

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 ADAM K. KRAEMER,)
)
 Plaintiff,)
)
 vs.)
)
 MARSHLAND COMMUNITIES, LLC;)
 KAREN COLIE; IMC RESORT)
 SERVICES, INC.; RONALD)
 FENSTERMAKER (individually and in)
 his capacity as agent/representative of)
 IMC Resort Services); CRAIG)
 FENSTERMAKER (individually and in)
 his capacity as agent/representative of)
 IMC Resort Services); MEREDITH)
 MILLENDER (individually and in her)
 capacity as agent/representative of)
 Marshland Communities, LLC); SIMONS)
 & DEAN LAW FIRM; DEREK F.)
 DEAN; AND KEATING L. SIMONS, III,)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2016-CP-10-01294

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ORDER SC Court of Appeals

FILED
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 JULIE J. FENSTERMAKER
 CLERK OF COURT
 BY _____

This matter came before the Court on the Motion of Defendants Simons & Dean Law Firm, Derek F. Dean, and Keating L. Simons, III's (hereinafter collectively "Simons & Dean") to Dismiss Plaintiff's Second Amended Complaint. A hearing was held on Thursday July 14, 2016. Plaintiff, a licensed attorney in South Carolina, appeared *pro se* and Simons and Dean were represented by counsel. Having thoroughly considered the motion, supporting and opposing filings, and arguments presented, the Court finds that Plaintiff's Second Amended Complaint fails to set forth facts sufficient to constitute any cause of action against Simons & Dean. Accordingly, as further set forth below, Simons & Dean's Motion to Dismiss Plaintiff's Second Amended Complaint is GRANTED.

LMC

Plaintiff's Second Amended Complaint sets forth eight causes of action. Some of the causes of action appear not to be intended to apply to Simons & Dean, but the Second Amended Complaint does not specify as to which defendants each cause of action applies, so each of the eight causes of action will be discussed separately below.

1. Unlawful Workplace Discrimination – S.C. Code Ann. §1-13-10

Plaintiff alleges that he was an employee of Defendant Marshland Communities, LLC (hereinafter "Marshland"). Plaintiff's first cause of action alleges "Defendants" decided to pay each employee of Marshland except for Plaintiff and one other person. Plaintiff alleges that such "actions on behalf of the Defendants are baseless and discriminatory to the detriment of the Plaintiff."

In order to be held liable under this statute, a defendant must have been an employer that committed an unlawful workplace practice against an employee. S.C. Code Ann. § 1-13-80. Plaintiff's Second Amended Complaint fails to allege that Simons & Dean was ever Plaintiff's employer. In fact, Plaintiff is clear that he is complaining of Marshland's actions as his employer. At the hearing on Simons and Dean's motion, Plaintiff did not argue that this cause of action applies to Simons & Dean, and the motion should be granted on this basis.

2. Negligence

Plaintiff's Second Amended Complaint alleges eleven separate instances of negligence. However, none of the Plaintiff's eleven instances of negligence are applicable to Simons & Dean. Simons & Dean is a law firm representing a group of property owners' associations in litigation against Marshland, Plaintiff's former employer. Plaintiff's Second Amended Complaint does not allege any recognized legal duty that Simons & Dean owed to him. At the

hearing on Defendants' motion, the Plaintiff did not argue that this cause of action applies to Simons & Dean. The motion to dismiss must therefore be granted as to this cause of action.

3. Quantum Meruit

In order to establish a quantum meruit claim under South Carolina law, a plaintiff must show: (1) a benefit conferred by the plaintiff on the defendant; (2) a realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. Gignilliat v. Gignilliat, Savitz, & Bettis, L.L.P., 684 S.E.2d 756, 764 (2009).

Plaintiff's Second Amended Complaint alleges that Simons & Dean were unjustly enriched because Plaintiff was not paid the wages he should have earned from Marshland. Plaintiff's Second Amended Complaint contains no allegation that Simons & Dean ever employed the Plaintiff or agreed to pay Plaintiff any wages for any benefit he may have conferred. To the contrary – as stated above – the Second Amended Complaint unequivocally alleges that Simons & Dean represents property owners' associations that are in litigation against Plaintiff's former employer, Marshland. Plaintiff alleges that he cooperated with Simons & Dean as a witness. He does not allege that he expected Simons & Dean to pay him or that Simons & Dean ever promised to pay him. His cooperation as a witness did not directly benefit Simons & Dean, but rather benefitted their clients. Accordingly, Plaintiff has failed to plead facts that would entitle him to any quantum meruit recovery against Simons & Dean. Therefore, the Court grants Simons & Dean's Motion to Dismiss as to Plaintiff's cause of action for Quantum Meruit.

4. Violation of S.C. Code Ann. §41-10-50

South Carolina Code Ann. § 41-10-50 says, "When an employer separates an employee from the payroll for any reason, the employer shall pay all wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days." Plaintiff's Second Amended Complaint does not allege that Simons & Dean were ever an employer of Plaintiff; rather, Plaintiff's employer was Marshland. At the hearing on Simons & Dean's motion, Plaintiff did not argue that this cause of action applies to Simons & Dean. The Court grants Simons & Dean's Motion to Dismiss as to Plaintiff's Violation of S.C. Code Ann. §41-10-50 cause of action.

5. Violation of the South Carolina Unfair Trade Practices Act

Plaintiff's Second Amended does not allege this cause of action against Simons & Dean. To the extent there is any question whether it does so allege this claim against Simons & Dean, the Court grants Simons & Dean's Motion to Dismiss Plaintiff's UTPA cause of action, as the Second Amended Complaint does not allege any facts to support such a claim against Simons & Dean. Moreover, Simons & Dean are immune from suit under the authority of Gaar v. City of North Myrtle Beach, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986), Stiles v. Onorato, 318 S.C. 297, 298, 457 S.E.2d 601 (1995), and Argoe v. Three Rivers Behavioral Center, et. al., 388 S.C. 394, 697 S.E. 2d 551 (2010). At the hearing on Defendant's motion to dismiss, Plaintiff did not argue that this cause of action applies to Simons & Dean. This cause of action must be dismissed as to them.

6. Defamation

Defamatory statements made in the course of judicial proceedings are absolutely privileged. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002); Crowell v. Herring, 301 S.C. 424, 429, 392 S.E.2d 464, 466 (Ct. App. 1990); Corbin v.

Washington Fire & Marine Ins. Co., 278 F.Supp. 393 (D.S.C. 1968). No defamation action lies for the alleged defamatory publication, no matter what the circumstances under which it is published, even if the publication was made with malice. Hainer v. American Medical Intern, Inc., 328 S.C. 128, 492 S.E.2d 103 (1997). The judicial proceedings privilege protects not only statements made in pleadings, affidavits, statements made in open court, letters between counsel, but also to "any utterance arising out of the judicial proceeding and having any relation to it," including statements made prior to the judicial proceeding. Crowell, 301 S.C. at 430, 392 S.E.2d at 467.

Plaintiff's Second Amended Complaint alleges that a defamatory statement was made about him in a Receiver's Report, which Plaintiff alleges was drafted in part by Simons & Dean. The allegedly defamatory statement was to the effect that Plaintiff's threatened litigation against the Receiver was meritless. The Second Amended Complaint specifically alleges that this Receiver's Report was drafted and published as part of the litigation whereby Simons & Dean represents the property owners' associations. Any alleged defamatory statements contained in the Receiver's Report are thus absolutely privileged and cannot support a cause of action for defamation. Crowell, 301 S.C. at 430, 392 S.E.2d at 467. Simons & Dean are alleged to have re-published the defamatory statement by disseminating the Receiver's Report to their clients. Inasmuch as Simons & Dean moved for the appointment of the Receiver on behalf of their clients, disseminating the report to them was clearly related to the litigation and was thus privileged. Therefore, the Court grants Simons & Dean's Motion to Dismiss Plaintiff's Defamation cause of action. Id.

7. Civil Conspiracy

Under South Carolina law, civil conspiracy “is the combination of two or more persons for the purpose of injuring another.” LaMotte v. Punchline of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988). “The gravamen of the tort is the damage resulting to the plaintiff from the overt act done pursuant to the combination, not the agreement or combination per se.” Lee v. Chesterfield General Hospital, Inc., 289 S.C. 6, 344 S.E.2d 379, 382 (Ct. App. 1986). The elements of civil conspiracy are: (1) a combination of two or more persons (2) for the purpose of injuring the plaintiff (3) which cause special damages. LaMotte at 296 S.C. at 66, 370 S.E.2d at 711.

In Stiles v. Onorato, 318 S.C. 297, 298, 457 S.E.2d 601 (1995), the South Carolina Supreme Court specifically held that an attorney who is representing a client can be held liable to a third party for conspiracy only where “he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.” 318 S.C. 297, 300, 457 S.E.2d 601, 602. Plaintiff’s Second Amended Complaint makes it clear that Simons & Dean’s only connection to the Plaintiff was through the litigation whereby Simons & Dean represents the property owners’ associations. It does not allege that Simons & Dean sought to injure him because of any motivation outside their role as attorneys. Under Stiles, Plaintiff’s Second Amended Complaint fails to allege a viable cause of action for civil conspiracy as to Simons & Dean.

Further, Plaintiff’s Second Amended Complaint fails to allege any special damages that he suffered from the alleged civil conspiracy. Accordingly, he has not alleged facts sufficient to support this cause of action. Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989).

For the foregoing reasons, the Court grants Simons & Dean's Motion to Dismiss Plaintiff's Civil Conspiracy Cause of Action.

8. Assault

In order to prove assault, a plaintiff must show that: (1) the conduct of the defendant placed the plaintiff, (2) in reasonable fear of bodily harm. Herring v. Lawrence Warehouse Co., 222 S.C. 226, 241, 72 S.E.2d 453, 458 (1952); Jones by Robinson v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995). The conduct complained of "must be of such nature and made under such circumstances as to affect the mind of a person of ordinary reason and firmness, so as to influence his conduct; or it must appear the person against whom the threat is made was peculiarly susceptible to fear, and the person making the threat knew and took advantage of the fact he could not stand as much as an ordinary person." Mellen v. Lane, 377 S.C. 261, 276, 659 S.E.2d 236, 244 (Ct. App. 2008)

Plaintiff alleges that Defendant Keating Simons threatened to attack Plaintiff's law license if Plaintiff pursued litigation against the Receiver. Plaintiff then alleges that Defendant Keating Simons took a step towards Plaintiff, raised his hand, and placed his finger in Plaintiff's face. These allegations do not support a claim for assault. This threat to commit a future non-physical injury, conditioned upon Plaintiff pursuing litigation against the Receiver, cannot form the basis of an assault. Brooker v. Silverthorne, 111 S.C. 553, 99 S.E. 350, 351 (1919). Further, Plaintiff's allegation that Defendant Keating Simons conveyed this threat while pointing a finger in his face would not, as a matter of law, place a reasonable person in fear of imminent bodily harm under these circumstances. Therefore, the Court grants Simons & Dean's Motion to Dismiss Plaintiff's cause of action for Assault.

CONCLUSION

For the foregoing reasons, the Court GRANTS Simons & Dean's Motion to Dismiss as to each of the Plaintiff's causes of action and completely dismisses Simons & Dean from this matter.

IT IS SO ORDERED!



Benjamin H. Culbertson
Presiding Judge, Ninth Judicial Circuit

Aug. 11, 2016