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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-092488 02/25/2009

THE HONORABLE LOUIS ARANETA

CLERK OF THE COURT
M. Brady
Deputy

EDWARD T GANNON HENRY M STEIN

v.

PAULA WALKER, et al. MICHAEL W PEARSON

MINUTE ENTRY

The Court has considered Plaintiff's Motion to Amend Complaint together with the Defendants' motion seeking summary judgment. The Court has also considered the oral argument on the two motions.

Plaintiff has sued the Defendants, alleging three counts of defamation in the existing complaint. Plaintiff seeks to add two additional defamation claims and a false light invasion of privacy claim in the proposed amended complaint. Plaintiff is a commercial airline pilot. The Defendants, except for the husband of Paula Walker are flight attendants. The case arises from the morning of January 24, 2003 when Plaintiff and Defendants were all part of the flight crew on an America West flight departing Alberta, Canada for Phoenix, Arizona. When the Plaintiff had the plane pushed back for take-off, the Defendants informed him that contaminant ice was seen on a wing which by Federal Aviation Administration (FAA) regulation required de-icing. The Plaintiff conducted another visual inspection and confirmed that he saw a contaminant frost on the wing. When contamination is visible on the wing surface, be it ice or frost, the FAA regulation requires de-icing for safety.

Defamation count one of the existing complaint involves the Defendants' reporting Plaintiff to the FAA regarding the plane pushing back for take-off without de-icing. Defamation

count two involves Defendant Paula Walker's statement to her union representative that she felt threatened and intimidated by Plaintiff's demeanor at a FAA deposition in February, 2006. Defamation count three involves Defendant Paula Walker's statements about the FAA investigation to a co-worker in August, 2006.

A qualified privilege has been found to exist as to the Defendants (Minute entry ruling of May 9, 2008). Where a conditional privilege exists and in order to avoid summary judgment Plaintiff must present sufficient evidence to show that Defendants made their statements knowing them to be false or with reckless disregard for the truth or falsity. *Aspell v. American Contract Bridge League, Etc. 122 Ariz. 399, 595 P.2d 196 (App. 1979); Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (App. 1978).*

Plaintiff acknowledges in his deposition that he saw frost on the wing and that the frost is a contaminant under the FAA regulation. Exhibit G to Defendants' Statement of Facts. Plaintiff's viewing of the frost was consistent with the Defendants having seen what they thought was ice and reporting it. Plaintiff also admitted in his deposition that a flight attendant does not act recklessly if they see ice or contamination on an aircraft and report it. Summary judgment is appropriate as to count one.

As to count two, Plaintiff challenges Defendant Walker's statement that she felt Plaintiff's demeanor at deposition to be threatening and intimidating. Plaintiff's must present evidence to overcome the common interest privilege that Defendant Walker made her statement knowing it to be false or with reckless disregard of its truth or falsity. *Aspell, Id.* In *Miller v. Servicemaster, 174 Ariz. 518, 851 P.2d 143 (App. 1992),* summary judgment was appropriate where the claim turned on a female janitor's misperception. Plaintiff has presented no evidence for a jury that Defendant Walker lied about her perception of Plaintiff's demeanor. Summary judgment is appropriate as to count two.

Regarding count three, truth remains an absolute defense to defamation. *Read v. Phoenix Newspapers, Inc. 169 Ariz. 353, 355 819 P.2d 939 (1991).* Defendant Walker explained to a co-worker that Plaintiff was being investigated for pushing back for take-off without de-icing. It is undisputed that the FAA investigated Plaintiff for this incident. Summary judgment is appropriate as to count three.

As to count one of the existing complaint, the Court also finds that the defamation claim is time-barred. Plaintiff learned of the Defendants' report of January, 2003 to the FAA almost immediately thereafter. Plaintiff did not file his complaint until November 20, 2006, well beyond the one-year statute of limitations. A.R.S. §12-541(1).

Plaintiff orally argued that the Court should not grant due to the law of the case. The law of the case doctrine does not prevent a different judge sitting on the same case from reconsidering the first judge's prior non-final rulings. *Zimmerman v. Shakman, 204 Ariz. 231, 62 P.3d 976 (App. 2003).*

The Court finds that there is no genuine issue as to a material fact and Defendant is entitled to summary judgment as a matter of law as to the three counts in the existing complaint.

The Court further finds that the requested amendment of the complaint with two other defamation claims would be futile. *Walls v. Arizona Dept. of Public Safety, 170 Ariz. 591, 826 P.2d 1217.* The determination whether allegedly defamatory statements are substantially true is a matter for the court when the underlying facts are undisputed. *Read, Id. at 355.* Here, the statements published in the recent *The Phoenix New Times* publication are based on the substantially same statements of alleged defamation in the prior defamation counts – that he was investigated for pushing off for the take-off with a contaminant of frost or ice on the wing. As with *Read,* the "sting" of the earlier statements and those reported in *New Times* are substantially the same. Plaintiff has given no indication that he intends to sue *The Phoenix New Times.*

Regarding the false light invasion of privacy claim, given the truthfulness of the statements that Plaintiff was investigated for the failure to de-ice with a contaminant on the wing, Plaintiff has not shown that evidence exists that the statement was made with knowledge of its falsity or with reckless disregard for the truth. *Godbehere v. Phoenix Newspapers Inc. 167 Ariz. 335, 342, 738 P.2d 781 (1989).* In *Godbehere*, the Supreme Court dealt with a public law enforcement official and the public interest in law enforcement but also noted that "privacy rights are absent or limited...where the information would be of public benefit" citing *Reed v. Real Detectives Pub. Co. 63 Ariz. 294, 162 P.2d 133 (1945).* As either a limited purpose public figure or someone who played a significant role in the public controversy of whether the de-icing regulation was followed, Plaintiff is barred from claiming the false light invasion of privacy tort. Amended of the complaint to add this claim is also futile.

For the above reasons, the Motion to Amend Complaint is denied.

Counsel for Defendants shall prepare and file a form of judgment consistent with this ruling.