

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

BMT Management LLC, et al.

Court of Appeals No. E-08-058

Appellants

Trial Court No. 2005-CV-0341

v.

Sandusky Newspapers, Inc., et al.

DECISION AND JUDGMENT

Appellees

Decided: June 5, 2009

* * * * *

William H. Smith, Jr., for appellants.

David Marburger, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellants, BMT Management LLC ("BMT Management") and Robert R. Tomazic, Jr. dba The Drinkery ("Tomazic"), appeal a July 3, 2008 judgment of the Erie County Court of Common Pleas dismissing appellants' complaint against appellees Sandusky Newspapers, Inc., Don Lee, Annette LaCross, Kevin Purdy and Brandi Barhite. Appellants filed suit against appellees on May 13, 2005.

{¶ 2} In the complaint, appellants alleged that appellees negligently and/or maliciously defamed them in newspaper articles, tortiously interfered with their business relationships, and engaged in a civil conspiracy against them. The dispute arises out of newspaper articles that reported on a beating that occurred early in the morning of June 13, 2004. At that time, Kelly Smith, a bar customer, was severely beaten in a Sandusky municipal parking lot located adjacent to Rick's Underground Speakeasy, after leaving the bar.

{¶ 3} In the July 3, 2008 judgment, the trial court granted a Civ.R. 12(B)(6) motion of appellees to dismiss the complaint as to all claims and all parties.¹ Appellants assign two errors on appeal from that judgment:

{¶ 4} "Assignment of Error No. 1:

{¶ 5} "The trial court erred in granting defendants' motion to dismiss as defendants committed defamation and civil conspiracy against plaintiffs and tortiously interfered with plaintiffs' [sic] business relations.

¹This case was the subject of an earlier appeal that we dismissed for lack of a final appealable order, *BMT Management LLC v. Sandusky Newspapers, Inc.*, 6th Dist. No. E-07-029, 2008-Ohio-2375. The trial court judgment considered in that appeal did not include a final judgment on all claims. The July 3, 2008 judgment concerned in this appeal is a final judgment as to all parties and all claims.

{¶ 6} "Assignment of Error No. 2:

{¶ 7} "Had this case not been prematurely dismissed, plaintiffs would have amended their complaint pursuant to Rule 15(B) of the Ohio Rules of Civil Procedure to include a claim of false light, as it became a viable tort in Ohio during the course of this litigation."

{¶ 8} We review a trial court's order granting a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted on a de novo basis.

Perrysburg Twp. v. Rossford, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5; *Firelands Regional Med. Ctr. v. Jeavons*, 6th Dist. No. E-07-068, 2008-Ohio-5031, ¶ 17. "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. In considering such a motion, we accept as true the factual allegations of the complaint. *Perrysburg Twp. v. Rossford* at ¶ 5.

{¶ 9} "The standard for determining whether to grant a Civ.R. 12(B)(6) motion is straightforward. In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond a doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 5.

{¶ 10} Appellants filed suit against appellees on May 13, 2005. According to the complaint, both BMT Management and Tomazic own and operate night clubs in downtown Sandusky, Ohio. BMT Management owns and operates E & K Winery and the Underground, previously known as Rick's Underground Speakeasy or Boscos. Tomazic owns and operates The Drinkery. The Drinkery and the Underground are located at a complex at 130 Wayne Street in Sandusky. A municipal parking lot is located nearby and was used by club patrons due to its close proximity.

{¶ 11} Appellants allege in the complaint that appellees made "false and defamatory statements" in writing in newspaper articles "falsely stating and implying that the nightclubs were and/or are responsible for injuries sustained as a result of certain events that have occurred in and around the 'parking lot', including but not limited to alleged assaults and alleged nuisances."

{¶ 12} According to the complaint, these "false statements, allegation and accusations" by appellees were in writing -- in newspaper articles. The complaint also states that copies of the "relevant" newspaper articles were contained in Exhibit "A" and attached to the complaint.

{¶ 13} None of the articles directly assert any responsibility of appellants for the beating of Smith. They do not state that appellants breached any duty to Smith, either by any act or omission, that caused the beating. Appellants' sole contention has been that some articles inaccurately state or imply that the incident occurred in the bar rather than in the adjacent public parking lot.

{¶ 14} The first three articles each refer to the incident as occurring outside the bar. Two of the three also indicated that the beating took place in a parking lot. One of them identified the parking lot as a municipal lot. Nine other articles include headlines referring to the incident as a "bar beating" (6), "assault at bar" (1), "tavern beating" (1), or "bar assault" (1). The body of eight of these articles nevertheless disclosed that the beating did not occur in the bar.²

{¶ 15} The exception was a July 8, 2004 article concerning dismissal of criminal charges against a person accused of an assault. The headline read "Cops help clear man in bar beating." The article reported that criminal charges arising out of a June 13 beating "of a Norwalk man at a Water Street tavern" were dropped after further investigation disclosed that the man had not been present at the time of the offense.

{¶ 16} The July 8, 2004 article did not name the "Water Street tavern." Although the fact that the term was intended to refer to Rick's Underground Speakeasy could be gleaned through review of appellees' other articles, each of those articles disclosed that the beating took place outside the bar.

{¶ 17} Included in the articles that were attached as Exhibit "A" to the complaint are a July 14 article and a July 17, 2004 editorial. The article specifically discussed the beating of a man the month before in a municipal parking lot near Rick's Underground

²Five describe the incident beginning as Smith stopped to fix his sandal as a vehicle pulled up from behind him. The other three identify the incident as occurring in a parking lot, outside, or in a driveway.

Speakeasy. Among other things, the article reported an interest of BMT Management in leasing the parking lot from the city during certain hours to permit use of the lot as a private parking lot including use of private security officers. The July 17, 2004 editorial identified the municipal parking lot as "the scene of the brutal beating that put a Norwalk man in the hospital" and recommended that the parking lot remain open.

{¶ 18} The Supreme Court of Ohio recently summarized the tort of defamation: "In Ohio, defamation occurs when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business, or profession.' *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Const. Trades Council* (1995), 73 Ohio St.3d 1, 7, 651 N.E.2d 1283. See *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 243, 72 O.O.2d 134, 331 N.E.2d 713." *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9.

{¶ 19} In a defamation action, the trial court is to determine as a matter of law whether the words used are "actionable or not." *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 372; *Bigelow v. Brumley* (1941), 138 Ohio St. 574, 590; *Early v. The Toledo Blade* (1998), 130 Ohio App.3d 302, 320. This includes a determination of whether the words used in the claimed defamatory statement "are reasonably capable of any defamatory meaning." *Bigelow v. Brumley* at 590. "When making this legal determination, the trial court must 'review the statement under the totality of the circumstances.' *Mendise v. Plain Dealer Publishing Co.* (1990), 69 Ohio App.3d 721,

726, 591 N.E.2d 789, 792. The trial court must read the statements at issue 'in the context of the entire article' in order to determine 'whether a reader would interpret them as defamatory.' Id. at 726, 591 N.E.2d at 792." *Early v. The Toledo Blade* at 320-21. Specifically, a newspaper headline and the entire body of the article itself are to be considered together in making the determination as to whether a newspaper article is defamatory. *Mendise v. Plain Dealer Publishing Co.* at 726; *Painter v. E.W. Scripps Co.* (1957), 104 Ohio App. 237, 241.

{¶ 20} In our view, under the totality of the circumstances presented here, no reader reasonably could believe that the Smith beating took place inside any of appellants' bars. Although eight articles employed headlines such as "bar beating," "assault at bar," or the like in addressing the incident or its aftermath, the articles themselves disclosed that the incident occurred outside the bar. One article used the term "bar beating" in the headline but did not identify Rick's Underground Speakeasy as the bar. While that connection could be secured through reading other articles, the other articles either disclosed that the incident occurred outside the bar or more specifically in a driveway or parking lot.

{¶ 21} Additionally, we agree with the trial court that "[t]he mere reporting of the situs, even if wrong, does not defame the tavern. The articles do not accuse plaintiffs of any wrongdoing, let alone something which would be considered defamatory." Certainly these articles do not falsely state or imply that appellants' nightclubs were or are responsible for Smith's beating as alleged in the complaint. Based upon a review of the

complaint, including newspaper articles attached as Exhibit "A," we conclude that appellants can prove no set of facts entitling them to relief on the defamation claim against appellees. Accordingly, we conclude that the trial court did not err in granting appellees' motion to dismiss appellants' defamation claim.

{¶ 22} Under Assignment of Error No. 1, appellants also claim error based upon dismissal of claims for tortious interference with business relationships and for civil conspiracy to defame. The parties, however, agree that appellants have no claim for tortious interference without the existence of a viable defamation claim to support it. No claim for civil conspiracy to commit defamation exists without the existence of an underlying claim for defamation. *Burns v. Rice*, 157 Ohio App.3d 620, 2004-Ohio-3228, ¶53. As the defamation claim was properly dismissed, the trial court did not err in dismissing the tortious interference with business relationships or civil conspiracy claims.

{¶ 23} Assignment of Error No. 1 is not well-taken.

{¶ 24} Under Assignment of Error No. 2, appellant argues that if the trial court had not erroneously dismissed the defamation claim, they would have sought to amend the complaint to set forth a false light invasion of privacy claim under *Welling v. Weinfeld* (2007), 113 Ohio St.3d 464, 2007-Ohio-2451. Appellant, however, never sought leave of court to file an amended complaint to assert a false light claim and never filed one. Furthermore, we have determined that the defamation claim was properly dismissed. Accordingly, Assignment of Error No. 2 is not well-taken.

{¶ 25} On consideration whereof, the court finds that substantial justice has been done the party complaining. The judgment of the Erie County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James R. Sherck, J.
CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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