VERMONT SUPREME COURT
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Case No. 23-AP-404

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

JUNE TERM, 2024

Zygmunt Joe Dever* v. Christopher Dugan et al.	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Civil Division
	}	CASE NO. 22-CV-04544
		Trial Judges: Michael R. Kainen; David A. Barra

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals pro se from the dismissal of his complaint against defendants. We affirm.

I. Proceedings Below

Plaintiff sued defendants for defamation. To state a defamation claim, a plaintiff must allege:

> (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.

Skaskiw v. Dep't of Agric., 2014 VT 133, ¶ 8, 198 Vt. 87 (quotations omitted).

Defendants filed three separate motions to dismiss, each of which was granted. The court determined in each case that, taking the alleged facts in plaintiff's amended complaint as true, plaintiff failed to adequately support his defamation claims. We summarize each decision below, beginning with defendant Dugan.

A. Defendant Dugan

In reaching its decision, the court recounted the following facts. Plaintiff was performing work at Amy's Bakery in Brattleboro. Defendant Amy Comerchero owned the business; Dugan owned the property where the business was located. Plaintiff alleged in his complaint that

Dugan stated "that, as owner of [the] property, he had the right to approve or refuse, anyone doing work in or on his building," and "he would not allow [plaintiff] to work in his building" because "[plaintiff] had sued people for whom he had worked in the past," and "there was a good chance" that plaintiff would sue them and "he didn't want to take that chance." According to plaintiff, Dugan told Comerchero that if she did not terminate plaintiff immediately, he would evict her. Plaintiff also alleged that Dugan gave Comerchero a list of cases that plaintiff had been involved in for use in a breach-of-contract case that plaintiff brought against her. While plaintiff referred to this list of cases as "malicious defamation," there was no allegation that plaintiff was not in fact involved in these suits.

The court concluded that plaintiff failed to allege that Dugan made any false and defamatory statement concerning him. Taking the factual allegations contained in the complaint as true, the court considered Dugan's statement about who could work in his building and whether he would evict Comerchero to be irrelevant to whether there was an untrue or defamatory statement of fact. It found the statement that "[plaintiff] has sued people for whom he worked in the past" to be a true statement. The court also noted that "the publication need not be literally true to receive protection. It is enough if the publication is substantially true." 2 D. Dobbs et al., Law of Torts, Practitioner Series § 410 (citing Williams v. WCAU-TV, 555 F. Supp. 198 (E.D. Pa. 1983)).

The court found that the second part of the statement, "there is a good chance that [plaintiff] would sue" Comerchero or Dugan or both, and "he didn't want to take that chance" did not assert a fact. It was an opinion about what the future might hold. The court emphasized that not every derogatory statement about another person constituted defamation; expressions of opinion were protected by the First Amendment of the U.S. Constitution.

The court also rejected plaintiff's assertion that calling him "litigious" was slanderous. It noted that plaintiff made no specific allegation that Dugan published such statement at a particular time. The closest he came was in his answer to the motion to dismiss, where he referenced Comerchero presenting a list of his prior cases in court as "proof" that plaintiff was litigious. The court explained that Dugan did not make that statement, and in any event, any statement made in court would be protected by the litigation privilege. Finally, the court noted that a response to a motion to dismiss was not an opportunity to add facts. The court looked to a definition of the term "litigious" and concluded that, while the term might have a derogatory implication in common usage, considering someone "litigious" was a statement of opinion, not fact. The court found that particularly true in the context of this case. Thus, even if the amended complaint had identified a specific time that Dugan published a statement that plaintiff was litigious, it would be an expression of opinion, which was not actionable. The court found that the balance of plaintiff's complaint contained irrelevant assertions or conclusory allegations. Because plaintiff's factual allegations did not establish the first element of his defamation claim, the court dismissed the complaint as to defendant Dugan.

B. Defendant Comerchero

The court found that plaintiff's amended complaint similarly did not allege any specific statement that Comerchero made. He asserted that she made "defamatory" statements but did not identify what statements were made, or when, where, or to whom they were made. His failure to do so was fatal to the complaint. While plaintiff referred to a list of cases prepared by Dugan, he did not allege facts that could support a conclusion that the list itself could be a defamatory statement made by Comerchero, nor did he allege any other statements that satisfied

the necessary elements. The only alleged statement from her was that Dugan said he would evict her if she did not terminate plaintiff from his position. Plaintiff offered no explanation how this statement could be defamation by Comerchero against plaintiff. Thus, because plaintiff failed to allege specific facts supporting each of the required elements of defamation, the court granted Comerchero's motion to dismiss.

C. Defendant Banks

Defendant Banks is a state fire inspector. Plaintiff alleged that he discovered safety issues at Amy's Bakery and complained to the State of Vermont's Division of Fire Safety in late June 2021. Banks issued a report that dismissed his complaint as unfounded. Plaintiff alleged that Banks defamed him by filing his report. In a March 2023 pleading, plaintiff asserted that in June 2021, Banks inspected two properties and "preemptively dismissed the complaint in his hand, then uttered my name, [and] slandered me with false accounts of my conduct while performing the obligations of my building trade!" The court explained that while plaintiff offered conclusory assertions about Banks slandering him, he failed to identify any specific statement in his complaint. The closest he came was asserting that Banks dismissed plaintiff's complaints as meritless, although Banks' report did not attribute any complaints to plaintiff. In addition to the absence of any actual defamatory statement, the court found that Banks was entitled to a limited privilege as a state official exercising his official duties. Skaskiw, 2014 VT 133, ¶ 11. The court explained that when a plaintiff accused a state official of defamation in the course of his duties, the plaintiff must show that the defendant knew the statement was false or that it was made with reckless disregard for its truth or falsity. Plaintiff did not allege that Banks made a knowingly false statement or reckless statement; indeed, he identified no specific statement at all. Because plaintiff failed to allege any facts or circumstances that would entitle him to relief, the court dismissed his complaint against Banks.

II. Arguments on Appeal

Plaintiff argues on appeal that he is not litigious and that he was entitled to relief against defendants.

Our standard of review is well-established:

> We review decisions on a motion to dismiss de novo under the same standard as the trial court and will uphold a motion to dismiss for failure to state a claim only if it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief. We assume as true all facts as pleaded in the complaint, accept as true all reasonable inferences derived therefrom, and assume as false all contravening assertions in the defendant's pleadings. Our role in reviewing the trial court's decision on such a motion is limited to determining whether the bare allegations of the complaint are sufficient to state a claim.

Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6, 198 Vt. 420 (quotations and citations omitted). A complaint must contain more than mere conclusory allegations or "legal conclusions masquerading as factual conclusions." Colby v. Umbrella, Inc., 2008 VT 20, ¶ 10, 184 Vt. 1.

We find no error here. We agree with the trial court that plaintiff failed to allege sufficient facts to establish a defamation claim against each defendant. He failed to identify any

specific false and defamatory statements in his amended complaint that any of the defendants made about him, among other shortcomings. We further agree with the trial court that the term "litigious" is an expression of opinion.

Plaintiff offers no persuasive argument to the contrary. Plaintiff fails to show that he alleged a tortious interference with contract claim below. See In re S.B.L., 150 Vt. 294, 297 (1988) (explaining that appellant bears burden of demonstrating how trial court erred warranting reversal, and Supreme Court "will not comb record searching for error"); see also V.R.A.P. 28(a)(4) (appellant's brief should explain what issues are, how they were preserved, and what appellant's contentions are on appeal, with citations to authorities, statutes, and parts of record relied upon). He presents his version of events but fails to show that his complaint contained sufficient factual allegations to support a defamation claim against defendants. Merely asserting that a party has made "offensive, libelous and slanderous" statements is insufficient. We note that plaintiff cannot present new evidence or claims on appeal as he appears to do in his brief. Hoover v. Hoover, 171 Vt. 256, 258 (2000) (explaining that this Court's "review is confined to the record and evidence adduced [below]," and "[o]n appeal, we cannot consider facts not in the record"). We have considered all the arguments discernible in plaintiff's brief and find them all without merit.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

Nancy J. Waples, Associate Justice