STATE OF MICHIGAN

COURT OF APPEALS

PARVIZ DANESHGARI and MOTOR CONSULTANTS OF AMERICA, INC., a/k/a MCA, Plaintiffs-Appellants,	UNPUBLISHED July 21, 2011
v	No. 297293 Oakland Circuit Court
JEROME GREENBAUM, SUSAN OROZCO, WILLIAMS WILLIAMS RATTNER & PLUNKETT, P.C., ARIE LEIBOVITZ, and SCOTT LEIBOVITZ, Defendants-Appellees.	LC No. 2009-105507-CZ

Before: M J KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

This case involves a defamation claim for statements made during a previous lawsuit. The trial court granted summary disposition in favor of the defendants because the allegedly defamatory statements were absolutely privileged. We affirm.

I. BACKGROUND

The present dispute has its roots in lawsuits filed in 2007 (the 2007 lawsuit) and 2009 (the 2009 lawsuit). In the 2007 lawsuit, two LLCs in which the Leibovitzs may have been officers,[1] sued two LLCs owned by plaintiff.[2] The 2007 plaintiffs won a judgment against the 2007 defendants in the amount of $506,589.68.

[1] The trial court stated that the Leibovitzs were officers in the plaintiff LLCs in the 2009 suit, but defendants dispute that on appeal.

[2] Motor Consultants of America (MCA) does not appeal the portion of the trial court's opinion finding that it could not sue any defendant for defamation because the allegedly defamatory

Having failed to collect on the judgment, the 2007 plaintiffs again filed suit in 2009, naming as defendants plaintiff and entities allegedly under plaintiff's control that had not been defendants in the 2007 lawsuit. The 2009 lawsuit alleged that the 2007 defendants are alter egos of plaintiff or other named 2009 defendants, and that plaintiff was using his network of entities to avoid paying the judgment from the 2007 lawsuit. The 2009 lawsuit sought to pierce the corporate veils of these entities and to hold plaintiff personally liable for the debts of the 2007 defendants.

As a part of the 2009 lawsuit, the 2009 plaintiffs requested a temporary restraining order (TRO) to prevent plaintiff and the other 2009 defendants from withdrawing or transferring funds from bank accounts. In their brief supporting the motion, the 2009 plaintiffs stated:

> B. The harm to Plaintiffs in the absence of an injunction outweighs the harm to Defendants if an injunction is granted.
>
> At issue in this matter is the determination of whether the defendants in this cause are the alter egos of or the successors in interest to [the 2007 defendants], against which Plaintiffs have a judgment in excess of half a million dollars. Plaintiffs seek a Temporary Restraining Order restraining Defendants from transfers of cash and other assets outside the ordinary course of business. A Temporary Restraining Order constitutes no harm to Defendants, other than their inability to transfer assets offshore or hide them from the reach of this Court. On the other hand, once these assets are transferred to Iran or hidden from the reach of the Sheriff, the harm to Plaintiffs is the impossibility of ever collecting on their judgments, one already entered and another sought by this action.
>
> The attached affidavits and exhibits vividly show that cash deposits have been transferred regularly among the defendant entities, for no apparent business reason. (See Affidavit of Susan A. Orozco, attached as Exhibit E).
>
> Since the Court's recent Order finding Parviz Daneshgari in contempt of court, and service of the summons and Complaint in this matter, he has shuttered his office building from which he conducted business and put it up for sale. (See Affidavit of Theresa Bailey). Prior to that, he rented out his home in Oakland County. Further he, without any non-incriminating reason known to Plaintiffs' counsel, gave up his teaching position at the University of Michigan, Dearborn. These recent activities portend furtive plans to leave this area and eternally transfer all portable assets from the reach of Plaintiffs, causing the irreparable injury.
>
> C. An injunction will not harm the public interest.
>
> Upon information and belief Parviz Daneshgari is a citizen of Islamic [sic] Republic of Iran. The public has an interest in retaining U.S. funds in this country

statements did not concern MCA. Therefore, the term "plaintiff" in this opinion refers only to Daneshgari.

