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SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Athan Fokas,)

Plaintiff,)

v.)

Phillip Ferderigos, Spiros)
Ferderigos, and Jacob Ferderigos,)

Defendant(s).)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-3919

ORDER GRANTING PLAINTIFF
PARTIAL SUMMARY JUDGMENT

FILED
2017 AUG 31 AM 11:59
JULIE S. HARRIS
CLERK OF COURT

THIS MATTER came before me for hearing on Plaintiff's Motions for Partial Summary Judgment as to the counterclaims by Defendants, Phillip and Spiros Ferderigos, on June 8, 2017. Specifically, Plaintiff moved for summary judgment as to the claims by these Defendants for defamation.

BACKGROUND

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In this case, the Plaintiff seeks summary judgment as to the claims by Defendants Spiros Ferderigos and Phillip Ferderigos that Plaintiff published defamatory statements about them. This case was filed by Plaintiff alleging breach of a contract between himself and the Defendants, all brothers and the cousins of Plaintiff, to add floors to a building all of the parties own together as tenants in common at 229 King Street in downtown Charleston. Plaintiff also alleged breach of the duty of care by Defendants required by S.C. Code 33-44-409 for members of an LLC based on the same actions he alleges give rise to a breach of contract. The answers of Defendants in this case incorporated counterclaims by Spiros and Phillip Ferderigos for defamation in which they allege that Plaintiff published false and damaging statements against them. The statements allegedly made to third persons were:

- a. That these Defendants did not agree to go forward with the plan to add additional rental suites at 229 King Street because Phillip Ferderigos and/or Spiros Ferderigos could not eat for free at the Old Towne Restaurant;
- b. That either Phillip or Spiros Ferderigos do not have good business sense;
- c. That either Phillip or Spiros Ferderigos are bad business people; and
- d. That either Phillip or Spiros Ferderigos were accusing Athan Fokas of setting fire to 229 King Street.

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In their response to Plaintiff's motion, Defendants raised additional statements by Plaintiff, not alleged in their pleadings or discovery responses, which they argue constitute defamation. These are that Plaintiff sent text messages to Defendants after this case was filed saying that Spiros Ferderigos had lied in his deposition and that he had threatened to use his position as an assistant solicitor to convince law enforcement to pursue a charge against Plaintiff for arson unless Plaintiff backed off his claim that Defendants were in breach of contract.

Discovery was completed prior to Plaintiff's motion and included interrogatories and requests to produce to Defendants as well as depositions of both. In their responses to interrogatories, the Defendants addressed their original allegations set forth in their counterclaim and said they had no specific information as to which third parties such statements were made, but that they thought he might have made them to his mother, Irene Fokas, Kevin Carroll and Justin Hansen. (Exh. B to Plaintiff's Motions as to both Defendants). They made similar statements in their deposition testimony. (Exh. C to Motions as to both Defendants). Irene Fokas was deposed in a companion case, Athan Fokas v. Phillip Ferderigos and Spiros Fokas, Civil Action No. 2015-CP-10-3819 and denied any such statements were made to her by Plaintiff. (Exh. D to Plaintiff's Motions). Justin Hansen denied by affidavit ever being told these things by Plaintiff. (Exh. F to

Plaintiff's Motions). Plaintiff denied in his deposition and affidavit testimony making any such statements to third parties. The publication these Defendants claimed "on information and belief" to have been made to third parties who are not parties to this action is not, therefore, supported by the scintilla of proof required to avoid summary judgment.

Defendants argue that Plaintiff's publication of all of the statements they claim to have been defamation to their brother and co-defendant, Jacob Ferderigos, satisfies the element of the cause of action for defamation of publication to a third party. The statements to Jacob Ferderigos were all in the form of text messages sent to all of the Defendants as part of the parties' discussion and disagreement over the project to add floors to the building at 229 King Street which resulted in the filing of this action. Some of these texts were sent after the commencement of this action.

STANDARD FOR SUMMARY JUDGMENT

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The standard for summary judgment under South Carolina law is high. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376-77, 597 S.E.2d 181, 184 (Ct. App. 2004)(quoting Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001). Furthermore, in determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). If there is a "scintilla of evidence" in the record which gives rise to a genuine issue of material fact, summary judgment should not be granted. Howle v. Woods, 231 S.C. 75, 97 S.E.2d 205 (1957).

A trial court may grant a motion for summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *See also, Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied."

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However, the party opposing summary judgment has the burden of producing proof and not mere allegations in the face of proof submitted by the moving party. "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is genuine issue of fact remaining for trial." *Sides v. Greenville Hospital System*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff cannot defeat the motion by relying upon the mere allegations of his complaint, but must disclose the facts he intends to rely on by affidavit or other proof." *Shupe v. Settle*, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994); *Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." *Shupe*, 315 S.C. at 516-17, 445 S.E.2d at 655; *German v. N.Y. Life Ins. Co.*, 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985).

ELEMENTS OF DEFAMATION

The tort of defamation permits a plaintiff to recover for an injury to his reputation caused by false statements by another. *Banks v. St. Matthew Baptist Church*, 406 S.C. 156, 161, 750 S.E.2d 605, 607 (2013). To prove defamation, a plaintiff must show: (1) a false defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Erickson v. Jones St. Publishers, LLC*, 368

S.C. 444, 464, 629 S.E.2d 653, 664 (2006). "A communication is defamatory if it tends to impeach the honesty, integrity, virtue or reputation..." Hubbard and Felix, The South Carolina Law of Torts, 462 (2nd Ed. 1997).

A statement may be actionable *per se*, in which case the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages."

Id. Under common law, slander is actionable *per se* only when it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime or moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; (5) unfitness in one's business or profession.

Holtzscheiter v. Thomsan Newspapers, Inc., 332 S.C. 502, 511 n.5, 506 S.E.2d 497, 502, n. 5 (1998). "Or a statement may be not actionable *per se*, in which case nothing is presumed and the

plaintiff must plead and prove both common law malice and special damages." Erickson, 368 S.C.

at 465, 620 S.E.2d at 664. Common law malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, i.e. with a conscious disregard of the plaintiff's rights.

Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). "The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve." Erickson, 368 S.C. at 466, 629 S.E. 2d at 665.

A statement is not necessarily defamatory simply because it is unfavorable or critical. Dauterman v. State Record Co., 249 S.C. 512, 154 S.E.2d 919 (1967), "It is true the complaint alleges that the publication tended to impeach the reputation of the plaintiff and to injure his business, but that bald allegation does not make the publication actionable, else a confessedly harmless act may be converted into a harmful act by a mere allegation. The inference of hurt arising out of a statement of facts in order to become actionable, must be such an inference as is established by the general consent of men, and the inference must be judged of by the court in the first instance.

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The language complained of by the plaintiff was naturally displeasing to him and was unquestionably of an unfavorable nature. However, it by no means follows that a publication which is unfavorable is also libelous;" Costas v. Florence Printing Co., 237 S.C. 655, 118 S.E.2d 696 (1961), "We point out that there is no allegation that the respondent lost any customers, or had any diminution in trade. There is no allegation of special damages for losses sustained by reason of the publication of the alleged libelous statement. In short, the complaint does not allege special damages."; and Murphy v. News & Courier, 141 S.C. 51, 139 S.E. 18 (1927), "To hold libelous per se the mere statement that one has failed, or even that he was unable, to furnish bond-whether the amount required be large or small-would be carrying the law of libel beyond any precedent that has been called to our attention. Many a good citizen, if suddenly and unexpectedly arrested without reason for forearming himself against the contingency of such arrest, would very likely be unable to give immediate bond, or perhaps might be reluctant to call in friends who would relieve his embarrassment, but enjoy his misadventure."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is no genuine issue of material fact on the record in this case as to the elements of defamation. There is no evidence that the plaintiff made defamatory statements to third parties. As to all but two of the statements Defendants allege to have been defamatory, such statements do not constitute defamation under the law. Publication to Jacob Ferderigos of the two statements concerning Sprios Ferderigos recently raised by Defendants does not constitute defamation as these statements were made to a party in this lawsuit and were made during the course of the disagreement between the parties that constitute the issues in this case and were part of that disagreement. As such, these statements were not defamation, but are protected by the litigation privilege.

Neither Phillip Ferderigos nor Spiros Ferderigos identified any person other than their brother and co-defendant, Jacob Ferderigos, to whom statements were made. None of the people they said in discovery to whom they thought Plaintiff "might" have made these statements came forward to say that Plaintiff made such statements. Both Irene Fokas and Justin Hansen specifically testified that he did not. The question thus becomes whether Plaintiff's statements to Jacob Ferderigos constitute publication in the context of a defamation claim. I conclude they do not.

