MondayMonday

My Baby She Sent Me A Letter

January 27, 2014

In *The Producers*, while reading scripts through the night, Max Bialystock is horrified when he recognizes that he is so tired that he is reading the same bad scripts twice. This opening line is what makes him realize his fatigue: "Gregor Samsa awoke one morning to find that he had been transformed into a giant cock-a-roach."

With suitable apologies to both Franz Kafka and Mel Brooks, that must be the same stark reality faced by the Denver Bronco and Seatlle Seahawks this morning. Having left the West Coast for New York City, they open their eyes to find that they are in New Jersey. Gregor Samsa had it better.

Now, don't shoot the messenger. Jersey City just isn't New York City. Out the door of the Hyatt is not The Great White Way. There are no Broadway theaters, no world-class restaurants, no subway, no Yankee Stadium, no Katz' Delicatessen. Hell, there's not even a Brooklyn. In essence, Jersey City is to New York City as Hoboken is to Tribeca - nothing.

How do we explain this to these lost boys? The teams that play in East Rutherford are called the New York Jets and the New York Giants,

but unlike our baseball teams, the "New York" does not mean "New York City" anymore. What it means is "East Rutherford, New Jersey." The only professional football team that actually plays in New York State is the Buffalo Bills, who don't' really play in Buffalo either. Clear? Have some taffy.

Your client fires you, alleging that you are inadequate or committed misconduct or malpractice. But he does so in a letter, presumably typed by someone else. Can you sue your former client for defamation?

If you think that's a good question then read the Justice Saxe's opinion in *Frechtman v. Gutterman*, 2014 Slip Op 00437 (1st Dep't 1/23/14). There, it was not one, but three letters, signed by the former client alleging defalcations, failures and negligence. However, these letters, explains the First Department, do not support an action for defamation and the complaint is dismissed.

Without question, the statements in the letter surely could have been viewed as false statements designed to damage plaintiff attorney in his profession by impugning his professional conduct, a textbook definition of defamation *per se* (put the *Prosser* down.) The problem is, are they privileged in some way or do they merely state opinion rather than fact? Either one would doom plaintiff's cause of action in defamation.

Justice Saxe explains first that the letters were indeed "published" for they were prepared by a third party employee of defendants. But, as decided by Supreme Court, they were only non-actionable expressions of opinion, rather than fact. One has to look at the whole communication, including its tone and purpose, to make that decision. In the context in which they were sent, these letters from a disgruntled client to his attorney "are better understood as opinion than as fact."

Failing all else, the letters were also protected by both absolute and qualified privilege. "[A] letter sent by a client to his or her attorney discharging the attorney is absolutely privileged[.]" That privilege could be challenged if the letter is then released to an unrelated third party, but that did not happen here.

Finally, the letter had a qualified privilege as well, "as a communications upon a subject matter in which both parties had an interest." That privilege can be destroyed, however, by a showing of spite, falsity or ill will.