

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

Vicki's Home Care, LLC

Court of Appeals No. L-09-1319

Appellant

Trial Court No. CI0200806498

v.

Erie Foods, et al.

DECISION AND JUDGMENT

Appellee

Decided: May 28, 2010

* * * * *

Mark A. Davis, for appellant.

Jason M. Van Dam and Peter N. Lavalette, for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that granted summary judgment in favor of appellee and against appellant. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "Assignment of Error No. 1:

{¶ 4} "The trial court erred by granting summary judgment.

{¶ 5} "Assignment of Error No. 2:

{¶ 6} "The trial court erred by failing to grant summary judgment to appellant."

{¶ 7} Appellant Vicki's Home Care, LLC is a small business that provides health care aides for its clients in their homes. Appellee Kirco Enterprises, Inc., d/b/a Erie Foods, is a small, locally-owned grocery store located in Toledo, Ohio. In June 2008, appellee cashed several payroll checks for a former employee of appellant's that were drawn on appellant's business account. Appellee later discovered the checks to be fraudulent. It is not disputed that after suffering a loss in the amount of the fraudulent checks, appellee posted notices on its three cash registers instructing employees not to accept checks from Vicki's Home Care, LLC. The notices stated, "Vickies Home Care No Checks for Ever [Sic]." Appellant claims, and appellee disputes, that appellee also posted a fourth notice on a bulletin board near the front of the store warning against accepting checks from Vicki's Home Care.

{¶ 8} As a result of the foregoing, appellant filed a complaint on August 29, 2008, alleging that appellee published defamatory statements which damaged the reputation of Vicki's Home Care and constituted slander per se.¹

¹The trial court construed appellant's claim to be one for libel, as the claim was based upon a writing.

{¶ 9} On October 1, 2009, appellee filed a motion for summary judgment, arguing that it did not publish any defamatory statements and that it was privileged to publish the notices on the cash registers, as they were merely instructions to its employees. Appellee supported its motion with the affidavit of Laurie Austin, one of the store managers. Austin stated that, after experiencing losses as a result of cashing checks written on appellant's account which were later found to be forged or were returned for insufficient funds, she posted a "small" notice on the bottom corner of each of the store's three cash registers stating "Vickies Home Care No Checks for Ever."

{¶ 10} On October 20, 2009, appellant filed a memorandum in opposition, as well as a cross-motion for summary judgment. In its motion, appellant ignored the issue of the notes posted on the cash registers and focused on the notice appellant claimed appellee had placed on the bulletin board at the front of the store. In support of this argument, appellant attached a four-page excerpt from the deposition testimony of Brandy Johnson, an individual who stated that she saw a sign on the bulletin board which said "Vicki's Home Care do not accept checks, wrote bad checks."

{¶ 11} On November 30, 2009, the trial court filed its opinion and judgment entry finding appellee's motion for summary judgment well-taken and appellant's cross-motion not well-taken. The trial court first found that the three notices on the cash registers did not make false statements as to whether appellant wrote bad checks, but merely instructed appellee's employees not to cash checks from appellant. As to the defamatory sign

appellant claimed had been posted on the bulletin board, the trial court found that appellant had not presented any evidence that such a sign was placed on the board with appellee's permission or that appellee had knowledge of such a notice being on the board. Additionally, the trial court acknowledged appellee's argument that the Johnson deposition was not properly before the court because appellant had not filed the full transcript of the deposition as required by Civ.R. 32(A) and Civ.R. 56(C). However, the trial court stated that although the deposition was not properly filed, it had considered the testimony in order to rule on the substantive merits of the complaint. In conclusion, the trial court found that appellant had not shown there was a genuine issue of material fact as to its claim for defamation.

{¶ 12} An appellate court's review of a summary judgment determination is conducted on a de novo basis, applying the same standard used by a trial court. Summary judgment will be granted when there remains no genuine issue of material fact and, considering the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 13} Appellant's two assignments of error will be addressed together as both challenge the trial court's decision on summary judgment.

{¶ 14} This court will construe appellant's claim to be one for libel, as did the trial court. The Supreme Court of Ohio has defined the tort of libel as "a false written

publication 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*, 73 Ohio St.3d 1, 7, 1995-Ohio-66.

{¶ 15} In a libel action, the trial court is to determine whether the words used in the claimed libelous publication are reasonably capable of any defamatory meaning. *Bigelow v. Brumley* (1941), 138 Ohio St. 574. 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.

{¶ 16} The trial court had before it two affidavits from Erie Foods' assistant manager, Laurie Austin. In her first affidavit, Austin stated that: prior to June 23, 2008, several checks drawn on the account of Vicki's Home Care were later returned for insufficient funds, causing the store to incur bank fees; on two other occasions from June 23, 2008, to June 24, 2008, the store cashed checks drawn on appellant's bank account; when a third check was presented on June 24, 2008, Austin became suspicious of the authenticity of the checks; Austin contacted appellant and learned that the checks were forged; Austin then decided to stop accepting any check drawn on appellant's account; to ensure that its cashiers did not accept checks drawn on appellant's account, Austin posted a notice on the bottom corner of each of the three cash registers in the store. Austin

further stated that neither she nor any other employee of Erie Foods posted any other sign in the store concerning Vicki's Home Care.

{¶ 17} As to the issue of the alleged notice on the bulletin board, Austin stated in her second affidavit that the store provided a small bulletin board for members of the community to post notices regarding missing pets, yard sales, and other miscellaneous information. Austin stated that the bulletin board was never used for store-related business and store employees did not post store-related material on the board.

{¶ 18} Appellant argues that circumstantial evidence and common sense support a finding that appellee posted the sign on the bulletin board because appellee posted a substantially similar sign on the cash registers. Appellant asserts that for a "random citizen" to post such a sign on the bulletin board does not make sense. Appellant further argues that appellee should be held liable because it owns and controls the premises and adopted the libel as its own by refusing to remove the sign. However, appellant did not provide the trial court with any evidence that a libelous sign was in fact posted on Erie Foods' bulletin board. Appellant's only "evidence" consisted of the words of Brandy Johnson, whose deposition was never properly filed with the trial court, as well as statements by Vicki Snyder, the owner of Vicki's Home Care, whose deposition was not properly filed. The deposition excerpts attached to appellant's cross-motion for summary judgment reflect Snyder's statement that several people told her about the sign on the bulletin board, although she did not see it herself.

{¶ 19} Under the totality of the circumstances presented here, we conclude that appellant can prove no set of facts entitling it to relief on the libel claim against appellee. We are unable to find that the notices taped to the cash registers contain false statements sufficient to constitute libel. The notes were nothing more than an instruction to appellee's employees.

{¶ 20} Accordingly, appellant's first and second assignments of error are not well-taken.

{¶ 21} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.