2012 IL App (2d) 110863-U
No. 2-11-0863
Order filed March 23, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BRANDON A. DONATELLI and DONATELLI & SONS, INC.,	)	Appeal from the Circuit Court of McHenry County.
Plaintiffs-Appellants,	)	
v.	)	No. 09-LA-363
J. PETER DOYLE and DEBORA B. DOYLE,	)	Honorable Michael T. Caldwell,
Defendants-Appellees,	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: Trial court's grant of summary judgment in favor of defendants was affirmed where the defamation allegations in plaintiffs' complaint were barred by the statute of limitations and allegedly defamatory statements made to a bankruptcy trustee were not sufficiently pleaded and were absolutely privileged.

¶ 1 Plaintiffs, Brandon A. Donatelli (Brandon) and Donatelli & Sons, Inc. (DSI), appeal from an order of the circuit court of McHenry County granting summary judgment in favor of defendants, J. Peter Doyle (Peter) and Debora B. Doyle (Debora). We affirm.

¶ 2 BACKGROUND

¶ 3 This litigation arose out of a dispute between the parties over plaintiffs' performance of a contract to remodel defendants' home in Fox River Grove, Illinois. On April 21, 2004, the parties entered into a written agreement for a two-story addition to defendants' home. During the construction, a dispute arose as to plaintiffs' performance and Brandon's misuse of payments plaintiffs made pursuant to the contract. On December 7, 2004, defendants terminated the agreement.

¶ 4 On December 6, 2006, plaintiffs filed suit against defendants. Count I sought to foreclose a mechanics' lien; count II was for breach of contract; count III was for malicious prosecution; and count IV was for defamation. Count IV alleged that Brandon was employed by the Cary Fire Department, and that Brandon was also employed by Lowe's Home Improvement (Lowe's) as a subcontractor. Count IV further alleged that "[a]t times unknown," Peter called the Cary Fire Department chief, Jeffrey Macko, and stated that Brandon was a thief and should be fired; additionally, plaintiffs alleged that "at times unknown," Peter called Lowe's stating that Brandon was a thief. Count IV also alleged that "defendants made similar statements alleging criminal conduct on the part of [Brandon] to numerous persons for the purpose of harming [Brandon] and his reputation in the community." The trial court dismissed count III (malicious prosecution) with prejudice and dismissed count IV (defamation) without prejudice. Plaintiffs voluntarily dismissed the remainder of the lawsuit on September 17, 2008, pursuant to section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2008)).[1]

[1]Plaintiffs appealed the order dismissing the malicious prosecution count with prejudice, and this court affirmed in *Donatelli v. Doyle*, No. 2-07-0936 (June 6, 2008) (unpublished order pursuant

¶ 5 On September 16, 2009, plaintiffs refiled suit pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 2008)). Count I alleged breach of contract; count II alleged "negligent" defamation; and count III alleged "intentional" defamation. Counts II and III more specifically alleged that "at times unknown," Peter called Cary Fire Chief Macko and stated that Brandon had diverted money for his personal use that was intended as payment for cabinets. Counts III and IV further alleged that "at times unknown" Peter called Lowe's Home Improvement stating that Brandon was a thief. Paragraph 34 of count III and paragraph 41of count IV were identical and alleged: "In addition to the foregoing, upon information and belief, [Peter and Debora] made numerous similar statements regarding [Brandon] to numerous persons in the community." Plaintiffs voluntarily dismissed count I, breach of contract, and defendants answered counts III and IV and raised the affirmative defense that those counts were barred by the statute of limitations applicable to defamation actions, which is one year. Following discovery, defendants moved for summary judgment based upon their statute-of-limitations defense. In their response to the motion for summary judgment, plaintiffs conceded that the original complaint was filed outside the limitations period for actions based on the alleged defamatory statements made to Chief Macko and Lowe's. However, plaintiffs raised additional new allegations that defendants made defamatory statements to the McHenry County State's Attorney's office,[2] to a bankruptcy trustee, and to one James Passarelli that Brandon contended were within the limitations period as of the filing of the original complaint.[3] Plaintiffs later conceded that any statements made to the State's Attorney were

---

to Supreme Court Rule 23).

[2]The State's Attorney had indicted Brandon for home repair fraud.

[3]Passarelli furnished an affidavit to plaintiffs in which he stated that he had a conversation

privileged but contended that statements made to the bankruptcy trustee were not. On August 4, 2011, the trial court granted defendants' motion for summary judgment, and plaintiffs filed a timely appeal.

¶ 6 ANALYSIS

¶ 7 On appeal, plaintiffs assert that the trial court erred in granting summary judgment because (1) defendants falsely asserted that they made no defamatory statements to anyone other than Chief Macko and Lowe's, which prevented plaintiffs from discovering the allegedly defamatory statements to the bankruptcy trustee; (2) the statements to the bankruptcy trustee were not privileged; and (3) the refiled complaint sufficiently alleged the defamatory statements to the trustee.

¶ 8 Summary judgment is inappropriate if a material question of fact exists. *Moss v. Rowe Construction Co.*, 344 Ill. App. 3d 772, 776 (2003). All evidence is viewed in the light most favorable to the nonmovant. *Moss*, 344 Ill. App. 3d at 776. Summary judgment is a drastic measure that should be allowed only when the right of the moving party is clear and free from doubt. *Duffy v. Togher*, 382 Ill. App. 3d 1, 7 (2008). We review a grant of summary judgment *de novo*. *Moss*, 344 Ill. App. 3d at 776.

---

with Peter "just" prior to Brandon's scheduled criminal trial in August 2006 in which Peter accused Brandon of stealing money from Peter and Debora. Passarelli also furnished an affidavit to defendants in which he stated that he could not recall the date of his conversation with Peter, saying, "[T]he conversation with [Peter] could have been a day before the criminal trial or it could have been a year before the criminal trial, I simply do not recall." Peter noted in a writing he made contemporaneously with the Passarelli conversation that it occurred on October 20, 2005, outside the limitations period. Plaintiffs have abandoned their claim based on the Passarelli conversation.

¶ 9 Here, plaintiffs refiled their complaint pursuant to section 13-217 of the Code after dismissing their original complaint. Section 13-217 grants a plaintiff who voluntarily dismisses his or her complaint the right to refile within one year or within the remaining period of limitations, whichever is greater. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 215 (2007).[4] The statute of limitations for defamation is one year. 735 ILCS 5/13-201 (West 2008). The refiled complaint alleged that defendants made defamatory statements to Chief Macko and to Lowe's. Plaintiffs conceded that the one-year statute of limitations had expired as to those statements at the time they filed their original complaint.

¶ 10 However, in response to the motion for summary judgment, plaintiffs alleged that defendants had also made defamatory statements to a bankruptcy trustee, statements of which they alleged they were unaware until the prosecution in Brandon's criminal case disclosed them. Plaintiffs maintain that defendants falsely averred in their affidavits in support of summary judgment that they had made statements only to Macko and Lowe's. Therefore, plaintiffs urge that the discovery rule applies and the statute of limitations began to run from the date they became aware of the statements to the trustee. The record shows that Brandon and his wife filed bankruptcy. Defendants filed a proof of claim in that bankruptcy proceeding for money they claimed they were owed by plaintiffs arising out of the remodeling agreement. Defendants discussed the matters contained in their proof of claim in numerous emails with the trustee. As we shall see, when plaintiffs knew about the statements to the

[4]Our supreme court in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997), held the 1995 amendment to the statute unconstitutional. The current version in effect is the one that preceded the 1995 amendment. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n. 1 (2008).

trustee is irrelevant because (1) plaintiffs did not plead the statements to the trustee in their refiled complaint, and (2) the statements to the trustee were privileged.

¶ 11 Defendants maintain that the statements to the trustee were privileged. The trial court agreed and also noted that the alleged defamatory statements to the trustee were not contained within the cause of action alleged in the refiled complaint because the allegation in paragraph 41 was too vague. Paragraph 41 alleged that "upon information and belief," defendant made similar statements to those made to Macko and Lowe's "to numerous persons in the community." The trial court commented that the allegation was "as general and as vague as general and vague can be." The court told plaintiffs' lawyer, "You can't sue somebody because you think they're going around talking about you." Plaintiffs' counsel's response was, "But as it turned out, they were."

¶ 12 Plaintiffs contend that the statements to the bankruptcy trustee were adequately pleaded in paragraph 41. They argue that because defendants were "recalcitrant," in that they allegedly concealed their statements to the bankruptcy trustee by excluding them from their affidavits in support of the motion for summary judgment, plaintiffs were forced to plead a vague allegation. This can hardly be so. What defendants excluded from their affidavits could not have influenced the pleading, since the refiled complaint preceded the filing of Peter's and Debora's affidavits by nearly two years. Furthermore, the record shows that the State's Attorney turned over the bankruptcy emails to Brandon's criminal attorney on June 8, 2006. Thus, plaintiffs knew, or should have known, of the statements to the trustee before they filed their original complaint in December 2006.

¶ 13 In their reply brief, plaintiffs assert that because certain defamatory statements were known to plaintiffs (the statements to Macko and Lowe's), the statements to the trustee are "sufficient to allow [p]laintiffs to proceed to trial." In the same vein, plaintiffs argue:

> "The fact that there were statements acknowledged to have been made by [d]efendants, and that later statements that fell within the limitations period came to light during the discovery process indicate that [p]laintiffs were not simply guessing that [d]efendants had defamed them."

