THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY

IN THE COURT OF COMMON PLEAS

ALSON ALSTON	:	**CIVIL TRIAL DIVISION**
Appellant,	:	**AUGUST TERM, 2006 No. 00572**
v.	:	**Commonwealth Court Docket No. 2008 CD 2008**
KEEL COMMUNICATIONS, THE REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, FRANK KEEL, FRANCIS BIELLI, THE CITY OF PHILADELPHIA, AND MAYOR JOHN STREET	:	
Appellees	:	

O P I N I O N

Tereshko, J.

PROCEDURAL HISTORY

Alson Alston appeals the February 12, 2007 Order granting the preliminary objections and dismissal of Plaintiff's Complaint against Frank Keel, Keel Communications, and the Redevelopment Development Authority of Philadelphia ("RDA").

FACTUAL BACKGROUND

On August 10, 2005, THE PHILADELPHIA WEEKLY (hereinafter "THE WEEKLY") published the article *Strange Brew*, written by Gwen Shaffer. (Pl.'s Compl. ¶ 13). The article discussed development plans for the low-income Philadelphia neighborhood known as Brewerytown, and referenced various people and agencies involved in the project, including Alson Alston (hereinafter "Plaintiff"), who was at the time the president of the African-American Business & Residents Association ("AABRA"), a Brewerytown grassroots organization. (*See* Exhibit A, attached to Opinion. (*Strange Brew*)).

According to Plaintiff, Shaffer's article was to address the politics of real estate development and gentrification in Brewerytown. (Pl.'s Compl. ¶ 14; *See Strange Brew*,). Instead, Plaintiff claims the article directly attacked his participation in Brewerytown's growth because he opposed the City's development plans for fear of its gentrification effects. (Pl.'s Am. Compl. ¶ 29).

As part of her article research, Shaffer investigated Plaintiff's finances, real estate ownership and tax records. (Pl.'s Compl. ¶ 16). She received some of this information from Deputy City Solicitor Francis Bielli. (*Id*. at ¶ 17). Plaintiff alleges that the publication of this information about him was "of a defamatory character and demonstrably false." (*Id*. at ¶¶ 16). As a fact-checker Tom Cox was responsible for confirming Schaffer's news sources and facts in the article. Plaintiff asserted that both Shaffer and Cox failed to challenge assertions made by the defendants. According to Plaintiff, omissions driven by Shaffer's alleged bias in favor of the City's scheme to improve Brewerytown contributed to the result of an unbalanced and unfair story.

On August 6, 2006, Plaintiff commenced this defamation action against the defendants. Original defendants include: (1) the Weekly, (2) author Gwen Shaffer, (3) fact-checker Tom Cox, (4) Review Publishing (owners of the Weekly), (5) the Redevelopment Authority of Philadelphia ("RDA"), (6) Frank Keel (RDA spokesman), (7) Keel Communications (Keel's employer), (8) Deputy City Solicitor Francis Bielli, (9) the City of Philadelphia, (10) then Mayor John Street, and (11) John Doe #1-5. (*See* Pl. Compl.). Plaintiff sought both compensatory and punitive damages exceeding $50,000 from the defendants.

Plaintiff believes and therefore alleges that the article attacked his credibility, he also claims his reputation as a community member has been "irreparably harmed." (*Id*. at ¶ 28). In his Complaint, Plaintiff attached a catalogue of approximately 43 citations listing what the Plaintiff claims as "false [assertions] and are based upon false or deliberately ambiguous statements, research and information." (Ex. B attached to Pl.'s Am. Compl. ¶ 27).

In their September 18, 2006 Preliminary Objections to the Complaint, Street, Bielli and the City of Philadelphia claimed they were immune from tort claims because of their "high public official" status. (Defs.' Prelim. Obj. to Compl. ¶ 5). If the defendants were not immune to tort claims, they asserted that Plaintiff fails to establish the elements of defamation because the defendants (Street, Bielli and Philadelphia) did not publish the article; the City of Philadelphia and Street were not quoted in the article. (*Id*. at ¶¶ 6-8). Additionally, Bielli claimed his comments in the article were truthful. (*Id*. at ¶ 9).

