

COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2020-P-0088

HAMPDEN COUNTY

RIAN WATERS,
PLAINTIFF-APPELLANT,

v.

AIDAN KEARNEY & OTHERS,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE HAMPDEN SUPERIOR COURT

**BRIEF FOR
THE DEFENDANTS-APPELLEES,
AIDAN KEARNEY, TURTLEBOY ENTERPRISES LLC AND
WORCESTER DIGITAL MARKETING**

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ISSUES PRESENTED¹

- I. Whether the Superior Court correctly allowed the Defendants-Appellees Motion to Remove Default.
- II. Whether the Superior Court correctly allowed Summary Judgment in favor of the Defendants-Appellees as to Plaintiff-Appellant's Complaint.

STATEMENT OF THE CASE AND OF THE FACTS

The facts and procedure of this case are as follows: The Plaintiff-Appellant, Rian Waters (the "Plaintiff") filed a civil Complaint (the "Complaint") on May 16, 2018, in Hampden Superior Court. (R.A. 3) On June 1, 2018, the Plaintiff filed an Amended Complaint. (R.A 4) On September 13, 2018, the Plaintiff requested a Default. The Superior Court subsequently entered a Default Order on September 18, 2018. (R.A. 8) On September 25, 2018 the Appellee-Defendants (the "Defendants") filed an Emergency Motion to Remove Default and File Answer Late. (Lower Court Docket, Paper No. 14) After hearing on November 20, 2018, the Court

¹ While Plaintiff-Appellant's Brief is fraught with various indiscernible allegations of wrong doing by the lower court, Plaintiff-Appellant's Statement of the Issues can best be responded to in the following Issues Presented.

Allowed Defendants Motion to Remove Default and file Answer Late. (R.A. 26) Defendants filed their Answer with claim for trial by jury on November 26, 2018. (L.C.D., Paper No. 19) Plaintiff filed a Motion to Amend his Complaint for a second time on December 21, 2018, which was subsequently allowed. (L.C.D., Paper No. 23) Plaintiff filed his Second Amended Complaint on December 26, 2018. (L.C.D., Paper No. 24) Plaintiff filed a series of various other Motions, including a Motion to Reconsider on Defendants' Motion to Remove Default and File Answer Late. On February 4, 2019, Defendants filed a Motion to Dismiss. (R.A. 64) On February 19, 2019, the Court indicated it would treat Defendants' Motion to Dismiss as a Motion for Summary Judgment, allowing both parties to submit additional papers and evidence and scheduled a hearing for March 12, 2019. On June 27, 2019, the Court entered Judgment on all Counts dismissing Plaintiff's Complaint against the Defendants. (L.C.D., Paper No. 51) The Court dismissed the Plaintiff's Second Amended Complaint because the action was, in summary: Based on statements that were constitutionally protected expressions of opinion and/or fact.

Without restating all facts, the Defendants further adopt and incorporate herein by reference the facts

found by Judge Mulqueen in her Summary Judgment Decision. (S.A. 2, *passim*).

ARGUMENT

I. STANDARD OF REVIEW.

In reviewing a grant of summary judgment, Massachusetts appellate Courts apply the same standard as that originally applied by the Superior Court. See *Harrison v. Boston Fin. Data Serv., Inc.*, 37 Mass. App. Ct. 133, 136 (1994). "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991) (citation omitted). "An order granting or denying summary judgment will be upheld if the trial judge ruled on undisputed material facts and his ruling was correct as a matter of law." *Commonwealth v. One 1987 Mercury Cougar Auto.*, 413 Mass. 534, 536 (1992), citing, *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 556 (1976); see *Nelson v. Salem State College*, 446 Mass. 525, 530 (2006).

An appellate Court is not constrained by the trial judge's stated basis for granting summary judgment, even

if wrong, but may consider any ground that supports the judgment. *Kourouvacilis v. Am. Fed'n of State, County and Mun. Employees*, 65 Mass. App. Ct. 521, 527 n.11 (2006); *Augat, Inc.*, 410 Mass. at 120 ("We may consider any ground supporting the judgment.").

II. THE SUPERIOR COURT PROPERLY ALLOWED DEFENDANTS TO REMOVE THEIR DEFAULT.

The removal of an entry of default under Dist./Mun. Cts. R. Civ. P., Rule 55(c) is a matter addressed to the sound discretion of the trial judge and will not be reversed on appeal save for abuse. *Burger ChefSystems, Inc. v. Servfast of Brockton, Inc.*, 393 Mass. 287, (1984). Even though the standards differ, the same elements support either the removal of a default under Rule 55(c) or removal of a default judgment, under Rule 60(b), although the default removal standard, "good cause shown" is more lenient. *MPV, Inc. v. Department of Revenue*, 26 Mass. App. Ct. 932, (1988). In deciding to remove a default judgment under Rule 60(b), the Massachusetts Appeals Court set forth six factors to be considered. Those factors are: (1) whether the offending party has acted promptly after entry of judgment to assert his claim for relief therefrom; (2) whether there is a showing either by way of affidavit, or otherwise

apparent on the record, that the claim sought to be revived has merit; (3) whether the neglectful conduct occurs before trial, as opposed to during, or after the trial; (4) whether the neglect was the product of a consciously chosen course of conduct on the part of counsel; (5) whether prejudice has resulted to the other party; and (6) whether the error is chargeable to the party's legal representative, rather than to the party himself. *Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, (1979).

