COLORADO COURT OF APPEALS

Court of Appeals No. 15CA0933
City and County of Denver District Court No. 15CV30856
Honorable R. Michael Mullins, Judge

Aminokit Laboratories, Inc., a Colorado corporation, d/b/a Addiction Treatment Centers XL; and Tamea Rae Sisco,

Plaintiffs-Appellants,

v.

Jerome M. Reinan; and Law Office of J.M. Reinan P.C., a Colorado professional corporation,

Defendants-Appellees.

ORDER AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE BOORAS
Graham and Kapelke*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 4, 2016

Miller & Law, P.C., James F. Scherer, Littleton, Colorado, for Plaintiffs-Appellants

Gordon & Rees, LLP, John M. Palmeri, John R. Mann, Edward J. Hafer, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2015.

In this defamation case, Aminokit Laboratories, Inc., doing business as Addiction Treatment Centers XL, and Tamea Rae Sisco (collectively Aminokit), appeal the trial court's order granting Jerome M. Reinan and Law Office of J.M. Reinan, P.C.'s motion to dismiss. We affirm and remand for a determination of reasonable attorney fees and costs associated with defending the action.

I. Background

Sisco is the owner and principal of Addiction Centers, XL, a drug and alcohol addiction center. Jerome M. Reinan is an attorney and the owner and principal of Law Office of J.M. Reinan, P.C., a law firm.

In related litigation, Reinan represented former patients of Aminokit in two civil actions against Aminokit. In those cases the plaintiffs alleged, among other things, that Aminokit defrauded them. Reinan posted the following on his law firm's blog about the other two suits:

> (a) the State of Colorado had caused the issuance of a cease and desist order, directed to Ms. Sisco, and that Ms. Sisco continued to willfully violate said cease and desist order;
>
> (b) Ms. Sisco had been involved in the trafficking and distribution of unlawful

> substances, and associated with convicted felons;
>
> (c) Ms. Sisco had been previously sued for fraud and deceptive trade practices in prior identified civil lawsuits;
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> (d) the plaintiff in one of the pending civil actions brought by Mr. Reinan had been subjected to a "horrific" series of abuse and neglect while in Treatment Centers XL, including dangerous and improper detoxification at an adjacent motel, verbal and sexual abuse, and medical neglect;
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> (e) Aminokit had provided keys to the motel room of the plaintiff in one of the civil actions brought by Mr. Reinan to employees and agents of Treatment Centers XL, after Treatment Centers XL had been made aware that one of their employees or agents had sexually assaulted Mr. Reinan's client; and
>
> (f) during the course of his treatment at Treatment Centers XL, the plaintiff in the other civil action brought by Mr. Reinan had been subjected to repeated humiliation, fraud, and medical experimentation.

In addition to the blog posting, Reinan posted hyperlinks to the complaints in the two related civil suits.

In this case, Aminokit sued Reinan alleging that the blog posting was defamatory and that Reinan intentionally interfered with Aminokit's prospective business relations. Later, Aminokit filed an amended complaint, adding a third claim that Reinan

violated the Colorado Consumer Protection Act. Both complaints also alleged, among other things, that Reinan used the blog posting to attract potential clients.

Reinan moved to dismiss for failure to state a claim, arguing that the statements were privileged under Restatement (Second) of Torts section 586 (Am. Law Inst. 1977) (the litigation privilege). Reinan also argued that the claims should be dismissed because the incremental harm doctrine applied and that the blog posting was also privileged under the fair report privilege.

The trial court granted the motion, agreeing with the arguments raised.

On appeal, Aminokit challenges only the trial court's conclusion that that Reinan's blog posting is not actionable; Aminokit does not argue that the complaints themselves are actionable.

II. Defamation and Privilege Defenses

Aminokit contends that Reinan's blog posting was not subject to the litigation privilege. We disagree.

A. Standard of Review

We review de novo a trial court's ruling on a C.R.C.P. 12(b)(5) motion. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). In doing so, we accept all allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Warne v. Hall*, 2016 CO 50, ¶ 24 (adopting the "plausible on its face" standard set out in *Iqbal* and *Twombly*).

B. Defamation

"Defamation is a communication that holds an individual up to contempt or ridicule thereby causing him or her to incur injury or damage." *Zueger v. Goss*, 2014 COA 61, ¶ 13. The elements for defamation are: "(1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of

special damages to the plaintiff caused by the publication." *Lawson v. Stow*, 2014 COA 26, ¶ 15 (quoting *Williams v. Dist. Court*, 866 P.2d 908, 911 n.4 (Colo. 1993)).

Among other defenses, there are two types of privileges that can be raised as a defense against defamation: a qualified privilege and an absolute privilege. "A qualified privilege exists for communications by a party with a legitimate interest or duty to persons having a corresponding interest or duty in communications promoting legitimate individual, group, or public interests." *McIntyre v. Jones*, 194 P.3d 519, 529 (Colo. App. 2008) (quoting *Williams v. Boyle*, 72 P.3d 392, 400 (Colo. App. 2003)). A qualified privilege can be lost by showing that a defendant communicated a defamatory statement known to be false or made with a reckless disregard for its veracity. *See id.*

An absolute privilege, in contrast, is a complete defense. *See Merrick v. Burns, Wall, Smith & Mueller, P.C.*, 43 P.3d 712, 714 (Colo. App. 2001) ("This absolute immunity applies to actions in a legal proceeding no matter how erroneous, how injurious the consequences, or how malicious the motive."); *see also Simpson Strong-Tie Co., Inc. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 22

(Tenn. 2007) (noting that "an absolute privilege is, in effect, a complete immunity"). Statements made by attorneys, in some instances, can qualify as an absolute privilege. Restatement (Second) of Torts section 586 provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

This litigation privilege "protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity." *Id.* at § 586 cmt. a.

In order to qualify as an absolute privilege in this context, the alleged defamatory statement must be made in reference to the subject matter of the proposed or pending litigation. *Club Valencia Homeowners Ass'n, Inc. v. Valencia Assocs.*, 712 P.2d 1024, 1027 (Colo. App. 1985). In the case of proposed litigation, "[c]ommunications preliminary to a judicial proceeding are protected by absolute immunity only if they have some relation to a

proceeding that is actually contemplated in good faith." *Merrick*, 43 P.3d at 714.

If there is a question of whether an alleged defamatory statement relates to litigation, "[a]ll doubt should be resolved in favor of its relevancy or pertinency. No strained or close construction will be indulged to exempt a case from the protection of privilege." *Club Valencia*, 712 P.2d at 1027.

In addition to the requirement that the alleged defamatory statement be related to the subject matter of proposed or pending litigation, both the maker and recipient "must be involved in and closely connected with the proceeding." *Id.*

The application of the privilege set out in the Restatement is a question of law for the court. *Merrick*, 43 P.3d at 713.

C. Application

Aminokit contends that (1) Reinan did not publish the blog posting in relation to proposed or pending litigation and (2) the recipients of the blog posting — the general public, via the Internet — were not involved in and closely connected with the proceeding. We reject these contentions

1. Relation to a Judicial Proceeding

Under *Club Valencia*, the privilege contemplates "anything that possibly may be relevant." 712 P.2d at 1027. Here, the blog posting contained information about other suits against Aminokit. Thus, they were relevant to those suits and therefore related to a judicial proceeding.

2. The Recipients' Relationship to the Proceeding

The complaint alleges that Reinan published the blog posting, in part, to attract clients. Specifically, it alleged:

> The firm website blog materials referenced above were accompanied by, or linked to, solicitations by defendant Reinan, soliciting persons to retain him to bring legal action against the plaintiffs, as well as general business solicitations.

Thus, Reinan published the blog to recipients that might be connected to a future lawsuit against Aminokit. These types of communications are protected by the litigation privilege. *See id.* at 1028 (Letters sent to home owners — potential clients — are protected by the litigation privilege because, in part, "a lawsuit involving the homeowners' association would undoubtedly involve the interests of individual homeowners."); Restatement (Second) of

Torts § 586 cmt. e (noting that an alleged defamatory statement is shielded by the litigation privilege "only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration"). That the blog posting could be seen by others not having an interest in the litigation has no bearing on this outcome. There is no requirement that the posting be made exclusively to those connected to the litigation. *See Club Valencia*, 712 P.2d at 1027.

Nonetheless, Aminokit relies on *Seidl v. Greentree Mortgage Co.*, 30 F. Supp. 2d 1292, 1315 (D. Colo. 1998), for the proposition that an attorney's statements made via the Internet were not directed towards recipients who were involved in or connected with a judicial proceeding or preliminary to a judicial proceeding and thus not privileged.[1] The *Seidl* court noted, in reference to the attorney's statements, "[t]hese communications were made for the express purpose of publicizing the lawsuit. Their dissemination via

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[1]Although *Seidl* applies Colorado law as set out in *Club Valencia* and the Restatement, it is not binding on this court. *See Kohn v. Burlington N. & Santa Fe R.R.*, 77 P.3d 809, 811 (Colo. App. 2003) ("The decisions of lower federal courts may be persuasive, but they are not binding upon us.").

the Internet created a world-wide audience. There is no evidence that any of the viewers had any connection to the proceeding, except as potentially concerned observers." *Id.* This case is distinguishable.

As noted above, Aminokit's complaint alleges that Reinan's blog posting was "accompanied by, or linked to, solicitations [for legal action against Aminokit]." Thus, the blog posting was not limited to only "potentially concerned observers," as in *Seidl*, but instead extended to potential plaintiffs, who might have an interest in or otherwise be connected to the suits filed by Reinan. Based on the allegations in the complaint, Reinan did not post the blog solely for the purpose of publicizing the cases. Because the blog posting was, in part, directed towards soliciting potential clients, it is protected under the litigation privilege. *Accord Finkelstein, Thompson Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 336 (D.C. 2001) (holding that an attorney's statements made during a pre-retention meeting to a potential client protected under the litigation privilege), *overruled on other grounds by McNair Builders, Inc. v. Taylor*, 3 A.3d 1132 (D.C. 2010); *Samson Inv. Co. v. Chevaillier*, 988 P.2d 327, 331 (Okla. 1999) (same); *Simpson Strong-*

Tie Co., 232 S.W.3d at 24 (holding that solicitations of potential clients qualify under the litigation privilege when the attorney has a client or an identifiable prospective client at the time the communication is published).

Viewing the complaint in the light most favorable to Aminokit and accepting the allegations as true, we conclude that Aminokit has not stated a facially plausible claim for relief.

III. Reinan's Remaining Contentions

Because we conclude that the blog posting was protected by the litigation privilege, we need not address whether the trial court erred by granting Reinan's motion to dismiss on the grounds that the incremental harm doctrine barred the suit or that the fair report privilege applies.

IV. Reinan's Request for Attorney Fees and Costs on Appeal

Reinan requests attorney fees pursuant to section 13-17-201, C.R.S. 2015, which provides for an award of attorney fees if a defendant prevails in dismissing a tort action under C.R.C.P. 12(b). Reinan also requests costs pursuant to C.A.R. 39(a)(2) which allows for costs to be taxed against the appellant if a judgment is affirmed. We agree that Reinan is entitled to such an award and remand the

case to the trial court for a determination of reasonable attorney fees and costs associated with defending the action.

V. Conclusion

Reinan's blog posting and hyperlinks to the complaints in the related cases were privileged under the litigation privilege. Therefore, the trial court did not err by granting Reinan's motion to dismiss. The order is affirmed, and the case is remanded for a determination of reasonable attorney fees and costs associated with defending the action.

JUDGE GRAHAM and JUDGE KAPELKE concur.

Court of Appeals

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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(l), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: June 30, 2016

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