STATE OF ILLINOIS
SS.
COUNTY OF COOK

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CHICAGO ASSOCIATION OF REALTORS and VIRGINIA DOWNS, Plaintiffs, vs. ANDREA GELLER, Defendant.	Case No. 12 L 010003

MOTION TO DISMISS

Defendant ANDREA GELLER ("Geller"), through her attorneys, the Law Offices of Donald C. Battaglia, Ltd., moves to strike and dismiss CHICAGO ASSOCIATION OF REALTORS (“CAR”) and VIRGINIA DOWNS’ (“Downs”) complaint pursuant to Section 2-615 of the Illinois Code of Civil Procedure.

The complaint is deficient under Illinois law in that it does not state a cause of action for defamation per se. Geller’s statements are either constitutionally protected expressions or not defamatory per se pursuant to Illinois’ innocent construction rule. Further, plaintiffs fail to allege facts supporting that any of Geller’s statements were made with actual malice, which is a required element for public figures under defamation per se. In support of her motion, Geller states as follows:

Background

The complaint describes plaintiff CAR as a prominent professional real estate organization, consisting of Chicago area members of the Chicago area real estate community. CAR's website describes itself as "the 'Voice for Real Estate' in Chicago since 1883, represent[ing] 11,500 members from all real estate specialties." (http://www.chicagorealtor.com). Plaintiff Downes is CAR's Chief Executive Officer, who also holds a myriad of other leadership positions in the real estate industry. (Complaint, par. 5).

The complaint also confirms that defendant Geller is a member of CAR and has served on its Board of Directors. (Complaint, par. 15). During all times relevant to the complaint and through September 30, 2012, Geller was a member of CAR's Finance Committee, a position she had held since 2011. (Complaint, par. 26, 27). As a member of CAR's Finance Committee, plaintiffs admit that Geller shared a duty with other committee members and CAR's senior management to "provide oversight of the financial management and financial reporting activities of the Association." (Complaint, par. 19).

In June, 2012, Geller requested to review the tax returns for CAR and its various entities dating back to 2005. (Complaint, par. 29). Although Geller stated that she had concerns about CAR's financials, CAR refused to disclose the requested information. (Complaint, par. 29). Instead, Geller was told that CAR's "Audit Subcommittee" would investigate her concerns, even though Geller was a sitting member of the Finance Committee attempting to do her job of overseeing CAR's financial management and reporting activities. (Complaint, par. 30). Geller's concerns were heightened when the

following month CAR's then-president Robert Floss was removed from office by CAR's Board of Directors, ostensibly for raising his own concerns about CAR's finances. (Complaint, par. 40).

After CAR's refusal to allow Geller to review CAR's financial reports and the board's removal of its own president, Geller wrote of her concerns and her opinions regarding CAR's decision to keep its financial records hidden from a sitting member of its Finance Committee. These writings, which are the subject matter of the underlying complaint, were limited to postings on a Chicago Agent Magazine's website article about a related subject, and a "Raise the Bar / Real Estate Facebook Page." (Complaint, par. 48, 50, et al).

Geller's Statements Are Not Actionable

Section 2-603 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-603, provides the rules for pleadings and states: "All pleadings shall contain a plain and concise statement of the pleader's cause of action . . . ." Despite this admonition, Plaintiffs' complaint contains 22 individual paragraphs of Geller's Facebook and Chicago Agent Magazine postings without breaking down exactly where the allegedly defamatory statements lie. Whether examined collectively or individually, however, it is clear that none of the statements can be characterized as defamation under Illinois law.

a) Illinois' innocent construction rule precludes plaintiffs' recovery

Plaintiffs' single count action is premised on defamation per se. Under Illinois law, four categories of statements constitute defamation per se where they impute (1) commission of a crime; (2) infection with a communicable disease; (3) inability to perform or want of integrity to discharge duties of office or employment; and (4)

prejudice to a party, or lack of ability, in his trade, profession or business. Kirchner v. Greene, 294 Ill. App. 3d 672, 679, 691 N.E.2d 107 (1st Dist. 1998). Plaintiffs allege that Geller's statements generally fall within the last two of these categories. However, under Illinois' innocent construction rule, "even a statement that falls into one of the limited *per se* categories will not be found defamatory *per se* if it is reasonably capable of an innocent construction." Kolegas v. Heftel Broad Corp., 154 Ill. 2d 1, 11, 607 N.E.2d 201 (1992).

Whether a statement is capable of innocent construction is a question of law for the court to decide. Id. "If the statement is reasonably capable of a nondefamatory interpretation, given its context, it should be so construed, and there is no balancing of reasonable constructions." Harte v. Chicago Councel of Lawyers, 220 Ill. App. 3d 255, 260, 581 N.E.2d 275 (1st Dist. 1991). This "rigorous standard . . . favors defendants in per se actions in that a nondefamatory interpretation must be adopted if it is reasonable." Mittelman v. Witous, 135 Ill. 2d 220, 234, 552 N.E.2d 973 (1989). "The tougher standard is warranted because of the presumption of damages in per se actions." Id.

In the present complaint, nowhere does it allege or show that Geller attacked the integrity or character of the plaintiffs. As alleged in the complaint, Geller's comments were posted in relation to CAR's refusal to turn over financial documents for inspection by a member of its Finance Committee, which would indicate that CAR is reluctanct to disclose how it spends its members' dues. Plaintiffs acknowledge that Geller's comments related specifically to her "financial concerns" over CAR's bookkeeping, descibing in detail the series of events leading up to her postings. Indeed, Geller's

derision of CAR's and Downs' alleged secrecy over CAR's financial records are the core of every allegedly defamatory statement set forth in the complaint. None of Geller's comments accuse CAR, its board, or Downs of dishonesty or unfitness for office.

Plaintiffs cite twenty-two separate postings by Geller, yet fail to state which if any of the individual postings contain false statements of fact. Plaintiffs simply state that all of the twenty-two postings somehow "impute" that both CAR and Downs "lack integrity, are unethical, have misappropriated funds for the Association, and are otherwise unable to perform their duties faithfully." (Complaint, par. 69). Under Illinois' innocent construction rule, however, "a statement reasonably capable of a non-defamatory interpretation, given its verbal or literary context, should be so interpreted." Mittelman, 135 Ill. 2d 220, 232.

It is important to note that none of Geller's comments actually accuse plaintiffs of lacking integrity, acting unethically, or misappropriating funds. It is clear from the face of the complaint that the underlying theme of the comments is CAR's failure to make available its financial records in light of indications of "irregularities" in how CAR keeps its accounts. "Irregularities" does not necessarily mean misappropriation of funds; indeed, it is just as reasonable to assume that "irregularities" can be accounting errors or careless bookkeeping. It is also reasonable to read Geller's comments as a criticism by a member of CAR's Finance Committee as to how CAR chooses to hide, rather than make public, its accounts which could give an appearance of impropriety where none may actually exist. Calling for a third-party forensic audit may not be flattering to CAR's accountants, but it certainly does not impute unethical behavior or misappropriation of funds in and of itself. A per se defamation action must "stand or fall upon the import of

the statement, without the aid of extrinsic facts . . . ." Id. Because finding an "innocent construction" of Geller's comments is equally if not more reasonable than a defamatory construction, plaintiffs' complaint must be dismissed.

b) Geller's opinions are protected and non-actionable under the first amendment

While none of Geller's comments in general rise to the level of defamation per se under the innocent construction rule, the comments cited by plaintiffs in their complaint are also simply her opinions and observations. In Illinois, "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993). "While in one sense all opinions imply facts, the question of whether a statement of opinion is actionable as defamation is one of degree; the vaguer and more generalized the opinion, the more likely the opinion is nonactionable as a matter of law." Wynne v. Loyola Univ. of Chicago, 318 Ill.App.3d 443, 452, 741 N.E.2d 669 (1st Dist. 2000).

The test for determining the actionability of an allegedly defamatory statement of opinion, under Illinois law, rests upon whether the statement contains an objectively verifiable assertion. Haywood v. Lucent Technologies, Inc., 169 F. Supp. 2d 890, 915 (N.D.Ill. 2001). Individually, and taken as a whole, Geller's allegedly defamatory comments are no more than opinions, general conjecture and observations that on their face do not contain objectively verifiable facts. Plaintiffs claim that Geller's postings "contained false statements that she either knew were false or that she made recklessly without regard for their truth." Yet none can be deemed anything but Geller's own observations and opinions about the appearance of impropriety that CAR's refusal to

disclose financial information would imply.

Plaintiffs do not specify what exactly they want the court to consider as defamatory comments, nor could they. Nowhere in all of the twenty-two posting does Geller make specific, verifiable fact assertions which would indicate that CAR or Downs are unable to perform, or lack the integrity to discharge, their professional duties. When viewed in their entire context, these comments can only be seen as comprising Geller's beliefs, observations and opinions on what she has experienced in her capacity as a member of CAR's Financial Committee. For example, Geller's comment that "I[i]t just seems like a pile of cover-ups" does not accuse plaintiffs of anything other than giving off an appearance of impropriety for not disclosing their financial records. In the few instances where objectively verifiable facts are asserted, such as "we were never provided printouts from the accounting systems for the entities," whether true or not, such statements simply do not rise to the level of defamation.

The Complaint is Factually Deficient

Even if Geller's comments were not simply opinions or otherwise protected expressions under the innocent construction rule, plaintiffs fail to plead facts sufficient to sustain a cause of action of defamation per se. Illinois is a fact-pleading jurisdiction, requiring plaintiff to allege facts, rather than mere conclusions, to demonstrate that the claim constitutes a viable cause of action. Iseberg v. Gross, 227 Ill. 2d 78, 86, 879 N.E.2d 278 (2007). To survive a motion to dismiss, the plaintiff must allege specific facts supporting each element of the cause of action, and the trial court will not admit conclusory allegations and conclusions of law that are not supported by specific facts. Crossroad Ford Truck Sales, Inc. v. Sterling Truck Corp., 406 Ill. App. 3d 325, 336, 943

N.E.2d 646 (1st Dist. 2010).

When a plaintiff is a public figure, the first amendment to the U.S. Constitution precludes the plaintiff from obtaining redress in a defamation action unless it is alleged and proven that the defamatory statements were made with actual malice. Imperial Apparel v. Cosmos' Designer Direct, 227 Ill. 2d 381, 394, 882 N.E.2d 1011 (2008). For purposes of their defamation action, both CAR (a non-profit corporation association with over 11,500 members) and its CEO Downs are "public figures," i.e., "by virtue of their voluntary conduct in assuming roles of especial prominence in the affairs of society. . . which invites attention and comment." Kessler v. Zekman, 250 Ill. App. 3d 172, 179, 620 N.E.2d 1249 (1st Dist. 1993) *citing* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 41 L. Ed. 2d 789, 808 (1974).

In their eighty- paragraph complaint, CAR and Downs plead no facts whatsoever to support an allegation that Geller acted with "actual malice" when she published her comments in Chicago Agent Magazine and Facebook. Plaintiffs simply repeat the conclusion that Geller's comments contained "false statements that she either knew were false or that she made recklessly without regard for their truth." (Complaint, par. 49, 51, 55, 58, 60, 62, and 64). "[M]alice is not sufficiently pleaded . . . without any facts tending to support that conclusion." Arlington Heights Nat. Bank v. Arlington Heights Federal Sav. & Loan Ass'n, 37 Ill.2d 546, 551, 229 N.E.2d 514 (1967). "Ill-will alone is not enough to establish actual malice and there must be a desire to harm, which is independent of and unrelated to a desire to protect the acting party's rights and which is not reasonably related to the defense of a recognized property or social interest." Id.

Plaintiffs plead no fact to indicate that Geller acted with ill-will or intent to harm either CAR or Downs. At the time of the postings Geller was a member of CAR's Finance Committee whose comments were specifically limited to questioning the refusal of CAR to make certain financial records available for inspection even though, by plaintiffs' own admission, the committee's responsibility is to "provide oversight of the financial management and financial reporting activities of the Association." Nothing in Geller's comments indicate on their face that Geller had a desire to harm CAR or Downs, independent of her desire to protect her's and the rest of CAR's membership's right to fiscal accountability, and plaintiffs plead no facts that would support such a conclusion. Because plaintiffs plead no facts to establish that Geller acted with actual malice in posting her comments, an action for defamation per se cannot be maintained and the complaint must be dismissed.

Conclusion

"Illinois law requires that a plaintiff present a legally and factually sufficient complaint." Guinn v. Hoskins Chevrolet, 361 Ill. App. 3d 575, 586 (1st Dist. 2005). A complaint must allege facts sufficient to bring a claim within a legally recognized cause of action. Vernon v. Schuster, 179 Ill. 2d 338, 344, 688 N.E.2d 1172 (1997).

The comments set forth in plaintiffs' complaint do not rise to the level of defamation per se, as Illinois law requires the reasonable non-defamatory construction that imputes nothing more than criticism of CAR and its board for failing to disclose financial records to alleviate claims of bookkeeping irregularities. Moreover, the comments are essentially constitutionally-protected opinions, and those containing verifiable facts are bereft of defamatory statements. Finally, the complaint fails to allege

facts to show Geller acted with malice in posting her comments, a required element of an action based in defamation per se when brought by a public figure.

WHEREFORE, for the foregoing reasons, Andrea Geller prays this Honorable Court enter an order dismissing Chicago Association of Realtors and Virginia Downs' complaint with prejudice as substantially insufficient in law and fact.

Respectfully submitted,

_____
Attorney for Andrea Geller

Donald C. Battaglia
1950 N. Elston Avenue
Chicago, Illinois 60642
773-292-0100
Atty. No. 18592