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CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
BRENDA Q. GANEY, CLERK

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

LAKE FOREST PROPERTY OWNERS' ASSOCIATION, INC.	*	
PLAINTIFF,	*	
vs.	*	**NO. CV-2023-900163**
LAKE FOREST STRONG, DOREEN KNIGHT, EVE GRAY, DEXTER CURRY, CATHIE MARX, LYNN DAVIS, AND FICTITIOUS PARTIES 1-100	*	
DEFENDANTS.	*	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Comes now Plaintiff Lake Forest Property Owners' Association, Inc. ("Plaintiff" or "LFPOA") and files its opposition to the motion to dismiss filed by Defendants Lake Forest Strong, Doreen Knight, and Dexter Curry ("Defendants"). The Plaintiff alleges that the Defendants maliciously accused the Plaintiff of criminal conduct by flooding the Internal Revenue Service ("IRS"), the Alabama Attorney General ("AG"), and the Federal Bureau of Investigations ("FBI") with hundreds of defamatory letters. The Plaintiff alleges that the defamatory statements triggered an IRS audit. The Plaintiff alleges that the Defendants spread their false, defamatory statements through NBC 15, Facebook, and other mediums in our community. There are no privileges that insulate the Defendants from liability. Blevins v. W.F. Barnes Corp., 768 So. 2d 386 (Ala. Civ. App. 1999) (reversing summary judgment and holding that defamatory letter to Alabama Attorney General presented an issue of fact). The Court should not grant the Defendants' motion to dismiss. In further opposition to the motion to dismiss, the Plaintiff states as follows:

1. The Plaintiff has brought detailed claims against the Defendants for libel (Count I), slander (Count II), invasion of privacy – false light (Count III), and civil conspiracy (Count IV). (Doc. 2.) The Defendants' motion to dismiss does not even address Counts III and IV, as the Defendants fail to cite any legal authority that the "litigation privilege" defense asserted by the Defendants can theoretically apply to Counts III and IV.

2. Some of the factual basis for the claims arise from false, defamatory statements made by the Defendants to the IRS, the AG, and the FBI. On July 29, 2022, NBC 15 broadcast a report in our community stating that, "[a] group of residents called 'Lake Forest Strong' brought forth their complaints about the property owners association board of directors, and what the group claims are **unscrupulous dealings**." https://mynbc15.com/newsletter-daily/community-group-sends-thousands-of-complaints-to-irs-alabama-ag-about-lake-forest-hoa (last visited on April 20, 2023) (emphasis added). The report continues to state that the Defendants "sent **thousands** of complaint letters to the state **attorney general** and the **IRS**." Id. (emphasis added).

3. The Defendants argue that the "litigation privilege" affords them absolute immunity for defamatory statements made to the IRS, the AG, and the FBI. (Doc. 38, ¶¶ 8-12.) The Defendants are incorrect. In Hollander v. Nichols, 19 So. 3d 184 (Ala. 2009), the Alabama Supreme Court described the litigation privilege, as follows:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Id. at 195-96, quoting Restatement (Second) of Torts § 587 (1977) and citing Walker v. Majors, 496 So. 2d 726 (Ala. 1986) and Barnett v. Mobile Co. Pers. Bd., 536 So. 2d 46 (Ala. 1988).

4. The only "judicial proceeding" is the matter before the Court. None of the alleged defamatory statements made to the IRS, the AG, or the FBI were made in connection with the "judicial proceeding" before the Court. The Defendants fundamentally misunderstand how the litigation privilege applies.

5. For instance, in Hollander, the plaintiff (employee) alleged that the defendants (doctor/medical group) published defamatory materials by sending medical records containing false statements to the plaintiff's employer. Hollander v. Nichols, 19 So. 3d 184, 194 (Ala. 2009). The trial court held that the original alleged defamation was time-barred. Id. at 195. The plaintiff argued, in response, that the defamatory materials were republished within the statute of limitations period when the defendants filed the medical records in a small-claims action between the parties. Id. The court held that the litigation privilege applied to bar the defamation claim because the alleged defamatory statements were made in a court filing. Id. at 196. In other words, court filings are protected from defamation claims.

6. Likewise, in Walker, the plaintiff (seller) alleged that the defendant (seller's former real estate agent) defamed him by writing a pre-suit litigation letter threatening to sue the plaintiff for breach of contract and fraudulent conduct. Walker v. Majors, 496 So. 2d 726, 728 (Ala. 1986). The letter was also sent to the prospective buyers and the plaintiff's attorney. Two days after the letter, the defendant filed suit against the plaintiff for breach of contract and fraud. Id. In a separate action, the plaintiff filed suit against the defendant for defamation based on the pre-suit litigation letter accusing the plaintiff of fraud. Id. Relying on the same rule of law as stated in Hollander, the court held that the litigation privilege barred the alleged defamatory statements about fraudulent conduct made shortly before the lawsuit was filed. Id. at 728-30.

7. Again, in Barnett, the plaintiff (city's town clerk) alleged that the defendant (director of the county's personnel board) defamed the plaintiff by writing a pre-suit litigation letter sent to the mayor and city council accusing the plaintiff of fraud in a dispute about illegal payroll increases for city employees. Barnett v. Mobile Co. Pers. Bd., 536 So. 2d 46, 48 (Ala. 1988). The defendant and the board sued the plaintiff a few weeks after the letter to "recover the payroll overpayments." Id. The board later instituted its own action and fired the plaintiff from her position as the town clerk for her role in the payroll overpayments. Id. at 49. Later, the plaintiff filed a defamation action against the defendant based on the fraud comments in the pre-suit letter. Relying on Walker, the court held that the pre-suit litigation letter was privileged "due to its clear relevance to a judicial proceeding that was 'contemplated in good faith and under serious consideration.'" Id. at 52.

8. Here, the Defendants' reliance on Hollander, Walker, and Barnett is misplaced.[1] The facts in the present case are not remotely analogous to the facts in Hollander, Walker, and Barnett. The Court is faced with third-party communications between the Defendants and the IRS, the AG, and the FBI making false, defamatory statements about the Plaintiff alleging criminal conduct. The only way for the litigation privilege to apply would be if there was a "judicial proceeding" between the Plaintiff and the IRS, the AG, or the FBI. But no such judicial proceeding exists. The litigation privilege cannot apply in these circumstances.

9. The litigation privilege only applies to statements made in court filings or statements in the context of court filings (such as pre-suit demand letters).

[1] In their motion to dismiss, the Defendants rely on Hollander, Walker, and Barnett. (Doc. 38, ¶¶ 9, 10, 11)

10. The court in Blevins v. W.F. Barnes Corp., 768 So. 2d 386 (Ala. Civ. App. 1999) squarely addressed a defamatory letter written by the defendant (building owner) to the **attorney general** about the plaintiff (attorney). There, the plaintiff initially sued the defendant seeking a temporary restraining order related to cigarette smoking occurring in the building. The trial court granted the TRO. In response, the defendant wrote a letter to the attorney general stating, in part, that "[t]here is NO question in my mind that [plaintiff] was bleeding information about my finances and conspired with his employee in making false charges so they could sue and extort $25,000 in cash from me . . . I don't feel like the City of Montgomery needs this type of an attorney that continuously files frivolous law suits." Id. at 389. The defendant argued that the litigation privilege applied to bar the defamation claim, relying on Walker. Id. at 392-93. The court disagreed with the defendant. Quoting the Restatement, the court opined that, "[f]or the privilege to exist, the questioned communication must have 'some relation to the proceeding." Id. at 393. The litigation privilege "is not a license which protects every slanderous publication or statement made in the course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation." Id. (citations omitted). The court reversed summary judgment in favor of the defendant after finding that the defamatory statements to the attorney general did not relate to the litigation about smoking in the building. In other words, the defendant was making false, defamatory statements about the plaintiff revealing the defendant's financial affairs.

11. The present case is far stronger than Blevins because here, unlike Blevins, there was **not** pending litigation between the Plaintiff and the Defendants when the alleged letters were written to the IRS, the AG, and the FBI. It would be a reversible error for the Court to grant the Defendants' motion to dismiss based on the litigation privilege.

12. The Defendants also cite Cutts v. American United Life Ins. Co., 505 So. 2d 1211 (Ala. 1987) in support of their motion to dismiss. (Doc. 38, ¶ 11.) In Cutts, the plaintiff (the president of a company) was withholding money from the employees' checks to pay for insurance premiums. There was a debate about whether the plaintiff actually stole the money from the employees and was not using it to pay for insurance premiums. The district attorney opened a criminal investigation and requested information from the insurance company which then provided information to the district attorney showing that the insurance policies were terminated for failure to pay premiums. The plaintiff brought a defamation claim against the insurance company based on the information given to the district attorney during an ongoing criminal investigation. The court held that summary judgment was proper because there is "an absolute privilege exists in favor of those involved in judicial proceedings, including judges, lawyers, jurors, and witnesses, shielding them from an action for defamation."

13. Cutts does not support the Defendants' motion to dismiss. The IRS, the AG, and the FBI did not open criminal investigations into the Plaintiff's financial affairs and then request the Defendants to provide information during an ongoing criminal investigation. To the contrary, in paragraph 22 in the complaint, the Plaintiff alleges:

> The Defendants conspired to send hundreds of letters to the [AG], [IRS], and [FBI] in an attempt to cause a criminal investigation directed at the Board's activities or, at a minimum, create the appearance that the Board had engaged in a crime. The Defendants knew that the criminal agencies would likely view any complaints as a 'civil matter', so they intentionally conspired to flood the criminal agencies with waves of letters to give the illusion of widespread complaints of a criminal nature. The Defendants acted with malice, ill will, and spite and knew or should have known that there was no factual basis to allege that the Board or any of its members had committed a crime.

(Doc. 2, ¶ 22.) The facts alleged by the Plaintiff are very different from the facts at issue in Cutts. Here, unlike Cutts, the Defendants made false, defamatory statements to try to create a criminal

investigation and intentionally spread the defamatory statements through NBC 15 to our entire community. The Court should not rely on Cutts to grant the Defendants' motion to dismiss.

14. In addition, the "litigation privilege" is "lost" if defamatory statements are published outside the judicial context. Borden v. Malone, 327 So. 3d 1105, 1117 (Ala. 2020) ("it remains possible that Borden could prove a set of facts under which the litigation privilege would be lost, depending on what role Malone and the clinic played in disseminating the letter outside the litigation context. Therefore, the trial court erred in dismissing Borden's defamation claims.") Here, the Plaintiff alleges that the Defendants made false, defamatory statements to NBC 15 and other third parties which are obviously disconnected from any "judicial proceeding", as that phrase is used in Hollander. (Doc. 2, ¶¶ 17, 25, 27) For instance, the Defendants, through counsel, stated on May 26, 2022 that, "these kinds of boards invite certain, 'unsavory' activities . . . improprieties, embezzlement, kickbacks, acts of friendly contract." (Doc. 2, ¶ 25.) Some of the defamation claims are totally unrelated to statements made to the IRS, the AG, and the FBI (which, again, were not connected to any judicial proceeding in the first place).

15. Without citing any Alabama legal authority, the Defendants also contend that their motion to dismiss is due to be granted because the Plaintiff is the LFPOA and not an individual. (Doc. 38, ¶ 7.) The Defendants contend that there are no defamatory statements alleged in the complaint "concerning" the LFPOA. (Id.) The Defendants are incorrect. For instance, the Plaintiff alleged that the LFPOA is "operated under § 501(c)(7) of the Internal Revenue Code. 26 U.S.C. § 501(c)(7). Therefore, the Association is exempt from paying income taxes." (Doc. 2, ¶ 13.) The Plaintiff alleged that the Defendants made false, defamatory statements to the IRS and the AG that the Plaintiff had failed to comply with the IRS rules and regulations. (Id., ¶ 29.) The Plaintiff alleged that the defamatory statements resulted in an IRS audit and caused the Plaintiff to retain

accountants to defend against the audit. (Id., ¶¶ 30-33.) The Plaintiff alleged that there would have been serious financial consequences if the Plaintiff lost its § 501(c)(7) status. (Id.) The Plaintiff alleged that it was damaged because of the audit and the defamatory statements causing the audit.

16. The Defendants also argue that the First Amendment to the U.S. Constitution protects the Defendants from the defamation claims. (Doc. 38, ¶ 6.) The United States Supreme Court has, of course, established the lines between free speech and defamation. See generally Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Alabama Pattern Jury Instruction on defamation cites Dun and Gertz. A.P.J.I. 23.01. The Court should reject the Defendants' request to disregard well-established constitutional law.

17. Finally, Defendant Lake Forest Strong ("LFS") argues that it is incapable of being sued because it is not an incorporated entity and only a "description of a movement". (Doc. 38, ¶ 4.) In the complaint, the Plaintiff alleged that LFS "is an unincorporated non-profit association organized and governed by certain members and non-members of the LFPOA." (Doc. 2, ¶ 2.) The Alabama code has an entire chapter governing unincorporated nonprofit associations. Ala. Code § 10A-17-1.01 et. seq. (1975). Section 10A-17-1.08(a) states that "[a] nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution." Ala. Code § 10A-17-1.08(a) (1975) (emphasis added.) LFS is incorrect that it is not a proper party to the lawsuit. The Court should not grant LFS' motion to dismiss based on the grounds that it cannot be sued. See Randolph Cnty. Comm'n v. Landrum, 342 So. 3d 574, n. 2 (Ala. Civ. App. 2021) (recognizing that a hunting club could be a party to litigation).

18. For all of the foregoing reasons, the Court should deny the Defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF electronic document filing system which sends notification of such filing to the following attorneys of record:

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