In this case, the defense counsel acted promptly to remove the default, filing a Motion within seven days of the default order, and asserted a meritorious defense as outline in Defendants' Memorandum to Remove Default and File Answer Late. (S.A. page 3, and AR 03-08) In addition, the Plaintiff failed to show he suffered any prejudice by the delay in the filing of an answer. Applying the factors to be considered, it was not an abuse of discretion for the trial judge to allow the Defendants' motion to remove the default.

As such, this Court should affirm the Superior Court's endorsement on Defendants' Motion to Remove Default and File Answer Late.

III. The Superior Court correctly allowed Summary Judgment in favor of the Defendants-Appellees as to Plaintiff-Appellant's Complaint

The Plaintiff filed a ten-count complaint against the Defendants, alleging defamation, intentional infliction of emotional distress, fraud, and loss of consortium. Plaintiff further alleged that the Defendants published defamatory statements on the Turtleboy blog, Facebook Live, and in the book "I am Turtleboy" authored by the Defendant, Aidan Kearney, and published by the Defendant, Worcester Digital Marketing ("WDM"). The Defendants moved for summary judgment on all counts Of the Complaint.

On December 31, 2016, Plaintiff was arrested for animal cruelty and assault and battery on Samantha Cardin (Cardin), his fiancé at that time. (S.A. 2, pages 1-2) Shortly thereafter, Cardin posted, on her Facebook account, photographs of her black eye and statements concerning plaintiff's alleged assault on her and her dog. (S.A. 2, page 2) On or about January 6, 2017, a blog was posted on Turtleboy Sports, social media platform operated by defendant WDM.² (S.A. 2, page 2) A third-party blogger posted a blog containing Cardin's

²Third-party bloggers are permitted to post their own blogs to the Turtleboy Sports' social media platforms.

Facebook posts in which she stated that she was assaulted by Plaintiff and that her dog was injured by him and subsequently died. (S.A. 2, page 2) Plaintiffs Facebook posts were also added to the blog. (S.A. 2, page 2) On May 16, 2018, plaintiff filed this action. (S.A. 2, page 2) On or about May 20, 2018, Kearney discussed this blog, and the related criminal case, on an online "live show." (S.A. 2, page 2) On or about November 13, 2018, WDM published a book entitled "I am Turtleboy" written by Kearney. (S.A. 2, page 2) This action is discussed on several pages of the book. (S.A. 2, page 2)

On February 4, 2019, Defendants filed a Motion to Dismiss asserting, inter alia, that: (1) Kearney cannot be individually liable to plaintiff; and (2) plaintiff has not alleged a viable claim for defamation because: (a) the Defendants did not make any statements concerning plaintiff; (b) the Defendants alleged statements are not false; and (c) much of the alleged statements constitute opinion and thus are not actionable. (AR 9A)

Summary judgment procedures are especially favored in defamation cases. *Godbout v. Cousens*, 396 Mass. 254, 258 (1985). "Allowing a trial to take place in a meritless case 'would put an unjustified and serious

damper on freedom of expression.'" *Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 37 (1985), quoting *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 233 (1979), cert. denied, 446 U.S. 935 (1980). Even if a defendant in a libel case is ultimately successful at trial, the costs of litigation may induce an unnecessary and undesirable self-censorship. *King v. Globe Newspaper Co.*, 400 Mass. 705, 708, (1987).

The lower Court reviewed each and every alleged defamatory statement raised by the Plaintiff. The Court provided a detailed opinion applying the facts to correct law. The Court held, "To withstand a motion for summary judgment on a defamation claim, a plaintiff must have a reasonable expectation of proving four elements: first, the defendant made a statement, of and 'concerning the plaintiff, to a third party'; second, the 'statement could damage the plaintiffs reputation in the community'; third, the defendant was at fault for making the statement; and fourth, the statement caused economic loss or, in four specific circumstances, is actionable without economic loss." **The Court found, "Although each of the challenged statements arguably meets one or more of the above-stated elements of a claim**

of defamation, none of them meet all elements."

(emphasis added).

The Court continued, "to be actionable, the statement must be one of fact rather than opinion." "Whether a statement is a factual assertion or an opinion is a question of law 'if the statement unambiguously constitutes either fact or opinion,' and a question of fact 'if the statement reasonably can be understood both ways.'" *King v. Globe Newspaper Co.*, 400 Mass. 705, 709 (1987). "In determining whether a statement reasonably could be understood as fact or opinion, a court must examine the statement in its totality in the context in which it was uttered or published, and must consider all the words used, not merely a particular phrase or sentence." The factors to be considered in differentiating statements of fact from statements of opinion include: (1) specific language used; (2) whether the statement is verifiable; (3) general context of the statement; and (4) the broader context in which the statement appeared. *Milkovich v. Lorain Journal*, 497 U.S. 1, 9 (1990). An additional consideration is any "cautionary terms used by the person publishing the statement." *Id.*, quoting *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 263 (1993).

