

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000683-MR

EDWARD H. FLINT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 08-CI-007865

DENNIS J. STILGER;
JANE DOES; AND JOHN DOES

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, KRAMER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: In this defamation action, Edward H. Flint, *pro se*, appeals from a summary judgment of the Jefferson Circuit Court entered in favor of Dennis J. Stilger. Flint argues that summary judgment was improperly granted because material issues of fact remain regarding whether Stilger acted with actual malice. We affirm.

Flint is a condominium owner at the Coach House condominiums and a member of the condominium owners' association. After Flint suspected association funds were being misappropriated, he requested that the Board of Directors of Coach House permit him access to financial records and minutes of the Board's meetings from 2005 to 2007.

Stilger, as the attorney representing the Board, informed Flint that his request was unreasonable and that he could view the records and minutes under supervision at the management office and would be charged a fee. Flint then wrote to the Office of the Kentucky Attorney General asking that it prosecute the matter involving his records request.

Stilger submitted a letter to the Attorney General in response to Flint's request for prosecution explaining why Flint was permitted to review the records only under supervision and using the following language possibly viewed as unflattering:

Mr. Flint's letter of October 17th contains false allegations. Mr. Flint has previously sued and lost litigation with Coach House and is extremely erratic and unstable. He made an unreasonable demand for review of records. Because of his past conduct, Mr. Flint would only be allowed to review the records under supervision. No one at the condo feels physically safe with him.

Flint filed this action against Stilger asserting Stilger's letter to the Attorney General was defamatory. Stilger filed a motion for summary judgment arguing that the communication was made in the course of a judicial proceeding and entitled to an absolute privilege. The circuit court determined Stilger's letter to the

Attorney General was a direct response to an appeal for prosecution and, therefore, part of a judicial proceeding and absolutely privileged. The circuit court granted Stilger's motion for summary judgment.

Flint appealed the Jefferson Circuit Court's summary judgment to this Court, which concluded that Stilger's communication to the Attorney General was not part of or preliminary to a judicial proceeding and that it was entitled only to a qualified privilege. The case was reversed and remanded to the circuit court for a determination on whether Stilger acted with actual malice. *Flint v. Stilger*, 2009-CA-000475-MR, 2010-WL-199566 (Ky.App. 2010). Our Supreme Court affirmed in *Stilger v. Flint*, 391 S.W.3d 751 (Ky. 2013). The Court held the Attorney General does not act in a judicial or quasi-judicial capacity and that it is an investigatory body. *Id.* at 754. Consequently, Stilger's communications to the Attorney General enjoy a qualified rather than an absolute privilege. *Id.*

After remand, both parties propounded interrogatories, requests for production of documents and requests for admissions. During the course of discovery, Flint sought to serve interrogatories on nonparties, Coach House, Inc. and members of its Board of Directors. The circuit court quashed discovery and advised Flint that he could subpoena the members for deposition but could not obtain information through interrogatories.

On February 12, 2014, Flint filed a motion to amend his complaint to add members of Coach House, Inc.'s Board of Directors. The circuit court denied the motion on the basis that the amended complaint alleged no facts which were

unknown to Flint when he filed his original complaint in 2008 and that the amendment was merely a means to circumvent the discovery process.

With an April 22, 2014, trial date looming, Stilger moved for summary judgment on March 19, 2014, arguing there was no evidence he acted with malice. The motion was accompanied by Stilger's affidavit stating that he provided legal counsel to Coach House, Inc. regarding Flint's records request and, in response to Flint's letter to the Attorney General, wrote a letter to the Attorney General explaining the Board's position in the matter. He stated that the statements made were either matters of law or factual statements derived from confidential communications with his clients.

Flint responded to Stilger's motion for summary judgment. He argued that Stilger committed certain ethical violations. In his accompanying affidavit, he did not set forth any factual matters that Flint acted with malice but only reiterated his conclusion that Stilger violated the ethical rules governing the conduct of attorneys.

The circuit court granted Stilger's motion for summary judgment. It concluded the statements made by Stilger, even if false, were not made with the malice required to overcome the qualified privilege afforded to those statements. The court pointed out that the letter was penned in response to Flint's request to the Attorney General to prosecute his clients and explanatory of why his clients denied Flint access to the records in the manner requested and disseminated by Stilger only to the Attorney General and his clients.

“The circuit court’s decision to grant summary judgment is reviewed *de novo*.” *Harstad v. Whiteman*, 338 S.W.3d 804, 809 (Ky.App. 2011). The standard of review has been often repeated and summarized as follows:

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. The party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial.

Id. at 810 (internal quotations and citations omitted).

Our Supreme Court determined the statements written by Stilger enjoy only a qualified privilege. Nevertheless, Flint is wrong when he argues that the existence of less than an absolute privilege requires the matter to be submitted to a jury.

“The essential elements of defamation are: “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Id.* (quoting Restatement (Second) of Torts § 558 (1977)). If a statement is subject to a qualified privilege, the burden is on the plaintiff to prove actual malice. *Id.*

In *Harstad*, the court defined “actual malice” as follows:

[K]nowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not. . . . [R]eckless disregard is . . . a high degree of awareness of . . . probable falsity, and . . . [where] the publisher must have entertained serious doubts as to the truth of his publication. (Internal quotations and citations omitted.)

Id. at 813 (quoting *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684, 689 (Ky. 1990)).

In *Harstad*, this Court considered whether a summary judgment was appropriate in a defamation case involving the qualified privilege and held that the appropriate inquiry by the court when deciding whether to grant summary judgment is whether the plaintiff has presented “some evidence that would incline a reasonable person to believe” that the defendant knew he or she was “lying or making wholly unfounded statements without regard to their truth or falsity.” *Id.*

Even if the unflattering statements made by Stilger were false, Flint is required to come forth with some evidence from which a reasonable person could conclude the words were written with malice. “[N]ot every erroneous statement is expressed with malice. As our highest court plainly stated, once a qualified privilege attaches, even false and defamatory statements will not give rise to a cause of action *unless maliciously uttered*. *Id.* (quoting *Stewart v. Williams*, 309 Ky. 706, 708, 218 S.W.2d 948, 950 (1949)).

Stilger’s affidavit reflected the statements in the letter were made in good faith based upon communications between counsel and his clients for the purpose of responding to Flint’s request that the Attorney General prosecute his clients.

There is no evidence that Stilger acted maliciously or otherwise abused the qualified privilege afforded the statements.

Flint also alleges that the circuit court erred when it denied his motion to amend his complaint to add members of the Coach House Board of Directors who communicated with Stilger and when it did not compel Stilger to answer Interrogatory 18 and produce documents requested.

Kentucky Rules of Civil Procedure (CR) 15.01 “allows a party to amend a pleading once as a matter of course any time before a responsive pleading is filed. Thereafter, a party may amend his pleading only by leave of court or written consent of the adverse party.” *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 548 (Ky. 2001). “[L]eave shall be freely given when justice so requires.” CR 15.01. “Although amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself.” *First Nat. Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky.App. 1988).

The circuit court properly exercised its discretion in denying the amendment. The facts alleged in the amended complaint were well known to Flint when he filed his complaint against Stilger in 2008. Moreover, because we affirm the summary judgment against Stilger, no purpose would be served by permitting the amendment.

Finally, Flint’s argument that the circuit court committed reversible error when it did not compel Stilger to answer Interrogatory 18 and produce documents

is without merit. Interrogatory 18 asked Stilger if he was in possession of “ballots or other election materials pertaining to the 2005 Coach House, Inc., Association’s election for Board of Directors” and requested copies of those materials. He also requested copies of documents which Stilger maintained were not discoverable under the attorney client privilege.

The circuit court did not deny the motion to compel in its entirety but ordered Stilger to produce the requested documents if not covered by the attorney client privilege or “if such documents are to be produced as trial exhibits Plaintiff may make other motions related to claim of privilege if warranted.” Most importantly, Flint does not allege how the answer to Interrogatory 18 or the requested documents could demonstrate the malice required to defeat the qualified privilege afforded the statements contained in Stilger’s letter to the Attorney General.

Based on the forgoing, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Edward H. Flint, *Pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

Dennis J. Stilger
Louisville, Kentucky