

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

LAKE FOREST PROPERTY OWNERS' ASSOCIATION, INC.,)	
)	
Plaintiff,)	
)	
v.)	<u>05-CV-2023-900163</u>
)	
LAKE FOREST STRONG, et al.,)	
)	
Defendants.)	

RESPONSE TO MOTION TO RECONSIDER

Come now Defendants Lake Forest Strong (“LFS”), Doreen Knight (“Knight”) , and Dexter Curry (“Curry”) and respond in opposition to Plaintiff’s Motion to Reconsider the Court’s granting of LFS, Knight and Curry’s motion to dismiss this action with prejudice pursuant to Rule 12(b), 12(b)(1) and 12(b)(6). The Motion to Reconsider is due to be Denied.

As further grounds for said motion Defendants LFS, Knight and Curry state as follows:

1. Defendants LFS, Knight and Curry adopt the response in opposition to the motion to reconsider of Defendants Davis and Marx as if fully set out herein. Plaintiff still fails to identify any statement of fact at all, allegedly made by Defendants LFS, Knight or Curry anywhere in the complaint. The complaint is but a narrative of interpretation of opinion, innuendo and alleged “motivation speculating” by Plaintiff. To the extent any such statement is alleged, such

statements are mere opinion or legitimate questions that should be answered by Plaintiff's Board Members. The complaint completely fails to allege any specific act or omission of LFS, Knight, or Curry that would lend any factual support to the Association's claims.

2. The Association is still the only Plaintiff which is improper.

Defendants would further underscore the baseless and frivolous nature of this complaint. It is an improper attempt by a disgruntled Board Member to prevent, stifle, and punish its Lake Forest Property Owner's Association members and Defendants their free speech rights, their constitutional rights and rights according to the governing Declarations, By Laws and Regulations to petition for a removal and election of new Board Members, to make their grievances known, and to better their neighborhood community in their view and opinion.

3. Lake Forest HOA Board Members have a duty to represent the Lake Forest homeowners and to act in their best interest. He serves at their pleasure. They have the right to petition for new Board Members. This complaint brought in the name of the Association violates those duties. Regardless, it is baseless and due to be dismissed.

Defendants would further state:

4. Defendant Lake Forest Strong is not a person or entity that is capable of being sued under Alabama law, rather it is simply a description of a movement, and is therefore due to be dismissed. Lake Forest Strong ("LFS") is

a voluntary name or description of a movement associated with members of the Lake Forest homeowners association and public community that desired a change in the HOA's Board of Directors, and is therefore incapable of being sued under Alabama law. *See Peters v. State*, 12 Ala.App. 133, 67 So. 723 (Ala. Civ. App. 1915) (finding an unincorporated or voluntary association of persons, is not a legal entity, and is not capable of suing by or of being sued in their common name); *Dean v. Barber*, 2951 F.2d 1210 (11th Cir. 1992) ("County sheriff's department was not legal entity and, thus, was not subject to suit or liability under § 1983, as department ***lacked capacity to be sued under Alabama law.***"); *Ex parte Haralson*, 853 So. 2d 928, 931 (Ala. 2003) ("It is clear under Alabama law that the sheriff's department is not a legal entity subject to suit."). LFS is not even a voluntary association of persons, but more akin to the "America First" affiliation, or description of a movement like "MAGA", or "Left Wing Liberal." It simply referred to those homeowners in Lake Forest that "stood strong" against the current board and were in favor of signing the appropriate petition to remove the current board and elect new members. Such political descriptive movement is incapable of being sued.

5. Plaintiffs alleged "narrative" or "insinuation" by some anonymous homeowners in a political fight cannot serve as a basis for a defamation, libel, slander or false light claim. These are simply the opinions or perceptions or interpretations put on by Plaintiff to legitimate questions and concerns of

community of Lake Forest.

6. All the allegations are absolutely privileged under Alabama law as this was election and political speech in a public forum meant for the betterment of the community and protected by Free Speech. The meetings and governing of Associations and its elections are public forums. The association functions similar to a governmental body. The association's board of directors is significant in the promulgation and enforcement of rules which affect the daily lives of Lake Forest residents, collects dues from them, and is obligated to spend their money appropriately.

The allegedly defamatory statements were made in connection with the management of a homeowners association, and concerned issues of critical importance to a large segment of our local population. Given the size of the homeowners association community, the nature of the challenged statements as involving fundamental choices regarding future management and leadership of the Association, under Alabama law homeowner association boards can and should be treated similar to governmental entities, as far as public forums. Accord, *Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1117, 123 Cal.Rptr.3d 251 (homeowner's complaints about homeowners association's actions were a matter of public interest).

Likewise, any such statements alleged in Complaint are protected by the First Amendment. *Macias v. Hartwell* 673, 64 Cal. Rptr. 2d 222 (1997) (“Where,

as here, a candidate speaks out on issues relevant to the office or the qualifications of an opponent, the speech activity is protected by the First Amendment.”); *Southbark, Inc. v. Mobile County Com'n*, 974 F.Supp.2d 1372 (S.D. Ala. 2013).

7. The Complaint is brought in the name of the Association. It is therefore due to be dismissed under Alabama law. See, *Horsley v. Feldt*, 304 F.3d 1125 (11th Cir. 2002) (“[t]he [allegedly] defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. A plaintiff cannot rely on rumor, innuendo, and extraneous circumstances to create an inference of defamation.”); *Parekh v. CBS Corp.*, 820 F. App'x 827, 833 (11th Cir. 2020) (“[A] defamatory statement must be ‘of and concerning’ the plaintiff to be actionable.”). The Complaint fails to identify any statements, narrative or innuendo concerning the Lake Forest Homeowners Association, Inc., and therefore it is due to be dismissed. *Accord, Mac Isaac v. Twitter, Inc.*, 557 F.Supp.3d 125 (S.D. Fla. 2021) (holding the average person upon reading the statements could reasonably have concluded that the plaintiff was implicated motion to dismiss granted and attorney fees awarded).

8. The Plaintiff's complaint is due to be dismissed based on the litigation privilege, otherwise known as absolute privilege. Alabama courts treat the litigation privilege as an affirmative defense. See, e.g., *Webster v. Byrd*, 494 So. 2d 31, 32 (Ala. 1986). Nevertheless, a court may dismiss a complaint for

failure to state a claim based on an affirmative defense when the allegations of the complaint, on their face, show that the defense bars recovery. *Douglas v. Yates*, 535 F.3d 1316, 1321 (11th Cir. 2008). Thus, a court may dismiss claims based on the litigation privilege where the allegations in the complaint establish that the defendant's conduct occurred under circumstances that amounted to a privileged setting. *Tolar v. Bradley Arant Boult Cummings*, No. 2:13-cv-00132-JEO, 2014 WL 3974671 (N.D. Ala. Aug. 11, 2014); *July v. Terminix Int'l Co., Ltd. P'ship.*, 387 F. Supp. 3d 1306, 1315 (S.D. Ala. 2019).

9. Alabama courts have recognized that a party that has published allegedly defamatory matter in the course of a judicial proceeding may claim, as a defense to a defamation action based on that publication, the absolute privilege described in the *Restatement (Second) of Torts* § 587 (1977). See *Walker v. Majors*, 496 So. 2d 726, 729–30 (Ala. 1986); *Hollander v. Nichols*, 19 So. 3d 184, 195 (Ala. 2009).

10. The litigation absolute privilege extends to written statements to governmental investigative agencies based on serious concerns of possible activity that could result in litigation. See *Walker v. Majors*, 496 So. 2d 726 (Ala. 1986); *O'Barr v. Feist*, 292 Ala. 440, 296 So. 2d 152 (1974).

11. In *Cutts v. American United Life Insurance Co.*, 505 So. 2d 1211 (Ala. 1987), two companies provided an assistant district attorney for Mobile County inaccurate information about a contract they were involved in with a

company owned by William Cutts. Based on the information, the district attorney's office obtained grand-jury indictments against Cutts. After Cutts provided the district attorney's office with correct information about the transaction in question, the district attorney's office nol-prossed the indictments and discontinued its investigation. Cutts sued the two companies, asserting, among other things, a defamation claim based on a letter the two companies had provided to the district attorney's office. The Alabama Supreme Court concluded that the defamation claim was due to be dismissed because “*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.*” *Cutts*, 505 So. 2d at 1215. Thus, in *Cutts*, although the judicial proceeding was only in the investigatory stage when the companies provided information to the district attorney's office, the criminal case against Cutts was never taken to trial, and the two companies were not parties to the criminal case, the Court concluded that the *litigation privilege applied to the communication in question.*

11. Similarly, in *Barnett*¹ the Court determined that a letter that the then director of the Mobile County Personnel Board wrote to the town council of Mount Vernon, Alabama, which allegedly contained defamatory statements about the Mount Vernon town clerk, was absolutely privileged because the letter

¹ *Barnett v. Mobile Cnty. Pers. Bd.*, 536 So. 2d 46, 51–52 (Ala. 1988).

was “clearly relevant” to a “proposed [judicial] proceeding” that was actually filed a few weeks after publication of the letter. *Barnett*, 536 So. 2d at 52. The lawsuit subsequently filed by the Personnel Board and the director against the town clerk to recover payroll overpayments was dismissed based on a lack of standing. Thus, even though the letter was never submitted in a judicial proceeding and the personnel-board director never testified in a judicial proceeding, the Court concluded that the “allegedly defamatory letter was absolutely privileged due to its *clear relevance* to a judicial proceeding that was ‘contemplated in good faith and under serious consideration.’ *Restatement (Second) of Torts*, § 587, comment (e) (1977).” 536 So. 2d at 52.

12. In the instant case, the Plaintiff relies on supposed letter to the FBI, Alabama Attorney General’s office, the IRS and other investigatory governmental agencies having jurisdiction over matters of potential mismanagement of funds. Those are the exact agencies that our judicial system desires that parties bring their questions and concerns to. And are thus absolutely privileged under Alabama law.

13. The *Ponder* case dealt with statements of fact directly made against the Association. The *Ponder* case does not support the motion to reconsider, and indeed, supports the Denial of the motion to reconsider.

Wherefore, premises considered, Plaintiff’s Motion to Reconsider is due to be Denied.

Respectfully submitted this the 23rd day of May, 2023.

Respectfully submitted,

/s/Adam M. Milam
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon all counsel of record via the Alafile system and/or placed a copy of the foregoing in the United States Mail, postage prepaid and properly addressed, on this 23rd day of May, 2023, to all Counsel of Record and/or pro se parties.

/s/Adam M. Milam
Of Counsel