

Third District Court of Appeal

State of Florida

Opinion filed September 18, 2019.

Not final until disposition of timely filed motion for rehearing.

No. 3D18-0203

Lower Tribunal No. 12-43235

Jonathan Hullick,
Appellant,

vs.

Gibraltar Private Bank & Trust Company,
and Steven D. Hayworth,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Eric William Hendon, Judge.

Weil Snyder Schweikert & Ravindran, P.A., and Ronald P. Weil, and Iva U. Ravindran; Joel S. Perwin, P.A., and Joel S. Perwin, for appellant.

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., and Jose G. Sepulveda, Carlos J. Canino, and Julie Fishman Berkowitz; Wicker Smith O'Hara McCoy & Ford, P.A., and Dennis M. O'Hara, Alyssa M. Reiter, Lindsey A. Hicks, and Brandon J. Hechtman, for appellees.

Before SALTER, LOGUE, and LINDSEY, JJ.

LINDSEY, J.

Appellant Jonathan Hullick (Plaintiff below) appeals an order entering final summary judgment in favor of Appellee Steven Hayworth (Defendant below) on two counts of defamation per se. Hullick alleged that Hayworth, as Chief Executive Officer of Gibraltar Private Bank and Trust Company, made defamatory statements in front of Gibraltar's Board of Directors. Because Hullick failed to establish the essential element of publication to a third party, we affirm.

I. BACKGROUND¹

In May 2007, Hayworth, former CEO, Executive President, and Chairman of Gibraltar's Board of Directors, hired Hullick to fill the recently-vacated Chief Operating Officer ("COO") position. Hullick's time with Gibraltar was, however, short-lived. In July 2007, Hullick wrote a memo in which he expressed concern over irregularities and other suspicious activity in a client's accounts. Over the next 15 months, Hullick reported his ongoing concerns to Hayworth, the Board of Directors, the Senior Managing Director, the Audit Committee, the Chief Risk Officer, the Bank Secrecy Act/Anti-Money Laundering Officer, and the Chief Credit Officer. In addition, Hullick reported his concerns regarding Senior Vice President John Harris,

¹ Because the specific facts establishing Hullick's defamation action are not at issue in this appeal, we need only provide a brief outline of the relevant factual background.

the Regional Market Manager at Gibraltar's Ft. Lauderdale branch, where the client's accounts were maintained. Hullick believed that Harris was aware of fraudulent activity in the accounts and was permitting it to continue. Conflict arose between Harris and Hullick, and Hullick was eventually terminated from his position as Gibraltar's COO.

Approximately two years later, Hullick filed the underlying action, alleging, inter alia, that Hayworth made multiple defamatory statements about him post-termination that destroyed his reputation in the banking community, making it difficult for him to find employment. Hullick further alleged Hayworth made these statements to the other members of Gibraltar's Board of Directors during a Board meeting. After numerous motions and orders from three different trial court judges, Hullick's twenty-count operative complaint was whittled down to just five counts: one count against Gibraltar for breach of contract and two counts each against Gibraltar and Hayworth for defamation per se.

Gibraltar and Hayworth filed motions for summary judgment, arguing that the element of publication was not established by the allegations in the Complaint based on this Court's holding in American Airlines, Inc. v. Geddes, 960 So. 2d 830 (Fla. 3d DCA 2007).² The prior trial court judge disagreed and denied the motions,

² Hullick, relying on Southern Bell Telephone & Telegraph Co. v. Barnes, 443 So. 2d 1085 (Fla. 3d DCA 1984), argues that under certain circumstances intra-corporate communication can be actionable. However, because Barnes, a brief per curiam

allowing the case to go forward.³ Thereafter, Gibraltar and Hayworth renewed their motions for summary judgment with the successor trial judge, asserting the same grounds as previously argued. The trial court agreed and granted summary judgment in favor of Hayworth on both defamation counts (Counts XII and XVI) because Hullick had failed to establish the necessary element of publication to a third party.

This timely appeal followed.⁴

II. STANDARD OF REVIEW

When there are no disputed factual issues, the granting of summary judgment presents a pure question of law and is subject to the *de novo* standard of review. Bosem v. Musa Holdings, Inc., 46 So. 3d 42, 44 (Fla. 2010) (“Because this is a pure question of law, our standard of review is *de novo*.”); So. Baptist Hosp. of Fla., Inc. v. Welker, 908 So. 2d 317, 319 (Fla. 2005); Siegel v. Tower Hill Signature Ins. Co., 225 So. 3d 974 (Fla. 3d DCA 2017).

III. ANALYSIS

opinion, contains no facts, limited analysis, and involved an appeal from a jury verdict, we cannot glean its precedential value, if any, with respect to the instant appeal.

³ Gibraltar and Hayworth moved to disqualify the trial court judge based on comments made at the motion for summary judgment hearing. The trial court granted the motion.

⁴ The order on appeal is final only as to Hayworth because there are no remaining counts against Hayworth below. However, Gibraltar is properly a party to this appeal. See Fla. R. App. P. 9.020(g) (defining “Appellee” as “[e]very party in the proceeding in the lower tribunal other than an appellant”).

The issue before us is whether publication to a third party occurred when Hayworth allegedly made defamatory statements as the CEO and Chairman of Gibraltar’s Board of Directors to other members of the Board. It is undisputed that an essential element of a defamation claim is publication to a third party.⁵ See Advantage Pers. Agency, Inc. v. Hicks & Grayson, Inc., 447 So. 2d 330, 331 (Fla. 3d DCA 1984). “A defamatory statement does not become actionable . . . until it is published or communicated to a third person; statements made to the person alleging the defamation do not qualify.” Geddes, 960 So. 2d at 833 (Fla. 3d DCA 2007) (citing American Ideal Mgmt., Inc. v. Dale Village, Inc., 567 So. 2d 497, 498 (Fla. 4th DCA 1990); Granda–Centeno v. Lara, 489 So. 2d 142, 143 (Fla. 3d DCA 1986)).

In Geddes, this Court explained that, with respect to corporations, “statements made to corporate executive or managerial employees of that entity are, in effect, being made to the corporation itself, and thus lack the essential element of publication.” 960 So. 2d at 833; see also Lopez v. Ingram Micro, Inc., 10 Fla. L. Weekly D635 (S.D. Fla. Mar. 18, 1997) (“[S]tatements ‘made to a corporate

⁵ The five required elements for defamation are: “(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory.” Jews For Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1106 (Fla. 2008).

executive or managerial employee . . . are, in effect, being made . . . to the corporation itself” (quoting Hicks & Grayson, Inc., 447 So. 2d at 331)).

Gibraltar is a Federal Savings Association (“FSA”). As such, federal regulations require that “[a] majority of the directors must not be salaried officers or employees of the savings association or of any subsidiary thereof.” 12 C.F.R. § 163.33(a)(1)(i). Hullick argues that because Gibraltar’s Board of Directors is comprised of a majority of non-employee directors, Geddes does not apply. We disagree.

In Hoch v. Loren, 273 So. 3d 56, 57 (Fla. 4th DCA 2019), the Fourth District explained the rationale behind treating certain intra-corporate communications, even though apparently made to third persons, as not published for the purposes of a defamation claim: “To reach this conclusion, courts have employed the legal fiction that the party hearing or seeing the purported defamation is so closely connected with the potential defamation plaintiff or defendant that they merge into a single entity, so there is no publication to a ‘third person’ necessary to the cause of action.”

Here, although Gibraltar’s Board includes a majority of non-employee directors, these directors and Hayworth, the former CEO, were undoubtedly so closely connected with Gibraltar that communications among the Board and Hayworth were tantamount to the “corporation talking to itself.” See Geddes, 960 So. 2d at 834. This conclusion is supported by the federal regulations governing

FSAs, which require non-employee directors to form an integral part of the FSA corporate structure. See 12 C.F.R. § 163.33(a)(1)(i).

Further, Florida law has long considered a board of directors to be a corporation's management and has provided that the acts of a corporation's board of directors are the acts of the corporation itself. See, e.g., Mease v. Warm Mineral Springs, Inc., 128 So. 2d 174, 179 (Fla. 2d DCA 1961) ("The board of directors of a corporation represents the corporate body, and the directors are entrusted with authority to conduct and manage the corporate affairs."); Jacksonville Am. Pub. Co. v. Jacksonville Paper Co., 197 So. 672, 677 (Fla. 1940) (corporation's business is "managed by a president, a board of directors"); Schein v. Caesar's World, Inc., 491 F.2d 17, 20 (5th Cir. 1974) ("[I]t is to be noted that the management of corporate business is vested in the directors of a corporation....") (applying Florida law); 19 C.J.S. Corporations § 538 ("A corporation's board of directors is the governing body of the corporation . . . the board . . . is vested with the control and management of the corporation, including the management of corporate business and affairs, the management of corporate property or assets, and litigation authority. All corporate power is vested in the board of directors"). We therefore conclude that the rationale underlying the rule set forth in Geddes is equally applicable here. Consequently, because federal regulations require a majority of Gibraltar's Board to be composed of non-employees, communications between Hayworth and Gibraltar's

non-employee directors is subject to the same no-publication rule set forth in Geddes.

IV. CONCLUSION

Because Hayworth's alleged defamatory statements made to Gibraltar's Board of Directors do not constitute publication to a third party, the trial court was correct in granting summary judgment as to Hullick's claims against Hayworth for defamation.

Affirmed.