Here, Judge Mulqueen applied the appropriate factors to each of the challenged statements detailed above, including "the medium by which the statement was disseminated and the audience to which it [was] published," *Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 309 (1982), and concluded "it is clear that the alleged defamatory statements are constitutionally protected expressions of opinion."

With regard to the five alleged libelous statements made by the Defendants, the lower Court also concluded, that four of statement are not actionable because of the cautionary terms that were used and the fifth statement was supported by factual evidence.

"A plaintiff alleging libel must ordinarily establish five elements: (1) that the defendant published a written statement; (2) of and concerning the plaintiff; that was both (3) defamatory, and (4) false; and (5) either caused economic loss, or is actionable without proof of economic loss." *Clay corp. v. Colter*, 2012 WL 6928132 at (Mass Super. 2012). "Since a given statement, even if libelous, must also be false to give rise to a cause of action, the defendant may assert the statement's truth as an absolute defense to a libel claim." *Noonan v. Staples. Inc.*, 556 F.3d 20, 26 (1st

Cir. 2009) (citations omitted). In the first four challenged statements, cautionary terms and language used (i.e., "alleged domestic abuse;" "alleged he killed their dog;" "according to the woman he assaulted he sold drugs;" "allegedly shipped himself drugs;" "allegedly assaulted her"), "relay[s] to the reader that the authors were 'indulging in speculation'".

With regard the final statement, the Defendants submitted evidence in support of its truthfulness including, an affidavit of Cardin, the Palmer Police Department's application for criminal complaint, Palmer Police Department Arrest Report, Criminal Complaint 1743 CR 0009, victim impact statement, photographs of Cardin's injured eye, as well as a forensic veterinary investigation (autopsy) report regarding the death of the dog.

The lower Court concluded that this evidence, together with other information in the summary judgment record, negates an essential element (falsity) of plaintiff's claim; and that the plaintiff has failed to substantiate his adverse claim with counter affidavits or concrete evidence. The Court correctly found that there is no genuine issue of material fact as to the

truth of Defendant's statement, and they are entitled to summary judgment as a matter of law.

CONCLUSION

For the foregoing reasons, Summary Judgment as to the Plaintiff's Complaint should be affirmed.

Respectfully submitted,

THE DEFENDANTS-APPELLES,
AIDAN KEARNEY, WORCESTER DIGITAL MARKETING, LLC AND
TURTLEBOY ENTERPRISES, LLC

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COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JUN 20 2019

RIAN WATERS

SUPERIOR COURT
CIVIL ACTION
No. 1879 CV 0344


CLERK OF COURTS

vs.

AIDAN KEARNEY & others¹

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT²**

Rian Waters (plaintiff) filed a ten-count complaint³ against Aidan Kearney (Kearney); Worcester Digital Marketing, LLC (WDM); and Turtleboy Enterprises, LLC (Turtleboy) (collectively, the defendants), alleging defamation, intentional infliction of emotional distress, fraud, and loss of consortium. Plaintiff alleges that the defendants published defamatory statements on the Turtleboy blog, Facebook Live, and in the book "I am Turtleboy" authored by Kearney and published by WDM. The defendants move for summary judgment⁴ on all counts of the complaint. For the reasons that follow, this motion is **ALLOWED**.

BACKGROUND

On December 31, 2016, plaintiff was arrested for animal cruelty and assault and battery on Samantha Cardin (Cardin),⁵ his fiancé at that time. Shortly thereafter, Cardin posted, on her

¹ Worcester Digital Marketing, LLC and Turtleboy Enterprises, LLC

² The defendants originally filed a motion to dismiss, but because additional matters outside the complaint were included, the court gave the parties notice and an opportunity to supplement the pleadings. The court accordingly treated the motion to dismiss as a summary judgment motion, except for Counts VII, VIII, and IX that are dismissed pursuant to the Rule 12(b)(6) standard as no supplemental materials were provided.

³ See Second Amended Complaint.

⁴ See Note 1.

⁵ Cardin was a defendant in this matter until plaintiff voluntarily dismissed suit against her on January 9, 2019 removing Counts III and VI from the complaint.

Facebook account, photographs of her black eye and statements concerning plaintiff's alleged assault on her and her dog. On or about January 6, 2017, a blog was posted on Turtleboy Sports, a social media platform operated by defendant WDM.⁶ A third-party blogger posted a blog containing Cardin's Facebook posts in which she stated that she was assaulted by plaintiff and that her dog was injured by him and subsequently died. Plaintiff's Facebook posts were also added to the blog.

On May 16, 2018, plaintiff filed this action. On or about May 20, 2018, Kearney discussed this blog, and the related criminal case, on an online "live show." On or about November 13, 2018, WDM published a book entitled "I am Turtleboy" written by Kearney. This action is discussed on several pages of the book.

On February 4, 2019, the defendants filed this motion to dismiss asserting, inter alia, that: (1) Kearney cannot be individually liable to plaintiff; and (2) plaintiff has not alleged a viable claim for defamation because: (a) the defendants did not make any statements concerning plaintiff; (b) the defendants alleged statements are not false; and (c) much of the alleged statements constitute opinion and thus are not actionable. A hearing was held on this motion on March 12, 2019.

