2019 IL App (1st) 18-2346-U

THIRD DIVISION
August 7, 2019

No. 1-18-2346

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

McSTEPHEN O. A. "MAX" SOLOMON,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant,	)	of Cook County, Illinois,
	)	Law Division.
v.	)	
	)	No. 2016 L 003162
MICHAEL E. HASTINGS, and CITIZENS FOR MICHAEL E. HASTINGS,	)	
	)	The Honorable
	)	Christopher E. Lawler,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment where there remained no genuine issue of material fact as to whether the defendants published the allegedly defamatory statements with actual malice.

¶ 2 This cause of action arises from a defamation claim filed by the plaintiff, McStephen O. A. "Max" Solomon (Solomon), against the defendants, Michael E. Hastings (Hastings) and Citizens for Michael E. Hastings, for allegedly defamatory publications made against him during a campaign for public office where he and Hastings were both candidates. The plaintiff appeals from the circuit court's order granting summary judgment in favor of the defendants, contending that there remain genuine issues of material fact as to whether the allegedly defamatory

statements were substantially true and whether the defendants acted with actual malice. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 The record below reveals the following undisputed facts and procedural history. On November 23, 2015, Solomon and Hastings both filed their nomination petitions seeking the Democratic Party's nomination for the office of State Senator of the 19th Legislative District of Illinois, at the primary election which was to be held on March 15, 2016. In the course of the campaign, between February 21 and March 10, 2016, a campaign flyer was published, distributed and mailed by the Citizens for Michael E. Hastings, on behalf of Hastings, and was received by the residents of the 19th Legislative District. On March 15, 2016, Hastings won the nomination of the Democratic Party at the primary election.

¶ 5 On March 29, 2016, the plaintiff filed a one-count complaint for defamation *per se* against the defendants. Therein, the plaintiff alleged that the aforementioned campaign flyer contained the following two defamatory statements:

> (1) "The Grande Prairie Library Board for the Village of Hazel Crest only meets ONCE a month. Despite living just a few minutes away, trustee MAX SOLMON has managed to miss over 95% of his regularly scheduled meetings and public hearings in the last year;" and
>
> (2) "While Max Solomon has been in Hazel Crest, he has cost tax payers hundreds of thousands of dollars in legal expenses because of lawsuits which courts call 'mere fishing expeditions.' "

The last statement was followed by an asterisk with the following footnote: "* Sources: Grande Prairie Library District Board Meeting & Public Hearing Minutes (All official minutes are available online at http://grandeprairie.org/about/board-of-trustees/board-meeting/agenda/)."

¶ 6 The offending campaign flyer further contained a large photograph of the plaintiff with the words "Missing in Action," across his face. In addition, it contained the following statements written in bold: "Have you seen this man? We have been looking for a long, long time. We think he may be lost. If you see this man, please send him to the Grand Prairie Library District," and "If you see this man, please send him to the library so he can learn that YOU ACTUALLY HAVE TO GO TO YOUR JOB!"

¶ 7 According to the complaint, the two statements referring to the plaintiff's non-attendance at public meetings and the legal expenses incurred by the district on his behalf were defamatory *per se* because they imputed to him a lack of integrity and an inability to perform his profession as an attorney. In his complaint, the plaintiff therefore sought damages in excess of one million dollars.

¶ 8 On May 25, 2016, the defendants filed a combined section 2-619.1 motion to dismiss (735 ILCS 5/2-619.1 (West 2016)) arguing, among other things: (1) that the complaint should be dismissed pursuant to the Illinois Citizen Participation Act (ICPA) (735 ILCS 110/1 *et seq.* (West 2016)); and (2) that the plaintiff had failed to sufficiently plead that the defendants' statements were made with actual malice so as to proceed with his claim.

¶ 9 On September 15, 2016, the trial court granted the defendants' motion pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)) finding that the plaintiff did not allege sufficient facts to establish that the two allegedly defamatory statements were made with actual malice. The court, however, granted the plaintiff leave to amend his complaint.

¶ 10 On October 6, 2016, the plaintiff filed a two-count amended complaint alleging: (1) defamation *per se* and (2) false-light invasion of privacy. Therein he alleged that the defendants acted with knowledge of or reckless disregard as to the falsity of the two statements prior to and

after their publication, and maliciously continued to disseminate them by way of their campaign flyer, even after he asked that they be retracted.

