2012 IL App (1st) 120476-U

No. 1-12-0476

SIXTH DIVISION
September 28, 2012

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CONSTANTINE TRAMBAS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 CH 2972
	)	
MORMINO LANDSCAPE SERVICES, INC., an Illinois	)	
Corporation; and KIRSTEN MORMINO,	)	The Honorable
	)	LeRoy Martin,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justice Hall concurred in the judgment.
Justice Robert E. Gordon specially concurred.

O R D E R

¶ 1 HELD: The trial court erred in dismissing plaintiff's complaint where he sufficiently presented a claim for slander per se.

¶ 2 Plaintiff, Constantine Trambas, appeals the dismissal of his claim for slander per se pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615) (West 2010)). Plaintiff contends the trial court erred in granting the dismissal where both the original

complaint and the proposed amended complaint stated a cause of action for slander per se. Based on the following, we reverse and remand for further proceedings.

¶ 3 FACTS

¶ 4 In April of 2010, plaintiff entered into a contract with defendants, Mormino Landscaping Services, Inc., (MLS) and Kirsten Mormino (Mormino), for a landscaping project at plaintiff's property in Lake Geneva, Wisconsin. From May 2010 through July 2010, MLS performed work on plaintiff's property pursuant to the contract. Plaintiff paid MLS $124,275.00 of the $139,500.00 contract price. Plaintiff alleged that the balance of $15,225 was not paid because MLS performed some of the work defectively and failed to complete all the work contracted for. The dispute over payments led MLS and a subcontractor, Midwest Mining & Materials, LLC, to serve plaintiff with a prime contractor's notice of intention to file a claim for a mechanic lien and a subcontractor's notice of intention to file a claim for a mechanic lien, respectively.

¶ 5 Prior to the completion of the project, Mormino, president and secretary of MLS, visited plaintiff's property. Mormino observed the foreman, Tim Schmidt (Schmidt), following a plan which she mistakenly believed to be different from the plan used in the bidding of the project. The plan being used by Schmidt called for substantially more features and Mormino believed that MLS would lose a significant amount of money on the project. In September or October of 2010, Mormino told Gus Warren (Warren), a subcontractor, that Schmidt had an arrangement to provide material and labor "above and beyond [the] contractual agreement." Mormino further stated that this foreman provided plaintiff with material and labor belonging to MLS without charge in exchange for money paid by plaintiff directly to the foreman. In addition to the

conversation with Warren, Mormino had a meeting with Robert Garbacz[1] (Garbacz), the president of another subcontractor. During that meeting, Mormino told Garbacz that "Tim was taking cash from under the table" from plaintiff for MLS's material and labor. Mormino stated that she wanted to make sure that Garbacz had not "taken any cash from Tim" on the project.

¶ 6 On January 24, 2011, plaintiff filed an action against defendants, MLS and Mormino, alleging causes of action for: (1) declaratory relief (count I); (2) breach of contract (count II); and (3) slander per se (count III). In the slander per se count, plaintiff alleged the following: "Kirsten Mormino told Gus Warren that plaintiff had an under-the-table deal with a foreman of Mormino Landscape whereby the foreman provided plaintiff with materials and labor of Mormino Landscape without charge in exchange for money to be paid directly to the foreman, thereby accusing plaintiff of felony theft." On May 11, 2011, defendants filed a section 2-615 motion to dismiss all claims, arguing that plaintiffs failed to state valid causes of action upon which relief could be granted.

¶ 7 On August 2, 2011, after reviewing the parties' briefs and hearing argument, the trial court dismissed plaintiff's slander per se claim with prejudice pursuant to section 2-619[2] and

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[1] Mr. Garbacz was referred to as both Roger Garbacz and Robert Garbacz in the records. For ease of reading, we will refer to him as Robert Garbacz.

[2] The trial court improperly dismissed plaintiff's claim for slander per se pursuant to section 2-619. A section 2-615 motion with respect to a pleading attacks the legal sufficiency of the plaintiff's claims, while a section 2-619 motion for involuntary dismissal based upon certain defects or defenses admits the legal sufficiency of the claims, but raises defects, defenses, or other affirmative matters, appearing on the face of the complaint or established by external submissions, that defeat the action. 735 ILCS 5/2-615, 2-619 (West 2010). Review of the records show that the trial

dismissed plaintiff's other claims without prejudice pursuant to section 2-615, granting leave to replead.

¶ 8 On November 7, 2011, the trial court denied plaintiff's motion for leave to file a first amended complaint instanter, but allowed leave to refile that motion. On November 21, 2011, plaintiff refiled a motion for leave to file a first amended complaint. On December 6, 2011, the parties appeared before the trial court for a hearing on plaintiff's motion for leave to file an amended complaint containing counts II and III. After giving plaintiff an opportunity to be heard on his motion, the trial court entered an order granting plaintiff leave to file an amended complaint instanter containing a count for breach of contract (count II), but dismissing the slander per se (count III) count with prejudice. On December 9, 2011, the trial court, sua sponte, vacated its December 6, 2011, order and entered a new written order granting plaintiff leave to file an amended complaint alleging breach of contract, but denying plaintiff leave to file an amended slander per se claim. Plaintiff was also granted leave to file a motion requesting Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) language as to the dismissed slander per se claim. The record does not contain any indication that plaintiff filed a motion requesting Rule 304(a) language. Rather, on January 12, 2012, the trial court entered an order, granting plaintiff's motion to voluntarily dismiss his breach of contract claim. Therefore, this court has jurisdiction pursuant to Rule 301 (eff. Feb. 1, 1994).

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court intended to dismiss plaintiff's claim pursuant to section 2-615 for failure to state a cause of action for slander per se.

¶ 9 DECISION

¶ 10 I. Slander Per Se

¶ 11 Plaintiff contends that the trial court erred in determining that his complaint did not state a cause of action for slander per se.

¶ 12 The standard of review for an order granting a motion to dismiss pursuant to section 2-615 is de novo. Gardner v. Senior Living Systems, Inc., 314 Ill. App. 3d 114, 117, 731 N.E.2d 350 (2000). On review, the question is "whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." Green v. Rogers, 234 Ill. 2d 478, 491, 917 N.E.2d 450 (2009).

¶ 13 Five categories of statements are considered as per se actionable giving rise to a cause of action for slander without a showing of special damages. Gardner, 314 Ill. App. 3d at 118. The five categories are: (1) words that impute the commission of a criminal offense; (2) words that impute infections with a loathsome communicable disease; (3) words that impute an individual is unable to perform his employment duties or otherwise lacks integrity in performing these duties; (4) words that prejudice an individual in his profession or otherwise impute a lack of ability in his profession; and (5) words that impute an individual has engaged in fornication or adultery. Id. The slanderous character of the statement must be apparent on its face, and extrinsic facts are unnecessary. Bel-Grade, Inc. v. Etheridge, 229 Ill. App. 3d 624, 625, 593 N.E.2d 91 (1992).

¶ 14 To constitute slander per se based on imputing the commission of a crime, the words need not meet the technical requirements necessary for an indictment, but they must fairly impute

the commission of a crime. Moore v. People for the Ethical Treatment of Animals, Inc., 402 Ill. App. 3d 62, 69, 932 N.E.2d 448 (2010). A slander per se claim must be pled with a heightened level of precision and particularity because it relieves the plaintiff of proving actual damages. Green, 234 Ill. 2d at 495.

¶ 15 A slanderous statement, however, will not be actionable per se if it is reasonably capable of an innocent construction. Id. at 499. The innocent construction rule requires courts to consider the statement in context and give the words of the statement, and their implications, their natural and obvious meaning. Id. However, when the defendant clearly intended and unmistakably conveyed a slanderous meaning, a court should not strain to see an inoffensive gloss on the statement. Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 93, 672 N.E.2d 1207 (1996).

¶ 16 Plaintiff's complaint alleged Mormino made a statement to Warren indicating that plaintiff had an "under-the-table deal" with a foreman, which amounted to felony theft because the foreman retained money from plaintiff in exchange for providing MLS's materials and labor. As previously noted, an allegedly slanderous statement must fairly impute the commission of a crime to be actionable per se. Moore, 402 Ill. App. 3d at 69. Theft requires that the person knew or reasonably should have known of the criminal nature of their conduct. 720 ILCS 5/16-1(a) (West 2010). In particular, the statute provides that a person commits theft when he knowingly "obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him *** to believe that the property was stolen." 720 ILCS 5/16-1 (West 2010). The allegation that plaintiff was involved in an "under-the-table deal"

with the foreman, Schmidt, imputes knowledge of an illegal transaction that was not sanctioned by defendants under the contract to which plaintiff was a party.

¶ 17 In McKimm v. Ohio Elections Commission, 89 Ohio St.3d 139, 729 N.E.2d 364 (2000), the Ohio Supreme Court held that the phrase "passing money under the table" connotes an illegal transaction. McKimm, 729 N.E.2d at 372. We recognize that case law from a foreign jurisdiction does not have binding authority in Illinois courts (Kim v. Mercedes-Benz, U.S.A., Inc., 353 Ill. App. 3d 444, 455, 818 N.E.2d 713 (2004); Skipper Marine Electronics, Inc. v. United Parcel Service, Inc., 210 Ill. App. 3d 231, 239, 569 N.E.2d 55 (1991)); however, decisions from foreign jurisdictions may be considered persuasive authority (Joe Cotton Ford, Inc. v. Illinois Emcasco Insurance Co., 389 Ill. App. 3d 718, 721, 906 N.E.2d 1279 (2009)). Because the language at issue is nearly identical to that found in McKimm, we find the case is persuasive.

¶ 18 Moreover, we find that, considered in context, a reasonable person would not innocently construe Mormino's statement that plaintiff and the foreman were involved in an "under-the-table deal." The context in which Mormino made her statement, in that she was alerting a subcontractor that the foreman and plaintiff went outside the bounds of the parties' contractual agreement in receiving and paying money for the use of MLS's labor and materials, demonstrates a clear intent to impute the commission of theft.

¶ 19 Considering the allegations in a light most favorable to plaintiff, we conclude the trial court erred in dismissing plaintiff's claim for slander per se.

¶ 20 CONCLUSION

¶ 21 The trial court erred in dismissing plaintiff's complaint alleging slander per se where he sufficiently pled a cause of action upon which relief may be granted.

¶ 22 Reversed; remanded.

¶ 23 JUSTICE GORDON, SPECIALLY CONCURRING

¶ 24 I agree with the conclusion of the majority, but I must write separately to show how I arrived at my conclusion. I too would reverse the trial court's dismissal of plaintiff's slander *per se* claim because I find that plaintiff did state a cause of action for slander *per se*. Since this case concerns a motion to dismiss, the appropriate standard of review is *de novo*. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 25 Words that impute the commission of a criminal offense are one of the five categories that give rise to a cause of action for defamation *per se*. *Gardner*, 314 Ill. App. 3d at 118. Plaintiff asserts that Mormino told Garbacz that the foreman was "taking cash from under the table" from plaintiff in exchange for materials and labor that rightly belonged to MLS, and that this statement accused plaintiff of the crime of theft. The Ohio Supreme Court has held that the "phrase 'passing money under the table' connotes an illegal transaction made for personal gain." *McKimm*, 89 Ohio St. 3d at 145. I agree, and would find that the phrase here, "taking cash from under the table," coupled with Mormino's accusation that plaintiff was giving the money "under the table" to the foreman for the purpose of diverting materials, labor, and compensation away from MLS, would cause a reasonable listener to believe that Mormino was accusing plaintiff of a crime.

¶ 26 "A person is legally accountable for the conduct of another when: *** either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the

planning or commission of the offense." (Emphasis added.) 720 ILCS § 5/5-2(c) (West 2010). Under the accountability statute, a person who satisfies the requirements of the statute is deemed just as guilty as the individual who committed the underlying offense, regardless of whether or not the person charged under the accountability statute directly participated in the crimes. *People v. Green*, 179 Ill. App. 3d 1, 7 (1988). The intent to promote or facilitate the commission of the underlying crime may be proven not only from the character of the accountable person's acts, but also from the circumstances surrounding the offense. *People v. O'Neill*, 272 Ill. App. 3d 178, 181 (1995).

¶ 27 The complaint alleged sufficient facts to indicate that Mormino's statement implicated plaintiff in the theft just as much as the foreman. Mormino told Garbacz that the foreman was "taking cash under the table" from plaintiff, and Mormino wanted to make sure that Garbacz had not "taken any cash from [the foreman]." The phrase cash under the table connotes an illegal transaction, and Mormino's warning about not taking cash from the foreman bolstered the connotation of illegality. *McKimm*, 89 Ohio St. 3d at 145. Although the statement may have indicated that it was the foreman who was actually taking the materials labor and delivering them to plaintiff, plaintiff's payment "under the table" for the materials and labor rightly belonging to a contractor with whom he was engaged in a dispute indicate that he intended to promote or facilitate the commission of the underlying crime. *O'Neill*, 272 Ill. App. 3d at 181. But for plaintiff's "under the table" payments, the foreman would not have committed the theft.

¶ 28 Defendant asserts that if the "cash under the table" statement was defamatory, plaintiff's claim is defeated by the innocent construction rule. The innocent construction rule states that if

the alleged statement falls into one of the categories of defamation *per se*, "it will not be actionable *per se* if it is *reasonably* capable of an innocent construction." (Emphasis added.) *Green v. Rogers*, 234 Ill. 2d 478, 499 (2009). Under the innocent construction rule, the court must consider the words *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning. *Green*, 234 Ill. 2d at 499.

¶ 29 Defendant claims that "cash under the table" can have meanings that are not criminal in nature. However, whether or not "cash under the table" may have other connotations is not the issue. Instead, we must determine whether, in the context in which the statement was made, the use of the phrase "under the table" had criminal connotations. *Green*, 234 Ill. 2d at 499. See also *Gardner*, 314 Ill. App. 3d at 119 (holding that although the word "illegal," standing alone, does not always have criminal connotations, the use of "illegal" in the particular context did connote criminality). When examining whether an innocent construction is *reasonable*, we need not construe the words under their best possible meaning, nor shall we espouse a naivete unwarranted by the context in which the statement was made. *Gardner*, 314 Ill. App. 3d at 119-20.

¶ 30 Defendant compares the case at bar to *Miller* to conclude that Mormino's statement is subject to an innocent construction. In *Miller*, the plaintiff alleged that her coworkers accused her of "taking sums from petty cash without authority." *Miller*, 211 Ill. App. 3d at 153. The court determined that this statement did not constitute defamation *per se* because (1) the plaintiff failed to allege in the complaint that the statement was an accusation of theft, and (2) the plaintiff alleged in the complaint that her coworkers accused of her taking sums from petty cash *without*

authority. *Miller*, 211 Ill. App. 3d at 153. The court stated that borrowing from petty cash "may not be a standard accounting practice, but it implies a lack of rigor in following proper procedures, rather than a lack of integrity in carrying out the duties of comptroller." *Miller*, 211 Ill. App. 3d at 153.

¶ 31 Unlike in *Miller*, plaintiff in the case at bar did plead that Mormino's statement accused him of theft. More importantly, the use of the phrase "taking cash under the table," reviewed in the context in which it was said, indicates that any innocent construction would be unreasonable. Although "cash under the table" could mean covert, Mormino used the phrase to describe plaintiff wrongfully taking materials and labor from MLS without the intent to compensate MLS, which suggests criminal, rather than covert, activity, and Mormino simultaneously warned Garbacz not to take any money from the foreman. See *McKimm*, 89 Ohio St. 3d at 145. Under the circumstances presented by this case, to find that Mormino was referring to a "covert" transaction devoid of criminal action would be to espouse a naivete unwarranted by the context in which the statement was made. *Gardner*, 314 Ill. App. 3d at 119-20. Rather, the context more strongly suggests that Mormino believed that plaintiff and the foreman were wrongfully taking materials and labor from MLS, and that she intended to make Garbacz aware of this. See *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 325 (stating that a letter containing explicit accusations of criminal activity was "clearly intended to convey" the accusations to its readers).

¶ 32 To find true justice in this case, the trier of fact should have the opportunity to determine whether the words "taking cash from under the table" is actionable slander *per se* based on all of

the evidence in the case. I find that plaintiff did state a cause of action and it is not the job of the trial court to dismiss this case on a 2-615 motion. I find it to be error for the trial court to find the wording is not slander *per se*.