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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

ROBERT L. EARLE, *Plaintiff/Appellant*,

v.

SEDONA FINANCIAL CENTER, LLC, an Arizona limited liability company; MARISHA SWIDER, a married person; and SAL DIGIOVANNI, a married person, *Defendants/Appellees*.

No. 1 CA-CV 16-0079
FILED 9-19-2017

Appeal from the Superior Court in Yavapai County
No. V1300CV201480292
The Honorable Jeffrey G. Paupore, Judge *Pro Tempore*

AFFIRMED IN PART; VACATED IN PART; REMANDED

COUNSEL

Law Offices of Earle & Associates, Sedona
By Robert L. Earle
Counsel for Plaintiff/Appellant

Aspey Watkins & Diesel, PLLC, Flagstaff
By Wm. Whitney Cunningham, Kathryn G. Mahady
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Kent E. Cattani and Judge Donn Kessler (retired) joined.

S W A N N, Judge:

¶1 In this defamation per se case, we hold that the superior court properly dismissed the plaintiff's claim because the alleged defamatory statement was not legally actionable. We hold that the court erred, however, by failing to make the findings required to sustain its award of attorney's fees to the defendants under A.R.S. § 12-349(A) or Ariz. R. Civ. P. ("Rule") 11. We therefore affirm in part, vacate in part, and remand.

FACTS AND PROCEDURAL HISTORY

¶2 Robert L. Earle brought an action against Sedona Financial Center, LLC, Marisha Swider, and Swider's alleged agent Sal DiGiovanni. The action arose out of a dispute concerning Earle's authority to remove non-party John Monteleon's personal property from office space owned by Sedona Financial Center and Swider.

¶3 Earle asserted claims for injunctive relief, defamation per se, intentional infliction of emotional distress ("IIED"), conversion, and declaratory judgment. In a series of rulings, the superior court dismissed the injunctive relief count as moot, dismissed the defamation and IIED counts for failure to state claims under Rule 12(b)(6), and granted summary judgment to the defendants on the conversion and declaratory relief counts.

¶4 The court awarded the defendants $10,000 in attorney's fees and approximately $1,300 in costs, and entered the final judgment from which Earle appeals.

DISCUSSION

¶5 On appeal, Earle contends that the superior court erred by dismissing his defamation per se claim, and by awarding attorney's fees and costs to the defendants. We address these two contentions in turn.

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT EARLE FAILED TO ALLEGE A DEFAMATORY STATEMENT.

¶6 We review de novo an order dismissing a claim under Rule 12(b)(6). *Coleman v. City of Mesa*, 230 Ariz. 352, 355–56, ¶¶ 7–8 (2012). We assume the truth of the complaint's well-pleaded factual allegations and all reasonable inferences therefrom. *Id.* at 356, ¶ 9. Dismissal is appropriate when, as a matter of law, the plaintiff would not be entitled to relief under any interpretation of the allegations susceptible of proof. *Id.* at ¶ 8.

¶7 A claim for defamation of a private person requires that the defendant, acting at least negligently, published a false and defamatory communication concerning the person. *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315 (1977). The communication may constitute defamation per se (which relieves the plaintiff of the burden to prove and plead special damages), if it concerns the plaintiff in his business capacity. *Modla v. Parker*, 17 Ariz. App. 54, 56–57 (1972). The publication must "reasonably appear to state or imply assertions of objective fact" that are provably false. *Yetman v. English*, 168 Ariz. 71, 76 (1991) (citation omitted). In general, it is for the court to decide whether a statement is actionable — the question is for the jury only when the publication is prone to a reasonable interpretation that would make it actionable. *Id.* at 79. If the statement is legally actionable, the jury retains the power to decide whether the defamatory meaning was conveyed and whether the plaintiff was damaged. *Id.*

¶8 Here, the superior court correctly concluded that Earle's defamation per se claim failed to allege an actionable statement. Earle alleged that Swider and DiGiovanni, at a meeting with Earle regarding the parties' dispute,

> indicated and imputed to [Earle] and Bradley Earle, who was present at the meeting, that they would contact the FBI and report [Earle]'s association with Monteleon, whom the FBI sought for criminal conduct and would inform the local newspaper and turn over to the FBI certain documents belonging to [Monteleon and Earle's business venture].[1]

[1] Viewing the complaint in the light most favorable to Earle, we assume that the publication element is satisfied by the presence of Bradley Earle at the meeting.

Earle alleged that the foregoing "imputed [Earle]'s association with Monteleon's criminal conduct involving moral turpitude," that the "statement imputing [Earle]'s association with Monteleon's criminal conduct was false," and that the "false statement of [Earle]'s association with criminal conduct prejudiced [Earle] in his profession."

¶9 But as Earle confirmed in his response to the motion to dismiss, his allegations did not challenge the truth of the publication's express statements of fact — i.e., that he had a business relationship with Monteleon and that Monteleon was the subject of a criminal investigation by the FBI.[2]

¶10 Here, the defamation per se claim was based solely on Earle's belief that the express statements implied that he is a criminal. We discern no actionable implication. The mere (undisputed) observation that a person's business partner is suspected of criminal activity is insufficient to create an actionable assertion of fact that the person himself was involved in malfeasance. Further, Swider and DiGiovanni's statement that they would report the facts to the media and that they would provide the business records to the FBI was, at most, a threat to report a non-defamatory communication with a secondary effect of exposing Earle's business dealings to scrutiny. Though the statement may have been intended to be coercive, it was not actionable. The threat did not state, expressly or by implication, that Earle had participated in criminal wrongdoing. No jury could properly find for Earle if he proved every fact alleged in his defamation per se claim, and the superior court therefore correctly dismissed that claim.

II. THE SUPERIOR COURT FAILED TO MAKE THE FINDINGS REQUIRED TO SUPPORT THE AWARD OF ATTORNEY'S FEES.

¶11 The defendants moved to recover approximately $34,000 in attorney's fees, plus an additional $5,000 as sanctions under A.R.S. § 12-349(A) and Rule 11. They also requested approximately $1,369 in costs under A.R.S. § 12-341, and double their taxable costs under Rule 68(g). The superior court held that the defendants' motion was "overkill" based on its considerable length, and that their fee affidavits were "defective" because they itemized only about half of the requested fees and did not comply with *Schweiger v. China Doll Restaurant*, 138 Ariz. 183 (App. 1983). The court nonetheless concluded: "[T]he Court is not inclined to invite further

[2] While truth is normally an affirmative defense to a defamation action, the plaintiff must first allege that the statements were false.

litigation. The Court does agree Defendants are entitled to recover reasonable attorneys' fees and costs, but sanctions will not be awarded." The court then awarded to the defendants $10,000 in fees and $1,369 in costs.

¶12 We affirm with respect to the award of costs. As the prevailing party, the defendants were entitled to that award under A.R.S. § 12-341. But the court erred with respect to the fee award. As an initial matter, we note the absence of any support in the record for the court's conclusion that the defendants' counsel's records were incomplete or supported by non-compliant fee affidavits. We further conclude that, contrary to the court's description, the fee award was a sanction — the defendants sought the award as a sanction under A.R.S. § 12-349(A) and Rule 11, and the court did not identify any other basis for the award. And under both A.R.S. § 12-349(A) and Rule 11, the court was required to make specific findings to support the award. A.R.S. § 12-350; *Bennett v. Baxter Group, Inc.*, 223 Ariz. 414, 423, ¶¶ 27–28 (App. 2010); *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497 (App. 1990). The court made no such findings.

¶13 Because the court articulated no proper basis for the fee award, we must vacate it. We remand so that the court may consider whether fees are warranted under any specific statute or rule, and, if applicable, make the findings required to support a fee award.

CONCLUSION

¶14 We affirm the superior court's dismissal of Earle's defamation claim. We vacate with respect to the attorney's fees award, and remand.

¶15 We deny Earle's request for costs on appeal, including legal document preparation fees, under A.R.S. §§ 12-341 and -341.02. We also deny the defendants' request for attorney's fees on appeal under A.R.S. § 12-349(A).

AMY M. WOOD • Clerk of the Court
FILED: AA