¶ 11 Specifically, the plaintiff alleged that the defendants must have been aware of the falsity of their statement about his failure to appear at any Grande Prairie Public Library Board (library board) meetings and public hearings, because on February 3, 2016, in an interview with the Chicago Sun Times, where both candidates were present, he informed Hastings that he was not required to attend those meetings since, even before he could be recognized as trustee of the library board, on June 1, 2006, the board ousted him and his seat was declared vacant. At that time, the plaintiff also informed Hastings that he had filed a mandamus action in the circuit court challenging the board's action and seeking to be reinstated. In addition, as to the second allegedly defamatory statement, the plaintiff asserted that Hastings should have been aware of its falsity, because with reasonable inquiry and due diligence, as an attorney, he could have discovered that the plaintiff had never been involved in any lawsuits either in his personal capacity or as an attorney, which had cost tax payers "hundreds of thousands of dollars," or which had been deemed "mere fishing expeditions."

¶ 12 In support of his amended complaint, the plaintiff only attached a copy of the allegedly defamatory campaign flyer.

¶ 13 The defendants again filed a combined section 2-619.1 motion to dismiss and strike the plaintiff's amended complaint (735 ILCS 5/2-619.1 (West 2016)), but the circuit court denied that motion on March 10, 2017.

¶ 14 Thereafter, on March 31, 2017, the defendants filed their answer to the plaintiff's amended complaint, denying any wrongdoing. In addition, the defendants raised six affirmative defenses. These included that the allegedly defamatory statements were: (1) substantially true; (2) opinions

rather than facts; and (3) protected by qualified privilege and (4) the ICPA (735 ILCS 110/1 *et seq.* (West 2016)). In addition, the defendants asserted and that in publishing these statements, they acted (5) in good faith and (6) without actual malice.

¶ 15 The cause proceeded with written discovery. Discovery was closed on May 15, 2018, when the plaintiff failed to appear at a status hearing at which the parties were ordered to appear and agree in writing on the "scope of party depositions." The trial court subsequently refused the plaintiff's request to reopen discovery.

¶ 16 On August 27, 2018, the defendants filed a motion for summary judgment. Therein, they argued, *inter alia*, that, as a matter of law: (1) the allegedly defamatory statements were substantially true; and (2) the plaintiff had failed to establish by clear and convincing evidence that the defendants had acted with actual malice in publishing them. In support of their motion, the defendants attached numerous exhibits including, *inter alia*, the plaintiff's answers to their requests to admit. Therein, the plaintiff admitted that while seeking the office of state senator of the 19th Legislative District, *inter alia*: (1) he knew and expected that his fitness and qualifications for public office would be scrutinized and subject to criticism by his political opponent; (2) at all relevant times, he resided 1.5 miles (by car or on foot) from where the library board held its meetings, so that the allegedly defamatory statement in the campaign flyer that he lived just a "few minutes away" from the library was true, or in the very least, substantially true; (3) he did not attend the library board meetings on January 22, 2015, February 12, 2015, February 26, 2015, March 3, 2015, April 6, 2015, April 23, 2015, June 1, 2015, June 25, 2015, July 24, 2015, August 27, 2015, October 22, 2105 and November 29, 2015, or any board meetings in 2016; and (4) despite being ousted as trustee, he continued to represent himself both on his website, and to the Sun-Times Editorial Board in his response to a written questionnaire

under the heading "Political/Civil Background" that he was "Trustee, Grande Prairie Public Library for Cook County."

¶ 17 The defendants also attached minutes from the library board's meetings which established that on June 1, 2015, the plaintiff failed to appear for his swearing in ceremony as trustee of the library board. As a result of his failure to appear, on that same date, the library board unanimously voted to declare the office of trustee vacant. The defendants further attached the plaintiff's response to their interrogatories wherein the plaintiff acknowledged that subsequent to this meeting and following an administrative hearing, he was ousted from his office as trustee of the library board. The plaintiff further acknowledged that in response he filed a mandamus action in circuit court against the library board in case No. 2015 CH 10237 (*Solomon et al. v. Grande Prairie Public Library District, et al*.) seeking reinstatement. That complaint for mandamus was also attached to the motion for summary judgment. In addition, the defendants provided monthly invoices from the law firm retained by the library board to represent it in this mandamus action, showing that the board incurred approximately $21,204.90 in attorney's fees between July 6, 2015 and February 25, 2016.

