STATE OF MICHIGAN

COURT OF APPEALS

OMAR NAKASH and PLATINUM LANDSCAPING INC.,	UNPUBLISHED March 15, 2016
Plaintiff-Appellants,	
v	No. 326152 Wayne Circuit Court
JOHN ULAJ and HAMTRAMCK REVIEW, INC.,	LC No. 2014-007389-CZ
Defendant-Appellees.	

Before: K. F. KELLY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Plaintiffs, Omar Nakash and Platinum Landscaping, Inc., appeal as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this defamation action. On appeal, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition. We affirm.

This case arises from claims of alleged defamation against plaintiffs by defendants. Nakash owns Platinum Landscaping, Inc. Plaintiffs contracted with the City of Hamtramck for services including snow removal, lawn mowing, debris clean up, tree removal, and cold patching. Defendant John Ulaj was the publisher of the Hamtramck Review newspaper, and was a 2013 mayoral candidate for the City of Hamtramck. On July 19, 2013, Ulaj was speaking at a mayoral open forum, and stated that Platinum Landscaping was "ripping the city off." A few days later, the Hamtramck Review published an article on the forum, which included a quote from Ulaj, where he stated, "[t]he first thing I am going to do is eliminate Platinum Landscaping that's been ripping the city off." In addition, plaintiffs alleged that Ulaj had conversations with Kathy Gordon, ex-city council member, and Hilary Cherry, publisher of the Hamtramck Star, relating to Nakash, stating, "He's a crook." Plaintiffs alleged that Ulaj's statements at the forum, the publication of the article in the Hamtramck Review, and Ulaj's comments to Gordon and Cherry constituted defamation, and further alleged claims of negligent supervision and tortious interference with a business relationship.

In response, defendants asserted that the statements were truthful. Defendants relied on a 2012 report prepared by Stout Risious Ross (SRR). SRR, a company that performs "dispute advisory and forensic services," was commissioned by the City of Hamtramck to undertake a forensic accounting of vendors that were under contract with the City and prepare a written

report. Platinum Landscaping was one of the vendors investigated, and SRR conducted an analysis of a random sample of invoices to ensure that the invoices complied with the terms of the vendor's contract. SRR's findings regarding Platinum included:

> From our random sample, five invoices from Platinum for $41,204 were selected for testing. SRR was able to find support for only $4,602 of the $41,204 of transactions selected for testing. Further, only one invoice of the 15 transactions tested was authorized and billed according to contract terms without the need for adjustment. Unverified amounts totaling $36,602 were for the following reasons:
>
> - Authorization for work not properly documented with Work Order per Contract.
> - Insufficient detail on invoice to determine work done and rate charged.
> - Services billed at amounts inconsistent with contract.
> - Services performed without an executed contract.

SRR recommended "In addition to applying tighter controls to ensure proper authorization and documentation of contractual services going forward, we recommend that the City also revisit the 'indefinite' nature of the contracts currently in place [with Platinum and others] and include a comparison of contract rates to invoice rates before payments are made." The SRR report was public record, and Ulaj had read the report prior to making the statement at the forum or publishing the statement in the newspaper. Based primarily on the SRR Report, the trial court granted defendants' motion for summary disposition, concluding that the statements were not defamatory.

Plaintiffs first argue that the trial court erred in determining that defendants did not libel or slander plaintiffs. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Id*.

"When addressing defamation claims, appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression." *Kevorkian v Am Med Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999). Whether a statement is actually capable of defamatory meaning is a question of law. *Id*. at 9. "Where no such meaning is possible, summary disposition is appropriate." *Id*.

The elements of a cause of action for defamation are:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. [*Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 262; 833 NW2d 331 (2013) (citation omitted).]

Generally, "[a] communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id*. at 256-257 (citation omitted).

Not all defamatory statements are actionable. *Kevorkian*, 237 Mich App at 5. A defendant need not prove that the publication is "literally and absolutely accurate in every minute detail." *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 258; 487 NW2d 205 (1992). A slight inaccuracy is immaterial if the charge is true in substance. *Id*. at 258–259. Additionally, a statement must be "provable as false" in order to be actionable. *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998). Thus, an objectively verifiable event may be actionable, while a subjective assertion is not. *Id*.; see also *Kevorkian*, 237 Mich App at 5-6. Furthermore, certain types of speech are protected. "[C]ertain statements, although factual on their face, and provable as false, could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff." *Ireland*, 230 Mich App at 617. "Speech that can reasonably be interpreted as communicating 'rhetorical hyperbole,' 'parody,' or 'vigorous epithet' is constitutionally protected." *In re Chmura (After Remand)*, 464 Mich 58, 72; 626 NW2d 876 (2001). Additionally, MCL 600.2911(3) provides, in relevant part:

> Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report.

The trial court did not err in granting summary disposition because the statements at issue were not defamatory. Here, there were three statements at issue: (1) Ulaj's statement at the mayoral forum, (2) the recitation of Ulaj's statement in the Hamtramck Review, and (3) Ulaj's statement to Cherry and Gordon. Defendants assert that Ulaj's statements were based on the SRR Report, which was public record. Defendants claim that the statements were true and mere rhetorical hyperbole, common in the political arena.

We conclude that the statements were not defamatory because plaintiffs cannot prove the falsity of the statements. *Ireland*, 230 Mich App at 616. Here, Ulaj's statements were based on a public document. Ulaj's reference to the report would have produced essentially the same effect as did his statements. Despite plaintiffs' nuanced arguments attempting to minimalize the content of the report, the information contained therein was certainly damaging to plaintiffs, stating that there were significant unverified amounts paid to plaintiffs by the City and that the services billed were inconsistent with plaintiffs' contract with the City. Ulaj read the report, and summarized its findings during his statements. In a defamation case, minor inaccuracies do not amount to falsity as long as the gist or the sting of the communication is true. *Chmura*, 464

Mich at 74. Further, in the trial court, plaintiffs were unable to dispute the information in the report. Plaintiffs alleged that they needed further time to conduct discovery. However, the invoices and contracts upon which the report was based belonged to plaintiffs. Thus, we cannot imagine what additional information to rebut the report would be needed. Indeed, plaintiffs have not alleged what further information could be unveiled during discovery on this issue. Accordingly, we agree that plaintiffs were unable to prove the falsity of the statements, and the trial court properly granted summary disposition.

Moreover, defendants' actual phrases, "crook" and "ripping off the city," amounted to mere "rhetorical hyperbole," or a "vigorous epithet" used by defendants to describe plaintiffs' actions. See *Ireland*, 238 Mich App at 618-619; *Chmura*, 464 Mich at 82. As the Michigan Supreme Court stated in *Chmura*, "this is the language of the rough-and-tumble world of politics." *Chmura*, 464 Mich at 81-82. In addition, MCL 600.2911(3) protects the allegedly libelous statement, as the statement in the article was "a fair and true report of matters of public record." Again, to be fair and true, literal accuracy is not required. *Rouch*, 440 Mich at 258.

Plaintiffs contend that defendants' claim fails because the SRR Report was not adjudicated as truthful, relying on *Porter v Royal Oak*, 214 Mich App 478, 485-486; 542 NW2d 905 (1995). However, *Porter* does not provide that the report was required to be adjudicated as truthful. In *Porter*, the plaintiff, a former police officer, claimed that he was defamed when the defendants gave the news media a memorandum stating that the plaintiff had been disciplined. *Id*. at 482-483. The plaintiff based his defamation suit on the contention that the charges against him were false. *Id*. at 485-486. However, the memorandum only listed the charges that had been sustained by an arbitrator. *Id*. The Court held that the truth of the memorandum had been established, and truth was a defense to a defamation claim. *Id*. Primarily, we note that nothing in *Porter* stated that adjudication was required to prove truthfulness. Moreover, *Porter* is similar to the current case in that plaintiffs may dispute the underlying accuracy of the SRR Report, but the report is a public document upon which Ulaj based his statements. The truthfulness of the SRR Report is not the issue, but whether Ulaj's statements were a fair and true summary of the report. Plaintiffs also contend that defendants failed to reference the SRR Report when making the statements, which they claim invalidates defendants' claim. However, plaintiffs provide no legal support for this contention. Finally, given the information in the report considered in context of defendants' statements, it is clear that Ulaj's statements were premised on the report.

Based on our disposition of the first issue, it is unnecessary to address plaintiffs' assertion that the trial court erred in designating plaintiffs as public figures and erred in designating Ulaj as a media defendant. Because the statements were not defamatory as a matter of law, it is unnecessary to determine the applicable standard of fault. Additionally, because plaintiffs' claims of negligent supervision and tortious interference were premised on plaintiffs' defamation claims, we also decline to address plaintiffs' argument that the trial court erred in granting defendants' motion for summary disposition on those claims.

Finally, plaintiffs assert that the court erred in failing to allow plaintiffs to amend their pleadings or conduct discovery. We disagree. This Court reviews a trial court's decisions regarding discovery for an abuse of discretion. *PCS4LESS, LLC v Stockton*, 291 Mich App 672, 676; 806 NW2d 353 (2011). It also reviews for an abuse of discretion the circuit court's denial of a motion to amend. *Diem v Sallie Mae Home Loans, Inc*, 307 Mich App 204, 215-16; 859

NW2d 238 (2014). "An abuse of discretion occurs when the trial court chooses an outcome falling outside a range of principled outcomes." *PCS4LESS, LLC,* 291 Mich App at 676-677.

Plaintiffs assert that summary disposition was premature because discovery had not concluded. A trial court prematurely grants summary disposition if a party has not had the opportunity to conduct discovery. *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 513; 853 NW2d 481 (2014). "However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). Here, there was not a fair chance of plaintiffs recovering further information to support their position. As discussed *supra*, the SRR Report was based on plaintiffs' contract and invoices. Thus, plaintiffs had the information needed to dispute the information contained therein, and failed to do so. Accordingly, the trial court did not abuse its discretion in granting summary disposition before the close of discovery.

Plaintiffs also argue that the trial court erred in failing to allow them to amend their complaint. MCR 2.118(A)(1) states that "[a] party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading." Otherwise, a party "may amend a pleading only by leave of the court or by written consent of the adverse party. *Leave shall be freely given when justice so requires*." MCR 2.118(A)(2) (emphasis added). MCR 2.116(I)(5) provides that "if the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." A motion to amend may be denied for the following reasons:

> (1) [U]ndue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment. Absent bad faith or actual prejudice to the opposing party, delay, alone, does not warrant denial of a motion to amend. [*Diem*, 307 Mich App at 216.]

Initially, we note that the trial court did not deny plaintiffs' request for amendment. Rather the request went unaddressed by plaintiffs and the trial court. Given the cursory request in plaintiffs' response to defendants' motion for summary disposition, the trial court's failure to sua sponte offer plaintiff an opportunity to amend did not amount to plain error. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). Moreover, plaintiffs fail to explain what information they would have included in an amended complaint that would have impacted the holding of the trial court. Accordingly, plaintiffs are not entitled to amend their complaint.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello