2012 App (1st) 111458-U

FOURTH DIVISION
March 15, 2012

No. 1-11-1458

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH ABBAS, Plaintiff-Appellant, v. MICHAEL WEININGER, LUPEL WEININGER, LLC., and CHARTER ONE BANK, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division. No. 09 L 12372 Honorable James N. O'Hara, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's section 2-619 dismissal of plaintiff's defamation claim was not erroneous where the record revealed that the alleged defamatory statement was substantially true.

¶ 2 The plaintiff, Joseph Abbas (hereinafter Abbas), filed a complaint in the circuit court alleging, *inter alia*, that the defendants, Michael Weininger (hereinafter Weininger), Lupel Weininger, LLC (hereinafter Weininger's lawfirm), and Charter One Bank (hereinafter Charter

One), defamed him in an email communication.[1] The defendants filed a joint motion to dismiss the complaint pursuant to sections 2-615 and 2-619 of the Illinois Code of Civil Procedure (Civil Procedure Code) (735 ILCS 5/2-615, 2-619 (West 2008)). The circuit court granted the defendants' motion to dismiss pursuant to section 2-619 of the Civil Procedure Code (735 ILCS 5/2-619 (West 2008)), finding that the allegedly defamatory statement was substantially true and therefore not actionable. The plaintiff now appeals contending that the alleged statement was not substantially true but rather defamatory *per se*. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following undisputed facts. Abbas is the former president and principal partner of a high-end luxury car dealership commonly known as Bentley of Downers Grove, Gold Coast Bentley and Gold Coast Lambroghini. Charter One was Abbas' principal business lender. Weininger is an attorney, principal partner of his own law firm and the legal representative of Charter One Bank.

¶ 5 In early 2009, Abbas' dealership began experiencing financial difficulties and Abbas agreed to sell his dealership to Joseph Perillo (hereinafter Perillo). Abbas and Perillo executed a purchase agreement on August 10, 2009. This agreement was amended and restated on August 24, 2009.

¶ 6 While Abbas was negotiating the sale of his dealership with Perillo, he continued to default on his loan obligations to Charter One. In September 2009, the bank exercised its right

[1]Abbas was permitted to amend his complaint several times. This appeal is from the dismissal of his fourth and final amended complaint.

pursuant to the Illinois Uniform Commercial Code to sell Abbas' collateral. The UCC sale took place on September 2, 2009.

¶ 7 After this sale, on September 25, 2009, Abbas and Perillo executed a second and final amendment to their purchase agreement. According to this final amended agreement, by September 25, 2009, Perillo acquired "all of the inventory, furnishings, fixtures, equipment, signage, intellectual property and all remaining tangible and intangible assets *** [and] any goodwill" of Abbas' dealership at the UCC sale for approximately $3.84 million.

¶ 8 Several days after the UCC sale, on or about September 29, 2009, an Illinois Secretary of State Police Officer confronted Abbas at his office and issued him multiple citations for failing to transfer title of the vehicles he had sold, in violation of section 3-113 of the Illinois Vehicle Code (625 ILCS 5/3-113 (West 2008)). The violations all related to auto sales made by Abbas prior to his sale of the dealership to Perillo.

¶ 9 On October 2, 2009, Weininger, who was at that time representing Charter One Bank (a/k/a RBS Citizens, N.A.) in an unrelated dispute between the bank, Abbas and certain other individuals, including Perillo and Bentley Motors,[2] wrote the following email:

> "[T]he IL Secretary of State Police arrested Abbas today on 27 counts and he posted bond. This is an excerpt from an email I received moments ago."[3]

Weininger sent the email to the attorneys for Bentley Motors and to Perillo.

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[2]This dispute would eventually be litigated in RBS Citizens, N.A. v. Bentley Motors, Inc., No. 10 CV 2929 (N.D. Ill.). It has no bearing on the outcome of this case.

[3]This is the email in its entirety.

¶ 10 As a result of this email, on October 19, 2009, Abbas filed his initial five-count verified complaint against Weininger, his law firm and Charter One Bank, alleging: (1) defamation per se; (2) defamation per quod; (3) false light; (4) negligence and (5) negligent infliction of emotional distress. Abbas did not attach the alleged defamatory email to his complaint. As a result, on December 31, 2009, the defendants filed a motion to dismiss the complaint pursuant to sections 2-615 and 2-619 of the Civil Procedure Code (735 ILCS 5/2-615, 2-619 (West 2008)). In addition to pointing out that Abbas failed to attach a copy of the email upon which all of the counts in his complaint relied, as required pursuant to section 2-606 of the Civil Procedure Code (735 ILCS 5/2-606 (West 2008)), the defendants further argued that: (1) the defamation per quod count was insufficiently pleaded because Abbas failed to allege "special damages" and (2) the negligent infliction of emotional distress count contained mere conclusory allegations.

¶ 11 Before a ruling on the motion to dismiss could be made, on February 23, 2010, Abbas filed an amended complaint, alleging the same counts as before, but again failing to attach the alleged defamatory email. On March 3, 2010, Abbas filed his second amended complaint, alleging the same counts but now finally attaching a copy of the email. On April 1, 2010, the defendants filed a motion to dismiss pursuant to section 2-615 of the Civil Procedure Code (735 ILCS 5/2-615 (West 2008)), contending that: (1) the allegedly defamatory statements did not meet the requirements of any of the five categories of defamation per se[4]; (2) Abbas failed to

[4]As shall be more fully elaborated below, these include words imputing that a person: (1) has committed a crime; (2) is infected with a loathsome communicable disease; (3) is unable to perform or lacks integrity in performing his employment duties; (4) has engaged in adultery; and

allege "special damages" required for defamation per quod and false light claims; and (3) Abbas' allegations of negligence and negligent infliction of emotional distress were merely conclusory.

¶ 12 Instead of filing a response to the motion to dismiss, on June 25, 2010, Abbas sought leave to amend his complaint for a third time, explaining that he "believe[d] after [his] review of the motion to dismiss, [that] the best use of judicial time [would be] for [him] to amend his complaint." The court permitted Abbas to file his third amended complaint on July 2, 2010. In that three-count complaint, Abbas only alleged: (1) defamation per quod; (2) false light; and (3) negligence.

¶ 13 The defendants once again filed a motion to dismiss the third amended complaint pursuant to sections 2-615 and 2-619 of the Civil Procedure Code (735 ILCS 5/2615-, 2-619 (West 2008)). In this motion, the defendants reiterated their prior arguments regarding the dismissal of the defamation *per quod* and false light claims. In addition, with respect to the negligence count, they argued that Abbas had failed to establish that they owed him any duty of care as he was never their client.

¶ 14 On October 25, 2010, when the matter came before the circuit court for argument, Abbas made an oral motion for leave to file yet another amended complaint. This motion was granted over the defendants' objection. In his fourth amended complaint, filed on November 15, 2010, Abbas reasserted counts he had previously dropped in response to the defendants' motions to dismiss, as well as added a new count for intentional infliction of emotional distress. Abbas'

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(5) lacks ability or otherwise prejudices a person's profession. See *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006).

fourth and final amended complaint, therefore, pleaded the following counts: (1) defamation *per se*; (2) defamation *per quod*; (3) false light; (4) intentional infliction of emotional distress; (5) negligent infliction of emotional distress; and (6) negligence. Each count was based upon the allegedly defamatory email, which Abbas attached to the amended complaint.

¶ 15 The defendants filed a joint motion to dismiss Abbas' fourth and final amended complaint. They first argued that the defamation per se, defamation per quod and false light counts had to be dismissed pursuant to 2-619(a)(9) of the Civil Procedure Code (735 ILCS 5/2-619(a)(9) (West 2008)) because: (1) the allegedly defamatory statement in the email sent by Weininger was substantial true and was protected by qualified privilege; and (2) the alleged damages were not caused by the email since Abbas had already sold his business by the time the email (i.e., the allegedly defamatory statement) was published. In support of these contentions, the defendants attached copies of the 27 citations issued against Abbas by the Illinois State Police in September 2009 for failure to transfer title, indicating that Abbas had posted bond on all the citations.[5] Each of the 27 citations contains the description of the violation ("failure to transfer title"), date, time and location of the violation as well as a notation stating "HOW ARREST WAS MADE: 1." In support of their motion, the defendants also attached copies of the purchase agreements between Abbas and Perillo and the UCC sale order, indicating that by the time the email was published, most of the dealership property had already been acquired by Perillo.