¶ 14 Plaintiffs' argument, set forth above, as it relates to the sufficiency of the allegation regarding the statements to the trustee in the refiled complaint makes little sense. To state a claim for defamation, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 715 (2010). A complaint for defamation must set forth the words alleged to be defamatory clearly and with particularity. *Krueger v. Lewis*, 342 Ill. App. 3d 467, 470 (2003). An allegation made "upon information and belief" that a defendant made statements that were then repeated in a press release was inadequate because the complaint did not "specifically state what [the defendant] actually said." *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 73 (2010). A defamation complaint is factually deficient where it cannot be determined from the complaint to whom the allegedly defamatory statements were communicated. *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 164 (1998). Allegations that defamatory statements were transmitted to newspapers or to the plaintiff's employer are insufficient. *Lykowski*, 299 Ill. App. 3d at 164. All paragraph 41 alleged was that "upon information and belief" defendants made "similar statements" to "numerous persons

in the community." It is possible that the trustee was not even a person "in the community," as plaintiffs alleged they were residents of McHenry County and the bankruptcy was filed in Rockford, Illinois. Because the refiled complaint nowhere pleaded the statements to the trustee clearly and with particularity, we agree with the trial court that paragraph 41 was fatally vague.

¶ 15 We also agree with the trial court that the statements made to the trustee were privileged. It is the "established law" of Illinois that statements made during quasi-judicial proceedings are absolutely privileged. *Richardson v. Dunbar*, 95 Ill. App. 3d 254, 256 (1981). The privilege encompasses testimony before administrative agencies or other governmental bodies when such agencies or bodies are performing a judicial function. *Richardson*, 95 Ill. App. 3d at 257. In *Edelman, Combs and Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156 (2003), the court held that communications made to a bankruptcy trustee in relation to a judicial proceeding were absolutely privileged. *Edelman*, 338 Ill. App. 3d at 165.

¶ 16 In *Edelman*, attorneys from Hinshaw & Culberston (Hinshaw) represented Dayton Hudson in a class action lawsuit that was filed by one Frys, who was also a debtor in a bankruptcy proceeding. *Edelman*, 338 Ill. App. 3d at 161-62. In connection with another class action suit involving a bankruptcy debtor, the law firm of Jenner & Block (Jenner) had prepared a memorandum alleging that the plaintiffs in *Edelman* routinely engaged in the practice of concealing assets from bankruptcy trustees. *Edelman*, 338 Ill. App. 3d at 160-61. Jenner shared this memorandum with Hinshaw. *Edelman*, 338 Ill. App. 3d at 161. Hinshaw then distributed the Jenner memorandum to the trustee in the Frys bankruptcy. *Edelman*, 338 Ill. App. 3d at 162. The plaintiffs in *Edelman* sued Hinshaw for defamation, and Hinshaw argued that the memorandum was privileged. *Edelman*, 338 Ill. App. 3d at 163-64. The trial court granted Hinshaw's motion to dismiss on the basis of privilege,

and on appeal the appellate court considered whether or not an absolute privilege applied to the communication with the trustee. *Edelman*, 338 Ill. App. 3d at 164. The appellate court held that a bankruptcy trustee is analogous to a court in that the trustee is appointed by the bankruptcy judge and performs quasi-judicial functions. *Edelman*, 338 Ill. App. 3d at 166. Plaintiffs contend that this analysis was *obiter dicta*. The question of absolute privilege was squarely before the appellate court, and its resolution was necessary to the court's disposition of the issue relating to Hinshaw's publication of the memorandum to the trustee. Consequently, the court's holding was not *obiter dicta*.

¶ 17 Nonetheless, plaintiffs in the present case assert that a bankruptcy trustee in a Chapter 13 bankruptcy—as opposed to the Chapter 7 bankruptcy in *Edelman*—performs solely ministerial functions and does not have discretionary powers. The statutory duties of the Chapter 13 trustee, as set forth in plaintiffs' brief, belie their argument. For instance, three of the duties of the Chapter 13 trustee are to examine proofs of claim, object to the allowance of any claim that is improper, and, if advisable, oppose the discharge of the debtor. These are not ministerial duties but involve a high degree of discretion. Another duty of the Chapter 13 trustee, as set forth in plaintiffs' brief, is to be accountable for all property received. Therefore, we agree with the court's assessment in *Edelman*, that the trustee executes the bankruptcy judge's orders concerning the collection and disposition of estate property, which is essential for the efficient functioning of the bankruptcy court. *Edelman*, 338 Ill. App. 3d at 166. We also agree with the court's policy determination:

> "[T]he trustee's duty to assemble the bankruptcy estate requires an unimpeded reception of information regarding the accuracy of its no-asset reports. *** It is of paramount public importance to encourage those who have knowledge of dishonest or unethical conduct

> on the part of the creditors or debtors to impart that knowledge to the bankruptcy trustee [handling] a particular bankruptcy estate." *Edelman*, 338 Ill. App. 3d at 166.

Accordingly, we hold that defendants' proof of claim and ensuing emails with the bankruptcy trustee handling Brandon's bankruptcy estate were absolutely privileged.

¶ 18 In its oral ruling on the motion for summary judgment, the trial court alluded to a third reason for granting the motion, which was that the refiled complaint was barred by *res judicata*. We do not address this additional reason for the court's decision, because neither party has argued it in their briefs.

¶ 19 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 20 Affirmed.