2013 IL App (4th) 120744-U

NO. 4-12-0744

FILED
May 23, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

HOOPER & NIEBUR, INC., an Illinois Corporation,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Pike County
MIDSTATE INSURANCE AGENCY, INC., an Illinois Corporation,	)	No. 09LM27
Defendant-Appellee.	)	Honorable
	)	Thomas J. Brannan,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's grant of summary judgment as the statement was not defamatory *per se*.

¶ 2 In November 2010, plaintiff, Hooper & Niebur, Inc., filed a second amended complaint against defendant, Midstate Insurance Agency, Inc. Count IV of the complaint alleged defamation *per se* based on plaintiff's claim Julie Kremer, an employee of defendant, contacted Linda Duke of the W.A. Schickendanz Agency, Inc., of Belleville, Illinois (Schickendanz), and informed Duke "we're buying Hooper & Niebur." In November 2011, defendant filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2010)) asserting plaintiff's claim in count IV of the second amended complaint did not meet the requirements of defamation *per se*. In May 2012, the trial court granted defendant's motion for summary judgment.

¶ 3 Plaintiff appeals, arguing the trial court erred in granting defendant's motion for summary judgment. Specifically, plaintiff asserts Kremer's statement to Duke, "we're buying Hooper & Niebur," fits within two of the five categories of statements considered defamatory *per se*. For the reasons stated, we disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff is an insurance agency in Pittsfield and has been operating since 1991. Defendant is an insurance agency in Pittsfield and was formed in October 2008 by five former employees of plaintiff: Kremer, Glen Cooley, Sally Green, Penny Roig, and Susan Clough.

¶ 6 A. The Complaints

¶ 7 In July 2009, plaintiff filed a single-count complaint against defendant alleging *per se* libel and slander. In November 2009, plaintiff filed a five-count first amended complaint. In December 2009, defendant filed a motion to dismiss plaintiff's first amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2008)) asserting plaintiff failed to state a cause of action. Defendant asserted count IV, which alleged Julie Kremer, an employee of defendant, contacted Linda Duke of Schickendanz and informed Duke "we're buying Hooper & Niebur," should be dismissed because the "complaint attempts to set forth a meaning of the conversation that is not present nor can reasonably be construed to be present such that the conversation did not impute an inability of the Plaintiff to perform." In October 2010, the trial court dismissed counts I and II and struck counts III and V of the first amended complaint. Plaintiff was granted leave to amend as to counts II, III, and V. The court denied the motion to dismiss count IV and stated, "Certainly the purported conversation cannot be construed as an innocent communication. However, there is a factual issue as to whether the purported

conversation did imply an inability of [plaintiff] to perform and raises an issue of fact as to the prejudice, if any, to Plaintiff in its profession."

¶ 8 In November 2010, plaintiff filed a second amended complaint and repleaded counts II, III, IV, and V. Count IV of the second amended complaint alleged the Kremer statement was slander *per se* in that it imputed an inability of plaintiff to perform its duties and prejudiced plaintiff in its profession as an insurance agency.

¶ 9 B. The Motion for Summary Judgment

¶ 10 In November 2011, defendant filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2010)). The motion asserted summary judgment was proper on count IV "because the alleged conversation does not meet the requirements for slander *per se*." In its memorandum of law in support of the motion, defendant elaborated the "deposition testimony proves that the statements did not impute Plaintiff's inability to perform their duties or lacked integrity in their performance" and "as a result of Linda Duke's deposition testimony, Plaintiff Hooper & Niebur is unable to meet the requirements of slander *per se*." The memorandum points out Duke stated during her deposition, "the phone conversation had no effect on her day-to-day operations, her employer's operations with [plaintiff], and that she still to this day continues to do business with [plaintiff]."

¶ 11 In February 2012, plaintiff filed a written memorandum in opposition to defendant's motion for summary judgment. Plaintiff asserted defamation *per se* does not "require that the recipient of the communication take damaging action towards the party being defamed" and "Linda Duke's actions and thoughts are irrelevant. What is relevant is that the statements were communicated to her by Defendants."

¶ 12 Defendants filed a reply to plaintiff's memorandum and asserted (1) "[a] review of all the evidence on file, including the affidavits and depositions to date, show that clearly no individual 'believed' that the plaintiff could no longer perform services for the clients as a result of the Duke conversation"; (2) "to this date the Plaintiff has not provided any evidence to support an argument that the Duke conversation somehow imputed an inability of Hooper & Niebur to perform in their employment duties, or prejudiced them in their profession"; and (3) "[s]ince the Plaintiff has been unable to provide any evidence that shows that the Duke conversation involved a discussion of the Plaintiff's ability to perform, nor show that anyone believed as such, the Plaintiff's allegations cannot survive summary judgment."

¶ 13 C. The Hearing On The Motion For Summary Judgment

¶ 14 The motion for summary judgment was heard March 7, 2012. Prior to the hearing, plaintiff filed a motion for leave to file the Duke deposition. By agreement of the parties, the court accepted the copy of the Duke deposition for consideration with the motion for summary judgment. Duke's deposition was taken July 27, 2011. During the deposition, Duke testified she was a customer service representative at Schickendanz and described herself as a "paper pusher." Schickendanz was a managing general insurance agent where retail agents come to place business. Duke had "minimal" contact with plaintiff because the mobile home business plaintiff placed through Schickendanz was a small part of its business. She had "a handful of conversations" with someone at plaintiff's office about a change of mailing addresses.

¶ 15 In February 2009, Duke received a fax from Kremer asking that eight insurance policies listed be changed to defendant. (We note the deposition refers to an "Exhibit 1," presumably the fax in question, but no exhibit is attached to the deposition.) Duke contacted

Kremer and said, "we have to do some paperwork for this. What is the reason we're changing these policies? And she said, we're buying Hooper & Niebur. And I said, fine. We still need paperwork." The paperwork in question was a broker of record change which meant the eight policies would have been taken away from plaintiff and it would no longer receive the commission. Duke testified the annual commission for the eight policies would total $315. Duke testified the reason given for a change in agents "doesn't matter to me *** it was almost a non-issue for me."

¶ 16 After her conversation with Kremer, Duke received a phone call from Filbert, "who basically said that he had been contacted by one of his insureds *** who was pitching a fit because she was being pressured into signing an agent of record, a broker of record letter." At that time, Duke learned plaintiff was not for sale. Duke described her impression of the situation as pressure on insureds to change agents and "that Midstate was in the process of trying to take the business."

¶ 17 D. The Trial Court's Decision

¶ 18 In May 2012, the trial court granted defendant's motion for summary judgment on all pending counts except count V. In its order, as to count IV, the court stated as follows:

> "Looking at the totality of the facts and circumstances, and predicated in part on the deposition of Linda Duke, the Court is of the opinion that the statements made by Kremer to Linda Duke did not imply an inability of Plaintiff to perform services for their clients or that Plaintiff lacked integrity."

¶ 19 In July 2012, the trial court, by stipulation of the parties, dismissed, with

prejudice, count V of plaintiff's second amended complaint and defendant's counterclaims.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Plaintiff appeals, arguing the trial court erred in granting defendants' motion for summary judgment on count IV. Plaintiff asserts Kremer's statement to Duke, "we're buying Hooper & Niebur," fits within two categories of statements considered defamatory *per se*, words that (1) impute an inability to perform or want of integrity in performing employment duties and (2) impute a lack of ability or that otherwise prejudice a person in his or her profession or business.

¶ 23 Because the statement is not defamatory *per se*, we affirm the trial court's grant of summary judgment.

¶ 24 A. Standard of Review

¶ 25 Section 2-1005 of the Code permits a defendant to move, at any time, for summary judgment in his favor for all or any part of the relief sought against him. 735 ILCS 5/2-1005(b) (West 2010). Summary judgment may be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show 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(c) (West 2010).

¶ 26 "The purpose of summary judgment is not to try a question of fact but simply to determine if one exists." *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280, 864 N.E.2d 227, 232 (2007). Summary judgment should not be allowed unless the movant's " 'right to judgment is clear and free from doubt.' " *Id.* (quoting *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424,

706 N.E.2d 460, 463 (1998)). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). "If the undisputed material facts could lead reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Forsythe*, 224 Ill. 2d at 280, 864 N.E.2d at 232. "If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper." *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 27 This court reviews a trial court's grant of a motion for summary judgment *de novo*. *Garcia v. Young*, 408 Ill. App. 3d 614, 616, 948 N.E.2d 1050, 1052 (2011).

¶ 28 B. Whether the Statement Constitutes Defamation *Per Se*

¶ 29 Plaintiff asserts the statement "we're buying Hooper & Neibur" made by Kremer to Duke is defamatory *per se*. "A statement is defamatory *per se* if its harm is obvious and apparent on its face." *Solaia Technology, LLC v. Specialty Publishing Co.,* 221 Ill. 2d 558, 579, 852 N.E.2d 825, 839 (2007).

> "In Illinois, there are five categories of statements considered 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."

(Emphases added.) *Solaia*, 221 Ill. 2d at 579-80, 852 N.E.2d at 839.

The parties agree only categories (3) and (4) listed in *Solaia* are at issue in this case.

¶ 30 Even if a statement is defamatory *per se*, that statement will not be actionable if it is reasonably capable of an innocent construction. *Tuite v. Corbitt*, 224 Ill. 2d 490, 502, 866 N.E.2d 114, 121 (2007). "The so-called 'innocent-construction rule' requires a court to consider the statement in context and to give the words of the statement, and any implications arising from them, their natural and obvious meaning." *Solaia*, 221 Ill. 2d at 580, 852 N.E.2d at 839.

¶ 31 Plaintiff argues the ultimate fact finder should have been given the opportunity to decide whether the statement, "we're buying Hooper & Neibur," constituted defamation *per se* rather than the trial court disposing of the issue through summary judgment. Plaintiff posits the statement is equivalent to General Motors contacting Ford automobile dealers to have payments sent to General Motors because they are purchasing Ford or Coca-Cola contacting Pepsi distributors to send them money because they are buying Pepsi. Plaintiff's analogy concerning a business competitor making a statement to a third party that the competitor is purchasing the target, while highlighting the implication the targeted competitor may no longer be operating, is not helpful in determining whether the statement is defamatory *per se*.

¶ 32 Defendant responds (1) this statement is not defamation *per se* because it is not "a direct comment about a person's inability to perform his profession," and (2) plaintiff did not present evidence the statement imputed an inability to perform its employment duties or prejudiced it in its profession. In support, defendant cites *Hopewell v. Vitullo*, 299 Ill. App. 3d

513, 701 N.E.2d 99 (1998), and *Rose v. Hollinger International, Inc.*, 383 Ill. App. 3d 8, 889 N.E.2d 644 (2008), for the proposition "defamation *per se* involves a direct comment about a person's inability to perform his profession." In *Hopewell*, the First District held the statement plaintiff "was 'fired because of incompetence' " qualified as defamation *per se*, but that the statement was nonactionable opinion. *Hopewell*, 299 Ill. App. 3d at 517-19, 701 N.E.2d at 102-04. In *Rose*, a memorandum stated plaintiff had " 'abusive behavior' "and a " 'bizarre management style' " and did damage to the newspaper's finances, reputation, business relationships, morale, and quality. *Rose*, 383 Ill. App. 3d at 9-10, 889 N.E.2d at 646. The First District assumed, for purposes of the appeal, there was "at least some defamation" in these statements but focused on whether the statements were expressions of opinion. *Rose*, 383 Ill. App. 3d at 11, 889 N.E.2d at 647. It concluded the "intemperate words" were constitutionally protected opinions. *Rose*, 383 Ill. App. 3d at 19, 889 N.E.2d at 654. Both *Hopewell* and *Rose* ultimately decided the issue on the basis the statements were opinions—an argument not presented here—and neither conclusively provides guidance as to whether the statement at issue here is defamatory *per se*.

¶ 33 Our research shows for a statement concerning an individual or corporation's profession to qualify as defamatory *per se*, Illinois courts have long required the statement to charge the plaintiff with fraud, improper dealings or methods, incapacity, dishonesty, financial embarrassment, dishonorable conduct or business methods, or mismanagement. *Clifford v. Cochrane*, 10 Ill. App. 570, 574 (1882); *Hays v. Mather*, 15 Ill. App. 30, 33 (1884); *Randall Dairy Co. v. Pevely Dairy Co.*, 274 Ill. App. 474, 481 (1934); *Vee See Construction Co., Inc. v. Jensen & Halstead, Ltd.*, 79 Ill. App. 3d 1084, 1088-89, 399 N.E.2d 278, 281 (1979); *American*

International Hospital v. Chicago Tribune Co., 136 Ill. App. 3d 1019, 1024-25, 483 N.E.2d 965, 969-70 (1985).

¶ 34 In this case, Kremer's statement merely conveyed defendant was purchasing plaintiff. Absent is an explanation for the purchase that assails plaintiff's abilities, financial condition, business methods, or management. Nothing on the face of this statement is obviously harmful to plaintiff's position or reputation in the community. It is common knowledge businesses engage in buyouts, friendly or hostile, of competitors for a plethora of reasons. Plaintiff suggests we qualify a benign statement made about a purported buyout, without any mention of the targeted business's financial position, business methods, or mismanagement, as defamation *per se*. The facts afford no reason to do so in this case. Given we do not find the statement to be defamatory *per se,* we need not reach the issue of whether or not the rule of innocent construction applies.

¶ 35 The trial court properly concluded the statement is not defamatory *per se*.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the trial court's judgment.

¶ 38 Affirmed.