STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO
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SCOTTSDALE CAPITAL ADVISORS CORPORATION

Plaintiff,

v

MORINGLIGHTMOUTAIN, LLC, MICHAEL GOODE AND DOES 1-10,

Defendants.

Circuit Court File No. 2018-0153-CZ

Hon. Alexander C. Lipsey

OPINION AND ORDER

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At a session of Court in the City and County of Kalamazoo, State of Michigan, on this 4th day of October, 2018.

PRESENT: HONORABLE ALEXANDER C. LIPSEY, Circuit Court Judge

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Scottsdale Capital Advisors, the Plaintiff, is an investment banking company that partakes in penny stock trading. Penny stocks are smaller, non-SEC regulated stocks. Scottsdale was used by certain investors to perform a pump-and-dump scheme in order to alter the current stock value for a company called Biozoom. The Defendants, MorningLightMountain, Michael Goode, and Does 1-10, report via blog and social media posts about issues facing the trading and investment world.

On April 17, 2017 and June 14, 2017, MorningLightMountain through the website GoodeTrades.com published two articles which Plaintiffs allege were defamatory. Plaintiff claims the April article contains at least three defamatory, false remarks. The Plaintiffs quote the following three:

1. "If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors."
2. "They [SCA] are one of the few brokers left that have continued to allow the deposit and sale of shares of illiquid penny stocks. Larger brokers and discount brokers stopped allowing that over five years ago."
3. "When the big Biozoom (BIZM) pump happened back in 2013 many of the frozen accounts were at Scottsdale Capital."

The June article contains at least one defamatory, false remark including the following:

1. "Lest anyone think that these are just minor paperwork deficiencies with no real consequences, I remind you that one pump and dump alone, Biozoom, (BIZM) led to over $17 million in fraudulent profits for manipulators / insiders, and many of accounts were at Scottsdale Capital Advisors."

Based on these alleged defamatory remarks, Plaintiff filed a summons and complaint on April, 16, 2018 in the 9th Circuit Court of Kalamazoo County. The Defendants filed a Motion for Summary Disposition on June 7, 2018. Plaintiffs responded on August 17, 2018 and Defendants replied on August 20, 2018.

STANDARD OF REVIEW

(C)(8)

A motion for summary disposition brought pursuant to MCR 2.116(C)(8) is appropriate when the opposing party has failed to state a claim on which relief can be granted. A Motion for Summary Disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. *Beaudrie v Henderson*, 465 Mich 124, 129 (2001). "[A]ll well pleaded allegations are accepted as true, and construed most favorably to the non-moving party." *Wade v Dep't of Corr*, 439 Mich 158, 162-163 (1992). A mere statement of conclusions, unsupported by factual allegations, is not sufficient to state a cause of action. *ETT Ambulance Svc Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade* at 163.

ANALYSIS

Through the parties' filed briefs, there are three issues at bar. First, there is a question regarding the standard of review. Second, there is a question what exhibits and evidence are admissible under review of MCR 2.116(C)(8). Third, there is a question whether the initial and amended complaint (the Complaint) properly give asserted factual basis for all the elements necessary to allege a defamation case.

1. **THE STANDARD OF REVIEW IS NOT ALTERED JUST BECAUSE THE CASE AT BAR INVOLVES AN ALLEGED DEFAMATION.**

The first issue is whether there is a heightened scrutiny when reviewing defamation cases in the scope of MCR 2.116(C)(8). Defendant, the moving party, claims that there is a heightened scrutiny when reviewing a defamation case for legal sufficiency based on its pleadings. The Plaintiff properly states that this claim is without merit. The two cases the Defendants cite to, *Bose Corp. v Consumers Union* and *Thomas M Cooley Law School v Does 1*, are improperly interpreted. 466 US 485 (1984); 300 Mich App 245 (2013). In *Bose Corp.*, the Supreme Court references decisions made in light of *New York Times Co v Sullivan.* 466 at 487-86. This case pertains to public officials. In defamation cases, most states impart a higher standard for public officials to prove "actual malice" before a proper claim can be made. *New York Times Co v Sullivan*, 376 US 254, 268 (1964).

Furthermore, the Defendant's citation of *Thomas M Cooley Law School v Does 1* also fails to appreciate the different standard between a public official or figure and a private one. The Defendant does not assert that the Plaintiff is a public official or figure, and thus by Michigan law the Plaintiff is not required to prove "actual malice" since proof or assertion of "actual malice" is reserved for defamation cases in which a public figure is the victim of the alleged defamatory remarks. *Peterfish v Frantz*, 168 Mich App 43, 52 (1988).

Further, this Court should not find that the Plaintiff is a public figure, even though neither party has argued such. A public figure is a "person who by his accomplishments, fame, or mode of living, or by adopting a calling which gives the public a legitimate interest in his act ivies, affairs, and character, has become a public personage. *Arber v Sahlin*, 382 Mich 300, n 4 (1969). Scottsdale Capital Advisors Corporation does not avail itself, intentionally or otherwise, to the public domain. By its nature of investment banking, the average population does not know the company by name and surely does not have a legitimate interest in its affairs.

For these reasons, this Court should not implement a higher standard as the Defendant suggests, but instead maintain a normal course of action regarding MCR 2.116(C)(8) that reviews only pleadings for legal sufficiency in light of the alleged wrongdoing. At bar, only normal defamation is being asserted by a private party.

2. **THE EXHIBITS AND EVIDENCE PRODUCED IN THE MOVING PARTY'S ORIGINAL BRIEF FOR SUMMARY DISPOSITION ARE NOT CONSIDERED WHEN REVIEWING WHETHER OR NOT THE ORIGINAL AND AMENDED COMPLAINT SUFFICIENTLY PLEADS A CLAIM IN WHICH RELIEF CAN BE GRANTED.**

The second issue is whether the Defendants' attached exhibits to their brief for their Motion for Summary Disposition are reviewable by this Court when deciding on a Motion brought under MCR 2.116(C)(8). The Plaintiff is correct that a Motion for Summary Disposition brought under MCR 2.116(C)(8) allows for the court to review only the pleadings already on file as evidence to support the moving party's Motion. *Dalley v Dykema Gossett*, 287 Mich App 296, 305 (2010). Because of this, the exhibits that were introduced via the Defendant's Motion are not to be reviewed when determining the Motion. This Court should only review the prior pleadings, both the original and the amended complaint, and any documents that were previously, properly submitted to the Court.

3. **THE ORIGINAL AND AMENDED COMPLAINT SUFFICIENTLY ASSERT AT LEAST ONE FACTUAL BASIS FOR WHICH THIS COURT CAN GRANT RELIEF THAT IS BEING REQUESTED.**

For recovery under MCR 2.116(C)(8), the moving party must prove that the Complaint does not establish the elements of the alleged wrongdoing with proper, factual basis. For a party to succeed in a defamation claim, the complainant must establish and prove that there were (1) false and defamatory statements concerning the plaintiff from an (2) unprivileged communication to a third party from (3) fault amounting at least to negligence on the part of the publisher and (4)

either actionability of the statement irrespective of the special harm or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 25 (2005).

While the parties may disagree on the some peripheral facts outside of the pleading, the issue before this Court is whether the Complaint by the Plaintiff establishes enough asserted factual basis for the Complaint to be properly pleaded. *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 685 (1989). In the Complaint, there are four statements made by the Defendant's publication that the Plaintiff alleges to rise to the level of defamation. Only one of the statements need to be properly pleaded for the Motion for Summary Disposition to be denied.

When analyzing each statement, the question is not whether there is enough evidence to make a legal determination as to whether the Defendant is culpable, but rather the Complaint properly asserts a legal stance in which relief can be granted by this Court. In their brief, the Defendant does not address the second and fourth elements of defamation. Instead, the Defendant claims that either the Plaintiff did not establish in their Complaint that the statements were false or defamatory and/or that the duty of care, negligence, has not been met.

The Plaintiff asserts in the Complaint that the Defendant should have known that the statements were false, or in the least acted in reckless disregard when it published the articles.[1] While this statement does not have alleged evidence to prove directly that the Defendant knew of the claim's falsity, this assertion implies a fact basis. If the Defendants were journalist that work within the realm of the investment banking, as they do, then they would likely know if the statements were intentionally false.

This argument is convincing for two reasons. First, applying the legal theory of res ipsa loquitor, the Defendant's statements were made about a realm that they claim to have a lot of

[1] Amended Complaint, ¶ 26, April 20, 2018.

experience in. If the statements prove to be false, then by its very nature they also meet the third element's standard that requires negligence on behalf of the wrongdoer. Second, Defendants have refused to retract, correct, or apologize for the statements and thus were on notice about their potential falsity.[2] If this court deems the statements to be false, then it consequently also determines that the Defendant's actions were negligent when reporting false statements. Because of this, only the falsity or defamatory nature will need to be assessed per statement within the Complaint.

A. "If you have followed penny stocks and pump and dumps for a few years then you know Scottsdale Capital Advisors."

The first statement from the April 2017 article implies that Scottsdale is associated with pump and dump schemes. The Court is not currently worried about whether this statement is true or false, but is ONLY worried about whether the Complaint filed by the Plaintiff properly asserts a factual basis that this statement by Defendant is false or defamatory. Defendants argue that this statement is factual because the statement does not explicitly state the Plaintiffs have never been a defendant in any pump and dump lawsuit, but claim that the Plaintiffs are still associated with pump and dump schemes because of their broker-dealer status in penny stocks.

The Plaintiff asserts that this statement implies that Scottsdale Capital Advisors are conducting pump and dump schemes. The Complaint alleges that the Plaintiff has never been a defendant and has never been convicted for engaging in pump and dump schemes. This is a strong argument since the Defendant's statements are not commenting on the Plaintiff's status in legal matters, but instead stating that pump and dump activity has been associated with the Scottsdale Capital Advisors. The Complaint does not properly allege a factual basis to refute this, for this reason the Defendant is correct, the Complaint does not properly give a basis to claim the first statement is false.

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[2] Amended Complaint, ¶ 23, April 20, 2018.

B. "They [SCA] are one of the few brokers left that have continued to allow the deposit and sale of shares of illiquid penny stocks. Larger brokers and discount brokers stopped allowing that over five years ago."

The second statement pertains to the amount of brokers who still partake in transactions of illiquid penny stocks. The Complaint attempts to prove this statement's falsity by asserting many large brokers continue to trade in penny stocks. The Defendant's statement asserts that all large brokers have stopped using this penny stock method. The alleged statements made by Defendants could shed a poor light on the Plaintiff in regards to what is common practice and whether the Plaintiff is following normal standards within the practice.

While the Defendant claims the statement is not false because some large brokers still trade in existing shares of penny stocks, instead of purchasing new penny stocks, this is not asserted in the statement and the Complaint properly asserts a basis to prove that statement #2 is false. Further, the statement is inherently defamatory by implying the practices of Scottsdale Capital Advising is not in line with others in its field. This statement would likely affect the opinions of its viewers, even if not illegal, that the practices by the Plaintiff are unusual and not for the betterment of its clients. For this reason, this statement is likely false and defamatory.

C. "When the big Biozoom (BIZM) pump happened back in 2013 many of the frozen accounts were at Scottsdale Capital."

This last statement from the April 2017 article is not false nor defamatory. The assertion in the Complaint states that "only a handful of accounts at SCA were frozen as a result of Biozoom trading. The difference between "many" and "only a handful" is meritless. Further, the Complaint asserts that SCA has never been a defendant in any lawsuit involving Biozoom stock. Once again, the statement by the Defendants do not declare that the Plaintiff was involved in a Biozoom related lawsuit, and thus the Complaint does not properly assert a factual basis for the claim.

D. "Lest anyone think that these are just minor paperwork deficiencies with no real consequences, I remind you that one pump and dump alone, Biozoom (BIZM) led to over $17 million in fraudulent profits for manipulators / insiders, and many of their accounts were at Scottsdale Capital Advisors."

The final statement comes from the June 2017 article. Defendant's statement in the June article, unlike statement #2 from the April article, does not imply any wrongdoing by Scottsdale Capital Advisors and only states that the accounts that were wrongfully partaking in the pump and dump scheme were being held through the Plaintiff. The Complaint asserts that this statement by Defendant implies the Plaintiff was handling the trading of Biozoom stock and that it was involved in lawsuits regarding the same matter.

The Complaint seems to be making assertions regarding statements that were never made. The statement from the June 2017 article by the Defendants does not claim the Plaintiff is a party to a lawsuit involving Biozoom stock nor does it state that the Plaintiff was partaking in the pump and dump scheme. The only claim is that many of the accounts that were taking part in pump and dump were held at Scottsdale Capital Advisors. For this reason, this statement is also not properly pleaded in the Complaint to assert that it is factually false.

CONCLUSION

As noted above, all of the legality hinges on the falsity or defamatory nature of each statement and whether the Complaint has properly asserted a basis on which the overall claim can stand. Statement #1, #3, and #4 are not sufficiently pleaded because the Complaint does not assert facts that prove these statements were false. However, Statement #2 likely does meet this standard. Because of this, the overall Complaint is sufficiently pleaded when viewed in light favorable to the non-moving party.

As to Count II, Invasion of Privacy; False Light, the Court having determined that Plaintiff Corporation would have no expectation of privacy Count II fails to state a claim under MCR 2.116(C)(8).

For the reasons cited above, Defendants' Motion for Summary Disposition is **DENIED**.

IT IS SO ORDERED.

Dated: October 4, 2018

Honorable Alexander C. Lipsey
Circuit Court Judge

PROOF OF MAILING

I, Denise Wilson, certify that on this date October 4, 2018 I mailed a copy of this document to the parties in interest at their above stated addresses via first-class mail and/or interoffice mail.

Denise H. Wilson
Judicial Aide to the Hon. Alexander C. Lipsey