DISCUSSION

Summary judgment is appropriate where, "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Scholz v. Delp, 473 Mass. 242, 249 (2015), quoting Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). "[The] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is

⁶ Third-party bloggers are permitted to post their own blogs to the Turtleboy Sports' social media platforms.

entitled to summary judgment if [the moving party] demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Id.* quoting *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 629 (2003) (alterations in original).

The court will address each count of the complaint separately.

Count I: Libel vs. John Does 1-10⁷

Plaintiff alleges that nine separate statements contained in the January 6, 2017 blog are defamatory. The first statement is that plaintiff has dirt and pubes on his upper lip. The context of this statement is as follows: "But there's two sides to every story. This is the accused, Rian Waters from Palmer.⁸ Although based on that Voke-stache, I think we all knew he was from Palmer. That collection of dirt and pubes on his upper lip is strike one. Because when I look at a picture like that, one of the first things that crosses my mind as an unbiased Facebook juror is, 'domestic abuse.'"

Next, plaintiff alleges that the statement "LOL Dumbass Ludlow cops don't know about celiac disease" was falsely attributed to him. That statement appeared in quotation marks after the reprint of plaintiff's 1/4/17 Facebook post which read, "Okay so now for the possibly really good news. Ludlow jail was stupid enough to not initially trust that I had Celiac disease. Their unprepared policy is to wait until they get a fax with a diagnosis from a doctor. Problem with this is if someone gets arrested on a Friday afternoon, and it happens to be a holiday weekend. Then the said person would be stuck eating less than 1000 safe calories in at least 4 days! I got a lot of work to do, and it's far from a sure thing. But if I get the right lawyer, I may be able to correct some outdated policies."

⁷ Plaintiff alleges John Doe #2 is Kearney.

⁸ A photograph of plaintiff was imbedded in the blog article.

The third statement is that plaintiff found his dog crushed underneath a big metal cabinet. The fourth statement is that plaintiff's dog was clearly in need of a vet for several days. The context of these two statements is as follows: "Wait . . . what??? You came home and found the dog crushed underneath a big metal cabinet? And you 'didn't think much of it?' Yea, that sounds believable. Because sometimes I come home and find my dog buried in rubble, and I'm like, 'whatever.' IF what he's saying is true, and that's a huge IF, then that means this dog was clearly in need of a vet for days, and they did nothing about it."

Next, plaintiff challenges that his statement, "Sadly I can't share the evidence yet, but it's enough to make me wonder if I even did cause that black eye" meant he was convinced he did cause the black eye. The blog, after repeating the above Facebook post by plaintiff, reads "But wait . . . that would mean that before he made this post that he was pretty convinced that he DID cause the black eye. Yea, that's a smart thing to post on Facebook when you have a court date in your future."

The next statements that plaintiff challenges are that plaintiff is far from innocent and that plaintiff was re-enacting his favorite episode of "16 and Pregnant." The blog reads, "The bottom line is that the real losers here are the dog and the child. I'm sure both he and her are far from innocent. A couple unwed Palmerites in their pajamas re-enacting their favorite episode of *16 and Pregnant*."

"To withstand a motion for summary judgment on a defamation claim, a plaintiff must have a reasonable expectation of proving four elements: first, the defendant made a statement, of and 'concerning the plaintiff, to a third party'; second, the 'statement could damage the plaintiff's reputation in the community'; third, the defendant was at fault for making the statement; and fourth, the statement caused economic loss or, in four specific circumstances, is

actionable without economic loss.” *Id.* at 249. Although each of the challenged statements arguably meets one or more of the above-stated elements of a claim of defamation, none of them meet all elements. In addition, “to be actionable, the statement must be one of fact rather than opinion.” *Id.* “Whether a statement is a factual assertion or an opinion is a question of law ‘if the statement unambiguously constitutes either fact or opinion,’ and a question of fact ‘if the statement reasonably can be understood both ways.’” *Id.* at 250, quoting *King v. Globe Newspaper Co.*, 400 Mass. 705, 709 (1987). “In determining whether a statement reasonably could be understood as fact or opinion, a court must examine the statement in its totality in the context in which it was uttered or published, and must consider all the words used, not merely a particular phrase or sentence.” *Scholz*, 473 Mass. at 250 (internal quotations and citation omitted). The factors to be considered in differentiating statements of fact from statements of opinion include: (1) specific language used; (2) whether the statement is verifiable; (3) general context of the statement; and (4) the broader context in which the statement appeared. *Id.* at 250, quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 9 (1990). An additional consideration is any “cautionary terms used by the person publishing the statement.” *Id.*, quoting *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 263 (1993).

Applying the appropriate factors to each of the challenged statements detailed above, including “the medium by which the statement was disseminated and the audience to which it [was] published,” *Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 309 (1982), it is clear that the alleged defamatory statements are constitutionally protected expressions of opinion. See *King*, 400 Mass. at 708 (“Statements of pure opinion are constitutionally protected.”). Additionally, the use of cautionary terms and language “relay[] to the reader that the authors were ‘indulging in speculation.’” *Scholz*, 473 Mass. at 251, quoting *King*, 400 Mass. at 713.

Here, the blog article contained the following language: “She’s saying he head butted her. She’s also accusing him of killing their dog. Not good if true. But there’s two sides to every story;” “You have to be careful with these domestic abuse stories. Your initial instinct is often to believe the battered woman. I know it was Turtleboy’s. But at the same time, we don’t know these people. And some chicks are capable of anything;” “Nothing about this story makes much sense, and if you’re keeping score, she’s winning in the court of public opinion;” and “If I can easily picture these two cheesehogs going at it, and her getting up in his grill and smacking him a couple times, and their heads banging into each other, than so can any real life juror.” It is clear that the author is “expressing subjective view, an interpretation, a theory, conjecture or surmise . . . [therefore] the statement[s] are not actionable.” Haynes v. Alfred A Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).⁹ Accordingly, the motion for summary judgment as to Count I is **ALLOWED**.

Count II: Libel vs. Turtleboy Enterprises LLC and Worcester Digital Marketing LLC

The second count of plaintiff’s complaint, brought against the corporations, is based on the same nine statements detailed above. For the same reasons detailed above, the motion for summary judgment as to this count is **ALLOWED**.

Count IV: Libel vs. Aidan Kearney

Plaintiff alleges that five statements written in Kearney’s book “I Am Turtleboy” are libelous. Those statements, outlined in Paragraph 40 of the Amended Complaint are: (1) “Rian

⁹ The final challenged statements – that plaintiff lived in Palmer and that his January 4th post was in response to Cardin’s January 5th post– do not constitute opinion. Plaintiff does, however, fail to demonstrate that the statements could damage plaintiff’s reputation in the community, and that they caused economic loss. As such, the claims with regard to the statements fail as a matter of law and are appropriate for summary judgment.

Waters sold drugs in California;" (2) "shipped himself drugs via the USPS, which he intended to sell here;" (3) "allegedly assaulted Samantha Cardin, causing the black eye;" (4) "went into the house and killed the dog in front of his special needs daughter by stomping it in the back;" and (5) "everything she (Samantha Cardin) had posted on Facebook was true, and she had finally gotten the courage to speak out against her abuser. I know this as a fact because Rian had a trial and it all came out." The full excerpt in the book "I Am Turtleboy" reads as follows:

In January 2017 Rian appeared in a blog written by one of the girls after his baby's mother *alleged* domestic abuse by posting a picture of herself with a black eye on Facebook. She also *alleged* that Rian Waters had killed their dog. The blogger never said that he did it, and simply satirized the story as an example of trashy people airing their trash publicly. . .

According to the woman he assaulted, Rian Waters sold drugs in California and hardly ever saw his daughter or baby momma in Palmer. However, on a visit to see them he *allegedly* shipped himself drugs via the USPS, which he intended to sell here. One day he got into an argument with his baby's mother and *allegedly* assaulted her, causing the black eye. He then went into the house and killed the dog in front of his special needs daughter by stomping it in the back.

Everything she had posted on Facebook was true, and she had finally gotten the courage to speak out against her abuser. I know this as a fact because Rian had a trial and it all came out. In court a veterinarian testified that the autopsy on the dog indicated that he killed the poor thing. . . (emphasis added).

"A plaintiff alleging libel must ordinarily establish five elements: (1) that the defendant published a written statement; (2) of and concerning the plaintiff; that was both (3) defamatory, and (4) false; and (5) either caused economic loss, or is actionable without proof of economic loss." Clay Corp. v. Colter, 2012 WL 6928132 at *3 (Mass Super. 2012). "Since a given statement, even if libelous, must also be false to give rise to a cause of action, the defendant may assert the statement's truth as an absolute defense to a libel claim." Noonan v. Staples, Inc., 556

F.3d 20, 26 (1st Cir. 2009) (citations omitted). Kearney advances this argument in his motion. In the first four challenged statements, cautionary terms and language used (i.e., “alleged domestic abuse;” “alleged he killed their dog;” “according to the woman he assaulted he sold drugs;” “allegedly shipped himself drugs;” “allegedly assaulted her”), “relay[s] to the reader that the authors were ‘indulging in speculation.’” Scholz, 473 Mass. at 251, quoting King, 400 Mass. at 713. These four statements are not actionable.

The defense asserts that the final challenged statement, “everything she (Samantha Cardin) had posted on Facebook was true, and she had finally gotten the courage to speak out against her abuser. I know this as a fact because Rian had a trial and it all came out,” is not actionable. In support of their motion for summary judgment, the defendants submitted an affidavit of Cardin, the Palmer Police Department’s application for criminal complaint, Palmer Police Department Arrest Report, Criminal Complaint 1743 CR 0009, victim impact statement, photographs of Cardin’s injured eye, as well as a forensic veterinary investigation (autopsy) report regarding the death of the dog.

The party seeking summary judgment has the burden of showing the absence of any genuine issue of material fact, which, under applicable principles of substantive law, entitles it to a judgment as a matter of law; the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. Mass. R. Civ. P. 56 (c) and (e); see also Pederson v. Time, Inc., 404 Mass. 14 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party’s case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The opposing party to a motion for summary judgment must substantiate

its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue, demonstrated by counter affidavits and concrete evidence. Pederson, 404 Mass. at 17. The nonmoving party cannot defeat a motion for summary judgment by resting on his pleadings and mere assertions of disputed facts. LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

Here, plaintiff's supplemental brief opposing the summary judgment motion cites Kearney's "flagrant violations of [G. L. c.] 268 § 13B" and the court's denial of plaintiff's request for appointed counsel and for a preliminary injunction, and argues that it was this court's responsibility to take an affirmative role in securing plaintiff's constitutional rights and his right to be fairly heard. Plaintiff suggested that the only way to secure such rights was to allow an injunction, impound the proceedings, or appoint counsel for plaintiff. Plaintiff offered no counter affidavits or concrete evidence regarding the alleged falsity of the challenged statement. Cardin's affidavit, signed under the pains and penalties of perjury, details that, on or about December 31, 2016, plaintiff did physically assault her leaving a black eye and bruises on her body; that it was Cardin's opinion that on that same date plaintiff did physically assault her dog leading to its death a few hours later; and that, on the same date, plaintiff was arrested for those crimes.¹⁰ The affidavit further states that, shortly after December 31, 2016, Cardin posted to her Facebook account photographs of the injury and statements concerning the assault on her and her dog; on or about January 6, 2017, a blog was posted on Kearney's social media pages detailing and commenting on her Facebook posts; and that "the Facebook posts within the Defendants' blog are true and accurate copies of my Facebook posts." The Forensic Veterinary

¹⁰ Palmer District Court Criminal Complaint No. 1743 CR 0009, shows plaintiff was arrested on December 31, 2016 for the crimes of domestic assault and battery in violation of G. L. c. 265 § 13M, and cruelty to animals in violation of G. L. c. 272 § 77.

Investigations report of the dog's postmortem examination indicates that, in the investigator's veterinary opinion, the dog suffered blunt force trauma which caused injuries. The report stated that it would have been painful and caused the dog's sudden inability to use her back legs. The report further detailed that "this constellation of injuries is not consistent with natural disease or an accidental fall. The allegation of a kick or other blunt force trauma (stomp or kneeling injury) would be plausible as the cause of these traumatic and painful injuries." This evidence, together with other information in the summary judgment record, negates an essential element (falsity) of plaintiff's claim; plaintiff has failed to substantiate his adverse claim with counter affidavits or concrete evidence. Accordingly, this court finds that there is no genuine issue of material fact as to the truth of Kearney's statement, and he is entitled to summary judgment as a matter of law on this count. Therefore, the motion as to Count IV is **ALLOWED**.

Count V: Slander Per Se vs. Aidan Kearney

In this count, plaintiff alleges that, on May 20, 2018, the Turtleboy Sports Facebook page hosted a live show, hosted by Kearney going by the name "Uncle Turtleboy," and made statements about emails that plaintiff "believes and alleges that no such emails exist." Plaintiff has sued Kearney in his individual capacity.

The affidavit of Kearney, signed under the pains and penalties of perjury, states that he is the manager of WDM which does business as Turtleboy Sports, owns all Turtleboy Sports publications, and operates all Turtleboy Sports social media platforms. Kearney moves for summary judgment on this count arguing that under G. L. c. 156C, § 22, he cannot be held personally liable for the limited liability corporation's obligations. G. L. c. 156C, § 22 provides that:

Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract,

tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, directly or indirectly, including, without limitation, by way of indemnification, contribution, assessment or otherwise, for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

The impact of this statute is fatal to the claims against Kearney individually. Accordingly, the motion for summary judgment as to Count V is ALLOWED.

Count VII: Intentional Infliction of Emotional Distress

To sustain a claim of intentional infliction of emotional distress, a plaintiff must prove:

(1) “that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct;” (2) “that the conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community;” (3) “that the actions of the defendant were the cause of the plaintiff’s distress;” and (4) “that the emotional distress sustained by the plaintiff was severe and of a nature that no reasonable man could be expected to endure it.” Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976) (citations and internal quotations omitted). A plaintiff faces a high burden in making a claim of intentional infliction of emotional distress; “[l]iability cannot be predicated on mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997) (citation and internal quotations omitted).

Plaintiff’s complaint for intentional infliction of emotional distress contains the following three allegations. First, “the defendant’s article stated their reason for writing the article is because; We like watching the world burn.” Second, “the plaintiff received death threats and lost contact with family members.” Finally, “as a result the Plaintiff has sustained damages.”

Reading the complaint and the record in as harsh a manner as possible, giving all deference to the plaintiff, the court finds that no trier of fact could reasonably find that the publications attributed to the defendants were “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Butcher v. University of Mass., 94 Mass. App. Ct. 33, 42–43 (2018).

The motion to dismiss Count VII is ALLOWED.

Count VIII: Negligent Publication

Negligent publication is a theory by which a plaintiff can prove the element of falsity in a defamation claim; it is not a separate cause of action. The motion to dismiss Count VIII is ALLOWED.