¶ 18 The defendants also attached a copy of a December 18, 2015, recommendation by a hearing examiner in a separate case (*Ogunneye v. Hastings*, 15 SOEB GP 506), denying the request of objector Niyi Ogunneye,[1] represented by the plaintiff and another attorney, for a subpoena to depose Hastings with respect to Hastings' run for the 19th Legislative District State senate seat, calling this request a "mere fishing expedition." In addition, they attached a copy of the plaintiff's answer to their interrogatory acknowledging that he filed two other lawsuits against different units of government arising from his previous and separate unsuccessful runs for public

[1] The record reflects that Ogunneye was another elected member of the library board who did not appear for his swearing in ceremony and whose seat was then unanimously voted vacated.

office. The appellate decisions in those two lawsuits, in *Solomon v. Ramsey*, 2015 IL App (1st) 140339-B, and *Solomon v. Scholefield*, 2015 IL App (1st) 150685, were also attached to the defendants' motion for summary judgment.

¶ 19 On September 27, 2018, the plaintiff filed a two-page response to the defendants' motion for summary judgment, reiterating the basic principles of law as to summary judgment and asserting, without any support in the record, that there remained genuine issues of material fact as to whether the alleged defamatory statements were true. The plaintiff did not attach any affidavits or other exhibits to his response.

¶ 20 After the defendants filed their reply, on October 12, 2018, the trial court entered an order granting the defendants' motion for summary judgment. In doing so, the trial court found that based on the evidence before it, no reasonable trier of fact could have concluded that the defendants had made the two allegedly defamatory statements with actual malice. The plaintiff now appeals.

¶ 21 II. ANALYSIS

¶ 22 On appeal, the plaintiff contends that the trial court erred when it granted summary judgment in favor of the defendants where there remain genuine issues of material fact as to: (1) whether the two statements were substantially true; and (2) whether in publishing them, the defendants acted with actual malice. For the reasons that follow, we find that regardless of whether the defamatory statements were substantially true, there is not an iota of evidence in the record to support the contention that the defendants acted with actual malice, so as to have precluded the trial court's grant of summary judgment in the defendants' favor.

¶ 23 It is well-established that summary judgment is proper where "the pleadings, depositions, 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." 735 ILCS 5/2-1005 (West 2016); see also *Epple v. LQ Management, L.L.C.*, 2019 IL App (1st) 180853, ¶ 14; *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 21; *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record in the light most favorable to the nonmoving party and strictly against the moving party. *Epple*, 2019 IL App (1st) 180853, ¶ 14; see also *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Morrissey v. Arlington Park Racecourse, L.L.C.*, 404 Ill. App. 3d 711, 724 (2010); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). The party moving for summary judgment bears the initial burden of proof, and may meet it either "by affirmatively showing that some element of the case must be resolved in his favor or establishing that there is an absence of evidence to support the nonmoving party's case." (Internal quotation marks omitted.) *Epple*, 2019 IL App (1st) 180853, ¶ 15. Our review of the trial court's entry of summary judgment is *de novo* and we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. See *Epple*, 2019 IL App (1st) 180853, ¶ 15; see also *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 24 A defamation action, such as the one raised here, provides "redress for false statements of

fact that harm reputation." *Brennan v. Kadner*, 351 Ill. App. 3d 963, 969 (2004). A statement is considered defamatory if it "harms a person's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with her or him." *Solaia Technology L.L.C., v. Specialty Pub. Co.*, 221 Ill. 2d 558, 579 (2006).

¶ 25 To prove defamation, the plaintiff must establish that: (1) the defendants made the defamatory statements about the plaintiff; (2) the defendants made an unprivileged publication of those statements to a third party; and (3) the publication caused damages. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 38 (citing *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009)); see also *Solaia*, 221 Ill. 2d at 579.

¶ 26 A statement is defamatory *per se* if the words used are so "obviously and materially harmful to [the plaintiff] that injury to the plaintiff's reputation may be presumed." *Bryson v. News America Publications, Inc*., 174 Ill. 2d 77, 87 (1996). Our supreme court recognizes five categories of statements that are defamatory *per se*, only two of which are relevant here, namely "words that impute a person is unable to perform or lacks integrity in performing his or her employment duties" and "words that impute a person lacks ability or otherwise prejudices that person in his or her profession." See *Solaia*, 221 Ill. 2d at 579-80.

¶ 27 However, a statement is not defamatory *per se* if it is substantially true. *Harrison v. Chicago Sun-Times, Inc.*, 341 Ill. App. 3d 555, 563 (2003). " 'Substantial truth' " is shown where the " 'gist' " or " 'sting' " of the allegedly defamatory material is true. *Id*. (quoting *Lemons v. Chronicle Publishing Co.*, 253 Ill. App. 3d 888, 890 (1993)). Accordingly, allegedly defamatory statements are not actionable even where they are not technically accurate in every detail. *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 71 (2010) (quoting *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 451–52 (2000)), *appeal denied*, 237 Ill. 2d

560 (2010). "While determining 'substantial truth' is normally a question for the jury, the question is one of law where no reasonable jury could find that substantial truth had not been established." *Id.*

¶ 28 In the present case, the defendants contend that the two allegedly defamatory statements were substantially true. In that respect, they point out that the plaintiff admitted that he lived only five minutes away from the library but did not attend any of the monthly library board meetings. In addition, they contend that even after being ousted from his position as trustee of the library board, while campaigning, the plaintiff continued to represent himself as the trustee to both the Chicago Sun Times and on his own website. Moreover, the defendants contend, the plaintiff admitted to pursuing the mandamus action against the library board, for which the bills exceeded, if not hundreds of thousands, in the very least, several tens of thousands of dollars. In addition, they point out that the plaintiff has been involved in at least two additional lawsuits, intended to redress grievances arising from his unsuccessful bids at other political positions, and whose costs are presumably similar.

¶ 29 The plaintiff, on the other hand, argues that the statements were not substantially true because he was not required to attend any library board meetings after his seat was proclaimed vacant when he failed to appear for his swearing in ceremony. In addition, he contends that he filed the mandamus petition in the circuit court only in response to the board's illegal action in ousting him and proclaiming his trustee seat vacant. He further points out that since the circuit court reversed the findings of the administrative agency and reinstated him to the office of trustee, the library board incurred all of the attorney's fees as a result of their own illegal conduct and not any malfeasance on his part. Moreover, the plaintiff points out that those attorney's fees which totaled $21,204.90, did not come close to the "hundreds of thousands of dollars" that the

campaign flyer alleged his lawsuits had cost tax payers. The plaintiff also points out that the flyer's characterization of these lawsuits by a trial court as "mere fishing expeditions" was false because it was taken from an order in a case in which the plaintiff was not even a party, but merely one of the two attorneys representing a client.

¶ 30 While we tend to agree with the plaintiff that under this evidence, taken in the light most favorable to him, there remains a genuine issue of material fact as to whether the allegedly defamatory statements were substantially true, we nonetheless conclude that summary judgment was proper because the plaintiff provided not a single iota of evidence to suggest that the defendants published those statements with actual malice.

¶ 31 In this respect, we note that as a candidate for public office, the plaintiff was a public figure, and, therefore, held to a higher standard of proof with respect to establishing the defendants' intent in publishing the allegedly defamatory statements. See *Jacobson v. CBS Broadcasting, Inc*., 2014 IL App (1st) 132480, ¶ 26. Unlike a private individual, who need only demonstrate that the defendants were negligent in their publication, the plaintiff was required to prove, by clear and convincing evidence, that the defendants acted with "actual malice" in making the two defamatory expressions. *Id*. (citing *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974) and *Kessler v. Zekman*, 250 Ill. App. 3d 172 (1993)).

¶ 32 "The inquiry into whether a statement was made with actual malice is subjective." *Hardiman v. Aslam*, 2019 IL App (1st) 173196, ¶ 6 (citing *Wanless v. Rothballer*, 115 Ill. 2d 158, 170 (1986) (citing *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 511 n.30, (1984))). The plaintiff must prove by clear and convincing evidence that defendants " ' published the defamatory statements with knowledge that the statements were false or with reckless disregard for their truth or falsity. ' " *Hardiman*, 2019 IL App (1st) 173196, ¶ 6 (quoting *Costello*

v. Capital Cities Communications, Inc., 125 Ill. 2d 402, 419 (1988)). Reckless disregard for the truth means that the defendants published the statements "despite a high degree of awareness of [its] probable falsity" and while "entertaining serious doubts as to its truth." (Internal quotation marks omitted.) *Coghlan*, 2013 IL App (1st) 120891, ¶ 43. If the defendants did not seriously doubt the truth of their assertions, their "failure to investigate does not itself establish actual malice." *Costello*, 125 Ill. 2d at 421.

¶ 33 What is more, the burden of proving actual malice is on the party claiming injury. *Piersall v, SportsVision of Chicago*, 230 Ill. App. 3d 503, 507 (1992). "This burden is not satisfied by the bare allegation that a defendant acted maliciously and with knowledge of the falsity of the statement; the plaintiff must allege facts from which actual malice may be inferred." *Davis v. John Crane, Inc.*, 261 Ill. App. 3d 419, 431 (1994); see also *Piersall*, 230 Ill. App. 3d at 507.

¶ 34 In the present case, construing, as we must, all of the pleadings and evidentiary material in the light most favorable to the plaintiff, we conclude that based on the record before us, no reasonable tier of fact could have concluded that the defendants acted with actual malice. The plaintiff presented no evidence whatsoever that the defendants entertained "serious doubts" as to the truth of the two allegedly defamatory statements but went ahead and published them in their campaign literature anyway. The plaintiff did not even attempt to meet this burden here. He did not attach a single affidavit, or document in support of his response to the defendants' motion for summary judgment. Nor did he cite to any portion of the record which would establish by clear and convincing evidence that the defendants published the statements "despite a high degree of awareness of [its] probable falsity" and while "entertaining serious doubts as to its truth." *Coghlan*, 2013 IL App (1st) 120891, ¶ 43. Instead, he apparently stood on the bare allegations in his amended complaint, which at best, boiled down to his assertion that with reasonable inquiry

and due diligence the defendants should have been able to discover that the statements were untrue. Our courts have repeatedly held that such bare allegations are not sufficient at the summary judgment stage. See *Piersall*, 230 Ill. App. 3d at 507-08 ("When a motion for summary judgment is made by a defendant in a defamation case, the plaintiff must set forth by 'clear and convincing' evidence that there is a genuine issue of material fact as to whether the defendant made an alleged defamatory statement with actual malice. *** *The party opposing summary judgment cannot rely upon his complaint or answer alone to raise a genuine issue of material fact*. [Citation.]"); *Davis*, 261 Ill. App. 3d at 431 ("Th[e plaintiff's] burden [in establishing actual malice] is not satisfied by the bare allegation that a defendant acted maliciously and with knowledge of the falsity of the statement."); see also *Costello*, 125 Ill. 2d at 421 (holding that where the plaintiff does not establish by clear and convincing evidence that the defendants did not seriously doubt the truth of their allegedly defamatory statements, their "failure to investigate does not itself establish actual malice.").

¶ 35 In this respect, we further reject the plaintiff's apparent attempt to fault the trial court's decision not to permit him to reopen discovery so as to depose Hastings in an attempt to present a triable issue of fact as to actual malice. The plaintiff does not expound on this argument, nor cite to any authority in support thereof. Instead, he merely references the circuit court's "abrupt" closing of deposition discovery and its denial of his motion to reopen the same, implying prejudice.

¶ 36 We initially remind the plaintiff of his burden under Supreme Court Rule 341(h)(7), to provide us with "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation to the authorities and the pages of the record relied on." Ill. S. Ct. R. 347(h)(7) (eff. Nov. 1, 2017). The plaintiff's argument here falls woefully short of what is

required under this rule, which our supreme court has stated is not a mere suggestion, but has the force of law. *Rodriguez v. Sherriff's Merit Comm'n*, 218 Ill. 2d 342, 353 (2006). A reviewing court is "entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented." *First Mercury Inst. Co. v. Nationwide Sec. Services, Inc.*, 2016 IL App (1st) 143942, ¶ 22; see also *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007); *Thrall Car Manufacturing Co. V. Lindquist*, 145 Ill. App. 3d 712, 719 (1986)). We are not a "depository in which the appellant may dump the burden of argument and research." *Id*.

¶ 37 Regardless of the plaintiff's failure to abide by the strict requirements of Rule 341(h)(7) Ill. S. Ct. R. 347(h)(7) (eff. Nov. 1, 2017), however, we also find no merit in his argument. It is axiomatic that trial courts are given great latitude in managing their own dockets and that our review of any decision relating to case management is for an abuse of discretion. *Johnson v. Ingalls Memorial Hosp.*, 402 Ill. App. 3d 830, 843 (2010). In the present case, we find no such abuse in the trial court's refusal to reopen discovery in light of the fact that the decision to close discovery before any depositions could be taken was the result of the plaintiff's own failure to appear at a status hearing, at which the parties were ordered to provide the court with a written agreement as to the scope of any deposition discovery.

¶ 38 For all of these same reasons, we further find that summary judgment on the false light invasion of privacy claim was also proper. To state a claim of false light invasion of privacy, a plaintiff has to allege and prove that: (1) he was placed in a false light before the public as a result of the defendants' action; (2) the false light in which he was placed would be highly offensive to a reasonable person; and (3) the defendants acted with actual malice. *Kapotas v. Better Government Ass'n*, 2015 IL App (1st) 140534, ¶ 77.

¶ 39 Since we have already held that no rational trier of fact could have found that the defendants published the two statements in the campaign flyer with actual malice, the same analysis applies to the plaintiff's false light invasion of privacy claim.

¶ 40 III. CONCLUSION

¶ 41 Accordingly, for all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 42 Affirmed.