STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN FIRST CREDIT UNION,

Plaintiff/Counter-Defendant-Appellee,

v

BARBARA J SMITH,

Defendant/Counter-Plaintiff-Appellant.

and

SARAH TROUPE,

Defendant/Counter-Plaintiff.

UNPUBLISHED
October 22, 2009

No. 284863
Oakland Circuit Court
LC No. 2007-082217-CZ

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant Barbara J. Smith[1] appeals as of right from the trial court's order granting plaintiff Michigan First Credit Union's motion for summary disposition pursuant to MCR 2.116(C)(10) and awarding plaintiff $4,000 in damages and $10,119.50 in costs and attorney fees. We reverse.

Plaintiff is a state-chartered credit union with its principal place of business in Lathrup Village, Michigan. Defendant and her daughter, Sarah Troupe, co-owned an account at Michigan First. In October 2001, defendant received a loan from plaintiff to finance the purchase of a 1998 Lexus, but she defaulted on her loan in 2005. Plaintiff initiated a case in the 36th District Court to recover possession of the Lexus and to collect the balance of the money owed. In the litigation before the 36th District Court, defendant claimed that plaintiff had taken or misappropriated funds from her account, and to support her claim, she produced a transaction

[1] Although Smith's daughter, Sarah Troupe, was also a defendant in the underlying case, she is not a party to this appeal. Therefore, we will use the term "defendant" to refer to Smith only.

summary that she alleged had been generated by the credit union and that she had acquired from an "inside source." The transaction summary contained three withdrawals made in triplicate on three dates in October 2001. According to this document, the first set of withdrawals occurred on October 12, 2001, when three withdrawals for $4,000 each were allegedly processed. The second set of withdrawals occurred on October 23, 2001, when three withdrawals for $10,000 each were allegedly processed. The final set of withdrawals occurred on October 26, 2001, when three withdrawals for $5,974.10 each were allegedly processed. Defendant claimed that plaintiff had used these triplicate transactions to embezzle money from her account.

In response, plaintiff claimed that this transaction summary was fraudulent and that the statements and other records that it provided to defendant regarding her account did not indicate that the triplicate withdrawals alleged by defendant occurred. Cris Mattoon, the risk manager at the credit union, noted that the transaction summary provided by defendant was an internal document used by the credit union at the time, and the transactions appearing in triplicate were the result of a data conversion that the credit union undertook in November 2001, which resulted in some transactions appearing to be processed three times. She explained that the $0.81 "Dividend Deposit" reflected on the transaction summary was much smaller than the actual dividend that would have been calculated if defendant had actually had $40,000 in her account on September 30, 2001, as defendant's document indicated. By comparison, on October 31, 2001, when defendant's transaction summary indicated that she had $18,022.08 in her account, she received a dividend deposit of $49.80. Defendant's account statement for this time, which plaintiff provided, did not indicate the triplicate withdrawals; instead, the statement indicated only one withdrawal of $4,000 on October 12, 2001, one withdrawal of $10,000 on October 23, 2001, and one withdrawal of $5,974.10 on October 26, 2001.[2]

On February 13, 2007, defendant sent Michael Poulos, the chief executive officer of the credit union, a letter from defendant introducing a packet that she intended to distribute to the credit union's branches "disclosing the type of fiduciary they are intrusting [sic] their money to." On February 16, 2007, defendant and Troupe appeared at the main branch of the credit union, located on the I-696 service drive in Lathrup Village, to protest. They held a picket sign that said,

SEE HOW
DETROIT TEACHER'S
CREDIT UNION
NOW KNOWN AS
MICHIGAN FIRST
STOLE MY
$40,000.00

[2] Plaintiff also provided the affidavits of Anne McKenzie, the accounting specialist at the credit union, and Bryan Randall, the manager of technology solutions at the credit union, both of whom stated that the transaction summary that defendant had provided was a forgery.

They also passed out flyers to credit union customers, which read as follows:

THEY USED THE
"DOUBLE
BOOKKEEPING"
TO TAKE MY MONEY
(I ONLY FOUND OUT BY AN
INSIDE SOURCE)

According to Mattoon, several credit union members saw the picketing and came into the lobby of the credit union to inquire about the protest. Mattoon and several other executives needed to explain the situation and calm down customers and employees who were confused with regard to what was going on.

On February 22, 2007, in response to defendant's actions, plaintiff's attorney sent defendant a letter requesting that she cease disseminating disparaging information regarding the credit union, citing sections of the state and federal code that she allegedly violated, and threatening to seek criminal and civil sanctions if she did not desist. At a hearing held that day, District Court Judge Ruth Ann Garrett ruled that the credit union did not engage in any improper activity with respect to defendant's account. The district court denied defendant's motion to dismiss the case and set trial for March 16, 2007.

Soon thereafter, defendant picketed the 36th District Court, claiming that Judge Garrett was biased. On March 16, 2007, in a handwritten order and on defendant's motion, Judge Garrett recused herself from the case. The case was reassigned to Judge Ronald Giles, and on October 3, 2007, plaintiff's cause of action against defendant was dismissed without prejudice and without costs to any party.[3] The district court also ordered that defendant's counter-complaint be removed to Wayne County Circuit Court (apparently because defendant was requesting more than $25,000 in damages) and that she be responsible for all costs of removal.