¶ 16 In addition, in their motion to dismiss, the defendants argued that Abbas' fourth amended complaint should be dismissed pursuant to section 2-615 of the Civil Procedure Code (735 ILCS

[5]Attached to the citations were Illinois State Police Officers' notes regrading each citation.

5/2-615 (West 2008). With respect to the defamation per se count, the defendants contended that the allegedly defamatory statement did not fall into any of the five established categories of defamation per se. With respect to the defamation per quod and false light counts, the defendants pointed out that Abbas had failed to allege any special damages with particularity. The defendants similarly argued that Abbas failed to allege "extreme or outrageous conduct" to proceed with a claim of intentional infliction of emotional distress. With respect to the negligence and negligent infliction of emotional distress counts, the defendants pointed out that they had no cognizable duty to Abbas. Finally, the defendants contended that Abbas did not suffer any direct physical impact and was not in the zone of danger of any such impact when the email was published so as to be able to proceed with his negligent infliction of emotional distress count.

¶ 17 In his response to the defendants' motion to dismiss, Abbas conceded that his claims for intentional and negligent infliction of emotional distress, as well as negligence should be stricken and the case proceeded only on the counts of defamation per se, defamation per quod and false light. In a written order, on April 27, 2011, the circuit court dismissed Abbas' fourth amended complaint with prejudice pursuant to section 2-619 of the Civil Procedure Code. The circuit court specifically found that under the record, the "citations issued to [Abbas by the Illinois Secretary of State Police] amounted to an arrest, and therefore, the statement [in the email] [wa]s substantially true," and not actionable. In coming to its decision, the circuit court took judicial

notice of the citations and the related documents attached to the defendants' motion to dismiss.[6] Having dismissed the case on this ground, the circuit court did not reach the merits of the defendants' alternative grounds for dismissal. Abbas now appeals.

¶ 18 II. ANALYSIS

¶ 19 On appeal, Abbas solely argues that the trial court improperly dismissed his claims of defamation per se, by finding that the issuance of the citations constituted an arrest. For the reasons that follow, we disagree.

¶ 20 We being by setting forth the well-established rules regarding defamation. To establish defamation, a plaintiff must present facts showing that the defendant made a defamatory statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and the publication caused damages. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). "A defamatory statement is a statement that 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*, 221 Ill. 2d at 579.

¶ 21 There are two types of defamatory statements: defamation *per se* and defamation *per quod*. *Brennan v. Kadner*, 351 Ill. App. 3d 963, 968 (2004). In an action for defamation *per quod*, the plaintiff must plead and prove actual damages in order to recover. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 390 (2008). If a defamatory statement is

[6]There appears to be no contention with respect to the propriety of the circuit court's judicial notice of the citations. See *Village of Riverwoods v. BG Ltd. Partnership*, 276 Ill. App. 3d 720, 724 (1995) ("A court may take judicial notice of facts when addressing a section 2-619 motion. Judicial notice is proper where the document in question is part of the public record and where such notice will aid in the efficient disposition of a case.")

actionable *per se*, on the other hand, the plaintiff need not plead or prove actual damage to his or her reputation to recover. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87 (1996). "Rather, statements that fall within these actionable *per se* categories are thought to be so obviously and materially harmful to [the plaintiff] that injury to the plaintiff's reputation may be presumed." *Bryson*, 174 Ill. 2d at 87.

¶ 22 The Illinois Supreme Court recognizes only five such categories of statements that are defamatory *per se*: (1) words that impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication. See *Solaia*, 221 Ill. 2d at 579–80.

¶ 23 In Illinois, an allegedly defamatory statement is not actionable if it is substantially true. See Hnilica v. Rizza Chevrolet, Inc., 384 Ill. App.3d 94, 97 (2008) ("Truth is an absolute defense to defamation; true statements cannot support a claim of defamation"); see also *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717 (7th Cir. 2004). This rule derives from the "recognition that 'falsehoods which do no *incremental* damage to the plaintiff's reputation do not injure the only interest the law of defamation protects.' " *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717, 727 (7th Cir. 2004) (applying Illinois law) (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993)). In determining whether a statement is substantially true, the court must consider whether the "gist" or "sting" of the

statement is true; the "gist" or "sting" of a statement is true if it produces the same effect on the mind of the recipient which the precise truth would have produced. *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2004); see also *Moore v. People for the Ethical Treatment of Animals, Inc*., 402 Ill. App. 3d 62, 71 (2010) ("Substantial truth refers to the fact that a defendant need prove only the 'gist' or the 'sting' of the statement.") "The question is one of law where no reasonable jury could find that substantial truth had not been established." *J. Maki Construction Co. v. Chicago Regional Council of Carpenters*, 379 Ill. App. 3d 189, 203 (2008).

¶ 24 In the present case, Abbas contends that the circuit court's finding that the allegedly defamatory statement ("the IL Secretary of State Police arrested Abbas today on 27 counts and he posted bond") was substantially true is against the manifest weight of the evidence because Abbas was never "arrested." We disagree.

¶ 25 The record reveals that on or about September 29, 2009, a couple of days before the allegedly defamatory email was sent, an Illinois Secretary of State Police Officer confronted Abbas at his office and issued him 27 citations for failing to transfer title of vehicles sold, in violation of section 3-113 of the Illinois Vehicle Code (625 ILCS 5/3-113 (West 2008)). All 27 citations are part of the record on appeal. Each citation, contains the description of the violation (i.e., "failure to transfer title"), as well as the date, time and location of the violation. More importantly, each citation contains a bond requirement as well as a notation stating "HOW ARREST WAS MADE," followed by numeral 1. The record also contains notes written by the Illinois State Police Officers regarding each citation. In addition, it is undisputed that Abbas posted bond for all of the aforementioned citations, by paying collectively on citation number

346511. Under this record, particularly the citations which contain a notation indicating that an arrest was somehow made (albeit, not clarifying how), as well as the payment of the bond, we cannot but find the "gist" or "sting" of the allegedly defamatory statement, "the IL Secretary of State Police arrested Abbas today on 27 counts and he posted bond," to be true.

¶ 26 Abbas nevertheless contends that the citations were not substantially equivalent to the arrest because at the time of their issuance, he was not handcuffed, physically restrained, fingerprinted, *Mirandized*, or deprived of either his liberty or any personal property.

¶ 27 Abbas is correct when he argues that an arrest most obviously occurs when a person is taken into custody, and that nothing in the record here conclusively establishes that Abbas was taken into custody. See *e.g.*, *People v. Wipfler*, 37 Ill. 400, 403 (1976) ("[a]n arrest is the taking into custody of a person, accomplished either by actual restraint of the person or his submission into custody"); see also Black's Law Dictionary 100 (5th ed. 1979) (an arrest means "[t]o deprive a person of his liberty by legal authority. Taking under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand."); see also Random House Webster's Unabridged Dictionary 116 (2d ed. 1997) (defining an arrest as "seiz[ing] (a person) by legal authority or warrant; tak[ing] into custody"); see also 725 ILCS 5/102-5 (West 2008) (an arrest is "the taking of a person into custody.")

¶ 28 However, our courts have been clear that "no formal declaration of arrest is necessary for an arrest to occur," (*People v. Fortney*, 297 Ill. App. 3d 79, 86 (1998) (citing *People v. Bahnfelth*, 233 Ill app. 3d 289, 292 (1992)) and that an arrest need not rise to the level of physical custody. See *Ryan v. Village of Hanover Park*, 311 Ill. App. 3d 515, 531 (1999) ("it is well settled that an

arrest requires less than being taken into custody") see also *People v. Lewellen*, 247 Ill. App. 3d 350, 353-54 (1993).

¶ 29 What is more, in situations similar to the one at bar, our courts have specifically held that a mere traffic stop or the issuance of a traffic citation can in and of itself constitute an arrest. See *e.g.*, *Ryan v. Village of Hanover Park*, 311 Ill. App. 3d 515, 531-32 (1999); *Lewellen*, 247 Ill. App. 3d at 354.

¶ 30 Specifically, in *Ryan*, the Attorney General brought an action challenging the Village of Hanover's municipal traffic ordinance as conflicting with state traffic laws. *Ryan*, 311 Ill. App. 3d at 519. Our appellate court agreed with the Attorney General and held that a Village's municipal traffic ordinance was unlawful as it conflicted with the state laws. *Ryan*, 311 Ill. App. 3d at 533. In doing so, the appellate court specifically addressed whether the issuance of a municipal traffic ticket by the Village police officer constituted an "arrest." *Ryan*, 311 Ill. App. 3d at 531. The Village argued, just as Abbas does here, that because the issuance of a ticket "does not require the officer to take the offender into custody" no arrests occurred when the ordinance was enforced. *Ryan*, 311 Ill. App. 3d at 531. The appellate court disagreed, holding that an issuance of a citation constituted an arrest. As the court explained:

> "Notwithstanding the above statutory definition of arrest, enforcement of the Code does not require taking the offender into 'actual custody.' See 155 Ill. 2d R. 526 (providing bail provisions for minor traffic offenses). Furthermore, it is well settled that an arrest requires less than being taken into custody. Recently, this court reiterated that "[a]n arrest occurs when a person's freedom of movement has been restrained by means of physical force or

> show of authority. [Citation.] In determining whether a person has been arrested, the relevant inquiry is whether a reasonable, innocent person in his situation would conclude that he was not free to leave." [Citation.] In the context of DUI driving offenses, Illinois courts refer to the same standard while also acknowledging that issuance of a citation in that context is one manner of evidencing an arrest. [Citations]. Under this definition, being stopped by a municipal police officer for an alleged traffic violation would be considered an arrest, since, more often than not, a reasonable person does not feel that he can leave until issuance of the ticket and permission to leave is given. Consequently, defendants cannot claim that arrests do not occur with issuance of P-tickets nor can they claim that traffic stops do not trigger adherence to Supreme Court Rule 552, requiring the arresting officer to complete the uniform citation and file it in the circuit court within 48 hours." *Ryan*, 311 Ill. App. 3d at 531.

¶ 31 Similarly, in *Houston v. Taylor*, No. 04 C 6984 (N. D. Ill. Feb. 6, 2006), the only case we have found that addresses arrests in the context of citations issued pursuant to section 3-113 of the Illinois Vehicle Code (625 ILCS 5/3-113 (West 2008)) for a dealer's "failure to transfer title," such as those issued here to Abbas, the court recognized that the issuance of the citations without any physical restraint or custody of the violator can and does in and of itself constitute an arrest. In *Houston*, a used car dealer filed a complaint alleging that he had been "falsely arrested" by the Illinois Secretary of State Police on the basis of citations he received for violating section 3-113 of the Illinois Vehicle Code (625 ILCS 5/3-113 (West 2008)). *Houston*, No. 04 C 6984, at 1 (N. D. Ill. Feb. 6, 2006). The court recognized that the dealer was not taken into physical custody

when he received the citations, noting that instead on November 1, 2002, an officer issued the citation and "processed the necessary paperwork, asked [the dealer] to pay $1,000 for bond, and released him, " but "did not handcuff, search, threaten, or physically restrain [him.]" *Houston*, No. 04 C 6984, at 1 (N. D. Ill. Feb. 6, 2006). Nevertheless, despite this lack of physical custody, throughout the case, the court proceeded under the premise that the issuance of the citations itself constituted an "arrest." See *Houston*, No. 04 C 6984, at 2-3 (N. D. Ill. Feb. 6, 2006) (holding that the Secretary of State Police had "probable cause to *arrest* Houston *** [by] the date of [his] *arrest* on November 1, 2002") (emphasis added.) Although the court in *Houston* did not specifically address the definition of an arrest in the context of citations issued pursuant to section 3-113 of the Illinois Vehicle Code (625 ILCS 5/3-113 (West 2008)), it implicitly recognized that even without physical custody the issuance of a citation pursuant to that section constituted an arrest.

¶ 32 Applying the rationale of *Ryan* and *Houston* to the facts of this case, we conclude that in the present case the issuance of the 27 citations to Abbas for "failure to transfer title" was sufficiently equivalent to an arrest. See also *Lewellen*, 247 Ill. App. 3d at 353-54 ("the standard for determining whether an arrest has occurred is whether a reasonable person innocent of any crime would have considered himself under arrest considering all of the circumstances. *** *[T]he issuance of a traffic ticket is a convincing way to establish the fact of arrest*"); see also *People v. Fortney*, 297 Ill. App. 3d at 86 (noting that in determining whether a suspect has been arrested for driving under the influence it is appropriate to consider "*the issuance of a citation*" as a relevant factor). Accordingly, any reference by the defendants to the issuance of the citations

as "arrests" was in the very least "substantially true" and the defendants therefore cannot be liable for defamation. See Hnilica, 384 Ill. App.3d at 97 ("Truth is an absolute defense to defamation; true statements cannot support a claim of defamation").

¶ 33 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 34 Affirmed.