation plaintiff must show as a threshold matter that the statement at issue is 1) a statement of fact that is 2) capable of defamatory meaning. Lynch, 161 N.J. 152, 164-65 (1999).

Analytically these are two distinct inquiries. But New Jersey has conflated them into a single test of "actionability." See Ward v. Zelikovsky, 136 N.J. at 529-32 (statement's susceptibility to defamation claim depends on its "content, verifiability and context"); see also Lynch, 161 N.J. at 164.

Moreover, "New Jersey has consistently adopted constitutional principles" into its defamation law. Nanavati v. Burdette Tomlin Mem. Hosp., 857 F.2d 96, 106 n. 11 (3rd Cir. 1988). See Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446, 453 (3d Cir. 1987). Thus, when a court assesses the defamatory character or the factual content of a statement in the "public official" context, it must be especially sensitive

to the overriding constitutional interests. See Redco v. CBS, Inc., 789 F.2d 970, 972-3 (3d Cir.), cert. den., 474 U.S. 843 (1985) (Pa. law).

A defamatory statement is one that is "injurious to the reputation of another" or exposes another to "hatred, contempt or ridicule." Leers v. Green, 24 N.J. 239, 251 (1957). In assessing a statement's defamatory character, a court must give language its reasonable meaning, and must view it in context, taking the publication as a whole. Karnell v. Campbell, 206 N.J. Super. 81, 88 (App. Div. 1985); Molnar v. The Star-Ledger, 193 N.J. Super. 12, 18 (App. Div. 1984). See generally, Ward v. Zelikovsky, supra.

Whether a statement is capable of a defamatory meaning is the threshold inquiry in a defamation case, Ward, 136 N.J. at 528; Romaine v. Kallinger, 109 N.J. 282, 290 (1988), and is a question of law. Decker v. Princeton Packet, 116 N.J. 418, 424 (1989).

As noted above, the language on the campaign sign is most reasonably read as a comment on the prevailing governmental ethos, and not as an allegation of criminal behavior by individual plaintiffs. If that is so, then at most the statement refers to plaintiffs' political ethics - an accusation

that they are tainted by the prevailing political standards and must be ousted from office.

Such a comment, which amounts in the campaign context to political name-calling, is not defamatory at all, much less "defamatory per se." "A certain amount of vulgar name calling is tolerated, on the theory that it will necessarily be understood to amount to nothing more." Prosser & Keeton, Handbook of the Law of Torts at 775 (5th ed. 1984). New Jersey courts have long adhered to this principle. See Schwartz v. Leasametric, Inc., 224 N.J. Super. 21, 28 (App. Div. 1988); Dressler v. Mayer, 22 N.J. Super. 129, 136 (App. Div. 1952) ("capable of political conniving" not defamatory in context of election campaign).

Furthermore, even if capable of defamatory meaning, a statement is not actionable, under both state and federal law, if it is "pure opinion," rather than objective, verifiable fact.

The First Amendment provides full constitutional protection for statements of opinion:

Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Gertz v. Robert Welch, Inc., 418 U.S. at 339-40. So long as a statement on matters of public concern is not a statement of

fact, provably true or false, the First Amendment precludes imposition of liability under state defamation law. Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990); see Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. at 776.

In addition to requiring a provably false statement of fact, the First Amendment protects the manner in which statements about public issues are made. "Rhetorical hyperbole" -- vigorous or imaginative use of language -- cannot constitute the subject of a defamation claim. Milkovich, 497 U.S. at 20; Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6, 13 (1970). Insults, parody or epithets, no matter how vituperative, are protected elements of public discourse so long as they "cannot reasonably be interpreted as stating actual facts." Hustler Magazine v. Falwell, 485 U.S. at 50.

Similarly, New Jersey extends absolute protection against a defamation suit to statements of "pure opinion." Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 147 (1986); Kotlikoff v. The Community News, 89 N.J. 62, 69 (1982). A "pure" opinion is found

where the maker of the comment states the facts on which he bases his opinion of the plaintiff and then states a view as to plaintiff's conduct, qualifications or character. "Pure" expression of opinion occurs also when the maker of the comment does not spell out the alleged facts on which the opinion is based, but both parties

to the communication know the facts or assume their existence and the statement of opinion is obviously based on those assumed facts as justifications for the opinion.

Kotlikoff, 89 N.J. at 68-9.

As with the inquiry into defamatory meaning, whether a statement is "fact" or "opinion" is a question of law, requiring a court to examine the statement in context. Dunn v. Gannett New York Newspapers, Inc., 833 F.2d at 453; Ward v. Zelikovsky, 136 N.J. at 530-32; Karnell v. Campbell, 206 N.J. Super. at 90-91. That examination includes not only the specific words at issue, but also both the linguistic and the social context of the challenged statements. See Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984), cert. den., 471 U.S. 1127 (1985).

Finally, if a statement can be construed as either fact or opinion, it must be characterized as opinion (and the defendant not held liable) to avoid the "chilling effect" on public speech. Lynch v. NJEA, 161 N.J. at 168, citing Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. at 148.

Again, that principle is particularly applicable to political campaigns:

Political discourse depends on the expression of opinion. In an election for public office, that discourse often entails a subjective appraisal of the qualifications of a candidate. Emotion, partisanship, or self-interest, although they may impair the

appraisal's value, do not justify its suppression.

Lynch, 161 N.J. at 168.

As noted above, the allegedly defamatory language on the signs is best characterized as political comment, in a campaign context in which the underlying factual situation is well-known to all concerned.

Thus, even if this language were read to apply to the individual plaintiffs, it constitutes the sort of non-factual, fundamentally unprovable political rhetoric that is the archetypical stuff of political opinion. It is therefore non-actionable as a matter of law.

In sum, plaintiffs' claim of "defamation per se" gets the law of public official defamation exactly backwards. The political comment on the signs, even if read to apply to plaintiffs, is neither defamatory nor an actionable statement of fact.

This Court should so hold as a matter of law, and should dismiss the lawsuit on that basis.³

³ At a minimum, however, the question is one that must be left to the jury. See Della Russo v. Nagle, 358 N.J. Super. 254, 263 (App. Div. 2003), citing Romaine v. Kallinger, 109 N.J. at 290.

IV. CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion to dismiss this case for failure to state a claim upon which relief can be granted.

DATED:

Respectfully submitted,

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