2015 IL App (5th) 140282-U

NO. 5-14-0282

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DARRELL DUNHAM,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Franklin County.
	)	
v.	)	No. 13-L-17
	)	
JAY B. HOWD,	)	Honorable
	)	Eric J. Dirnbeck,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Cates and Justice Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: Where the plaintiff-appellant's pleading failed to state a cause of action for defamation, for a violation of the Uniform Deceptive Trade Practices Act (815 ILCS 510/2 (West 2012)), or for a violation of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/10a (West 2012)), we affirm the trial court's dismissal of his third amended complaint with prejudice.

¶ 2 The plaintiff-appellant, Darrell Dunham, seeks a review of an order by the circuit court of Franklin County dismissing his third amended complaint with prejudice. The complaint alleged that the defendant-appellee, Jay B. Howd, defamed the plaintiff, violated the Uniform Deceptive Trade Practices Act (Deceptive Trade Practices Act) (815 ILCS 510/2 (West 2012)), and caused actual damages to Dunham's professional

practice pursuant to the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/10a (West 2012)).

¶ 3 On March 13, 2013, Dunham filed a complaint against Howd, alleging slander and requesting punitive damages. In response, Howd filed a motion to dismiss the complaint pursuant to the Illinois Code of Civil Procedure (the Code) sections 2-615 (attacking the legal sufficiency of the plaintiff's complaint); 2-619 (admitting the legal sufficiency of the complaint but raising defects, defenses, or other affirmative matters that act to defeat the plaintiff's allegations); and 2-619.1 (permitting a litigant to combine a section 2-615 motion to dismiss and a section 2-619 motion for involuntary dismissal into one pleading). 735 ILCS 5/2-615, 2-619, 2-619.1 (West 2012); *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1029 (2006). On July 8, 2013, the court granted Howd's motion pursuant to section 2-615 of the Code. On July 29, 2013, Dunham filed an amended complaint, and Howd again responded by filing a motion to dismiss pursuant to sections 2-615, 2-619, and 2-619.1 of the Code. On November 18, 2013, the court granted Howd's motion to dismiss the amended complaint without prejudice, again pursuant to section 2-615 of the Code.

¶ 4 On December 9, 2013, Dunham filed a third amended complaint (the complaint), which is the subject of this appeal. The following relevant facts were adduced from the complaint.

¶ 5 Dunham is a partner in the law firm of Bankruptcy Advocates, LLP, and has practiced bankruptcy law in southern Illinois since 1978. Dunham taught bankruptcy law at Southern Illinois University (SIU) Carbondale School of Law from 1976 until 2003.

Howd, a graduate of SIU Carbondale School of Law, has practiced bankruptcy law in southern Illinois since 1999 and maintains an office in Carbondale. Dunham and Howd are competitors in the same market. The complaint alleges that Howd, "for a minimum of the last 15 years," has held Dunham in extremely low regard as an attorney, has actual malice for Dunham, and has shared his opinions regarding Dunham with several individuals.

¶ 6 The complaint alleges that on September 7, 2012, Howd made the following statements about Dunham:

> "(A) Quoting from the last page of his opinion in (unintelligible) in the words of Judge Meyers, Professor Dunham is a liar and a cheat.
>
> (B) Dunham is a 'liar' and has no 'credibility'."

The purported statements were made at the conclusion of a "meeting of creditors" hearing, wherein one of Dunham's clients had been examined pursuant to section 341 of the Bankruptcy Code. The remarks were heard by Cynthia Hagan, the Chapter 7 Trustee in Bankruptcy presiding over the hearing; Heather Koester, Dunham's client; and Tim Daniels, an attorney retained by Dunham to represent the Bankruptcy Advocates, LLP and Heather Koester in the hearing.

¶ 7 The complaint also alleged that on October 2, 2012, Howd sent a letter to four people, one of whom was Trustee Hagan. This letter reported that Judge Meyers had purportedly made a statement that in his opinion, Dunham was "a liar and had no credibility." Howd attached a copy of the court transcript from June 26, 2001, to the

letter. Dunham's complaint asserted that the aforementioned statements calling him "a liar and a cheat" and asserting that he is without credibility were, and are, false.

¶ 8 The complaint alleged three causes of action against Howd based on these two instances of conduct. The first count, alleging defamation, stated that Howd enjoyed no privilege under the law at the time that he made the statements and published his letter, and his recitation and publication of the letter were not accurate, complete, or a fair abridgement of the occurrence reported. Judge Meyers's transcribed statements from June 26, 2001, are included in the record on appeal and reprinted in the third amended complaint.

> "THE COURT: I'd refuse [*sic*] myself from hearing any of Mr. Dunham's matters, nor would I want to sit in judgment on his credibility. I don't think he's a very credible individual. In fact, I think he's a liar.
>
> MR. HOWD: I agree, Your Honor.
>
> THE COURT: You agree? I'm glad somebody does.
>
> MR. HOWD: Full-heartedly.
>
> THE COURT: So I'm going to recuse myself in this. I wouldn't want to sit in judgment on your case with that kind of attitude, Mr. Wilson. So I'm going to recuse myself in this case[.]"

Dunham's complaint alleged that Howd misquoted Judge Meyers by saying that he is "a liar and a cheat and has no credibility," as Judge Meyers did not call Dunham a cheat, and that Howd did not make the statements because he believed that the facts were a matter of public concern, due to the fact that the comments were made 11 years prior to Howd's

report of them. The complaint stated that the primary purpose of Howd's statements was to publicly demean or obtain a competitive advantage over Dunham, and Howd's intent was to impute that Dunham is unable to perform his professional duties and that he lacks integrity.

¶ 9 Count II of the complaint alleged a violation of the Deceptive Trade Practices Act (815 ILCS 510/2 (West 2012)), where Howd's statements, made willfully and over time, constitute a disparagement of Dunham's services by impugning his honesty, veracity, and trustworthiness, which are essential characteristics for the successful practice of law. Count III alleged a violation of the Consumer Fraud Act (815 ILCS 505/2, 10a (West 2012)), where Howd's statements constituted an unfair method of competition because he knew that his statements were false, and the statements were made in order to undermine Dunham's reputation for honesty, integrity, and truthfulness, which are essential characteristics to perform professional services to the public. The complaint requested damages for slander, injunctive relief, and attorney fees under the Deceptive Trade Practices Act, and damages, injunctive relief, and attorney fees under the Consumer Fraud Act.

¶ 10 On June 13, 2014, the court granted Howd's motion to dismiss the third amended complaint with prejudice. The court held that, in regards to count I, the legal principles set forth in *Piersall v. SportsVision of Chicago,* 230 Ill. App. 3d 503 (1992), were controlling. The court found that "[Dunham]'s allegations are that [Howd] made statements as to which the Court cannot objectively verify whether any of said statements are true or false, and therefore, the statements are unactionable opinions." As to counts II

and III, the court found that the statutes cited by Dunham "do not apply to regulate the conduct of [Howd]." Dunham appeals.

¶ 11 We review *de novo* a trial court's dismissal based upon a section 2-615 or section 2-619 motion. *Burton*, 367 Ill. App 3d at 1030. The complaint is to be construed liberally and should only be dismissed when it appears that the plaintiff could not recover under any set of facts. *Dubinksy v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 322 (1999). Regardless of the basis for the trial court's ruling, this court may affirm a correct dismissal for any reason appearing in the record. *Gunthorp v. Golan*, 184 Ill. 2d 432, 438 (1998). Thus, this court may affirm the trial court's dismissal if we find that either Dunham's complaint does not state a claim upon which relief may be granted, or that a defect, defense, or affirmative matter raised by Howd serves to defeat Dunham's allegations as a matter of law. *Burton*, 367 Ill. App. 3d at 1030.

¶ 12 We begin with a review of the requirements of a defamation complaint. To state a claim for defamation, a plaintiff must allege facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. *Krasinski v. United Parcel Service, Inc.*, 124 Ill. 2d 483, 490 (1988). A defamatory statement is one 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. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 10 (1992).

¶ 13 Dunham alleges defamation *per se*, which is a statement that is obviously and apparently harmful on its face. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). Though a

complaint for defamation *per se* need not set forth the allegedly defamatory words *in haec verba*, it must set forth the words alleged to be defamatory with a "heightened level of precision and particularity"; this standard is higher than that of defamation *per quod* because a properly pled defamation *per se* claim relieves the plaintiff of proving actual damages. *Green*, 234 Ill. 2d at 491-92; *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 163 (1998).

¶ 14 In Illinois, there are five categories of statements that are considered defamatory *per se*: words that impute that the plaintiff (1) has committed a crime; (2) is infected with a loathsome and communicable disease; (3) is unable to perform or lacks integrity in performing his employment duties; (4) lacks ability or otherwise prejudices that person in his profession; and, (5) has engaged in adultery or fornication. *Green*, 234 Ill. 2d at 491-92.

¶ 15 Dunham contends that both the third and fourth categories of slander *per se* apply in the instant case, as Howd repeated the statements of Judge Meyers and expanded on them by calling Dunham a "cheat." In regards to count I, Dunham alleges that the trial court erred in dismissing his defamation claim by following the reasoning in *Piersall*. Dunham argues that *Piersall*, a case that was on appeal from a summary judgment order, is inapplicable at the pleading stage, and he should be permitted to fully conduct discovery as to the context of the remarks. Further, Dunham asserts that this case does not reflect the legal standard currently prevailing in Illinois; instead, the "innocent construction" test as advanced in *Costello v. Capital Cities Communications, Inc.*, 153 Ill. App. 3d 956, 965-66 (1987), is the legal standard to which we should apply the facts

presented here. Howd responds that both of these rules of law can be applied without the consideration of the other, and moreover, the cases cited by Dunham are inapplicable to the instant case.

¶ 16 As noted above, Howd advances the *Piersall* analysis in support of his position. Drawing on both Illinois and Supreme Court opinions, the First District appellate court in *Piersall* utilized the legal distinction between a false assertion of fact and an opinion to hold that the employer of a broadcast commentator did not defame his employee when the employer called the broadcast commentator a liar several times on the radio. *Piersall*, 230 Ill. App. 3d at 505-06. The court, noting that the distinction between fact and opinion is a matter of law, found that in order to determine whether a statement is fact or opinion, the court must consider whether the statement is capable of objective verification as true or false. *Id.* at 510. The court found significant that "there are no specific facts at the root of [the defendant's] statement, complete or incomplete, capable of being objectively verified as true or false." *Id.* at 511. The court held that general statements that someone is a "liar," without being put into the context of specific facts, are merely opinions and not actionable as libel *per se*. See *id.* at 510-11.

¶ 17 Dunham, however, asserts that the "innocent construction" test has supplanted the fact/opinion dichotomy in Illinois case law. The "innocent construction" test requires the court to consider a statement in context, and to give the words and any implications arising from them their natural and obvious meaning. *Kolegas*, 154 Ill. 2d at 11. If the statement may reasonably be innocently interpreted, then the statement is not actionable as defamatory *per se*. *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982). When a

defendant clearly intends and unmistakably conveys a defamatory meaning, a court should not strain to see an inoffensive gloss on the statement. *Id.* at 350-51.

¶ 18 Dunham notes that in *Costello v. Capital Cities Communications*, 125 Ill. 2d (1988), the Illinois Supreme Court clarified the test, rejecting a former distinction between comments critical of a person's integrity or conduct on a particular occasion versus those that impugn one's character as a whole, finding that a victim of clearly defamatory statements may seek redress in either case. See *id.* 415-17. While our supreme court makes no mention of the fact versus opinion "objective verification" test, Dunham points out that the *Costello* appellate court below had reasoned that although the supreme court had previously mentioned the "protected expression of opinion" rule, it had never followed it, "choosing instead to adhere to the 'innocent construction rule.' " *Costello v. Capital Cities Communications, Inc.*, 153 Ill. App. 3d 956, 965 (1987). Thus, Dunham asserts that our supreme court tacitly approved the *Costello* appellate court's reasoning by making no mention of the "objective verification" rule, and therefore only the "innocent construction" test applies when examining the sufficiency of his complaint.

¶ 19 We reject Dunham's argument, both because he cites no authority for his assertion that "tacit approval" is a valid legal theory in Illinois, and because a more recent Illinois supreme court case indicates that the tests for finding a successfully pled defamation *per se* claim are, in fact, used in conjunction. We find that *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558 (2006), provides guidance in the application of these rules. The *Solaia* court, presented with a litany of words and phrases from an allegedly defamatory magazine article regarding the plaintiffs' business practices,

affirmed in part and reversed in part the magazine defendant's motion to dismiss the plaintiffs' defamation *per se* claims. *Id.* at 596-97.

¶ 20 After reiterating the five categories of a defamation *per se* claim and the requirements of the "innocent construction" analysis, the court stated that "[a]dditionally, if a statement is defamatory *per se*, but not subject to an innocent construction, it still may enjoy constitutional protection as an expression of opinion. 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' [Citation.] However, there is no artificial distinction between opinion and fact: a false assertion of fact can be defamatory even when couched within apparent opinion or rhetorical hyperbole." *Id.* at 581. Citing its opinion in *Kolegas*, 154 Ill. 2d at 14-15, the court stated that a defamatory statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact; considerations that aid this analysis include whether the statement had a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content. *Solaia Technology*, 221 Ill. 2d at 581. Thus, the court noted, "[i]f a statement is factual, and it is false, it is actionable." *Id.* at 582.

¶ 21 As the tests are intended to be used in conjunction, and not as alternatives as Dunham suggests, we reason that the success of Dunham's defamation *per se* claim depends on the claim successfully overcoming three hurdles: first, the alleged defamatory remark must fall under at least one of the five *per se* categories. Next, the remark must

not, in context, be reasonably capable of an innocent construction. Finally, the alleged defamatory remark must still pass constitutional muster, as the first amendment protects Howd's freedom to express his opinion.

¶ 22 Among the *Solaia* court's determinations of the actionable statements at issue, most instructive is its finding regarding the magazine defendant's characterization of the plaintiffs as "deeply greedy people." The court found that, first, this phrase was not capable of innocent construction, as the context of the article clearly implied that the plaintiffs were "responsible for a legal nightmare, as well as industrywide anger with patent enforcement lawsuits against an increasing number of prey." The statement also "clearly impugn[ed] the plaintiffs' integrity and thus [fell] within one of the recognized categories of defamation *per se*." *Solaia Technology*, 221 Ill. 2d at 583. However, the court found that, within the context of the article, the phrase "deeply greedy people":

> "has no precise meaning, and it is not verifiable. Further, the context in which that phrase appeared indicates that it may have been judgmental, but it was not factual. This statement is not actionable." *Id.*

¶ 23 Similarly, we find that Dunham's allegations meet the first two criteria for properly pleading a cause of action for defamation *per se*. Howd's alleged statements, made in a shared professional setting, clearly impugned Dunham's qualifications as an attorney, and therefore may categorically qualify as defamatory *per se*. Further, we agree that there is simply no reasonable way for the statements to be innocently construed in their context–reiterating Judge Meyer's criticisms in front of a client and colleagues at a

hearing, for no discernible reason, "clearly intended and unmistakably conveyed" a defamatory meaning. See *Solaia Technology*, 221 Ill. 2d at 580, 583.

¶ 24 Nevertheless, as in *Solaia*, we cannot find that the statements are actionable. We agree with the trial court that the defamatory remarks fall within the bounds of a constitutionally protected opinion. Like the phrase "deeply greedy people" from *Solaia* and in tandem with the analysis in *Piersall*, the insults "liar," "cheat," and "[lacking] credibility" are judgmental, but unverifiable in this context. Indeed, nothing in the record or in Dunham's pleading indicates to us that upon hearing the insults, his audience "imp[lied] an assertion of objective fact" that would render his allegations actionable. See *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 324 (1999). Dunham's allegations simply do not adequately present a context signaling that the defamatory remarks had or implied misleading or false factual content. Therefore, we find that the remarks were expressions of his opinion, subject to constitutional protection from claims of defamation.

¶ 25 In regards to Dunham's contention that he should be allowed to conduct discovery to further explore the context of the remarks, we note that the *Solaia* decision was rendered on a motion to dismiss; also, Dunham cites no authority in support of his contention that he should be permitted to move forward on an insufficient pleading in order to conduct the discovery that would allow him to sufficiently state his cause of action. We therefore affirm the trial court's dismissal regarding count I.

¶ 26 Dunham next asserts that count II of his complaint stated a claim for disparagement under the Deceptive Trade Practices Act. A person engages in a deceptive

trade practice when, in the course of his business, vocation, or occupation, the person disparages the goods, services, or business of another by false or misleading representation of fact. 815 ILCS 510/2(a)(8) (West 2012). However, as our analysis above makes clear, Howd's statements were unverifiable opinions. Statements of opinion cannot form the basis for a commercial disparagement claim. *Soderlund Brothers, Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1995) (holding that the defendants' statements were "opinions, interpretations and conclusions" derived from an evaluation of the plaintiff's bid submission, and were therefore insufficient to support the plaintiff's claim). Dunham has failed to plead that Howd made false or misleading statements of *fact*, and we therefore affirm the trial court's dismissal regarding count II.

¶ 27 Finally, Dunham asserts that count III stated a disparagement claim under the Consumer Fraud Act, of which section 10a creates a private cause of action in favor of a person who suffers actual damages as a result of a violation of the act. 815 ILCS 505/10a (West 2012). Section 2 provides that the act is violated by the use of any practice described in section 2 the Uniform Deceptive Trade Practices Act. 815 ILCS 505/2 (West 2012). Dunham cites to section 2(a)(8) of the Deceptive Trade Practices Act as the basis for his claim under this act, as well.

¶ 28 In order to plead a private cause of action under the Consumer Fraud Act, a plaintiff must allege: (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the defendant. *Avery v. State Farm Mutual Auto Insurance Co.*,

216 Ill. 2d 100, 180 (2005). Again, however, statements of opinion are not actionable under this statute. *Id.* at 173-74 (noting that "puffing," *i.e.*, a statement of which the truth or falsity cannot be precisely determined, cannot form the basis of a consumer fraud claim). We affirm the trial court's dismissal of count III.

¶ 29 For the foregoing reasons, we affirm the trial court's dismissal of Dunham's third amended complaint with prejudice.

¶ 30 Affirmed.