

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MILTON PURCELL,

Plaintiff

v.

OLIVER EWING,

Defendant

CIVIL ACTION

NO. 1:07-cv-01857

ELECTRONICALLY FILED

Brief in Support of Defendant's Motion to Dismiss Complaint

Procedural History

This action was commenced in the Court of Common Pleas of Dauphin County. Defendant was served with the Complaint on September 17, 2007. Defendant removed the action to this Honorable Court on October 12, 2007. Defendant now moves to dismiss the Complaint for failure to state a claim upon which relief can be granted.

Facts

The pertinent facts alleged in Plaintiff's Complaint consist of the following.

* * * * *

7. The Defendant OLIVER EWING at all times knew that the Plaintiff was a resident of Dauphin County, the Defendant knew that the Plaintiff was a business owner with his principle place of business in Dauphin County, and the Defendant knew that the Plaintiff was actively involved in certain civic and private associations such as the Milton Hershey School Alumni Association which has its headquarters in Dauphin County.

* * * * *

10. With respect to the specific acts of defamation, on or about September 21, 2006 the Defendant posted or caused or contributed to the posting of the following message on the internet. The Plaintiff believes this was posted on the PennLive website.

*"Look at the pictures.
By prosecute, 4/21/06 22:49ET*

If one looks at the photos in the homecoming flyer, two of the candidates look to me like photos that you would see for someone accused of child molestation. Look at Bill Brill and Milt Purcell, those are the type of perverts to look out for. Then look at Brad's photo with the Rent a Model on this web page. Enough said."

11. This September 21, 2006 posting referred to a photographs of the Plaintiff published in the homecoming brochure of the Milton Hershey School Alumni Association. In that brochure, the Plaintiff's photograph was published and he

was identified by picture and name. Members of the alumni association or other people familiar with this photograph would have immediately recognized Milton Purcell as the person being referred to in the September 21, 2006 message.

* * * * *

14. The Defendant's course of conduct and pattern of defamation extended up to and at least including July 17, 2007 when the Defendant posted or caused or contributed to the posting of the following messages on the internet:

*"What does Purcell do??
By prosecute 7/17/07 17:50ET*

He is on no committees, he does nothing. How can someone like him has a full time criminal defense attorney on his payroll? The ansewer [sic] is easy, "when you have the money, you can bully whom ever you want and your criminal defense attorney will bail you out! Ain't that right Milt?" "Yes sir you are correct!" says Milt. Too bad Dick is not around to kick little brothers butt! Moron."

* * * * *

16. The Defendant's course of conduct and pattern of defamation extended up to and at least including July 30, 2007 when the Defendant posted or caused or contributed to the posting of the following message on the internet:

*"They must really be in fear
By prosecute, 7/30/07 22:51ET*

"They never post the minutes to all the board meetings held, they will not post the candidates running for the board of directors this year. And Brill still looks like a child molester. Just look at last years picture of him when he ran for a position on the board. And tell me what the hell does Purcell do? He

is on ___o committees and has a barn named after his family. Maybe that is where he belongs, in the bard. Perverts and bullies is all they are. Oh my, did I say pervert (:<)."

Question Involved

Are the alleged statements defamatory?

Suggested answer: No.

Argument

The alleged statements are not defamatory, as a matter of law.

Although the alleged statements are offensive insults, they are not defamatory, because that is all they are: offensive insults.

An essential element of a cause of action for defamation is of course "[t]he defamatory character of the communication." 42 Pa.C.S. §8343(a) (relating to burden of proof--burden on plaintiff).

Although certain types of *factual* statements are considered defamatory *per se*,¹ which excuses a plaintiff from the requirement of special damages, it is the Court's duty, on a motion to dismiss, to determine in the first instance whether a reasonable listener would have construed the

¹ There are four categories of words deemed defamatory *per se*. They are words imputing (1) the commission of a criminal offense, (2) a loathsome disease, (3) business misconduct, or (4) serious sexual misconduct. Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 188 (3d Circuit 1999), *cert. denied*, 528 U.S. 1078, 145 L. Ed 2d 670 (2000).

statements in question in such a way as to be defamatory. Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 187 (3d Cir. 1999). Offensive vulgar insults are not enough. Id. at 187-188.

The threshold legal issue in the present action boils down to this: in the circumstances, are the statements in question--that a photograph of the Plaintiff "look[s] to me like photos that you would see for someone accused of child molestation," that Plaintiff "has a full time criminal defense attorney on his payroll," and that Plaintiff is a "moron," a "bully" and a "pervert"--defamatory?

In Beverly Enterprises v. Trump, *supra*, the Court of Appeals affirmed the dismissal of a complaint alleging defamation, rejecting plaintiffs' contention that calling plaintiffs "criminal" was defamatory *per se* because it imputed criminal conduct to them. The court stated:

. . . . Although Trump's statements were undoubtedly offensive and distasteful, the law of defamation does not extend to mere insult. Courts in Pennsylvania and elsewhere have long recognized a distinction between actionable defamation and mere obscenities, insults, and other verbal abuse. "Statements which are merely annoying or embarrassing or no more than rhetorical hyperbole or a vigorous epithet are not defamatory." *Kryeski v. Schott Glass Techn., Inc.*, 426 (Pa. Super. 105, 626 A.2d 595, 601 (Pa. Super. 1993) (quoting *Redding v. Carlton*, 223 Pa. Super. 136, 296 A.2d 880, 881 (Pa. Super. 1972)); see also *Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6, 14, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970) (finding that a statement that was "no more than rhetorical hyperbole, a vigorous epithet" was not slander).

As the Restatement (Second) of Torts explains:

A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the fact that the plaintiff is of illegitimate birth but only to be abusing him to his face. No action for defamation will lie in this case.

Restatement (Second) of Torts § 566, comment e (1977).

Similarly here, Trump's exclamation that "you people at Beverly are all criminals" is reasonably understood as a vigorous and hyperbolic rebuke, but not a specific allegation of criminal wrongdoing. . . .

Id., 182 F.3d at 187-188. See, also, Kryeski v. Schott Glass Techs., 626 A.2d 595, 600-602 (Pa. Super. 1993) (offensive, vigorous epithets such as statement that plaintiff is "crazy and emotionally unstable" are not defamatory because not meant in literal sense), *appeal denied*, 639 A.2d 29 (Pa. 1994), and citations therein; Neshat v. County of San Bernardino, 2003 Cal. App. Unpub. LEXIS 10646 (Nov. 13, 2003) (defense attorney's statements that sex crime prosecutor was "the biggest pervert" and "sits on the toilet issuing [her cases] and gets off [masturbates]" are rude, outrageous vigorous

epithets, but they are not defamatory assertions of fact); and Polydoros v. Twentieth Century Fox, 67 Cal. App. 4th 318 (Ct. App. 1997) (vigorous epithets such as “little pervert” are not defamatory).

Here, the words in question were, regrettably, rude. A reasonable person would understand that the publisher did not like the plaintiff and was angrily insulting him. But no reasonable person would take them to be specific factual assertions of actual commission of a crime or sexual misconduct.

Conclusion

For the foregoing reasons, it is submitted respectfully, Defendant’s Motion to Dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter J. Speaker, Esquire, of the law firm of Thomas, Thomas & Hafer, LLP, attorney for Defendant, hereby state that a true and correct copy of the foregoing document was served upon all counsel of record in the manner and on the date set forth below:

By Middle District Court via Electronic Filing

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