

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**SHATTUCK ARMS ASSOCIATES, LLC,
Plaintiff,**

v.

**Case No. 15-147558-CB
Hon. James M. Alexander**

**GENEVIEVE DESMOND,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s motion for summary disposition. According to the Complaint, Defendant owns a 4.5% membership interest in Plaintiff. Plaintiff’s majority member is Defendant’s father, Richard Mazur, who owns a 69.5% membership interest in Plaintiff.

Plaintiff’s Complaint alleges a single claim for “Business Defamation Per Se” based on an April 15, 2015 letter that Defendant’s legal counsel sent to Huron Valley State Bank. The letter generally concerned the propriety of a February 7, 2014, \$1.75 million Business Loan Agreement between Plaintiff and Huron Valley. Plaintiff claims that this letter contained actionable “false and defamatory” statements.

Defendant now seeks dismissal Plaintiff’s Complaint for a variety of reasons. To this end, Defendant moves for summary disposition under MCR 2.116(C)(8) or (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint, and a (C)(10) motion tests the factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Defendant argues that she is entitled to summary disposition each of the following reasons.

First, Plaintiff lacks standing. Second, the alleged defamatory statements are inactionable expressions of opinion. Third, Plaintiff has failed to plead the elements of defamation per se under MCL 600.2911. Fourth, the alleged defamatory statements are protected by the absolute privilege pertaining to judicial proceedings. And finally, the alleged defamatory statements are protected by a qualified privilege for shared-interest communications.

The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

1. Opinion

The Court will first address Defendant's argument that the Letter contained only inactionable expressions of opinion. In *Ireland v Edwards*, 230 Mich App 607; 584 NW2d 632 (1998), the Court of Appeals reasoned that, generally, "the determination of truth or falsity in defamation cases [is] a purely factual question which should generally be left to the jury." *Id.* at 621-622, quoting *Locricchio v Evening News Ass'n*, 438 Mich 84, 137; 476 NW2d 112 (1991) (Cavanagh, J., concurring).

The *Ireland* Court, however, noted that "not all defamatory statements are actionable. If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment." *Ireland, supra* at 614, citing *Milkovich v Lorain Journal Co*, 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990); *Garvelink v Detroit News*, 206 Mich App 604, 608-609; 522 NW2d 883 (1994). In other words, "a statement must be 'provable as false' to be actionable." *Ireland, supra* at 616, quoting *Milkovich, supra* at 17-20. In addition, "a court may decide as a

matter of law whether a statement is actually capable of defamatory meaning. Where no such meaning is possible, summary disposition is appropriate.” *Ireland, supra* at 619, citing *Sawabini v Desenberg*, 143 Mich App 373, 379; 372 NW2d 559 (1985).

As a result and based on the *Ireland* Court’s reasoning, the Court must first determine whether the alleged statements potentially actionable *and* capable of defamatory meaning.

The Court also recognizes that “a statement of ‘opinion’ is not automatically shielded from an action for defamation because ‘expressions of ‘opinion’ may often imply an assertion of objective fact.’” *Smith v Anonymous Joint Enter*, 487 Mich 102, 128; 793 NW2d 533 (2010), quoting *Milkovich, supra* at 18. In the end, the dispositive question is “whether a reasonable factfinder could conclude that the statement implies a defamatory meaning.” *Smith, supra* at 128, citing *Milkovich, supra* at 21.

The Court now turns to the alleged statements. Plaintiff’s Complaint alleges nine false and defamatory statements contained in the letter (emphasis in original):

16. Defendant’s Letter falsely asserted:
 - a. That the Operating Agreement required the *unanimous* consent of Shattuck’s members to effect a financial transaction such as the Loan;
 - b. That the Loan was invalid;
 - c. That the Loan was an ultra vires act by Shattuck;
 - d. That the Loan was unlawful because Richard F. Mazur used the proceeds therefrom to address his own “personal obligations”;
 - e. That the Loan proceeds were not used for Shattuck’s legitimate business purposes;
 - f. That the Loan is a nullity and unenforceable against Shattuck;
 - g. That Shattuck and others had engaged in improper, invalid and/or illegal activities designed to legitimize the Loan;
 - h. That Huron Valley aided and abetted Richard F. Mazur and others in the breach of their fiduciary duties to Shattuck’s members; and
 - i. That certain proposed amendments to the Operating Agreement were unlawful “Machiavellian” ploys introduced to conceal the Loan’s illegality.

The Court has carefully reviewed the Letter. Although perhaps inartfully drafted, when read in whole, it is apparent that Mr. Alter was expressing his opinion that the loan and asset

pledge did not conform to Plaintiff's governing documents. This is apparent by the use of conditioning words such as "it appears," "it appears to us," "apparently," "it is our understanding," and "we firmly believe." Additionally, the Letter provides (emphasis added), "[i]f you have different or other information, please let us know immediately"; "[w]e hope and expect that you will not participate or 'look the other way,' at any activity *that may be* impermissible, illegitimate and/or invalid."

Each of these statements makes it apparent that the Letter is simply an expression of Defendant's opinion on the propriety of the Loan. In fact, based on the extensive use of conditioning language and requests for a different understanding, the Court finds that no reasonable factfinder could possibly conclude that the Letter implies a defamatory meaning.

As a result and viewing all evidence in the light most favorable to Plaintiff, the Court finds that there are no material questions of fact in dispute, and Defendant is entitled to judgment as a matter of law. Therefore, Defendant's motion for summary disposition is GRANTED, and Plaintiff's Complaint is DISMISSED.

Although the Court has found that the letter is a mere expression of opinion and incapable of defamatory meaning, the Court will briefly address Defendant's remaining arguments for dismissal.

2. Defamation per se

Defendant next argues that Plaintiff has failed to state a claim for defamation per se. Michigan's defamation statute, MCL 600.2911, provides that defamation per se only applies in two circumstances: if the alleged statements "imput[e] a lack of chastity to any female or male . . . or . . . imput[e] the commission of a criminal offense." See also *Burden v Elias Bros Big Boy*

Restaurants, 240 Mich App 723, 727-728; 613 NW2d 378 (2000).

Quoting *Heritage Optical Center, Inc v Levine*, 137 Mich App 793, 798; 359 NW2d 210 (1984), Plaintiff argues that business defamation may also be established “[Where] a libel contains an imputation upon a corporation in respect to its business, its ability to do business, and its methods of doing business, the same becomes libelous per se.”

But in this case, as stated, the Letter was sent over a year after the Loan was closed and merely expressed an opinion that the Loan was improper. It did not claim that Plaintiff was unable to do business. Rather, it claimed that certain corporate procedures were not observed when the Loan was obtained.

On these allegations, the Court finds that Defendant did not make statements containing an imputation upon a corporation in respect to its business, its ability to do business, or its methods of doing business. As a result, the Letter cannot serve as the basis for a defamation per se claim.

In the alternative, Plaintiff alleges that defamation per se can be based on alleged criminal activity because the Letter opines that the loan may be “illegal.” But it is apparent that the Letter used the term “illegal” as referring to a failure to abide by corporate procedure – and not alleging criminal wrongdoing.

As a result, had the Court not found the Letter to contain solely inactionable opinion, the Court would find that Plaintiff failed to state a claim for defamation per se, and Plaintiff’s Complaint would be dismissed on this ground.

3. The Judicial Proceedings Privilege

Defendant also argues that the alleged defamatory statements are protected by the judicial proceedings privilege.

Under this longstanding doctrine, “[s]tatements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried.” *Oesterle v Wallace*, 272 Mich App 260, 264; 725 NW2d 470 (2006); citing *Mundy v Hoard*, 216 Mich 478, 491; 185 NW 872 (1921); and *Couch v Schultz*, 193 Mich App 292, 294-295; 483 NW2d 684 (1992). Further, this privilege “should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation.” *Couch*, 193 Mich App at 295.

In *Couch*, the Court of Appeals extended the privilege to statements made **before** the start of a “judicial hearing” (in that case, a prisoner disciplinary hearing). The *Couch* Court reasoned “[t]he immunity extends to every step in the proceeding and covers anything that may be said in relation to the matter at issue.” *Couch*, 193 Mich App at 295.

In this case, Defendant filed an action against Plaintiff and her father on April 17, 2015 (two days after the date of the letter). One of the first allegations contained in said Complaint was that: (1) the loan was obtained without authority, (2) it was improperly secured by Plaintiff assets, and (3) the proceeds were used for Mr. Mazur’s own personal purposes. In other words, the letter contained precisely the same allegations as those in Defendant’s underlying Complaint.

As a result, had the Court not found the Letter to contain solely inactionable opinion, the Court would find that the alleged defamatory statements are protected by the judicial proceedings privilege, and Plaintiff’s Complaint would be dismissed on this ground.

4. Standing

Defendant also argues that Plaintiff lacks standing because all or virtually all of the alleged defamatory statements relate to Mr. Mazur (not Plaintiff).

Indeed, the first element of defamation is “a false and defamatory statement **concerning the plaintiff.**” *Mitan*, 474 Mich at 24 (emphasis added).

While the Court is inclined to agree that the bulk of the allegations relate to Mr. Mazur, at least two alleged statements could be viewed as relating to Plaintiff. These two statements are: “The loan is invalid and was an ultra vires act **of the LLC**, as you know or should have known”; and “You also should be aware that Dick, **Shattuck** and others are now engaged in other activity which, we firmly believe, is improper, invalid and/or illegal”

As a result, had the Court not found the Letter to contain solely inactionable opinion, the Court would find that Plaintiff does not have standing to pursue the bulk of the alleged defamatory statements, and most of the allegations contained in Plaintiff’s Complaint would be dismissed on this ground.

5. Shared Interest Qualified Privilege

Finally, Defendant claims that the alleged defamatory statements are protected by the shared interest qualified privilege.

This “‘shared interest’ privilege . . . extends to all bona fide communications concerning any subject matter in which a party has an interest or a duty owed to a person sharing a corresponding interest or duty. The privilege embraces not only legal duties but also moral and social obligations.” *Rosenboom v Vanek*, 182 Mich App 113, 117; 451 NW2d 520 (1989). This privilege may only be overcome by establishing actual malice. *Id.*

As stated, according to Plaintiff’s Complaint, Defendant holds a 4.5% membership interest in Plaintiff. As a result of her status, she has an undisputed interest in Plaintiff’s business and assets.

Plaintiff merely **concludes** that Defendant must have acted with actual malice when she sent the letter to Huron Valley. But it is apparent from the Letter itself that the statements made therein were based on her belief, and she invited “[i]f you have different or other information, please let us know immediately.”

As a result, had the Court not found the Letter to contain solely inactionable opinion, the Court would find that the alleged defamatory statements are protected by the shared interest privilege, and Plaintiff’s Complaint would be dismissed on this ground.

The Court will entertain a motion for costs brought pursuant to MCR 2.114.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

October 21, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge