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CIVIL DIVISION
Case No. 21-CV-00900

Jeffrey Norris et al v. Vermont Hemp Partners LLC et al

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment (Motion: 4)
Filer: David E. BondJeffrey NorrisLisa Norris
Filed Date: June 01, 2022

The motion is GRANTED IN PART and DENIED IN PART.

Plaintiffs Jeffrey and Lisa Norris have filed a motion for summary judgment seeking to dismiss the sole remaining counterclaim pending against them in the present action.

By way of brief background, Plaintiffs are farmers who entered a business relationship with Defendant Robert Mann and his company, and co-defendant, Vermont Hemp Partners, LLC in 2019. During the first year of this relationship, Plaintiffs grew hemp from seed, and Defendants sold the harvested product. The parties divided the resulting sales on a fifty/fifty basis. Plaintiffs grew hemp again in 2020 and sought to sell it through Defendants, but the relationship broke down. Plaintiffs allege in their complaint that this breakdown stemmed from Defendants' breach of contract, fraudulent misrepresentations, and a breach of the implied covenant of good faith and fair dealing. Defendants counter that this breakdown resulted from a lack of mutual understanding, a crash in the hemp market, problems with Plaintiffs' hemp crop, and Plaintiffs' unfounded mistrust and vilification of Defendants as bad actors. Parties do not dispute that Plaintiffs did not receive any compensation from their 2020 hemp harvest. Parties do dispute the nature of their 2020 business dealings and the existence of a contractual relationship and whether Plaintiffs' actions, post-dispute, have caused any harm to Defendants and their reputation.

To this last issue, Defendants allege that Plaintiffs made a series of statements that allegedly led Defendant Mann and his company to lose their reputation in Vermont and

eventually forced them to move from the State. The exact nature and type of statements are what the parties dispute, in part, in the present motion for summary judgment.

An actionable claim for defamation requires proof of the following:

> "'(1) a false and defamatory statement concerning [the plaintiff]; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm [to the plaintiff] so as to warrant compensatory damages.'"

Stone v. Town of Irasburg, 2014 VT 43, ¶ 61, 196 Vt. 356, 98 A.3d 769 (quoting *Lent v. Huntoon*, 143 Vt. 539, 546–47 (1983) (footnote omitted)).

In defamation claims, words matter. As a threshold consideration, defamatory statements must be described with some specificity to be actionable. *Sweet v. Roy*, 173 Vt. 418, 448 (2002). Identifying the precise statement(s) at issue is the first step. Only then can the court determine whether the defenses that have emerged in the law of defamation to protect true statements, opinions, and privileged conversations apply to protect Plaintiffs from liability. It is understanding the precise allegation(s) that allows the parties and the Court to separate the false and harmful statements that create liability for the speaker from speech that may simply be just crude or offensive or even justified in the moment.[1] See *Lent*, 143 Vt. at 546–47.

In the present case, much of the parties' briefing revolves around which of Plaintiffs' statements are allegedly false and defamatory. In their initial motion, Plaintiffs identify four groups of statements that they understand to be the basis of Defendants' claims:

1) E-mails and letters from March 2021 between Plaintiff Jeffrey Norris, Defendant Robert Mann, and one of Mann's partners, Gus Ibrahim;
2) 2021 text messages between Defendant Mann and Tyler Eckhart;
3) A social media post from Plaintiff Lisa Norris; and
4) The allegations made by Plaintiffs in the present action through their complaint and filings.

[1] The Restatement offers the following illustration on the point of justification—or rather, privilege: "A sees B, a stranger, about to drive off in a car that appears in every particular to be A's car. A calls to a policeman to prevent B from stealing his car. The privilege applies although the car actually belongs to B." Restatement (Second) of Torts § 594, cmt. h (1977, 2002 update).

In support of their motion, Plaintiffs make several arguments to demonstrate why the statements in each of these four groups of communications do not satisfy the first element of defamation and/or why they are privileged. For the first group of statements, Plaintiffs argue that the conversations expressed opinions and were privileged corporate communications. For the second group, Plaintiffs note that they cannot be held liable for communications between Defendant and a third party in which Plaintiffs were not involved (and their prior statements were not repeated). For the third group, Plaintiffs note that there has been no social media post produced to show what Lisa Norris is alleged to have said that was defamatory. For the fourth and last group, Plaintiffs note that any documents filed in the present action are protected by the privilege of litigation immunity and cannot give rise to liability. See *Pease v. Windsor Dev. Review Bd.*, 2011 VT 103, ¶ 28, 190 Vt. 639 ("'Litigation immunity is the common law doctrine that protects parties, witnesses, lawyers, and judges as participants in the judicial process from liability for acts and conduct related to a proceeding.'") (quoting *Eckert v. LVNV Funding LLC*, 647 F.Supp.2d 1096, 1102 (E.D. Mo. 2009)).

In their opposition brief, Defendants do not take issue with Plaintiffs' position on non-liability for third-party conversations (Group 2), the lack of evidence of a social media post (Group 3), or the litigation immunity applying to any filings by Plaintiffs in this action (Group 4). Instead, Defendants make two arguments with respect to the March 2021 e-mails (Group 1). First, Defendants argue that these e-mails are, in fact, defamatory because they use the phrase "due to the campaign of deceit and dishonesty" when referring to Defendant Mann. Second, Defendants argue that Plaintiffs' motion ignores a number of oral statements Plaintiffs allegedly made to third parties about Defendant Mann.

To identify the alleged oral statements, Defendants cite to three sources: (1) Robert Mann's Affidavit; (2) Robert Mann's Interrogatory Response #5; and (3) Robert Mann's Interrogatory Response #28.

In his Affidavit, Defendant Mann made the following statements:

> They texted me and others that I was "dishonest." Soon thereafter, the Norris's began telling people that I was "dishonest," "a thief," "a liar," "someone who could not be trusted" and "someone who should be avoided at all costs." Many people were telling me about the things the Norris's were saying: Joe and Dillon

> Solinsky, Tyler Eckhardt, Gus Abrahim [sic], other members of the VHP, friends who I know from around town. At one point, Joe and Dillon Solinsky advised that the Norrises asked them to help run me out of town ("He's a thief and we want you to help us run Bobby out of town.").

Mann Aff. at ¶ 7.

In Interrogatory Response #5, Defendants list the names of four individuals (Joey Avalon, Derrick Caffele, Robert Hill, and Todd Krohn) who they believe received allegedly defamatory statements from Plaintiffs about Defendants. According to Defendants' interrogatory response, the four witnesses "heard and witnessed threats, gunshots, drive by incidents, threats at the local stores, restaurants and at the post office, etc. made by people who had some knowledge of Norris spreading false information." Defendants also list Joe and Dillon Solinski as witnesses who "were called by Norris to come to the Norris home where they were asked to 'Help run Bobby Mann out of town.'"

In Interrogatory Response #28, Defendants identify Joe and Dillon Solinski as having witnessed Plaintiffs saying to other farmers in the area that Plaintiffs were "out to discredit Mann, accuse Mann of being a thief, and drive him out of town."

Plaintiffs, in their reply, point out that Defendants' factual sources for creating a disputed material fact are inadmissible and, therefore, insufficient to establish their burden of proof. See *Boyd v. State*, 2022 VT 12, ¶ 19 ("'Evidence which merely makes it possible for the fact in issue to be as alleged, or which raises a mere conjecture, surmise or suspicion, is an insufficient foundation for a verdict.'") (quoting *Fuller v. City of Rutland*, 122 Vt. 284, 289 (1961)). The problem with Defendants' factual citations to the record, according to Plaintiffs, is that they rely solely upon Defendant Mann's characterizations of others' statements. As Plaintiffs note, this is a hearsay issue, which is magnified by the need in a defamation claim to clearly and precisely identify the allegedly slanderous statements. Neither Defendant Mann's affidavit nor his responses to interrogatories are admissible as evidence under V.R.E. 802, which precludes hearsay statements from being admissible evidence or testimony, unless otherwise excepted.

As the Vermont Supreme Court states, "To survive a defendant's motion for summary judgment, the plaintiff must respond with specific facts to raise a triable issue and demonstrate sufficient admissible evidence to support a prima facie case." *Gates v. Mack Molding Co., Inc.*,

2022 VT 24, ¶ 14 (citing *Dulude v. Fletcher Allen Health Care, Inc.*, 174 Vt. 74, 79 (2002)). Defendants, as proponents of the counterclaim, therefore, have the burden of proof in this matter and in defending against this motion. As laid out in *Gates*, the burden can be broken into two parts. First, are there specific facts that raise a triable issue? As noted above, Defendants' claims based on statements in Groups 2, 3, and 4 did not surmount this burden. Second, is there sufficient admissible evidence to support the claim? It is at this point that Defendants' counterclaim, to the extent that it is based on allegedly oral statements of Plaintiffs, falls short. Defendants rely on Defendant Mann's affidavit and his responses to Plaintiffs' interrogatories to show they have admissible evidence to prove their claim. This evidence, however, is built from inadmissible hearsay.

The Vermont Supreme Court has consistently noted that the procedure for summary judgment should be liberally construed in favor of resolving litigation on the merits. *Stone v. Town of Irasburg*, 2014 VT 43, ¶ 57, 196 Vt. 356. This standard focuses on substance over form. In *Stone*, for example, the Supreme Court reversed a grant of summary judgment against a plaintiff who had failed to follow the provisions of V.R.C.P. 56(c) when the defendant had not followed the rules either but where there were more than sufficient factual records to support the plaintiff's claim. *Stone*, 2014 VT 43, ¶¶ 55—56 (noting that plaintiff's "critical evidence" was attached to an earlier motion). In the present case, Defendants have followed the form of Rule 56(c) by providing a statement of disputed facts and tying the provisions of that document to an affidavit. The problem lies with the substance of the record, which is effectively limited to Defendant Mann's expectations of what individuals might say if called to testify at trial to prove the essential elements of Defendants' claim(s) without accompanying affidavits or similar proof that would transform their statements from inadmissible hearsay into admissible evidence.

Defendants' proffer of his affidavit and interrogatory responses is insufficient to prove Defendants' defamation claims as a matter of law. As the Second Circuit has noted, an affidavit by a party about how another witness might testify does not "constitute competent evidence" for purposes of fulfilling a party's obligations under Rule 56. *Sarno v. Douglas Elliman-Gibbons &*

Ives, Inc., 183 F.3d 155, 160 (2d Cir. 1999).[2] Moreover, to the extent that Defendants did not have an affidavit from or immediate access to these witnesses, V.R.C.P. 56(d) provided them the opportunity to seek deferral to collect and present such evidence. Defendants have not sought such relief. Instead, they have rested their opposition on Defendant Mann's statements. This is insufficient as a matter of law, and Plaintiffs are, therefore, entitled to summary judgment on Defendants' claims of oral defamation (slander).

This leaves only the March 2021 e-mail messages. As collected in Plaintiffs' Exhibit E to their Statement of Undisputed Material Facts, there are three e-mails sent by Plaintiff Jeffrey Norris on March 8, 2021, March 9, 2021, and March 10, 2021, either to Gus Ibrahim alone or to both Gus Ibrahim and Robert Mann. In each of these e-mails, Mr. Norris used the phrase "deceit and dishonesty" or just the word "dishonest" in reference to Defendant Mann. The portions of the e-mails in which Plaintiff Norris used these phrases are reproduced below.

In his e-mails dated March 8 and 9 to "Gus and members of Vermont Hemp Partners LLC," Mr. Norris included the following statements:

> Per this statement, you are aware of the statements made by Robert Mann, representing Vermont Hemp Partners LLC, that he was testing in Burlington on September 16, 2020. Therefore my conclusion to this statement is that you are aware that Robert Mann was deceitful and dishonest in his business dealings. Why would Robert Mann make the statement with regard to testing? I can provide copies of text messages from Robert Mann if you require documentation of the false statements Robert Mann has made on behalf of Vermont Hemp Partners LLC.
>
> . . . .
>
> Due to the campaign of deceit and dishonesty in almost all of my business dealings with Robert Mann, representing Vermont Hemp Partners LLC, I cannot trust the statement that these seeds were leftover from the 2019 season.
>
> . . . .
>
> Yet again your response clearly shows the deceit and dishonesty of Robert Mann as I have the text messages showing Robert Mann stating the hemp had been sold.. . . .

[2] Although the Second Circuit is applying the federal rules of civil procedure in *Sarno*, the portions of the Federal Rule 56 at issue are nearly identical to V.R.C.P. 56. When the rules mirror each other, the Vermont Supreme Court allows the parties to look to federal precedent to aid interpretation. *Salatino v. Chase*, 2007 VT 81, ¶ 7, 182 Vt. 267.

Per the COA that you claim is my product tested on 9/10/2020 at Northeast Kingdom Hemp, does not show that the hemp product is hot. The delta 9 THC is well below the .3 threshold as well as the total THC is well below the 1.0 threshold. So once again it is hard to trust anything from Vermont Hemp Partners LLC as Robert Mann has proven time and time again to be deceitful and dishonest in his business dealings.

. . . .

This is not What Robert Mann stated and I do have copies of text messages to the contrary and once again a trail of deceit and dishonesty on the part of Robert Mann.

. . . .

I disagree with this statement, Robert Mann again in his campaign of deceit and dishonesty threw out various numbers and 2,000 plants is a very large discrepancy.

. . . .

I will state again, the campaign of deceit and dishonesty by Vermont Hemp Partners LLC leaves me with no choice but to have documentation as it is obvious that a lot of "incorrect statements" are being made on behalf of Vermont Hemp Partners LLC.

. . . .

Where was your inventory. I was never informed that the ziplock bag or any of my product was moved from the farm located on King George Farm Road. Robert Mann told Lisa she could pick up the bag but was still not able to produce it. This is also in a text message between Robert Mann and Lisa Norris that I can provide a copy if needed. This was also another potential sale that fell through for me because of dishonesty by Robert Mann. I would like to request a picture of this bag as well.

. . . .

I feel Robert Mann's business dealings with myself have been dishonest.

. . . .

Robert Mann representing Vermont Hemp Partners LLC, admitted to altering my hemp in the text message dated 2/3/2021. I can also provide you this text message as well. Once again Robert Mann can not be trusted as he has a history of deceit and dishonesty throughout all of our business dealings.

. . . .

At this point the only offer I will accept will be a cash offer and I am willing to take the fair market value for my hemp product. I will not take any product as I have suspicions that it has been altered and sadly I can no longer take you or

> Robert Mann at your word. It is clear that Robert Mann has an issue with deceit and dishonesty.

In his March 10 e-mail to the same recipients, Mr. Norris included the following:

> I understand how Robert Mann has put you in a difficult situation with his deceit and dishonesty.
>
> . . . .
>
> l will agree on the weight as you have stated in your last email dated today 3/10/21 (although the math you came up with and the math l have in text message from Robert Mann still does not equal out. Once again is this showing a trail of deceit and dishonesty on behalf of Vermont Hemp Partners LLC?)

Plaintiffs contend that they were privileged to make the statements regarding Defendant Mann's dishonesty and deceit. At the time these emails were sent, Mr. Ibrahim was a partner and co-owner of Defendant Vermont Hemp Partners, LLC. As Mr. Ibrahim states in a March 1, 2021 e-mail to Mr. Norris, "Any Business with the Hemp and Vermont Hemp partners will be only addressed to Bobby and myself . . ." This is where words matter: the context of these e-mails is that Mr. Norris is seeking payment for his 2020 hemp crop from Mr. Mann, Mr. Ibrahim, and Vermont Hemp Partners, LLC. Mr. Norris appears to be expressing frustration with what he perceives as inconsistent statements and positions, and his use of the phrase "deceit and dishonesty" serves, at times, as a transitional phrase, allowing Mr. Norris to pivot from Mr. Ibrahim's response back to his position. Notwithstanding this context, Defendants are correct that the phrases "deceit and dishonesty," when leveled at an individual, can rise to the level of a defamatory statement. See *Mauer v. Gadiel*, 2004 WL 2164947, at *2 (Conn. Sup. Ct. Aug. 27, 2004) ("In this case the allegations of dishonesty, deceit, incompetence and unreliability are purely gratuitous and highly inflammatory."). As such, these allegations were reasonably capable of conveying the defamatory meaning ascribed by Defendants.

Yet, the context of these statements is important for Plaintiffs' final argument of conditional privilege. As the Vermont Supreme Court recognized in *Lent*, a statement that is otherwise defamatory may be privileged if it is asserted to protect a party's legitimate business interests. *Lent*, 143 Vt. at 548–49. This conditional privilege is further described in the

Restatement (Second) of Torts in Sections 594 and 595. According to Section 594 of the Restatement,

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the publisher, and
>
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

RESTATEMENT (SECOND) OF TORTS § 594 (1977, 2022 update).

Section 595 of the Restatement continues in this vein and defines the conditional privilege as allowing the communication of a statement if the speaker has, based on the circumstances, "a correct or reasonable belief that":

> (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
>
> (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.

Id. § 595(1) (1977, 2022 update).

The Restatement further clarifies that a "generally accepted standard of decent conduct" includes whether:

> (a) the publication is made in response to a request rather than volunteered by the publisher or
>
> (b) a family or other relationship exists between the parties.

Id. § 595(2).

The undisputed facts of the March 8th, 9th, and 10th e-mails fit squarely into this privilege. The communications were part of an on-going back-and-forth between Plaintiff Norris and individuals whom he understood at the time were his business "partners." The statements were

made at a point when Plaintiff Norris believed that his business expectations were, rightly or wrongly, being frustrated in a manner that was inconsistent with his understanding of the situation. The e-mails referenced concerns about testing of the hemp, whether the hemp had been mixed with other hemp, and even the quality of the seeds. Plaintiff Norris expressed substantial concern and sought in each exchange to express and amplify these concerns and his overarching message that he believed he and his wife were entitled to payment for their crop that was in the possession of Defendants.

However, the nature of the parties' business relationship is disputed in this case. If the Plaintiffs were not, for example, in an actual business relationship with Defendants, then their statements accusing Defendant Mann of "deceit and dishonesty" would not be privileged. Given that a jury could find that there was no business relationship, and by extension no privilege, summary judgment is inappropriate at this time. This is because the application of the conditional privilege will ultimately depend on the factfinders' determination of the nature of the parties' business relationship, which involves disputed issues of fact.

Even if there was no factual dispute as to the Parties' business relationship and Plaintiffs' right to assert this conditional privilege, the inquiry does not end with the assertion of the conditional privilege. As the Vermont Supreme Court has ruled, once a conditional privilege is asserted and established in a defamation case, the party prosecuting the claim of defamation may defeat the privilege by showing evidence of malice or recklessness. *Skaskiw v. Vt. Agency of Agr.* 2014 VT 133, ¶¶ 11–14, 198 Vt. 187; see also *Bowles v. O'Connell*, 2018 WL3827141, at *6–7 (D. Vt. Aug. 10, 2018) (after assertion of conditional privilege, the issue of material fact shifts to whether party acted recklessly or maliciously). In the present case, Defendants' filings have asserted enough admissible evidence in support of a claim of malice or recklessness to create a factual dispute as to whether Plaintiffs acted with malice or recklessness in confronting Defendants and making the "deceit and dishonest" allegations. This is sufficient, as well, to prevent summary judgment on this portion of Defendants' defamation claims.

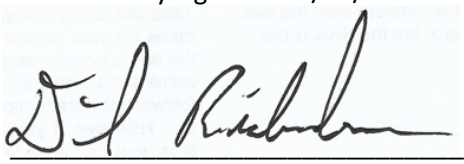
For these reasons and the analysis provided above, the Court finds that Defendants have raised a sufficient factual dispute about the conditional privilege to proceed to a jury, and,

therefore, summary judgment on Defendants' claim of defamation with regard to the March 8th, 9th, and 10th e-mails cannot be resolved as a matter of law on summary judgment.[3]

ORDER

Based on the foregoing, the Court grants Plaintiffs' Motion for Summary Judgment on Defendants' defamation claims for both oral and written statements alleged by Defendants to be defamatory, with the exception of the March 8th, 9th, and 10th e-mails referenced above. Defendants have raised sufficient issues of fact with regard to the March 8th, 9th, and 10th e-mails, which must go to an evidentiary proceeding and a factfinder to resolve.

Electronically signed on 8/24/2022 6:18 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge

[3] Plaintiff also raises an issue on the question of damages but given that the bulk of Defendants' damage allegations are tied to their assertions of reputational damage, this is an issue that is fundamentally disputed and cannot be resolved without findings of fact.