The defendants' (Street, Bielli and Philadelphia) preliminary objections were granted on October 25, 2006. (Order Granting Defs.' Prelim. Obj.). The Order noted

that Plaintiff's Amended Complaint was not timely filed. (*Id*.). On November 20, 2006, Plaintiff filed his Motion for Reconsideration from this Court's Order granting defendants' (Street, Bielli and the City of Philadelphia) preliminary objections. (Pl.'s Mot. Reconsideration). Because Plaintiff filed an appeal to the October 25, 2006 Order[1] on November 27, 2006, the Motion for Reconsideration was marked as moot on December 1, 2006. By Per Curiam Order dated January 3, 2007, the Superior Court discontinued Plaintiff's Appeal of the October 25, 2006 Order.

Defendants Frank Keel, Keel Communications and the RDA also filed Preliminary Objections to Plaintiff's Amended Complaint on October 30, 2006. On February 12, 2007, this Court sustained the Defendants' (Frank Keel, Keel Communications and the RDA) Preliminary Objections to Plaintiff's Amended Complaint. Frank Keel argued his comment that Plaintiff "is no more than a land speculator who cloaks himself in the guise of a community activist" was an expression of opinion and not actionable under the law. (*Id*. at ¶ 6-8; Ex B attached to Pl.'s Am. Compl. (*Strange Brew*)). Keel Communications contend they cannot be vicariously liable because Keel's comments are not defamatory. RDA and Keel Communications also collectively argued that they could not be held liable for defamation because they were not responsible for the publication of the article. Lastly RDA asserts immunity under the Pennsylvania Political Subdivision Tort Claims Act. (42 Pa. C.S.A. § 8541; (*Id*. at ¶ 1). (Defs.' Prelim. Obj. to Am. Compl. ¶ 3-5).

Defendants Review Publishing, Shaffer and Cox (hereinafter "media defendants") filed their preliminary objections, which were denied. On December 11, 2007, Plaintiff

[1] Although Plaintiff incorrectly states the date of the Order as October 27, 2006, which represents that date it was docketed.

reached a settlement agreement with the media defendants. Plaintiff later claimed two terms in the settlement were breached by the defendants in his Motion of Extraordinary Relief seeking to void the settlement agreement.[2] (Pl.'s Mot. Extraordinary Relief). This dispute was resolved at a June 3, 2008 Joint Pre-Trial Conference.

After resolving settlement disputes with the media defendants, Plaintiff filed an appeal to this Court's February 12, 2008 Order granting defendants' (Keel Communications, Frank Keel and the RDA) preliminary objections and dismissing Plaintiff's claims. Plaintiff's Concise Statement of Matters was filed on August 12, 2008. By Order, dated September 15, 2008, our Superior Court transferred this appeal to the Commonwealth Court because the City of Philadelphia and the RDA are local agencies that are involved in the case. (Superior Court Order).

ISSUES ON APPEAL

Pursuant to Plaintiff's Statement of Matters Complained of Upon Appeal, the following issues were raised which this Court will address accordingly:

A. Whether the Court abused its discretion or committed an error at law when it dismissed the instant matter against defendants, RDA and Keel Communications, because Frank Keel's statement was not defamatory and neither RDA nor Keel Communications published the alleged defamatory statement.

B. Whether the Court abused its discretion or committed an error at law in granting the preliminary objections of defendant Frank Keel because alleged defamatory statement made by Keel is protected as an opinion statement and therefore not actionable as a matter of law.

[2] The terms of the settlement agreement remain confidential unless the court requests access.

LEGAL ANALYSIS

Plaintiff appeals the February 12, 2007 Order sustaining preliminary objections filed by defendants RDA, Frank Keel and Keel Communications in a defamation action.[3] Plaintiff argues that Frank Keel's statement is not protected opinion and therefore defamatory and that RDA and Keel Communications are also liable and not immune from defamation claims.

Under 42 Pa. C.S.A. § 8343, in order to establish a valid defamation claim, Plaintiff must establish: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the Plaintiff from its publication; and (7) abuse of a conditionally privileged occasion.

The court has the responsibility of determining whether the challenged publication is capable of a defamatory meaning by considering whether the "statement tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him." *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 167 (1960) (quoting Restatement (First) of Torts, § 559 (1989)); *Thomas Merton Center v. Rockwell Int'l Corp.*, 497 Pa. 460 (1981).

According to this Court's Order, the RDA was immune from defamation claims under the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541. The Act immunizes municipalities from all state tort claims unless the claim falls within one of eight exceptions: vehicle liability; case, custody or control of personal property; real

property; trees, traffic controls and street lighting; utility service facilities; streets; side-walks; and care, custody or control of animals. 42 Pa. C.S.A §§ 8541-42. This immunity extends to city employees liable for civil damages resulting from acts within the scope of their employment, but not to acts considered to be crimes, actual fraud, actual malice or willful misconduct. 42 Pa. C.S.A. § 8550.

Because defamation claims do not fall within any of the eight exceptions to tort immunity for the City and its officials, the City is immune from defamation suits altogether. *Five Star Parking et al v. Philadelphia Parking Authority*, 662 F.Supp. 1053 (E.D. Pa. 1986). *Five Star* extended tort immunity to a private parking company, finding that the Political Subdivision and Tort Claims Act do not distinguish between authorized and unauthorized conduct of agencies. (*Five Star* at 1058). As the court explained in *Five Star*:

> To add to the Political Subdivision Tort Claims Act the word "authorized" would be no minor amendment. It is an amendment which presupposes that the Legislature intended that a court considering a tendered defense of governmental immunity would be required to conduct a mini-trial to determine whether the defendant governmental agency was acting *ultra vires*. And it is not all apparent why the Pennsylvania Supreme Court would suppose that the Legislature would have been drawn to the proposition that torts committed in the government's name by officials acting *ultra vires* would generate governmental liability where "authorized" torts should not. . . . It seems a fair inference that the Pennsylvania Supreme Court would find that the Legislature, rather than using 'authorized' *vel non* as the touchstone of immunity, eschewed such distinctions in structuring governmental immunity.

(*Id.*)

[3] Alston raises issues in his Statement of Errors concerning the Order dated October 25, 2006, in which this Court sustained the preliminary objections of Street, Bielli and the City of Philadelphia. However, Alston never appealed this Order and is therefore deemed waived on appeal.

Immunity allows "local agency employees to perform their 'official duties' without fear of personal liability, whether pursuant to state or federal law, so long as the conduct is performed during the course of their employment." *Renk v. City of Pittsburgh*, 537 Pa. 68, 73 (1994) (citing *Wiehagen v. Borough of North Braddock*, 527 Pa. 517, 594 (1991). The Order sustaining preliminary objections on the account that the RDA is immune from liability should be affirmed because the RDA is a city agency as defined by statute. (42 Pa. C.S.A. § 8501).

The February 2007 Order also dismissed claims against Frank Keel, Keel Communications and RDA on the basis that the statements made by Keel are protected as an opinion and are not defamatory.

Whether a particular statement constitutes fact or opinion is a question of law. *Braig v. Field Communications,* 310 Pa.Super. 569, 580, 456 A.2d 1366, 1372 (1983). In *Braig*, the Superior Court adopted §566 of the Restatement (Second) of Torts which states, "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." The Court further quoted *Comment b* and *c* which state,

> There are two kinds of expressions of opinion. The simple expression of opinion, or the pure type, occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character . . . . The second kind of expression of opinion, or the mixed type, is one which, while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication. Here the expression of the opinion gives rise to the inference that

> there are undisclosed facts that justify the forming of the opinion expressed by the defendant . . . *Id*. at 1372-1373.

The *Braig* court reiterated that "[i]f defendant states certain non-defamatory facts concerning the plaintiff, on the basis of which he expresses a defamatory opinion, *Comment c* to Section 556 recognizes that this 'pure' expression of opinion is absolutely privileged as a result of *Gertz*." (*Id*. (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974))). *Comment c*, in pertinent part, states:

> The distinction between the two types of expression of opinion, as explained in Comment b, therefore, becomes constitutionally significant. The requirement that a plaintiff prove that the defendant published a defamatory statement of fact about him that was false (See Section 558) can be complied with by proving the publication of an expression of opinion of the mixed type, if the comment is reasonably understood as implying the assertion of existence of undisclosed facts about the plaintiff that must be defamatory in character in order to justify the opinion. *A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable this opinion may be or how derogatory it is . . . .*" (*Id*. (emphasis added)).

The following is an excerpt of Keel's quote in THE WEEKLY:

> Some point out that while [plaintiff] is quick to criticize speculators snatching up properties on the cheap, he's collected more than a dozen addresses himself, paying less than market value for some of them.
>
> RDA spokesperson Frank Keel characterizes [plaintiff] as a world-class rabble-rouser. "*He is no more than a land speculator who cloaks himself in the guise of a community activist.*" (emphasis added).

Based on the facts printed in THE WEEKLY, Keel's statement is protected as a pure expression of opinion. The knowledge that Plaintiff has acquired multiple properties is a

disclosed, nondefamatory fact. In fact, real estate development is a principle focus of the AABRA.[4] Furthermore, *Strange Brew* itself reveals that Plaintiff speculates in real estate by investing in properties and is a community activist; facts Plaintiff himself confirms in his Amended Complaint and Exhibits. (Pl.'s Am. Compl. ¶ 27; n.3 of this opinion). As *Comment c* explains, whether or not the statement is true or unreasonable is irrelevant. The key is that the statement came from disclosed information. In this case, the fact that Plaintiff is a land speculator and a community activist came from *Strange Brew*. Keel's opinion about Plaintiff's property purchasing practices was based on these disclosed facts and does not imply the existence of undisclosed facts. Based on the subject-matter of the article, Plaintiff's participation in Brewerytown's real estate development, and Keel's role as representative of the RDA, Keel's comment about Plaintiff's purchasing pattern was related enough to his duties and to the purpose of this article that it makes Keel's comment a pure expression of opinion. Because Keel Communications and RDA did not publish Keel's comments, the only way that liability can attach to these entities is vicariously. However, Keel Communications and RDA cannot be vicariously liable for defamation were Keel's actions individually were not held to be defamatory. For these reasons, the February 2007 Order dismissing Keel, Keel Communications and RDA should be affirmed.

[4] *See* Ex. B 14 ("The AABRA plan, which we allowed Brewerytown CDC to adopt, was to have approximately 4 petitions signed by approximately 1,000 signatures each and then take these petitions to City Hall as proof that we represent the interests of the community. We would then negotiate with Councilman Clarke, the NTI office and the developers with the full authority of the people."); *See* Ex. B 18 ("Alston and other AABRA Board members deliver a consistent message regarding real estate, Taken from one of their pro-community, anti-gentrification posters, one message reads: "We truly welcome the world – diversity is an asset. But we reject displacement."); *See Id.* ("Essentially, AABRA encourages community members to invest in their neighborhoods by purchasing every property in sight, then sell only when there are no other choices available. We ask our community members to attempt to purchase properties form their neighbors for the price of back taxes and liens levied against the properties. We tell them to obtain mortgages to renovate the buildings and offer a mix of affordable and market-rate housing at each site.").

CONCLUSION

For the aforementioned reasons the Court did not commit an error of law nor abuse its discretion in granting Defendants Preliminary Objections to the Plaintiff's Complaint. This Court requests that the February 12, 2007 Order be affirmed.

BY THE COURT:

_____ _____

Date **ALLAN L. TERESHKO, J.**

cc:
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