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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MICHAEL E. SPREADBURY, Plaintiff, v. BITTERROOT PUBLIC LIBRARY, CITY OF HAMILTON, LEE ENTERPRISES, INC., and BOONE KARLBERG P.C., Defendants.	Cause No. CV-11-064-M-DWM DEFENDANT LEE ENTERPRISES, INC.'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S 'OBJECTION TO PART, AGREE IN PART; COURT FINDINGS IN RE: LEE ENTERPRISES INC.'

Defendant, Lee Enterprises, Inc. ("Lee Enterprises"), through its counsel, Garlington, Lohn & Robinson, PLLP, respectfully submits this Response in Opposition to Plaintiff's 'Objection to Part, Agree in Part; Findings in Re: Lee Enterprises Inc.' (Dkt. 188).

I. BACKGROUND

The Findings and Recommendation, (Dkt. 181, "Findings") sets out the relevant procedural history. Briefly, Spreadbury brought multiple claims against Lee Enterprises, many of which were dismissed on Lee's Motion to Dismiss. The claims that remained arose from comments posted by readers on Lee Enterprises' internet website in connection with a September 10, 2009, news article about Spreadbury, and included claims of defamation, negligence, tortious interference with prospective economic advantage, negligent and intentional infliction of emotional distress, punitive damages and injunctive relief. Spreadbury then filed a second amended complaint making the same claims in relation to a news article dated August 9, 2010.

Lee Enterprises moved for summary judgment on all remaining claims arising from (1) the online comments posted in response to the 9/10/09 item and, (2) the 8/9/10 news article.

In the Findings, the Magistrate recommended summary judgment for Lee on all claims related to the 9/10/09 article. However, the Magistrate recommended denying summary judgment as to certain claims related to the 8/9/10 article, because of an erroneous finding that Spreadbury was not a public figure. In particular, the Magistrate recommended denying summary judgment for Lee on Spreadbury's claim of defamation per se, negligence, tortious interference with

prospective economic advantage and punitive damages, to the extent those claims are predicated on the 8/9/10 news article that mistakenly described Spreadbury's criminal charge as disturbing the peace rather than criminal trespass.

Lee Enterprises objected to the Magistrate's factual finding that Spreadbury is a private figure, and to the resulting denial of summary judgment on those remaining claims. Spreadbury filed objections as well. Lee Enterprises now responds to Spreadbury's objections.

II. DISCUSSION

Although captioned an objection to the findings, Spreadbury's pleading spends the first seven pages re-arguing issues already decided by this Court and issues not relevant to this Defendant; in particular, whether he was properly excluded from the public library for his conduct. He raises again his conspiracy theory that was previously rejected and dismissed and argues that this Court is denying him of his Constitutional Rights. These arguments may be disregarded as irrelevant to the pending motion and Findings.

Plaintiff's objection to the Findings does not begin until page eight of his Brief. In order to defeat summary judgment, Spreadbury must do more than repeat his allegations and beliefs, however, that is exactly what he has done. He has failed to come forward with material issues of fact.

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A. Defamation and Defamation Per Se

1. Statements in the 8/9/10 Article

True or privileged statements are not defamatory even if the plaintiff believes they portray him in a negative light. The Findings correctly recommend judgment for Lee with respect to statements in the 8/9/10 article that fairly described allegations in a judicial proceeding, including the amount of money being demanded by Spreadbury in his various lawsuits, comments about the scope of duties of the City Attorney, and the supervision of a law student.

The Findings correctly recommend judgment for Lee on a statement about the student's supervision, which was a summary of Spreadbury's argument, and not a direct quote. As noted in the Findings, while he argued that the summary misstated his position, Spreadbury failed to show how the statement could subject him to hatred, contempt or ridicule. Spreadbury does not specifically object to these recommendations and judgment should be granted with respect to these statements.

2. Evidence of Malice

The Findings also properly conclude that Spreadbury produced no evidence whatsoever from which a jury could conclude that Lee Enterprises acted with malice in publishing any news articles about him. (Dkt. 181 at 9, n. 3.) Spreadbury objects that any false statement proves malice, but his assertion is

unsupported by the law on which he relies.

Spreadbury cites to *Time, Inc. v. Pape*, 401 U.S. 279 (1971), for the proposition that "any falsification establishes actual malice." (Dkt. 188 at p. 8). To the contrary, the holding in *Pape* was that, in the context of the whole article, the failure of a news magazine article to state that certain conduct it reported was only an allegation, was not a falsification sufficient to justify a finding of actual malice. *Pape*, 401 U.S. at 279-281.

In that case, Time Magazine reported on a 1961 report from the Civil Rights Commission ("Report"). The Report described alleged police brutality. The Time article reported an incident from the Report and did not say that it was describing the allegations made by a plaintiff in litigation. *Pape*, 401 U.S. at 281-282. Pape, one of the police officers, sued Time Magazine for libel. The question before the United States Supreme Court was whether Time's failure to clarify it was reporting no more than allegations, created a jury issue of "actual malice." *Pape*, 401 U.S. at 282.

Even though, in the *Pape* case, the omission was "admittedly conscious and deliberate," the Court found, in the context of the full article, the omission was not sufficient to create a jury issue of malice. *Pape*, 401 U.S. at 285, 289.

Spreadbury appears to argue for a heightened duty when the reporter is an "eyewitness." In *Pape*, the word "eyewitness" appears only once and does not

create a special rule. The Court said only, in *dicta,* that the instant case was not one in which the libel purports to be an "eyewitness or other direct account of events that speak for themselves." *Pape*, 401 U.S. at 285.

Spreadbury's reliance on *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al. v. Austin et al.*, 418 U.S. 264 (1974) is likewise misplaced. In that case, the Court held that federal labor law takes precedence over state libel law and overturned judgments for mail carriers who claimed union publications labeling them scabs and traitors were libelous. The Court emphasized the common law definition of "malice" as ill-will or spite was not the correct standard. Rather, recovery can be permitted only if the defamatory publication was made with knowledge that it is false, or with reckless disregard of whether it was false or not. *Old Dominion Branch,* 418 U.S. at 281.

Spreadbury cites *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S. Ct. 2419 (1991), presumably for the proposition that malice was demonstrated in Lee's 8/9/10 article by quoting his comment that Attorney Bell was "lost in space." In *Masson*, the writer put statements in quotation marks that he knew did not convey what the speaker said. In this case, Spreadbury does not deny he made the quoted statement and the transcript shows he did (Dkt. 111-5 at p. 7). Spreadbury argues only that the quote was taken out of context. *Masson* does not further his cause. The Court again held that even a deliberate alteration of the words uttered

by the plaintiff does not equate with knowledge of falsity or malice. *Masson*, 501 U.S. at 518.

In its Objections, Lee Enterprises addresses the requirement of the actual malice standard to these facts as Spreadbury is a limited public figure with respect to the subject matter of the news articles. Because there is no evidence of actual malice, Lee urges that summary judgment be granted on all defamation claims.

3. The 8/24/10 Correction

Spreadbury's argument that Lee's August 24, 2010 correction was insufficient has already been raised and rejected by this Court, which found the correction article to be a privileged description of judicial proceedings (Dkt. 85 at 13). There is no new evidence to revisit this issue.

4. On-Line Reader Comments

The Magistrate correctly recommended Lee Enterprises is entitled to judgment as a matter of law concerning public comments to the September 10, 2009 article, since it is undisputed the comments were made by third party, on-line readers, and not the *Ravalli Republic*.

Spreadbury objects that Lee is immunized by the Communications Decency Act, however, he raises no genuine issue of fact to defeat summary judgment. As stated in the Findings, his only argument is that Lee should not be considered an interactive computer service provider under the Act with respect to its internet

news website, but his argument fails as a matter of law.

The definition of "interactive computer service" includes a wide range of cyberspace services. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d at 1119, 1123 (". . . reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service' . . . "); *see e.g. Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 n. 7 (Cal. App. 2 Dist. 2002) (on-line auction website is an "interactive computer service"); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 460-461 (Wash. App. Div. 1 2001) (on-line bookstore Amazon.com is an "interactive computer service."); *see also Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 984 (10th Cir. 2000) (parties conceded that AOL was an interactive computer service when it published an on-line stock quotation services); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328-329 (4th Cir. 1997) (AOL assumed to be interactive computer service when it operated bulletin board service for subscribers).

"The prototypical service qualifying for this statutory immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posed by others." *F. Trade Commn. v. Accusearch, Inc.*, 570 F. 3d 1187, 1195 (citation omitted). In fact, Congress enacted the CDA in response to previous cases, which had held a provider of an online message board could be liable for defamatory statements posted by third parties. *Shiamill v. Real*

Est. Group of NY, 17 N.Y. 3d 281 (2011); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (en banc).

A newspaper's website is an interactive computer service as defined under the CDA and immune from liability. See *Collins v. Purdue University*, 703 F. Supp. 2d 862 (N.D. Ind. 2010).

The Magistrate correctly determined *Ravalli Republic* is an interactive computer service provider as defined by the CDA. It is undisputed that the alleged defamatory comments to the September 10, 2009, article were made by third parties. (Dkt. 110 at ¶¶ 14-16). Accordingly, Lee Enterprises is immune from liability for any allegedly defamatory comments made by readers.

B. Additional Discovery

Spreadbury argues that further discovery would support his claim that Lee should not be immune under the CDA; stating "[t]he Plaintiff requested production via interrogatory of Defendant Lee of any person who acquires internet service in Montana or elsewhere pending before this court." (Dkt. 188 at 11). In order to avoid summary judgment to do more discovery, Spreadbury is required to show what information he is seeking and how it would preclude summary judgment. *Hill v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986). If further discovery could not elicit evidence that would raise genuine issues of material fact, summary judgment is appropriate. *Klingele v. Eikenberry*, 849 F.2d 409, 412 (9th Cir.

1988).

Spreadbury has not met this burden. The discovery Spreadbury seeks will not elicit facts that would raise a genuine issue of material fact. The *Ravalli Republic* site is an interactive computer services provider as a matter of law. It is undisputed the allegedly defamatory comments were made by third party, on-line readers, and not the *Ravalli Republic*. (Dkt. 110 at ¶¶ 14-16). Accordingly, Lee Enterprises is immune from liability under the CDA and the Magistrate correctly recommended it is entitled to judgment as a matter of law.

C. Infliction of Emotional Distress

The Magistrate correctly recommended dismissal of Spreadbury's claims of Intentional and Negligent Infliction of Emotional Distress ("IIED" and "NIED"), because "Spreadbury has not identified . . . any . . . facts or evidentiary matters" supporting such a claim. (Dkt. 181 at 31). Spreadbury's response is to rely on and repeat his allegations that he has suffered distress. He has not met his burden of coming forth with material and substantial evidence to support his claim. *See McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶ 54, 330 Mont. 48, 125 P.3d 1121.

Spreadbury misunderstands the distinction between emotional distress as an element of damages, and a separate cause of action. He urges this Court to rely on *Johnson v. Supersave Markets Inc.*, 686 P.2d 209 (*overruled* by *Jacobsen v.*

Allstate Ins. Co., 2009 MT 248, ¶ 66, 351 Mont. 464, 215 P.3d 649) rather than *Sacco v. High Country Indep. Press, Inc.*, 271 Mont. 209, 235, 896 P.2d 411 (1995). *Johnson* addressed parasitic emotional distress damages and does not lower the threshold for making a claim for an independent cause of action for emotional distress.

Spreadbury claims that *Niles v. Big Sky Eyewear*, 236 Mont. 455, 771 P.2d 114 (1989) (also overruled), shows that being falsely accused of a crime is always sufficient to support an independent emotional distress claim. *Niles* does not stand for such a broad holding. In that case, there was evidence from the plaintiff, her husband and a clinical psychologist of the emotional distress suffered by the Plaintiff. No such evidence exists here.

Further, Spreadbury seems to argue the 8/9/10 article was the cause of his emotional distress that occurred three years earlier:

> As Defendant Lee falsely attributes Spreadbury speech for Wetzsteon's supervision in the August 9, 2010 article it triggers severe Emotional Distress due to false arrest, booking, abuse of power by Ravalli County Sheriff as middle of night warrant attempt 0330hrs August 11, 2007.

(Dkt. 188 at 14). Clearly, Lee Enterprises' 8/9/10 article could have not have caused any emotional distress in 2007.

Spreadbury has not met his burden of coming forward with admissible evidence of severe emotional distress he has experienced as a result of Lee Enterprises' conduct in publishing the articles about him. The Magistrate correctly

recommended summary judgment for Lee Enterprises on Spreadbury's claims for both IIED and NIED.

D. Injunctive Relief

The Magistrate correctly recommended Lee Enterprises is entitled to judgment as a matter of law with regard to Spreadbury's claim for injunctive relief.

As noted in the Magistrate's Findings and Recommendations, "[t]he courts lack authority to impose injunctive relief which broadly requires a person to simply obey the law." (Dkt. 181 at 32, referencing, *N.L.R.B. v. Express Publg. Co.*, 312 U.S. 426, 435-436 (1941)).

III. CONCLUSION

To avoid summary judgment, Spreadbury had the burden to come forward with evidence, not simply more allegations. He has not met his burden. Summary judgment for Lee on all claims is warranted.

DATED this 31st day of January, 2012.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this Defendant Lee Enterprises, Inc.'s Response Brief in Opposition to Plaintiff's 'Objection to Part, Agree in Part; Court Findings in Re: Lee Enterprises Inc.' is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is 2716 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

/s/ Jeffrey B. Smith
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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2012, a copy of the foregoing document was served on the following persons by the following means:

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