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Court: CO Park County District Court 11th JD

Judge: Stephen Groome

File & Serve Transaction ID: 47443700

Current Date: Dec 03, 2012

Case Number: 2012CV128

Case Name: GIDUCK, JOHN et al vs. SOCNETCOM et al

Court Authorizer Comments:

Per C.R.S. 13-17-201, Defendants are awarded their reasonable attorney fees.

/s/ Judge Groome, Stephen

	GRANTED WITH AMENDMENTS	**The moving party is hereby ORDERED to provide a copy of this Order to any pro se parties who have entered an appearance in this action within 10 days from the date of this order.**	**Stephen Groome** **District Court Judge** DATE OF ORDER INDICATED ON ATTACHMENT

DISTRICT COURT, PARK COUNTY, COLORADO Park County Courthouse 300 4th Street P.O. Box 190 Fairplay, CO 80440 (719) 836-2940	
Plaintiffs: JOHN GIDUCK; SHARI NICOLETTI; ARCHANGEL GROUP LTD., a Colorado Corporation v. **Defendants:** SOCNET.COM; JOE NIBLETT; MICHAEL KIRK; ROBERT MITCHELL; JAY HARRISON; JONATHAN G. CLOUSE; PHILIP D. MARTIN; JERROD BARENTINE; EDWARD D. CLARK; BARRY SLANT; TRACY-PAUL WARRINGTON; SEAN ALLEN WHITTENTON; MATTHEW LONGBOTTOM; LAURA STANFORD; PATRICK MCALEER; DF BEHR; JASON OLE; PATRICK SLOAN; DANIEL HAMMOND; JOSHUA GARMAN; JOHN DOES 1 THROUGH 30	▲ COURT USE ONLY ▲ Case No.: 12CV128 Division: B

PROPOSED ORDER REGARDING JOINDER IN MOTIONS TO DISMISS FILED BY DEFENDANTS NIBLETT, WARRINGTON AND MARTIN

THE COURT, having reviewed motions to dismiss pursuant to C.R.C.P. 12(b)(5) filed by Defendants Joe Niblett, Tracy Paul Warrington and Philip Martin (collectively "Defendants"), together with any response thereto, and being fully advised in the premises, hereby GRANTS said motions, and enters the following findings, conclusions and order.

This case was commenced by the filing of a Complaint and Jury Demand on June 11, 2012 (the "Original Complaint"). The Original Complaint asserted twelve (12) claims for relief against fifty-one (51) defendants, twenty-one (21) of whom were named and thirty (30) of whom were designated as "John Does 1 through 30."

The Defendants joined in filing a Motion For More Definite Statement arguing that the allegations of the Original Complaint failed to identify which defendants performed particular alleged acts and that the Plaintiffs had "not averred with sufficient definiteness or particularity to enable [them] properly to prepare [their] responsive pleading." C.R.C.P. 12(e).

The Court granted the joint Motions For More Definite Statement specifically stating as follows:

> The Court finds and concludes that the Plaintiffs' complaint lacks sufficient definiteness and particularity to enable the defendants to respond and defend against each alleged wrongdoing.
>
> Therefore, the Court GRANTS the defendants' motion and orders that the Plaintiffs shall have 30 days from the date of this Order in which to file an amended complaint, which provides the defendants with those particulars.

Order re Motion for more Definite Statement, p. 2.

On September 14, 2012, the Plaintiffs filed their Amended Complaint and Jury Demand (the "Amended Complaint"). The Amended Complaint added some detail to the first and second claims for relief (libel per se and libel per quod) alleging specific statements by this Defendant that Plaintiffs claim to be defamatory. The third through twelfth claims remained unchanged and were repeated verbatim from the Original Complaint.

Defendants filed similar motions to dismiss the claims against them for failure to state a claim upon which relief can be granted pursuant to C.R.C.P. 12(b)(5).

As with all motions to dismiss pursuant to C.R.C.P. 12(b)(5) the facts applicable to this motion are those recited in the Amended Complaint which must, for purposes of this motion only, be accepted as true. Douglas County Nat. Bk. v. Pfeiff, 809 P.2d 1100 (Colo. App. 1991). The Court is not, however, required to accept as true legal conclusions couched as factual

allegations. Denver Post Corp. v. Ritter, 255 P.3d 1083 (Colo. 2011).

1. The first and second claims for relief.

The elements of a claim for defamation such as libel are well settled in Colorado.

> To state a cause of action for defamation under Colorado law, the plaintiff must allege "(1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication." Williams v. Dist. Ct., Second Judicial Dist., 866 P.2d 908, 911 n. 4 (Colo. 1993).

TMJ Implants, Inc. v. Aetna, Inc., 498 F.3d 1175, 1183 (10th Cir. 2007).

The first element is at issue here.

The Amended Complaint stated specific allegations of the following allegedly defamatory statements posted on the internet by Defendant Niblett:

1. "Giduck is a fraud."
2. "Poser civilian," (which they claim means that "Giduck is posing as a special forces member.")
3. Giduck has spent years fabricating his for-profit legend.
4. "Giduck is a fool . . . What is worse are those that have forgotten what honorable means and support that fool. The associations should impeach the officers that allowed this fool to sully their honorable service."
5. "Giduck is a piece of shit."
6. "Giduck and his supporters are 'clowns' that use 'bullshit' to overstate their credentials."
7. "Giduck is an imposter."

8. “Giduck lies and embellishes his credentials. He is the enemy and his methodologies, advice, tactics, techniques and procedures will hurt, seriously injure or kill bystanders.”

9. “Anywhere you see an association that has honorary memberships, it is pay for play 98% of the time. Usually folks that donate money or services frequently are friends with the orgs officers . . . . Case in point with Giduck with the SOA and SF associations. Especially Giduck who flaunts memberships as if he actually met the criteria to actually be a full member, yet he fully lacks any qualifications or experience to be a member. In his fantasy he fully lacks any qualifications or experience to be a member. In his fantasy land, Giduck actually believes he meets the quals and is equal to those that actually served. He is the worst type of poser, and the officers of the association that allows him to perpetuate this fraud should be stripped of memberships as well.”

10. “Giduck lacks experience in anti-terrorism.”

The Amended Complaint stated specific allegations of the following allegedly defamatory statements posted on the internet by Defendant Warrington:

1. “Giduck claims he was a former Special Forces and Army Ranger and a retired Green Beret.”

2. “Mr. John Giduck listed former SF Solder, trainer of SF Soldiers or words to that effect.”

3. “Giduck claims United States Special Forces units have adopted his techniques.”

4. “Giduck presents himself as a survivor of eight wars/conflicts.”

5. Giduck is a fraud.

6. Giduck “scam money and fame from law enforcement organizations and the public at large.”
7. “Giduck is an imposter.”
8. “Giduck lies and embellishes his credentials. He is the enemy and his methodologies, advice, tactics, techniques and procedures will hurt, seriously injure or kill bystanders.”
9. “Giduck lied about and faked his credentials, qualifications and experience, including claiming to have experiences with U.S. Special Forces.”
10. “Giduck use his lies about his qualifications, credentials and experience to defraud others including law enforcement agencies and government agencies into hiring him so he could make money.”
11. “Giduck’s picture of himself with the Afghanistan mountain range behind him is false and photo-shopped. ”
12. “Giduck’s certificate from a Russian Special Forces unit is fake and was cut and pasted from a website. ”
13. “Giduck is not qualified to teach tactical SCUBA or tactical parachuting, as he claims he is.”
14. “Giduck has been in continuous contact with members of a Foreign Intelligence Service for almost 20 years.”

The Amended Complaint stated specific allegations of the following allegedly defamatory statements posted on the internet by Defendant Martin:

1. "Giduck is a charlatan."

2. "[Giduck] clearly found his 'calling' in Russia, whether that was due to Russian intervention or too many Chancy novels . . . I don't know but that seems to be the place and time that he started exaggerating his resume."

The law has long recognized the tension between the law of defamation and basic guarantees of free expression. Thus, for example, even patently defamatory statements concerning public officials and public figures are privileged under the First Amendment unless they are accompanied by "actual malice" defined as knowledge of falsity or reckless disregard of the truth. New York Times Co. v. Sullivan, 370 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

It is this tension that has generated numerous cases addressing the first element of a defamation action, i.e. is the statement defamatory. Not every untrue, uncomplimentary or offensive statement concerning an individual is defamatory. Indeed, the law is settled in Colorado that the "mere use of foul, abusive, or vituperative language does not constitute defamation." 7A Colo. Prac., Personal Injury Torts and Insurance § 32.2 (2d ed.), citing Bucher v. Roberts, 198 Colo. 1, 595 P.2d 239 (1979). Expressions of opinion, as distinguished from assertions of fact, are generally not actionable since "[u]nder the First Amendment there is no such thing as a false idea." Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2887, 41 L.Ed.2d 784 (1974). Such statements may be (and in practice almost always are) constitutionally privileged in order to safeguard the vigor and candor of public discourse. "Weighed against the individual's right to be free from false and defamatory assertions . . . is society's interest in encouraging and fostering vigorous public debate." Keohane v. Stewart, 882 P.2d 1293. 1298

(Colo. 1994).

"Whether allegedly defamatory language is constitutionally privileged is a question of law and a reviewing court must review the record de novo to insure that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression." NBC Subsidiary (KCNCTV), Inc. v. The Living Will Center, 879 P.2d 6, 11 Colo. 1994). See also Kuhn v. Tribune-Republican Pub. Co., 637 P.2d 315, 318 (Colo. 1981). Phrased somewhat differently, "[w]hether a statement constitutes a protected opinion or an actionable statement of fact is a question of law that [the court] may determine on a motion to dismiss." Wedbush Morgan Securities, Inc. v. Kirkpatrick Pettis Capital Management, Inc., 2007 WL 1097872 (D.Colo.).

Applying two landmark cases, one from the United States Supreme Court and one from the Colorado Supreme Court, the Colorado appellate courts have devised a settled test for determining whether allegedly defamatory speech is constitutionally privileged.

> Milkovich and Burns thus provide the necessary framework to determine if a statement is protected. The framework involves two inquiries. The first inquiry is whether the statement is sufficiently factual to be susceptible of being proved true or false." Milkovich, 497 U.S. at 21, 110 S.Ct. at 2707. The second inquiry is whether reasonable people would conclude that the assertion is one of fact. Id. The factors relevant to the second inquiry are: (1) how the statement is phrased; (2) the context of the entire statement; (3) the circumstances surrounding the assertion, including the medium through which the information is disseminated and the audience to whom the statement is directed. Burns, 659 P.2d at 1360; see Milkovich, 497 U.S. at 20, 110 S.Ct. at 270607 (holding that loose, figurative, or hyperbolic language may indicate that the statement could not reasonably be interpreted as a statement of fact) . . . .

Keohane, 882 P.2d at 1299.

Thus, expressions of opinion, even if couched in factual terms but which, when read in context are "rhetorical hyperbole," will receive full constitutional protection.

The Milkovich/Burns rule has been applied in several Colorado cases (or federal cases applying Colorado law) with factual predicates similar to those presented here to dismiss defamation claims where the allegedly defamatory statement was held to be a protected opinion. See e.g. Keohane, supra (references to plaintiff as a "sickie," "terrorist," "sleaze" and "scum"); NBC Subsidiary, supra (statement that business was a "scam" and that customers were "totally taken"); Wilson v. Myer, 126 P.2d 276 (Colo. App. 2006) (statement that plaintiff lacked "integrity," was "paranoid" and could be "prosecuted for eavesdropping"); Lockett v. Garrett, 1 P.3d 206 (Colo. App. 1999) (unequivocal statement that plaintiffs committed "violations of the Open Meeting Law"); Arrington v. Palmer, 971 P.2d 669 (Colo. App. 1998) (statement that plaintiff "lied" and "bullied and physically threatened those who disagreed with him"); Kelley v. New York Insurance and Annuity Corp., 2008 WL 5423343 (D.Colo. 2008) (statement that plaintiff "beats women"); Wedbush, supra (statement that plaintiff possibly violated state statutes governing investment of public funds); Brudwick v. Minor, 2006 WL 1991755 (D.Colo. 2006) (statement that plaintiff's residence was "probably a meth lab"); Seidl v. Greentree Mortgage Co., 30 F.Supp.2d 1292 (D.Colo. 1998) (allegations of "misappropriation for fraudulent purposes," "computer crime" and "telemarketing fraud" all protected opinion).

The United States Supreme Court has twice held that some words generally connoting criminality may only be reasonably interpreted, when viewed in proper context, as not specifically imputing criminality to the plaintiff. Thus, an accusation of "blackmail" has been held to be mere "rhetorical hyperbole" when applied to a developer's negotiations with a city. Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6, 1314, 90 S.Ct. 1537, 26 L.Ed.2d 6, (1970). Similarly, the use of the word "traitor" as part of a definition of the epithet "scab" was held to be

Nonactionable when used in the context of a labor dispute, being "merely rhetorical hyperbole, a lusty and imaginative expression of contempt" rather than an actual accusation of treason. Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFLCIO v. Austin, 418 U.S. 264, 286, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974). Similar cases from across the country finding seeming statements of criminality to be protected expressions of opinion in the form of rhetorical hyperbole are legion. See e.g. Elder, Defamation: A Lawyer's Guide § 8.27 (Database updated August 2012).

Applying the settled law set forth above to the facts alleged in the Amended Complaint the Court finds and concludes that the statements attributed to these Defendants are constitutionally privileged statements of opinion protected by the First Amendment. The Court will briefly address the statements attributed to each of the Defendants.

a. Defendant Tracy Paul Warrington.

The last four statements by defendant Warrington (along with statement #14) are simply observations that are not defamatory even if in error. The statements by Defendant Warrington that Plaintiff Giduck was a liar, fraud, scammer and imposter because he misrepresented his credentials are not actionable. Opining that someone is a liar, a fraud or was untruthful about his or her background, is, perhaps unfortunately, a common implement in American discourse. Such epithets are obviously statements of opinion and are protected under the rules enunciated in Milkovich and Burns. Similarly statement #12 alleging a fake photo and Russian certificate represent opinions and are protected.

b. Defendant Philip Martin.

The statement that Plaintiff Giduck is a "charlatan" and that he exaggerates his resume are opinion and are not actionable. These types of statements of opinion are protected under the rules enunciated in Milkovich and Burns.

c. Defendant Joe Niblett.

Defendant Niblett's statement that Plaintiff Giduck is a "piece of shit" or, a "fool," a "fraud," a "poser civilian," and a "clown" are patently Niblett's opinion and are not actionable. If every statement along these lines formed the basis for a libel or slander case, the courts of this country would be entirely devoted to the litigation of defamation claims. These are statements of opinion and are protected under the rules enunciated in Milkovich and Burns. Similarly, the other statements about embellishment of credentials (statement #F) and by virtue of the same perpetrates fraud (#9) also are protected opinion.

The statements attributed to these Defendants regarding Giduck were blunt, uncomplimentary, and probably "rhetorical hyperbole." But they were also privileged statements of opinion protected by the First Amendment as applied in a litany of Supreme Court and Colorado appellate cases. The application of those cases is a question of law that must be addressed by this Court before the case goes any further. Dismissal of the defamation claims contained in the Amended Complaint is required for failure to state a claim upon which relief can be granted.

2. Third through twelfth claims for relief.

The Court's Order of August 15, 2012 directs the Plaintiffs to file an amended complaint of "sufficient definiteness and particularity to enable the defendants to respond and defend against each alleged wrongdoing." As to the third through twelfth claims for relief the Plaintiffs

have ignored this direction. Instead they have simply repeated verbatim the allegations from the Original Complaint with no attempt whatsoever to tie the alleged wrongdoing to any particular defendant. There is absolutely no allegation in any of these nine claims for relief that these Defendants did anything wrong, did anything injurious to Plaintiffs, or, for that matter, that these particular Defendants did anything at all.

The failure to allege any wrongdoing by these specific Defendants in any of these nine claims requires that they be dismissed for failure to state a claim.

ORDER

For all the reasons set forth above, the Defendants motions to dismiss the claims against them pursuant to C.R.C.P 12(b)(5) are GRANTED.

Dated this _____ day of _____, 2012.

BY THE COURT

_____
The Honorable Stephen A. Groome
District Court Judge