

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Athan Fokas,)
)
Plaintiff,)

Case No.: 2015-CP-10-3891

v.)

Phillip Ferderigos and Spiros)
Ferderigos,)
)
Defendant(s).)

ORDER GRANTING PLAINTIFF
PARTIAL SUMMARY JUDGMENT

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THIS MATTER came before me for hearing on Plaintiff Athan Fokas' Motion for Partial Summary Judgment as to the counterclaims by Defendants, Phillip and Spiros Ferderigos, on December 11, 2017. Specifically, Plaintiff moved for summary judgment as to the claims by these Defendants for defamation.

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BACKGROUND

This case arises out of a controversy involving the parties to this case to expand an existing building the parties and the Defendants' brother, Jacob Ferderigos, own together, which is located at 229 King Street in downtown Charleston. Plaintiff filed a companion case in this Court captioned Athan Fokas v. Phillip Ferderigos, Spiros Ferderigos, and Jacob Ferderigos, C/A No. 2015-CP-10-3919 ("Contract Case"), in which he alleged breach of a contract among himself, the Defendants and Jacob Ferderigos. The answers of Defendants in the Contract Case included counterclaims by Spiros and Phillip Ferderigos for defamation, in which they allege that Plaintiff published false and damaging statements against them. When the instant action was filed by Plaintiff for his own claims of defamation, Defendants filed answers and counterclaims, which

incorporated the counterclaims filed in the Contract Case. The statements Defendants allege were defamatory and were published to third parties are:

- a. That Defendants did not agree to go forward with the plan to expand the building at 229 King Street because Phillip Ferderigos and/or Spiros Ferderigos were stubborn, jealous, and could not eat for free at the Old Towne Restaurant, which is located in the same building;
- 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 sometime in 2009.

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In their response to Plaintiff's motion, Defendant Spiros Ferderigos raised two additional statements by Plaintiff, not alleged in their pleadings or discovery responses, which he argues constitute defamation. These are that 1) Plaintiff sent text messages to Defendants and their brother Jacob after the instant case was filed stating that Spiros Ferderigos had lied in his deposition and 2) that Plaintiff recounted part of an affidavit filed in this case describing Spiros' threat to use his position as an assistant solicitor to cause Plaintiff to become the subject of a criminal charge if he pursued a breach of contract action.

STANDARD FOR SUMMARY JUDGMENT

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRPC; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Rule 56(c), SCRPC, provides a trial court may grant a motion for summary judgment "if 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.” 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).

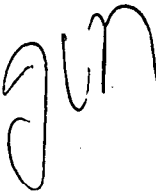
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However, the party opposing summary judgment has the burden of producing proof and not mere allegations in the face of proof submitted by the moving party. “Once the moving party carries its initial burden, the opposing party must come forward with 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.

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 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 South Carolina law. Furthermore, publication of any or all of the

alleged defamatory statements does not constitute defamation as the statements were made to a party in the companion breach of contract case and were made during the course of the disagreement which matured into the companion breach of contract case. As such, the defamatory statements were not defamation, but are protected by the litigation privilege.

Discovery has been completed in this case and included interrogatories and requests to produce to Defendants and the depositions of both. Defendants have failed to identify any person other than their brother and co-defendant in the Contract Case, Jacob Ferderigos, to whom any of the alleged defamatory statements were made or published. In their responses to interrogatories, Defendants acknowledged they had no specific information as to what third parties such statements were made by Plaintiff other than to their brother, but that they thought he might have made them to Plaintiff's mother, Irene Fokas, his father, Spiros Fokas, to his sister, Urania Nikatos, Kevin Carroll, and Justin Hansen. (Exh. C to Motions as to both Defendants). The Defendants made similar statements in their deposition testimony. (Exh. D to Motions as to both Defendants). Defendants noticed the deposition of Kevin Carroll in the Contract Case, but cancelled it and never rescheduled it. Neither Spiros Nikatos nor Rania Nikatos have provided any testimony that Plaintiff defamed Defendants in any way. Consistent with Defendants' lack of any evidence of publication, Irene Fokas was deposed in this case and denied any of the alleged statements were made to her by Plaintiff. (Exh. E to Motions as to both Defendants). Plaintiff has denied in his deposition and affidavit testimony making any such statements to third parties. (Exh. B, F to Motions as to both Defendants). Justin Hansen has denied by affidavit ever being told anything about the fire at 229 King Street or Defendants' accusations about the cause of the fire by Plaintiff. (Exh. G to Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment). The publication of the alleged statements Defendants claim "on information and belief" to have

occurred is not supported by even a scintilla of proof. In the absence of any evidence of publication to a third party which is not subject to the litigation privilege, Defendants' claims must fail as a matter of law.

Furthermore, the alleged statements, other than the two recently raised by Defendants and made by Plaintiff via text message regarding Spiros Ferderigos lying in his deposition and threatening to use his position as a solicitor simply are not defamation.

A statement is not necessarily defamatory simply because it is unfavorable. "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.

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." Dauterman v. State Record Co., 248 S.C. 512, 518, 154 S.E.2d 919, 922 (1967). "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." Costas v. Florence Printing Co., 237 S.C. 655, 663, 118 S.E.2d 696, 700 (1961).

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.” Murphy v. News & Courier, 141 S.C. 51, 55, 139 S.E. 189, 190 (1927).

The following statements Defendants claim to be defamatory simply do not constitute defamation:

- 1) That Defendants did not agree to go forward with the plan to expand the building at 229 King Street because Phillip Ferderigos and/or Spiros Ferderigos were stubborn, jealous, and could not eat for free at the Old Towne Restaurant;
- 2) That either Phillip or Spiros Ferderigos do not have good business sense;
- 3) That either Phillip or Spiros Ferderigos are bad business people.

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While these statements may have been unwelcome to Phillip and Spiros Ferderigos and critical of them, they are not defamation. None of these statements impugn Defendants’ honesty, integrity or proficiency in their profession, which is the practice of law. A statement that they do not have good business sense in the context of the proposed commercial real estate development project to expand the building at 229 King Street is purely an opinion about that proposal and nothing more. Such a statement in no way reflects Defendants’ proficiency as attorneys. It does not impeach their honesty or integrity. People can have different opinions about the wisdom of a development project, but a disagreement about the merits of a project or a partner’s commitment to continue the project does not equate to defamation.


With regard to the fourth allegation that Plaintiff reported Phillip and Spiros Ferderigos were accusing Plaintiff of setting fire to 229 King Street, there is no proof whatsoever that Plaintiff communicated this claim to any third person. Further, the statement has only been made in the context of this lawsuit and is, therefore, privileged.

Defendants have made allegations of defamatory statements by Plaintiff but Defendants have not identified any person to whom these statements were made other than to their brother, Jacob Ferderigos, in the Contract Case. None of the individuals identified by the Defendants in discovery that Defendants thought Plaintiff "might" have made these statements to has come forward to say that Plaintiff made such statements to them. On the contrary, both Irene Fokas and Justin Hansen have offered sworn testimony that Plaintiff did not make the alleged statements to them. Those are the only third parties who have been identified as possible recipients of the alleged defamatory statements and none have corroborated Defendants' mere allegations. While the alleged statements may be critical of Defendants, they do not rise to the level of defamation merely because they upset Defendant or even criticize a business decision made. Moreover, Defendants have alleged no damages of any kind flowing from publication of the statements.

Even if these statements were determined to be defamation, all of the statements Plaintiff made in the form of text messages sent to Defendants and Jacob Ferderigos either related directly to the disputes between the Ferderigos brothers and Plaintiff and those disputes matured into the Contract Case or were made during the course of litigation. As such, the statements 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, 392S.E.2d 464 (Ct. App. 1990). In Crowell, a Veterans of Foreign Affairs court martial was determined to be a judicial proceeding and statements made during the course of the proceeding were absolutely privileged. "The trial court held the VFW court-martial was a judicial proceeding. Crowell does not appeal this finding, nor does he argue the defendants' statements were irrelevant to the issues he was eventually brought to trial on." Id. at 430, 467. "[T]he investigation of Crowell's alleged misdeeds

can be likened to a prosecutor gathering evidence, interviewing witnesses and preparing a case. Accordingly, we hold the statements made by Allen and Wilder during the course of their investigation of Crowell as trustees and as members of the investigatory committee, were absolutely privileged, inasmuch as the statements bore relation to the contemplated proceeding.” Id. at 431, 467. See also Sriberg v. Raymond, 370 Mass. 105, 345 N.E.2d 882 (1976) (holding that an attorney writing to a defendant threatening litigation could not be sued for defamation given that the statements made were to the very defendant and addressed the very claims which were raised in the eventual litigation); and Mathis v. Kennedy, 67 N.W.2d 413 (1954) (concluding that statements made in a court of record having jurisdiction of a guardianship proceeding were absolutely privileged so long as “it has reference to or relation to or connection with the case before the court”).

 Defendants argue that Plaintiff's publication of any or all of the statements they claim to be defamatory to their brother, 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 Jacob and Defendants as part of a discussion and a disagreement over the development project to expand the building at 229 King Street. These discussions and disagreement resulted in the filing of the Contract Case. The statements concerning “eating for free” and that Phillip and Spiros Ferderigos were displaying bad business judgment by not going forward with the project at 229 King Street, even if defamatory, were made in the same disagreement that matured into the Contract Case and are directly within the scope of the issues surrounding Plaintiff's claims of breach of contract. The only statements Defendants complain of, which might otherwise give rise to a claim of defamation, are very clearly covered by the absolute litigation privilege. These are statements by Plaintiff via text message, accusing Defendant Spiros

Ferderigos of lying in his deposition taken in this case and the statement by Plaintiff recounting part of an affidavit in this litigation relating to Spiros' position as an assistant solicitor. The statements concerning Spiros Ferderigos' testifying falsely in his deposition are directly related to the discovery proceedings in this case. The statement that Spiros Ferderigos threatened to use his position as an assistant solicitor to cause Plaintiff to become the subject of a criminal investigation if he pursued his claim of breach of contract is directly related to the issues in the Contract Case and stem from an affidavit filed in this case. The statements Defendants complain of concerning Plaintiff's allegation that they were accusing him of arson and other insurance fraud actions also fall squarely within the absolute litigation privilege as they are directly related to the matters at issue in this case.

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



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 his 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.

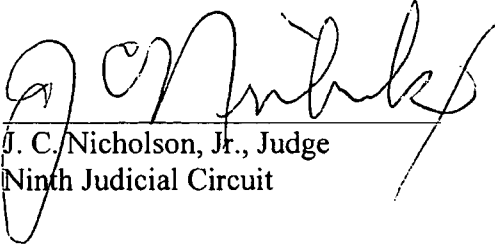
Conwell v. Spur Oil Co. of Western South Carolina, 240 S.C. 170, 125 S.E.2d 270, 274-275 (1962).

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

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.

2/22, 2018
Charleston, South Carolina


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