

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

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CLERK OF COURTS

William C. Kraner, :
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 Plaintiff, : Case No. 07CVC10-13917
 :
 -v- : JUDGE PFEIFFER
 :
 Dennis Cauchon, :
 :
 Defendant. :

DECISION AND ENTRY GRANTING, IN PART, AND DENYING IN PART,
PLAINTIFF'S MOTION TO DISMISS FILED JANUARY 3, 2008
AND
ENTRY SUA SPONTE GRANTING DEFENDANT LEAVE TO FILE AMENDED
COUNTERCLAIM

Rendered this 16th day of June, 2008

PFEIFFER, J

This matter is before the Court on Plaintiff's Motion to Dismiss filed January 3, 2008. The Motion is opposed.

The Court must first address a procedural issue indirectly raised by Plaintiff. The record reflects that Plaintiff filed this action on October 12, 2007 and Defendant filed an Answer on November 21, 2007. Defendant then filed an Amended Answer and Counterclaim on December 19, 2007. Thereafter, Plaintiff filed this Motion to Dismiss the Counterclaim. To address the alleged deficiencies raised by Plaintiff, Defendant then filed an Amended Counterclaim on January 31, 2008. In a footnote to his Reply brief, Plaintiff states "Defendant has improperly filed a Second Amended Counterclaim. The filing of such an amended pleading is clearly inappropriate and frivolous under Rule 15(A) of the Ohio Rules of Civil Procedure. Unless otherwise withdrawn, Plaintiff will

seek to dismiss Defendant's Second Amended Counterclaim in a separate motion." (Plaintiff's Reply, p. 1, fn. 1).

Thus, Plaintiff has not formally moved to strike the Amended Counterclaim, but has raised the issue of the propriety of that pleading. Although the Court would not characterize the amendment as "frivolous," it appears to have been improper under Civ. R. 15(A), which permits a party to "amend his pleading once as a matter of course at any time before a responsive pleading is served." (Emphasis added). Here, Defendant filed an Answer, then an Amended Answer and Counterclaim, and finally an Amended Counterclaim. Arguably, he should have sought leave for the latter filing. However, Plaintiff has suffered no prejudice as the Amended Counterclaim deletes a cause of action against him, and the allegations forming the two remaining claims are essentially unchanged. Therefore, the Court will sua sponte GRANT Defendant leave to file the Amended Counterclaim, and the Court will address Plaintiff's Motion to Dismiss to that pleading.

Turning to the Motion to Dismiss, by way of background, this lawsuit stems from Plaintiff's attempts to sell certain real estate he owned in Licking County, Ohio to the Cities of Granville and Newark. Defendant was a vocal critic of the land dealings and published statements accusing Plaintiff of having conflicts of interest as a Granville Township Trustee had represented Plaintiff in a legal matter and as Plaintiff had donated \$10,000.00 to the Mayor of Newark's campaign fund. Additionally, Defendant allegedly attempted to persuade a Licking County official to erroneously mark county records to indicate that Plaintiff's property was no longer in the Granville Exempted

Village School District. Based on these allegations, Plaintiff's Complaint asserts claims against Defendant for defamation and tortious interference with contract.

In his Amended Counterclaim, Defendant contends that Plaintiff's lawsuit is retaliation for his opposition to the land dealings and his filing of a complaint with the Ohio Ethics Commission against Plaintiff and two public officials. Defendant asserts claims against Plaintiff for "intimidation calculated to inspire fear" and defamation. The intimidation claim alleges that Plaintiff has engaged in a "pattern to harass and intimidate [Defendant], his family and others into ending opposition to Plaintiff's development plans." (Amended Counterclaim; ¶15). Defendant specifically alleges that after he wrote a letter against one of the land purchases, Plaintiff sent flowers to his residence with the note: "Have a nice day." As Defendant had never met or spoken with Plaintiff, Defendant "took this act to be [a] threat by innuendo," and believed the intent was to send the message that Plaintiff knew where he lived. (Id. at ¶10).

Defendant further alleges that, shortly after the filing of the ethics complaint, Plaintiff drove to the home of his former spouse and greeted his children as they got off the school bus. Plaintiff then asked the family member at home with the children: "How can I beat him?" Defendant "understood the purpose of this action to be [Plaintiff] sending the message: 'I know where your children live.'" (Id. at ¶¶11-12). Defendant asserts that Plaintiff's conduct violated R.C. 2921.03, R.C. 2905.12, and Granville Village Ordinance No. 537.09. He further contends that he can pursue a civil remedy pursuant to R.C. 2307.60. (Id. at ¶17).

Defendant's counterclaim for defamation alleges:

[Plaintiff], at a Granville school board meeting on October 15, 2007, and on other occasions, knowingly

and maliciously made false statements about [Defendant].

These statements include but are not limited to the false claim that [Defendant] had tried unlawfully, maliciously and improperly to have a public official alter records to transfer Plaintiff's land out of the Granville Village Exempted School District, and that [Defendant] had maliciously and improperly threatened to challenge the Current Agricultural Use Valuation of Plaintiff's property.

These and other statements are false and malicious ~~and were made with a reckless disregard for the falsity of the statements.~~

The false and defamatory statements made by Plaintiff have injured Defendant, including but not limited to damaging his reputation, adversely affecting his profession, exposing him to public contempt, ridicule, shame and/or disgrace, lowering him in the estimation of the community, and deterring third persons from associating with him.

The statements were made with the attempt to harm [Defendant] and his personal and professional reputation.

(Id. at ¶¶20-25).

Plaintiff now seeks a dismissal of the Amended Counterclaim pursuant to Civ. R. 12(B)(6) for failure to state claims for which relief may be granted. Plaintiff alleges that Ohio law does not recognize a civil claim for "intimidation" and that Defendant's claim for defamation is not supported with sufficient factual allegations.

Dismissal of a claim pursuant to Civ. R. 12(B)(6) is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. York v. Ohio State Highway Patrol (1991), 60 Ohio St.3d 143, 144. A court must presume all factual allegations contained in the complaint

to be true and make all reasonable inferences in favor of the non-moving party. Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 192. In resolving a Civ. R. 12(B)(6) motion, a court is confined to the allegations contained in the complaint. McGlone v. Grimshaw (1993), 86 Ohio App.3d 279, 285.

Plaintiff seeks a dismissal of Defendant's counterclaim for intimidation on the grounds that such a claim is not recognizable under Ohio law. The counterclaim alleges that Plaintiff engaged in conduct that violated R.C. 2905.12, which states:

(A) No person, with purpose to coerce another into taking or refraining from action concerning which the other person has a legal freedom of choice, shall do any of the following:

(1) Threaten to commit any offense;

(2) Utter or threaten any calumny against any person;

* * *

The statute further states that a threat "includes a direct threat and a threat by innuendo" and that "[w]hoever violates this section is guilty of coercion, a misdemeanor of the second degree." R.C. 2905.12(D) and (E)(1). Defendant argues that R.C. 2307.60 authorizes him to pursue a civil remedy for the violation of the above criminal statute. R.C. 2307.60 provides that:

[a]nyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the civil action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state, and may recover punitive or exemplary damages if authorized by section 2315.21 or another section of the Revised Code.

However, the Tenth District Court of Appeals has held that this provision “does not create a separate cause of action. Instead, R.C. 2307.60 * * * is merely a codification of the common law that a civil action is not merged in a criminal prosecution. Hence, a separate cause of action must be available before this section is invoked.” Edwards v. Madison Twp. (Nov. 25, 1997), Franklin App. No. 97APE06-819. (Citations omitted). The Tenth District has further ruled that no civil remedy is available for a violation of R.C. 2905.12. Id.; See also Heskett v. Van Horn Title Agency, Inc., Franklin App. No. 06AP-549, 2006-Ohio-6900. Thus, the alleged violations of R.C. 2905.12 cannot form a basis for a civil remedy. Defendant also seeks to impose civil liability for an alleged violation of Granville Village Ordinance No. 537.09. However, this provision is merely the municipal equivalent of R.C. 2905.12, is criminal in nature, and does not authorize a civil remedy. Consequently, the Court finds that Defendant has not set forth a meritorious counterclaim for violations of R.C. 2905.12, R.C. 2307.60, and Granville Village Ordinance No. 537.09.

Defendant's counterclaim for intimidation is additionally based upon alleged violations of R.C. 2921.03. This criminal statute states in relevant part:

(A) No person, knowingly and * * * by unlawful threat of harm to any person or property * * * shall attempt to influence, intimidate, or hinder a * * * witness in the discharge of the person's duty.

(B) Whoever violates this section is guilty of intimidation, a felony of the third degree.

Unlike R.C. 2905.12, this provision does provide for a civil remedy for its violation:

[a] person who violates this section is liable in a civil action to any person harmed by the violation for injury, death, or loss to person or property incurred as a result of the commission of the offense and for reasonable attorney's fees, court costs, and other expenses incurred as a result of prosecuting the civil action commenced under this division. A civil action under this division is not the exclusive remedy of a person who incurs injury, death, or loss to person or property as a result of a violation of this section.

R.C. 2921.03(C).

Plaintiff argues that Defendant does not qualify for the protections of R.C. 2921.03 as the section is limited to witnesses with first-hand knowledge of material facts in a criminal proceeding. Plaintiff asserts the allegations are that he engaged in the supposed threatening behavior in retaliation for Defendant's opposition to his land development plans, which does not involve any criminal proceedings. However, the Court disagrees that the basis for the counterclaim is so limited. Defendant is also alleging that Plaintiff engaged in the intimidating behavior after he accused Plaintiff and the city officials of having conflicts of interest and further filed a complaint with the Ohio Ethics Commission.

R.C. 2921.03 "protects persons who have knowledge of culpable behavior from being intimidated in doing their civic duty by reporting this information to the authorities as well as protecting those persons actually subpoenaed and deposed." State v. Hudson (June 30, 1982), Summit App. No. 10491. "For the purpose of R.C. 2921.03, a witness is a person with factual knowledge relevant to the issues involved in the proceedings." *Id.* Again, the statute makes it unlawful to "attempt to influence, intimidate, or hinder a * * * witness in the discharge of the person's duty." R.C. 2921.03(A). (Emphasis added). The Court questions whether Defendant has any

factual knowledge relevant to the proceedings before the Ethics Commission as opposed to merely being a suspicious, concerned citizen. A question also exists as to whether the alleged acts were an attempt to intimidate Defendant in the discharge of a duty. Additionally, the allegations do not involve any direct threats of harm, but rather accusations of threats by innuendo.

With these trepidations, the Court must be mindful that the standard of review requires not only the factual allegations to be construed as true, but also all reasonable inferences must be made in favor of the non-moving party. Here, it can be gleaned from the counterclaim that Defendant has some involvement with the Ethics Commission proceedings, having filed the complaint with that agency, and further that he perceived the alleged conduct as an attempt to intimidate him into ending his opposition to the land development plans. After careful consideration, the Court finds that, at this stage of the proceedings, Defendant has set forth a claim for violation of R.C. 2921.03.

Plaintiff seeks a dismissal of Defendant's counterclaim for defamation on the grounds that the claim is not based on sufficient factual allegations. There are two types of defamation claims: defamation per se and defamation per quod. Defamation per se occurs when a statement is defamatory on its face; defamation per quod occurs when a statement is defamatory through interpretation or innuendo. Whiteside v. United Paramount Network, Madison App. No. CA2003-02-008, 2004-Ohio-800, at ¶14. In order for a statement to constitute defamation per se, it must "consist of words which import an indictable criminal offense involving moral turpitude or infamous punishment, impute[] some loathsome or contagious disease which excludes one from society or

tend[] to injure one in his trade or occupation." Heidel v. Amburgy, Warren App. No. CA2002-09-092, 2003-Ohio-3073, at ¶30.

When a complaint alleges defamation per se, damages are presumed; when a complaint alleges defamation per quod, the complaint must allege special damages. Williams v. Gannett Satellite Information Network, Inc., 162 Ohio App.3d 596, 2005-Ohio-4141, at ¶7. Special damages are those direct financial losses resulting from the plaintiff's impaired reputation. Wheeler v. Yocum (Mar. 25, 1986), Franklin App. No. 85AP-828.

The counterclaim only alleges one specific defamatory statement made by Plaintiff—that Defendant attempted to persuade a Licking County official to erroneously mark county records to indicate that Plaintiff's property was no longer in the Granville Exempted Village School District. Plaintiff asserts that the statement is not defamatory on its face as it does not accuse Defendant of committing an indictable criminal offense or having a loathsome or contagious disease and further does not tend to injure Defendant in his trade or occupation. Thus, he argues Defendant has failed to set forth a claim for defamation per se. Plaintiff further contends that Defendant cannot recover under a theory of defamation per quod for the reason that the counterclaim does not plead special damages.

Construing the allegations and all reasonable inferences in favor of Defendant, the Court finds that he has set forth a viable counterclaim for defamation per se. Plaintiff allegedly defamed Defendant by accusing him of attempting to persuade a public official to falsify a public record. Defendant contends that this statement imputes "the charge of an indictable offense involving moral turpitude or infamous punishment"

as it involves allegations of records tampering in violation of R.C. 2913.42. The statute provides that “no person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall * * * falsify * * * [or] alter * * * any writing, * * * data, or record.” R.C. 2913.42(A)(1). The statute imposes the most serious penalty for the tampering of a record kept by or belonging to a governmental entity, rendering such an offense a felony of the third degree. R.C. 2913.42(B)(4).

In response, Plaintiff argues that the alleged defamatory statement did not equate to a charge that Defendant had committed a violation of R.C. 2913.42 since he never stated that Defendant had falsified a record. Plaintiff further explains that any such tampering would have actually been performed by the public official, and that individual would be guilty of the criminal offense, not Defendant. Regardless of any technical merit to Plaintiff’s argument, assuming the allegations in the Complaint to be true and drawing all reasonable inferences there from, Defendant was accused of attempting to influence a public official to commit a serious criminal act, which arguably could be considered the offense of attempted complicity. See R.C. 2923.02, R.C. 2923.03(A)(1). Thus, the Court finds that Defendant’s counterclaim for defamation per se sets forth a valid claim for which relief may be granted¹.

Based on the foregoing, Plaintiff’s Motion to Dismiss is GRANTED, in part, and DENIED in part, to the extent that Plaintiff is entitled to a dismissal of only the portion of the counterclaim for intimidation that is based on violations of R.C. 2905.12, R.C.

¹ The Court has not addressed Defendant’s assertion that the alleged statement also constitutes defamation per se as it tends to injure him in his trade or profession since this argument relies on facts outside of the pleadings.

2307.60, and Granville Village Ordinance No. 537.09. However, Defendant's counterclaim for intimidation based upon a violation of R.C. 2921.03 and his counterclaim for defamation remain.

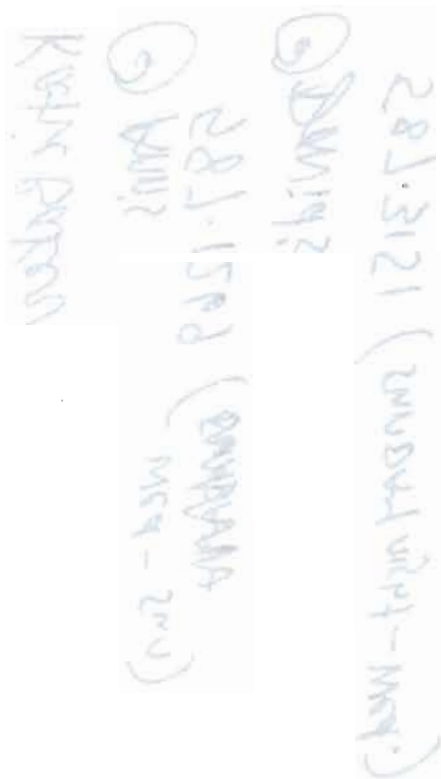

BEVERLY Y. PFEIFFER, JUDGE

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