On March 23, 2007, defendant sent Poulos another letter in which she threatened to continue to protest at the credit union. On March 30, 2007, defendant again appeared in front of the credit union's main branch with signs and flyers, disseminating the same information that she had disseminated during her February 2007 protest. According to the credit union, defendant again picketed and distributed flyers to customers outside the main branch of the credit union on August 17, 2007, and on November 8, 2007. On each occasion, Mattoon and other bank executives again had to explain to concerned customers and employees what was going on.

[3] According to plaintiff, this case was dismissed because defendant had filed for bankruptcy, discharging the underlying debt.

On April 12, 2007, plaintiff filed this cause of action against defendant and Troupe, alleging slander, libel, and defamation arising from their publication of statements that plaintiff stole $40,000 from defendant, and claiming that they damaged plaintiff's reputation with its customers and the public and harmed its business. On December 18, 2007, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), which the trial court granted, holding that defendant failed to present evidence establishing that a legitimate question of fact existed with regard to plaintiff's claims. The trial court also awarded plaintiff $4,000 in special damages to cover harm done to plaintiff as a result of the four instances of picketing, and $10,119.50 in costs and attorney fees.

On appeal, defendant asserts that the trial court should not have granted summary disposition in plaintiff's favor on its slander, libel, and defamation claims. We conclude that the affidavits that defendant submitted are sufficient to create a question of fact and, therefore, the trial court erred when it granted summary disposition to plaintiff pursuant to MCR 2.116(C)(10).

We review de novo the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "A trial court tests the factual support of a plaintiff's claim when it rules upon a motion for summary disposition filed under MCR 2.116(C)(10)." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "The court's task is to review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists to warrant a trial." *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). Documentary evidence submitted by the parties is viewed in the light most favorable to the nonmoving party. *Greene v A P Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006).

The elements of defamation, which encompasses slander and libel, 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); *Locricchio v Evening News Ass'n*, 438 Mich 84, 115-116; 476 NW2d 112 (1991). Plaintiff presented evidence indicating that defendant's repeated statements that plaintiff stole $40,000 from her were false, and that defendant published this false information by picketing in front of the credit union on four occasions and telling plaintiff's customers that plaintiff had stolen her money.

Defendant only appears to challenge the determination that no question of fact existed regarding whether she was at least negligent when she published these statements. Defendant claims that the trial court failed to consider the internal credit-union document that she introduced into evidence, which she claims supports her contention that $40,000 was stolen from her account. As plaintiff noted to the trial court, the document, on its face, was likely forged or otherwise inaccurate.[4] However, defendant and her daughter also asserted in their affidavits that

[4] In particular, the dividend payment noted on this document that was made in late September was abnormally small for the amount of money that, according to the document, was in
(continued…)

defendant already had approximately $40,000 in her account when she deposited $54,000 into the account on October 11, 2001.[5] The parties also do not dispute that defendant never withdrew the approximately $40,000 in disputed funds from the account. The factual dispute in this case is whether defendant had $40,000 in her account to begin with. Defendant claims in her affidavit that she had the money in her account and that plaintiff stole it, while plaintiff maintains that defendant never had this money in her account and that the document that defendant produced to support her claim was forged. Considering the lack of documentary evidence supporting her claims, it would not be difficult to conclude that defendant's statement in her affidavit that she had approximately $40,000 in her account in September 2001 is merely a self-serving statement that this Court can disregard. And perhaps defendant's claim is untruthful. However, at the oral argument in this case, plaintiff's counsel admitted that the trial court made a finding of fact when it disregarded defendant's claim that she had approximately $40,000 in her account in September 2001 and concluded that defendant was at least negligent in making the defamation claims. The claims in defendant's affidavit that she had $40,000 in her account, which subsequently disappeared and remains unaccounted for, raises a question of fact regarding whether defendant was at least negligent when she claimed that plaintiff took her money. Therefore, the trial court erred when it granted summary disposition to plaintiff under MCR 2.116(C)(10).

Defendant also claims that the trial court lacked subject-matter jurisdiction to hear plaintiff's cause of action sounding in tort,[6] and she alleges First Amendment violations. However, defendant fails to provide any legal or factual support for her assertions of error, so we need not consider these issues further. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Further, defendant claims that the trial court was biased against her and that the trial court judge should have recused himself from the case. However, defendant bases her argument that bias existed solely on her contention that the trial court's rulings were unfavorable to her although her position was correct. Defendant provides no legal support for this proposition. In fact, defendant's argument that a judge exhibits bias by ruling against a party, although that party believes that its position is correct, is contrary to the entire purpose of the judicial system, which is to settle disputes between parties who believe in the correctness of opposite results. In the absence of any support for her argument, we decline to consider it further. *Mitcham*, *supra* at 203.

Finally, defendant challenges the trial court's award of damages, costs, and fees to plaintiff. Because we reverse the trial court's grant of summary disposition, plaintiff's award of damages, costs, and fees is vacated as well.

(…continued)

defendant's account at the time, and was smaller than a dividend payment at the end of October, when defendant had less money in her account.

[5] Plaintiff does not dispute that defendant deposited $54,000 into her account on October 11, 2001.

[6] Subject-matter jurisdiction refers to "the right of the court to exercise judicial power over a class of cases." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens