



IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

LAKE FOREST PROPERTY OWNERS'
 ASSOCIATION, INC.,

Plaintiff,

v.

LAKE FOREST STRONG, et al.,

Defendants.

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CASE NO: CV-2023-900163

**RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER
 ORDER DISMISSING DEFENDANTS, LYNN DAVIS AND CATHIE MARX,
 PURSUANT TO ALA. R. CIV. P. 12(b)(6)**

COME NOW Defendants, Lynn Davis ("Mrs. Davis") and Cathie Marx ("Mrs. Marx") (together, "Defendants") and file this response in opposition to Plaintiff, Lake Forest Property Owners Association, Inc.'s ("LAKE FOREST POA") Motion to Reconsider this Court's Order dismissing LAKE FOREST POA's Complaint against them (Motion to Reconsider (Doc. 81)).

I. INTRODUCTION

This Court properly dismissed LAKE FOREST POA's claims against Mrs. Davis and Mrs. Marx pursuant to Rule 12(b)(6) because LAKE FOREST POA failed to state claims for which relief could be granted. As set out in Mrs. Davis and Mrs. Marx's Motion to Dismiss (Doc. 30) and Brief in Support (Doc. 31), Plaintiff did not make essential allegations supporting its claims of Libel, Slander, Invasion of Privacy—False Light, or Conspiracy. Plaintiff's argument in its Motion to Reconsider that it did not have to plead damages and that somehow Rule 17 was the reason for dismissal—even though it was not mentioned at all in briefing, at the hearing, or in the Court's Order—is futile.

LAW AND ARGUMENT

A. **Standard of Review.**

As stated in Mrs. Marx and Mrs. Davis’s Brief in Support in their Motion to Dismiss, a Rule 12(b)(6) dismissal is proper when it appears beyond doubt from the allegations in the complaint that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Garrett v. Hadden*, 495 So. 2d 616, 617 (Ala. 1986). Here, it appears beyond doubt from the allegations in the Complaint that Lake Forest POA can prove no set of facts in support of its allegations that would entitle it to relief.

B. **Lake Forest POA’s argument that Rule 17(a) was applied as the grounds for the dismissal of the Complaint fails because the Complaint was dismissed pursuant to Rule 12(b)(6).**

Lake Forest POA is mistaken in its suggestion that Mrs. Davis’s and Mrs. Marx’s Motion to Dismiss was granted pursuant to Ala. R. Civ. P. Rule 17(a) for not being prosecuted in the name of the real party in interest. In its Motion to Reconsider, Lake Forest POA correctly observes that “None of the Defendants even mention Rule 17 in their motions to dismiss or analyze the application of the Rule 17 to the facts. The Court also did not specifically mention Rule 17 at the hearing on April 25, 2023.” (Motion to Reconsider, (Doc. 81) (Footnote #1)). Rule 17(a) was not cited because it was not applied as grounds for the dismissal—instead, the claims against Mrs. Marx and Mrs. Davis were properly dismissed on the grounds of Plaintiff’s failure to state a claim against them for which relief can be granted pursuant to Rule 12(b)(6). (Order (Doc. 67)).

C. **Lake Forest POA Did Not Allege Special Damages or Defamation Per Se.**

As an initial matter and as addressed in prior briefing, Lake Forest POA did not allege **any** damages suffered by Lake Forest POA resulting from actions alleged to have been taken by Mrs. Marx or Mrs. Davis.

Lake Forest POA ignores the requirement that it plead any special damages that it, a corporate entity, claims to have suffered by arguing that it made claims of defamation *per se*; however, Lake Forest POA did not allege that Mrs. Marx or Mrs. Davis made any oral statements which imputed the commission of a crime by Lake Forest POA involving “infamy or moral turpitude.” *See Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1091 (Ala. 1988). Lake Forest POA also did not plead that Mrs. Davis or Mrs. Marx wrote anything at all. Plaintiff’s allegations of Mrs. Marx and Mrs. Davis’s actions in its Complaint were fatally nonspecific and its Motion to Reconsider is its first mention of any claim of defamation *per se* against Mrs. Marx and Mrs. Davis in this litigation.

Ordinarily, to state a claim for defamation, a plaintiff must plead either defamation *per quod* **and** special damages, or defamation *per se*. *See Butler v. Town of Argo*, 871 So.2d 1, 18 (Ala. 2003) (“Slander per quod exposes the plaintiff to disgrace, ridicule, odium, or contempt but falls short of imputing commission of a crime or misdemeanor, and it causes special damages”). Defamation per se is defamation which causes substantial damage to the plaintiff irrespective of special damage. Slander per se, which does not require a plaintiff to allege special damages, instead requires a plaintiff to allege that the defendant’s act imputes commission of a crime involving “infamy or moral turpitude.” *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1091 (Ala. 1988); *see also Anderton v. Gentry*:

Generally, in slander there must be an oral communication of a defamatory matter to a third person. There are two types of slander, that is, slander per se and slander per quod. Slander per se is actionable if it imputes to the plaintiff an indictable offense involving infamy or moral turpitude. Damage is implied by law when spoken words are found to be slander per se. Slander per quod is a communication to a third person of a defamatory statement subjecting the plaintiff to disgrace, ridicule, odium, or contempt although not imputing the commission of a crime involving infamy or moral turpitude.

577 So. 2d 1261, 1262 (Ala. 1991). Special damages are “material loss capable of being measured in money.” *Butler v. Town of Argo*, 871 So. 2d 1, 18 (Ala. 2003). A plaintiff fails to allege special damages by only alleging that “plaintiff was harmed by defendant’s defamatory remarks.” *Cajun Steamer Ventures, LLC v. Thompson*, 401 F. Supp.3d 1328, 1347 (N.D. Ala. 2019).

Imputing indictable offenses of infamy and moral turpitude is not merely suggesting possible criminal activity. Instead, a much graver kind of offense must be imputed to qualify as slander per se.

"Moral turpitude signifies an inherent quality of baseness, vileness, depravity.' *Gillman v. State*, 165 Ala 135, 51 So 722. Moral turpitude 'implies something immoral itself, regardless of the fact whether [***5] it is punishable by law. The doing of the act, and not its prohibition by statute fixes the moral turpitude.' *Pippin v State*, 197 Ala 613, 73 So 340. Moral turpitude means 'something immoral in itself. * * * It must not be merely *mala prohibita*, but the act itself must be inherently immoral. The doing of the act itself and not its prohibition by statute, fixes the moral turpitude. * * * It is the nature of the act itself, and not its legislative characterization or punishment which must be the test in determining whether or not it involves moral turpitude.'" *Ex Parte Marshall*, 207 Ala 566, 93 So 451 [471]."

Williams v. State, 55 Ala. App. 436, 437, 316 So. 2d 362, 363 (1975) (citing McElroy, Law of Evidence in Alabama, Vol. I, § 145.01(7)).

The standard for alleging libel per se is a slightly different from that for slander per se and the distinction is set out in *Ponder v. Lake Forest Prop. Owners Ass'n.*:

In cases of libel, if the language used exposes the plaintiff to public ridicule or contempt, though it does not embody an accusation of crime, the law presumes damage to the reputation, and pronounces it actionable per se. While to constitute slander actionable per se, there must be an imputation of an indictable offense involving infamy or moral turpitude...

214 So. 3d 339, 350 (Ala. Civ. App. 2015) (internal citations omitted).

In the absence of pleading defamation per se, which is the case here—no crimes of infamy and moral turpitude were mentioned in Lake Forest POA’s Complaint and no writings were alleged

to have been published by Mrs. Marx or Mrs. Davis—a plaintiff must plead special damages in order to recover on claims of defamation.

Lake Forest POA was required to allege the economic damages that it suffered as a result of Mrs. Marx and Mrs. Davis's actions in order to state a claim for defamation (Slander and Libel). Lake Forest POA failed to make that essential allegation and thus did not state a claim for which relief can be granted. Lake Forest POA only made allegations of damages suffered by individual board members but alleged no damage suffered by Lake Forest POA as a corporate entity. If those board members wish to pursue their individual claims, they may do so, but the fact remains that Lake Forest POA has made no allegation of economic damages to the Association and thus has not stated any claim entitling it to relief. Thus, this Court's dismissal of Lake Forest POA's defamation claims was proper.

D. The Case Law Cited in Plaintiff's Motion to Reconsider Supports the Court's Dismissal of its Complaint.

During the hearing on Defendants' Motion to Dismiss, Lake Forest POA's counsel urged the Court to rule in its favor because Lake Forest POA has sued its members before for defamation in *Ponder v. Lake Forest Property Owners Association, Inc.*, 214 So.3d 339 (Ala. Civ. App. 2015). However, the facts in *Ponder* are inapposite from those at hand. In *Ponder*, Lake Forest POA alleged that the defendant falsely represented on his website that, "I, along with dozens of Lake Forest POA members, have uncovered conclusive evidence of monetary fraud and voter fraud by past and current members of the Board of Directors."

The court held that the specific accusations of crimes which Lake Forest POA showed were published by Mr. Ponder on his website constituted libel per se, so the issue was never reached in that case whether the damages claimed in the action were actually damages to the Association, or damages to individual board members. While Lake Forest POA is yet again trying to sue its

members for defamation, this case is different because Lake Forest POA has not alleged that Mrs. Marx or Mrs. Davis made any publication at all, and to the limited extent letters to the IRS and the attorney general are mentioned, there is no allegation regarding the content of those letters. The writings are not ascribed in any way to Mrs. Marx and Mrs. Davis, and from reading the Complaint, it is impossible to tell whether they exposed Lake Forest POA to public ridicule or contempt.

This Court is not bound to rule in favor of Lake Forest POA each time it sues one of its members for defamation as Lake Forest POA seems to imply in its Motion to Reconsider. The Court is bound only to review the facts of each individual case and to soundly apply the law to those facts. In *Ponder*, the ruling on Ponder's appeal of the grant of summary judgment to Lake Forest POA does not mandate the Court in this case to overturn its own Order dismissing this action against Mrs. Marx and Mrs. Davis for Lake Forest POA's failure to state a claim.

Further, corporations can bring and prevail on claims for defamation. However, the rules of pleading for a defamation claim apply to corporate entities just as they apply to individuals. In every case Lake Forest POA cited where a corporate entity stated claims of defamation, most of which are not even binding on this Court, all but **one** were cases involving claims of defamation *per se* where pleading special damages was not required. See *Gen. Elec. Credit Corp. v. Alford & Assoc., Inc.*, 374 So.2d 1367 (Ala. 1979); *Hughes v. Cooper Tire Co.*, 76 F. Supp.2d 1312 (M.D. Ala. 1999); *Ponder v. Lake Forest Property Owners Association, Inc.*, 214 So.3d 339 (Ala. Civ. App. 2015); *Innovative Block of South Texas, Ltd. v. Valley Builders Supply, Inc.*, 603 S.W. 3d 409, 419 (Tx. 2020); *St. Augustine High School, Inc. v. Applewhite*, 2011 WL 3423942, * 3 (E.D. La. Aug. 5, 2011); *Gateway Logistics Group, Inc. v. Dangerous Goods Man. Australia Pty, Ltd.*, 2008 WL 1883914, *6 (S.D. Tx. April 25, 2008); *Johnson v. Resources for Human Dev., Inc.*, 860 F. Supp. 218, 221 (E.D. Penn. 1994).

The only case cited by Lake Forest POA involving a claim of defamation per quod, where a corporation had to plead special damages in the absence of an allegation that the defendant falsely alleged that the corporation committed a crime involving infamy or moral turpitude was *Fisher Sand & Gravel Co. v. FNF Construction, Inc.*, 2014 WL 12575859, *3 (D. N.M. May 29, 2014). The corporate plaintiff's defamation claim in *Fisher* survived a motion to dismiss because the plaintiff alleged special damages in the form of plaintiff's inability to obtain state construction contracts resulting from defendant's false and defamatory remarks. Though *Fisher* is not binding on this Court, it is a good example of the kind of special damages Lake Forest POA would have had to allege it suffered as a result of some act by Mrs. Marx or Mrs. Davis in order to plead the special damages required to state a claim. Lake Forest POA has not alleged any lost income, membership, loss of contracts, or any other discrete damages suffered by Lake Forest POA as a corporate entity resulting from any act by Mrs. Marx or Mrs. Davis. As such, it did not state a claim for defamation against Mrs. Marx and Mrs. Davis.

C. The Affidavits Attached to the Motion to Reconsider Should be Disregarded.

It is apparent from Lake Forest POA's Motion to Reconsider and the Affidavits executed by board members attached thereto wherein individual board members purport to ratify the claims brought by Lake Forest POA and allow Lake Forest POA to pursue the claims it brought in this action on their behalf.

The affidavits attached to Lake Forest POA's Motion to Reconsider are due to be stricken because submission of evidence is not appropriate for a motion to reconsider a judgment granting a motion to dismiss. The purpose of moving to dismiss is to test the sufficiency of the allegations within the four corners of the complaint and determine as a matter of law whether the claims that have been asserted are viable. *Pub. Relations Counsel, Inc. v. Mobile*, 565 So. 2d 78, 79 (Ala.

1990). However, even if, *arguendo*, the affidavits were to be considered, individual board members, does not cure Lake Forest POA's failure to state claims against Mrs. Marx and Mrs. Davis for which relief can be granted.

Here, no evidence was submitted by Mrs. Marx and Mrs. Davis to accompany their Motion to Dismiss and, therefore, it could not have been converted to one for summary judgment as contemplated by Ala. R. Civ. P. Rule 12(b)(6). The only matter at issue before the Court when it rendered its judgment dismissing Lake Forest POA's Complaint was whether Lake Forest POA's Complaint alleged sufficient facts to state a claim belonging to Lake Forest POA against Mrs. Marx or Mrs. Davis for which relief could be granted.

If Lake Forest POA believed it would have cured the defects in the Complaint that Mrs. Marx and Mrs. Davis identified in their Motion to Dismiss, Lake Forest POA could have amended the Complaint prior to the grant of the Motion to Dismiss to include allegations of the facts in the affidavits it now attempts to submit with its postjudgment motion. However, at this point in the litigation, it is too late for Plaintiffs to introduce additional facts or evidence. *See Mobile Cty. Dep't of Human Res. v. C.S.*, 89 So. 3d 780, 785 (Ala. Civ. App. 2012) (declining to consider affidavits attached to a postjudgment motion to reconsider a grant of summary judgment because those facts should have been introduced at a prior stage of litigation and holding that "DHR could not properly use a Rule 59 postjudgment motion to belatedly submit the evidence it should have provided to the juvenile court in opposition to the motion for a summary judgment"). Lake Forest POA's belated and improper attempt to introduce evidence with their postjudgment motion should be disregarded.

The Complaint was rightfully dismissed pursuant to Rule 12(b)(6) and this Court should not overturn its Order.

II. CONCLUSION

This Court was correct in its decision to dismiss the claims against Mrs. Davis and Mrs. Marx because Lake Forest POA failed to state a claim against either of them upon which relief may be granted. Based on the foregoing, Lake Forest POA's Motion to Reconsider is due to be denied.

Respectfully submitted,

s/Tyler W. Thull

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2023, I filed the foregoing document with the Clerk of the Court and served a copy of on all parties as I deposited a copy of the same in the United States Mail, postage-paid, addressed and/or via the electronic notification system of AlaFile/AlaCourt to the following:

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