> and not transferred [sic] to a country with which the U.S. has (i) no diplomatic relations and (ii) no treaties for the recognition or enforcement of our judgments. There is a documented history of substantial transferring of funds within the CBW entities and at least three funds transfers out of the entities to unknown sources totaling in excess of $275,000. (See Affidavit of Susan A. Orozco, Exhibit E). Defendants can point to no public interest favoring the wholesale transfer of U.S. funds overseas, especially to the Islamic Republic of Iran.

Plaintiff responded by filing this suit against the 2009 plaintiffs' attorneys and the Leibovitzs, alleging that "[t]he obvious implication of these statements is that Plaintiff Daneshgari is a terrorist, or someone who supports terrorism. Upon information and belief Co-Defendants Arie Liebovitz and Scott Liebovitz [sic] are the source of the inflammatory statements." Defendants moved for summary disposition, which the trial court granted under MCR 2.116(C)(7), holding that the statements in the TRO brief were relevant to a judicial proceeding and therefore absolutely privileged. Plaintiff now appeals.

II. STANDARD OF REVIEW

The trial court decided this issue under MCR 2.116(C)(7). However, it appears that MCR 2.116(C)(8), failure to state a claim, is the appropriate rule to apply in this case. An unprivileged communication is one of the elements of defamation. *Oesterle v Wallace*, 272 Mich App 260, 263-264; 725 NW2d 470 (2006). Therefore, if the statements at issue here are privileged, plaintiff has failed to state a claim for defamation. See *Couch v Schultz*, 193 Mich App 292, 293; 483 NW2d 684 (1992) (deciding a similar issue under MCR 2.116(C)(8)). "Where summary disposition is granted under the wrong rule, Michigan appellate courts . . . will review the order under the correct rule." *Speik v Dep't of Transp*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. *Newton v Bank West*, 262 Mich App 434, 437; 686 NW2d 491 (2004). The motion should be granted "if no factual development could possibly justify recovery." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Whether a statement is privileged is a question of law. *Couch*, 193 Mich App at 294. This Court reviews de novo questions of law. *Shinkle v Shinkle*, 255 Mich App 221, 224; 663 NW2d 481 (2003).

III. PRIVILEGE FOR STATEMENTS DURING JUDICIAL PROCEEDINGS

To establish a claim for defamation, a plaintiff must show:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Oesterle*, 272 Mich App at 263-264].

Statements made as part of judicial proceedings are absolutely privileged, "provided they are relevant, material, or pertinent to the issue being tried." *Couch*, 193 Mich App at 294-295; *Oesterle*, 272 Mich App at 264. The term "judicial proceedings" encompasses any hearing

before an entity performing a judicial function and includes any statements related to the case, "including pleadings and affidavits." *Oesterle*, 272 Mich App at 265. "If absolute privilege applies, there can be no action for defamation." *Couch*, 193 Mich App at 294. The privilege is liberally construed "so that participants in judicial proceedings are free to express themselves without fear of retaliation." *Id.* at 295. Plaintiff concedes that the statements at issue in this case were made during a judicial proceeding, but argues that they were not relevant to the underlying issues.

The statements were made during a motion for a TRO. When deciding a motion for a TRO, a trial court must consider four factors:

> (1) [H]arm to the public interest if an injunction issues, (2) whether harm to the applicant in the absence of temporary relief outweighs harm to the opposing party if relief is granted, (3) the strength of the applicant's demonstration that the applicant is likely to prevail on the merits, and (4) demonstration that the applicant will suffer irreparable injury if the relief is not granted. [*Comm'r of Ins v Arcilio*, 221 Mich App 54, 77-78; 561 NW2d 412 (1997)].

The allegedly defamatory statements were directed at the potential harm to the 2009 plaintiffs if no injunction were granted and the lack of harm an injunction would cause to the public interest. The 2009 plaintiffs argued that without the TRO they would never be able to collect their valid judgment from the 2007 case, and that the public interest would not be harmed by preventing the 2009 defendants from transferring money beyond the reach of the court. Whether or not the arguments are convincing, they were certainly relevant to the determination of whether the TRO should be granted.

The motion for a TRO was a step in a judicial proceeding. The allegedly defamatory statements were relevant to that motion. Therefore, the statements were absolutely privileged, and plaintiff failed to state a claim for defamation.

Affirmed. Defendants, having prevailed in full, may tax costs pursuant to MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto