

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RODNEY D. ENGLERT,

Civil No. 05-1863-AA
OPINION AND ORDER

Plaintiff,

vs.

HERBERT LEON MACDONELL, TERRY
L. LABER, BARTON P. EPSTEIN,
PETER R. DE FOREST, STUART H.
JAMES, and PATRICIA LOUGH.

Defendants.

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AIKEN, Chief Judge:

Plaintiff Rodney D. Englert filed a complaint for

1 defamation and libel against several people including defendant
2 Herbert MacDonell. Defendants then filed a special motion to
3 strike based on Oregon's "Anti-SLAPP" (strategic litigation
4 against public participation) law, O.R.S. §§ 31.150-31.155. On
5 May 10, 2006, this court granted in part and denied in part the
6 Anti-SLAPP motion dismissing several defendants. The parties
7 then engaged in numerous discussions and settlement conferences
8 in an attempt to resolve this case. Defendant MacDonell now
9 moves for summary judgment. That motion is granted and this
10 case is dismissed.

11 BACKGROUND

12 The parties are very familiar with the background of this
13 case. Moreover, the May 10, 2006, opinion of this court set
14 out an extensive factual background, therefore, most of it will
15 not be repeated here.

16 In Englert's defamation action against MacDonell, he
17 alleges the American Academy of Forensic Science ("AAFS")
18 ethics complaint, filed against Englert, included information
19 provided by MacDonell, among others. This court found in 2006,
20 and finds again after a detailed review of the record, that
21 MacDonell did not sign the defendants' AAFS submission, nor
22 does the record include any affidavits submitted by MacDonell
23 in support of the defendants' ethics complaints. I find
24 nothing in the record to support MacDonell's involvement or
25 participation in the ethics complaint.

26 Englert does, however, provide a series of letters
27 authored by MacDonell beginning in 1993 accusing Englert of
28 being a "Frankenstein monster," "forensic whore," "liar for

1 hire," and a "charlatan" relating to his work as a blood
2 spatter expert.

3 Further, the brother of a murder victim, William Crank,
4 states that in April 2000, MacDonell began an unsolicited
5 conversation with him in which he attacked and criticized
6 Englert, who had testified as an expert witness in Crank's
7 sister's homicide trial.

8 Prosecuting Attorney Jim. J. Thomas in Blaine County,
9 Idaho recounts a similar event in March 2005, in which
10 MacDonell telephoned him to accuse Englert of perjury, saying
11 that Englert would say anything in court if paid, and that
12 MacDonell would do whatever he could to get Englert out of the
13 forensic expert business. Around that same time, the Idaho
14 Attorney General's Criminal Division in Boise notified Englert
15 of documents left throughout the courthouse stating: "To whom
16 it may concern - if you would be interested in Rod Englerts
17 [sic] real background, training and credibility you should
18 contact Herbert Leon MacDonell. . ."

19 Finally, a police sergeant in Huntington, West Virginia
20 states that during a class MacDonell was teaching on blood
21 patterns in Corning, New York, MacDonell called Englert a
22 "charlatan," a "liar," and "untrustworthy."

23 In September 2005, Englert received notice of many of
24 MacDonell's writings. Englert filed this action on November 3,
25 2005, amending it November 9, 2005, to allege that defamatory
26 statements by MacDonell (and others) were published and/or
27 republished in Multnomah County, Oregon, bringing him into
28 public contempt and ridicule, and diminished in the esteem,

1 respect, goodwill and confidence in which he had been held.

2 **STANDARDS**

3 Summary judgment is appropriate "if the pleadings,
4 depositions, answers to interrogatories, and admissions on
5 file, together with the affidavits, if any, show that there is
6 no genuine issue as to any material fact and that the moving
7 party is entitled to a judgment as a matter of law." Fed. R.
8 Civ. P. 56C. Substantive law on an issue determines the
9 materiality of a fact. T.W. Electrical Service, Inc. v.
10 Pacific Electrical Contractors Assoc., 809 F.2d 626, 630 (9th
11 Cir. 1987). Whether the evidence is such that a reasonable
12 jury could return a verdict for the nonmoving party determines
13 the authenticity of a dispute. Anderson v. Liberty Lobby,
14 Inc., 477 U.S. 242, 248 (1986).

15 The moving party has the burden of establishing the
16 absence of a genuine issue of material fact. Celotex Corp. v.
17 Catrett, 477 U.S. 317, 323 (1986). If the moving party shows
18 the absence of a genuine issue of material fact, the nonmoving
19 party must go beyond the pleadings and identify facts which
20 show a genuine issue for trial. Id. at 324.

21 Special rules of construction apply when evaluating
22 summary judgment motions: (1) all reasonable doubts as to the
23 existence of genuine issues of material fact should be resolved
24 against the moving party; and (2) all inferences to be drawn
25 from the underlying facts must be viewed in the light most
26 favorable to the nonmoving party. T.W. Electrical, 809 F.2d at
27 630.

DISCUSSION

Statute of Limitations

MacDonell seems to argue for a second time that Englert's claims fall outside the one year statute of limitations under O.R.S. 12.120(2). In his initial motion to dismiss, MacDonell asserted this claim alleging that Englert relied only on a 1993 letter MacDonell admits having written. Englert's response, however, then clarified that additional incidents were at issue. Englert provided affidavits demonstrating MacDonell made defamatory communications within a year of Englert filing his lawsuit (November 3, 2005). Further, under Oregon's discovery rule, a claim for defamation based on statements made in confidential documents does not accrue until plaintiff discovers its contents. Holdner v. Oregon Trout, 173 Or. App. 344, 351, 22 P.3d 244 (2001) (citing White v. Gurnsey, 48 Or. App. 931, 935-36, 618 P.2d 975 (1980)). Thus, as I ruled earlier, Englert's September 2005 discovery of MacDonell's older confidential communications falls within the statute of limitations under the discovery rule. Any claim by MacDonell regarding the statute of limitations is denied.

Defamation

A claim for defamation requires the plaintiff to present evidence establishing that the defendant published a defamatory statement about the plaintiff to a third person. Affolter v. Baugh Construction Oregon, 183 Or.App. 198, 202, 51 P.3d 642 (2002). "A defamatory statement is one that would subject another to 'hatred, contempt or ridicule . . . [or] tend to diminish the esteem, respect, goodwill or confidence in which

1 [the other] is held or to excite adverse, derogatory or
2 unpleasant feelings or opinions against [the other].'" Id.
3 (internal citation omitted). "Whether a statement is capable
4 of having a defamatory meaning is a question of law for the
5 court." Simpson v. Burrows, 90 F.Supp.2d 1108, 1126 (D. Or.
6 2000).

7 An allegedly defamatory statement must contain some
8 factual assertion that is capable of being proven true or
9 false. Reesman v. Highfill 327 Or. 597, 603, 965 P.2d 1030
10 (1998). Opinion statements are not provably true or false and
11 are therefore not capable of a defamatory meaning. Id. at 606.
12 Similarly, for purposes of the First Amendment, "[t]he scope of
13 constitutional protection extends to statements of opinion on
14 matters of public concern that do not contain or imply a
15 provable factual assertion." Underwafer v. Channel 9
16 Australia, 69 F.3d 361, 366 (9th Cir. 1995). Slurs or name-
17 calling are considered opinion statements. See Simpson, 90
18 F.Supp.2d at 1126 ("a pervert, degenerate, or an immoral
19 person," although rude and mean, were only rhetoric and "not
20 the kind of ascertainable factual statements required to
21 sustain a defamation claim.").

22 Englert's claim again MacDonell is based on the following
23 communications: (1) a 1993 letter to a Utah attorney; (2) a
24 1994 letter to a North Carolina attorney; (3) a 1998 affidavit
25 signed by MacDonell and sent to a Washington prosecutor; (4)
26 portions of a 1999 email to a Alabama forensic scientist; (5)
27 an affidavit signed by William Crank regarding an April 2000
28 statement; (6) a 2000 letter addressed "to whom it may

1 concern;" (7) a June 2003 email to a New York attorney; (8) an
2 October 2003 email to a Washington attorney; (9) an unsigned
3 message posted in an Idaho courthouse; (10) an affidavit signed
4 by Jim J. Thomas about a March 2005 statement; (11) an
5 affidavit signed by David J. Castle about a September 2005
6 statement; and (12) a 2006 Indiana newspaper article. The
7 court will review each of these twelve pieces of evidence in
8 turn as possible support for Englert's defamation claim.

9 The 1993 letter to a Utah attorney, and 1994 letter to a
10 North Carolina attorney do not contain any statements that
11 constitute defamation, i.e. probable false assertions. The
12 letters contain only statements of opinion. Regarding the 1999
13 partial email, I find no defamatory statements. In fact, it is
14 difficult to discern much information about the email without
15 the context of the remainder of the email. Regarding the Crank
16 Affidavit, I find no defamatory statement, particularly
17 considering it is difficult to discern any MacDonell statements
18 whatsoever from the affidavit. With respect to the 2000 letter
19 addressed "to whom it may concern," it does not contain any
20 statements that constitute defamation. Regarding the June 2003
21 email to the New York attorney, and the October 2003 email to
22 the Washington attorney, neither email contains any statements
23 that constitute defamation. Regarding the message in the Idaho
24 courthouse by an unknown author, plaintiff has no evidence or
25 information to prove that MacDonell authored or posted the
26 unsigned message in an Idaho courthouse. MacDonell states that
27 he was not in Idaho at the time the message was posted and has
28 no information as to who created the document or how it got to

1 a courtroom in Idaho. Nevertheless, even assuming the document
2 was authored by MacDonell, it contains no statements that would
3 constitute defamation. With respect to the Jim J. Thomas
4 affidavit, it contains no quotes of statements by MacDonell
5 that constitute defamation. Regarding the Castle affidavit,
6 first there is no evidence that MacDonell actually made those
7 statements, and second, to the extent that MacDonell made those
8 statements, the opinion statements found within are not
9 defamatory. Finally, regarding the 2006 Indiana newspaper
10 article, MacDonell is not quoted in the article, nor does
11 Englert have any information or evidence that the reporter ever
12 talked to or obtained a quote from MacDonell. I find no
13 evidence that MacDonell spoke to the reporter or caused any
14 statement by him to be published or republished in the article.
15 Moreover, Englert never requested the newspaper print a
16 retraction. Or. Rev. Stat. 31.210 prohibits plaintiff from
17 recovering damages without first requesting a retraction from
18 the newspaper.

19 Further, based on the record, the court finds that
20 plaintiff is a public figure. As a public figure, plaintiff
21 must prove that MacDonell acted with actual malice in making
22 any statements about Englert. 'Actual malice' is defined as
23 making statements with knowledge, or reckless disregard, of
24 their falsity. New York Times v. Sullivan, 376 U.S. 254, 280
25 (1987); and Flowers v. Carville, 310 F.3d 1118, 1129 (9th Cir.
26 2002). Plaintiff has no evidence of any actual malice by
27 MacDonell. Plaintiff fails to point to a single alleged
28 factual statement by MacDonell that plaintiff demonstrates is

false, or made with knowledge or reckless disregard of its falsity. I find no evidence in the record that MacDonell's statements were false factual assertions made with actual malice.

Finally, Englert has no evidence that he was damaged by any of these twelve items. Englert testified that the ethics complaint caused him to lose work on four cases (one case each in New York, Hawaii, Arizona and Wisconsin). Englert agrees that MacDonell did not submit an ethics complaint and was not involved in the ethics proceeding. Since Englert's only damage was lost work on four cases due to the filing of the ethics complaint that MacDonell had no part of, plaintiff has failed to identify any damages attributable to MacDonell.

None of the twelve documents at issue support plaintiff's claim of defamation against MacDonell. Therefore, MacDonell is entitled to summary judgment.

CONCLUSION

MacDonell's Motion for Summary Judgment (doc. 117) is granted. The parties' request for oral argument is denied as unnecessary.

IT IS SO ORDERED.

Dated this 6 day of July 2010.

/s/ Ann Aiken
Ann Aiken
United States District Judge