Count IX: Fraud vs. Aidan Kearney and “Alter Ego Corporations”¹¹

In Count IX, plaintiff alleges that Kearney and the “Alter Ego Corporations” have publicly claimed that they listen to concerns of inaccuracy, and that they provide victims who allege mistakes with a form to address their concerns. He further alleges that, on May 11, 2018, the defendants published an article claiming that they are a blog of integrity and that they have an allegiance to facts, logic, and truth. Plaintiff states that, in his posts that were featured in the article, he tried to inform the defendants of the real story and provide evidence, but the defendants were unwilling to look at his evidence and never provided him with a form to complain. Plaintiff alleges that these statements “constitute a fraud as the Plaintiff reasonably expected for his concerns to be addressed, and did not expect to be attacked based on sharing a

¹¹ In Paragraph 12a – 12h, plaintiff avers that WDM and Turtleboy are Alter-Ego corporations of Kearney.

genuine complaint.” Finally, plaintiff avers “the defendants false claims of integrity have greatly increased the impact and amount of damage the Plaintiff has received.”

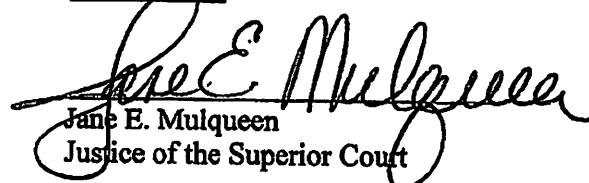
Mass. R. Civ. P. 9(b) requires all averments of fraud to be stated with particularity. To satisfy Rule 9(b), “the plaintiff must allege the content of the fraudulent statement, who made the statement and when and where it was made, the falsity of the statement and the defendant’s knowledge of the falsity, the materiality of the statement, and the plaintiff’s reliance thereon.” Feldman v. Aspen Technology, Inc., 2007 WL 1089220 at *8 (Mass. Super. 2007), citing Friedman v. Jablonski, 371 Mass. 482, 488 (1976) and Equipment & Sys. for Indus., Inc. v. Northmeadows Constr. Co., 59 Mass. App. Ct. 931, 931-932 (2003). Treating the motion on this count as a motion to dismiss, the court finds that the fraud count was not pleaded with sufficient particularity; specifically, there is no averment that the statements were made to induce reliance on them or that plaintiff relied on those statements to his detriment. Accordingly, the motion to dismiss is **ALLOWED** as to this count.

Count X: Loss of Consortium

It is unclear against whom this cause of action is brought, but, to the extent it is pled against the defendants,¹² the motion to dismiss is **ALLOWED**. Plaintiff’s daughter is not a party to the suit and therefore he cannot claim loss of consortium.

ORDER

For the foregoing reasons, the defendants’ motion is **ALLOWED**.


Jane E. Mulqueen
Justice of the Superior Court

DATE: June 18, 2019

¹² To the extent it is pled as against Cardin, plaintiff voluntarily dismissed the case against her in January of 2019.

ALM R. Civ. P. Rule 55

This document reflects rules changes received as of September 1, 2020.

MA - Massachusetts Court Rules > Massachusetts Rules of Civil Procedure > VII. Judgment

Rule 55. Default

(a)Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b)Judgment. Judgment by default may be entered as follows:

(1)By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due and affidavit that the defendant is not an infant or incompetent person, or an incapacitated person as defined in G. L. c. 190B shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear.

(2)By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person or an incapacitated person as defined in G. L. c. 190B unless represented in the action by a guardian, conservator, or other such representative who has appeared therein. The court shall not conduct a hearing unless the party entitled to a judgment by default has provided notice to all other parties, including the party against whom a judgment by default is sought, of the date, time, and location of the hearing. Such notice must include a statement setting forth the nature and type of all damages requested and the amount of any damages that are a sum certain or a sum which can by computation be made certain. The notice shall be sent at least fourteen days prior to the date of hearing by first-class mail to the last known address or by other means approved by the court. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by statute.

(3)The provisions of subparagraph (b)(2) supplement, but do not supersede, any other requirements of notice established by law.

(4)Affidavit Required. Notwithstanding the foregoing, no judgment by default shall be entered until the filing of an affidavit made by any competent person, on the affiant's own knowledge, setting forth facts showing whether or not the defendant is in military service or, if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service, as set forth in the "Servicemembers Civil Relief Act," 50 U.S.C. §§ 3901 et seq., except upon order of the court in accordance with the Act.

(5)[Repealed]

(6)[Repealed]

(c)Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

History

Amended May 3, 1996, eff July 1, 1996; November 28, 2007, eff March 1, 2008; June 24, 2009, eff July 1, 2009; Oct. 24, 2012, eff Jan. 1, 2013; eff May. 1, 2017; December 3, 2019, eff March 15, 2020; March 15, 2020, eff March 15, 2020.

Annotations

Notes

Reporters' Notes—

[1973] Rule 55 embraces two separate and distinct procedures:

(1) The entry of default, and (2) the entry of judgment by default. Rule 55(a) deals solely with entry of default, a formal, ministerial act of the clerk which does not constitute a judgment. Rule 55(b) provides the procedure for entering judgment by default which, in most cases, binds the defendant to the same degree as if he had appeared in the action and contested the allegations of the complaint. Riehle v Margolies, 279 US 218, 225, 49 S Ct 310, 313, 73 L Ed 669 (1928).

The entry of default by the clerk under Rule 55(a) is specifically limited to situations (1) where affirmative relief is sought; and (2) where there has been a failure to plead or otherwise to defend on the part of the opposing party. The clerk is authorized to make the entry when the above factors are brought to his attention by affidavit or otherwise.

Rule 55(a) authorizes the entry of default when the opposing party has "failed to plead or otherwise defend". The language includes a defendant's complete failure to file any papers at all, as well as his failure, after filing an appearance, to file an answer.

Rule 55(b)(1) changes slightly the language of Federal Rule 55(b)(1) by requiring the party seeking the default judgment to file an affidavit that the defendant is not an infant or incompetent. This amendment relieves the clerk of responsibility for determining the status of the defendant.

The filing of an appearance does not prevent the entry of default for failure to plead or otherwise defend, but it does, under Rule 55(b)(2), entitle a party to at least 7 days written notice of the application to the court for judgment on the default.

Rule 55(a) will produce no substantial change in Massachusetts practice. Generally, the Massachusetts rules of court and GL c 231, § 57 authorized the clerk to enter a default for failure of a defendant to appear and answer. The plaintiff, however, was not required specially to request a default; if the return of service was in order, the clerk would automatically enter one.

In the federal system, a party who without answering attacks service or moves to dismiss is not liable to default for failure to appear. Bass v Hoagland (1949, CA5 Tex) 172 F2d 205, cert den 338 US 816, 94 L Ed 494, 70 S Ct 57.

ALM R. Civ. P. Rule 56

This document reflects rules changes received as of September 1, 2020.

MA - Massachusetts Court Rules > Massachusetts Rules of Civil Procedure > VII. Judgment

Rule 56. Summary Judgment

(a)For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b)For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c)Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d)Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e)Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f)When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g)Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses

which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

History

Amended March 7, 2002, effective May 1, 2002.

Annotations

Notes

Reporters' Notes—

[1973] Except in a narrow class of cases, Massachusetts has up to now lacked any procedural device for terminating litigation in the interim between close of pleadings and trial. Under GL c 231, §§ 59 and 59B, only certain contract actions could be disposed of prior to trial. In all other types of litigation, no matter how little factual dispute involved, resolution had to await trial.

Rule 56, which, with a small addition, tracks Federal Rule 56 exactly, responds to the need which the statutes left unanswered. It proceeds on the principle that trials are necessary only to resolve issues of fact; if at any time the court is made aware of the total absence of such issues, it should on motion promptly adjudicate the legal questions which remain, and thus terminate the case.

The statutes, so far as they went, embodied this philosophy. They aimed "to avoid delay and expense of trials in cases where there is no genuine issue of fact." Albre Marble & Tile Co., Inc. v John Bowen Co., Inc., 338 Mass 394, 397, 155 NE2d 437, 439 (1959). Rule 56 will extend this principle beyond contract cases. Thus in tort actions where the facts are not disputed, summary judgment for one party will be appropriate. Should the facts concerning liability be undisputed, but damages controverted, Rule 56(c) authorizes partial summary judgment: the court may determine the liability issue, leaving for trial only the question of damages.

The important thing to realize about summary judgment under Rule 56 is that it can be granted if and only if there is "no genuine issue as to any material fact." If any such issue appears, summary judgment *must* be denied. So-called "trial by affidavits" has no place under Rule 56. Affidavits (or pleadings, depositions, answers to interrogatories, or admissions) are merely devices for demonstrating the absence of any genuine issue of material fact. Introduction of material controverting the moving party's assertions of fact raises such an issue and precludes summary judgment.

On the other hand, because Rule 56 recognizes only "genuine" material issues of fact, Rule 56(e) requires the opponent of any summary judgment motion to do something more than simply deny the proponent's allegations. Faced with a summary judgment motion supported by affidavits or the like, an opponent may not rely solely upon the allegations of his pleadings. He bears the burden of introducing enough countervailing data to demonstrate the existence of a genuine material factual issue.

If, however, the opponent is convinced that even on the movant's undisputed affidavits, the court should not grant summary judgment, he may decline to introduce his own materials and may instead fight the motion on entirely legal (as opposed to factual) grounds. Indeed, the final sentence of Rule 56(c) makes clear that in appropriate cases, summary judgment may be entered *against* the moving party. This is eminently logical. Because by definition the moving party is *always* asserting that the case contains no factual issues, the court should have the

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, Kevin Chrisanthopoulos, hereby certify that the foregoing brief complies with all of the rules of Court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

By /s/ *Kevin Chrisanthopoulos*
Kevin Chrisanthopoulos, Esq. (BBO#643734)

CERTIFICATE OF SERVICE

I hereby certify that I have this twenty-first day of September 2020, caused true and accurate copies of the foregoing Brief and Supplemental Appendix to be served via electronic mail, upon:

Rian Waters, *pro se*

By /s/ Kevin Chrisanthopoulos
Kevin Chrisanthopoulos, Esq. (BBO#643734)

RIAN WATERS,
PLAINTIFF-APPELLANT,

v.

AIDAN KEARNEY & OTHERS,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE HAMPDEN SUPERIOR COURT

**BRIEF AND SUPPLEMENTAL APPENDIX FOR
THE DEFENDANTS-APPELLEES,
AIDAN KEARNEY, WORCESTER DIGITAL MARKETING, LLC AND
TURTLEBOY ENTERPRISES, LLC**

HAMPDEN COUNTY