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All of the statements Plaintiff made in the form of text messages sent to all three Defendants, including Jacob Ferderigos, related directly to the dispute between the Ferderigos brothers and Plaintiff. The statements about "eating for free" and that Phillip and Spiros Ferderigos were displaying bad business judgment by not going forward with the project to add floors to 229 King Street were made in the disagreement that matured into this lawsuit and are directly related to the issues surrounding Plaintiff's allegations of breach of contract and breach of duty of care. Similarly, the statements concerning Spiros' Ferderigos testifying falsely in his deposition is directly related to the discovery proceedings in this case. The statement that Spiros Ferderigos threatened to use his position as an assistant solicitor to convince law enforcement to pursue a charge against Plaintiff if he pursued a breach of contract action is also directly related to the issues in this case and stem from an affidavit filed in the companion case, Athan Fokas v. Phillip Ferderigos and Spiros Fokas, Civil Action No. 2015-CP-10-3819.

As such, all of the statements alleged to be defamatory by Defendants are covered by the litigation privilege and are absolutely privileged. Any statement made as part of a judicial proceeding, in or out of court, is absolutely privileged under South Carolina law. Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990). The statements Defendants complain of

concerning Plaintiff's allegation that they were accusing him of arson and other insurance fraud actions and the statements related to Spiros Ferderigos' deposition and the Affidavit of Stan Barnett fall squarely within the absolute litigation privilege. Similarly the statements concerning "eating for free" and Defendants' bad business judgment were made either as part of a dispute that matured into litigation or made during the course of that litigation and are also absolutely privileged. Sriberg v. Raymond, 370 Mass. 105, 345 N.E.2d 882 (1976); and Matthis v. Kennedy, 243 Minn. 219, 67 N.W.2d 413 (1954).

South Carolina also recognizes the doctrine of qualified privilege that protects from actions for defamation:

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A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation... The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

Conwell v. Spur Oil Co. of Western South Carolina, 240 S.C. 170, 125 S.E.2d 270, 274-2275 (1962).

As Jacob Ferderigos shared the interests of Plaintiff, albeit with a different position being taken by him, Plaintiff's statements to him about anything related to the project to build additional floors at 229 King Street falls, if not under the protection of absolute litigation privilege, under the protection of qualified privilege. Consequently, Plaintiff's statements to Jacob Ferderigos are not actionable.

The only statements Defendants complain of which actually constitute defamation are those clearly covered by the absolute litigation privilege. These are the statements by Plaintiff by text message accusing Spiros Ferderigos of lying in his deposition taken in this case and the statement by Plaintiff recounting part of an affidavit in a companion litigation describing Spiros

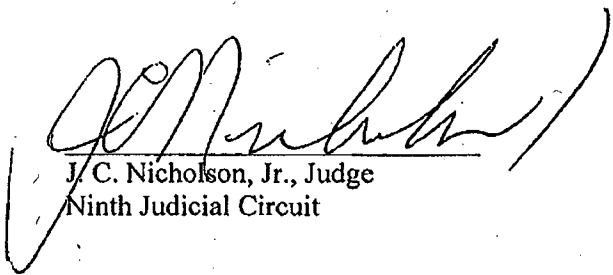
Ferderigos' threat to use his position as assistant solicitor to cause Plaintiff to become the subject of a criminal charge if he pursued a breach of contract action. The other statements claimed to be defamatory are simply not defamation. They may have been statements unwelcome to Phillip and Spiros Ferderigos and critical of them, but they are not defamation.

The statement that Defendants refused to go forward with the agreement to add rental suites to 229 King Street because they could not "eat for free" does not impugn their honesty, integrity or proficiency in their profession, which is the practice of law. Similarly, the statement that they do not have good business sense in the context of the proposed project to add rental suites at 229 King Street is purely an opinion about that proposal and nothing more. Many people have different opinions about the wisdom of development projects, but disagreement does not equate to defamation. These statements may be critical of Defendants, but do not rise to the level of defamation merely because they hurt Defendants' feelings or even criticize a business decision the made. Dauterman v. State Record Co.; Costas v. Florence Printing Co.; and Murphy v. News & Courier.

There is no evidence giving rise to a genuine issue of material fact regarding the counterclaims by Spiros and Phillip Ferderigos for defamation against Plaintiff and they should be, therefore, dismissed on summary judgment. Plaintiff's motion for partial summary judgment as to the counterclaims for defamation asserted by both Spiros Ferderigos and Phillip Ferderigos is hereby granted.

IT IS SO ORDERED.

8/30, 2017
Charleston, South Carolina


J. C. Nicholson, Jr., Judge
Ninth Judicial Circuit