VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF DINWIDDIE

DENNIS F. HARRUP III, individually,
Plaintiff,

v. Case No. CL21-463

COLLISON F. ROYER
ROYER CAR
and
BLUE RIDGE BANK, N.A.,
Defendants.

ORDER

This matter comes before the Court on Defendants', Blue Ridge Bank, N.A., Collison F. Royer, and Royer Caramanis, PLC, Demurrers filed to the Plaintiff's Complaint. The Court has considered the Defendants' motions and memoranda in support, the Plaintiff's Complaint and memorandum, and the arguments of counsel. The Court is prepared to rule on the Demurrer.

I. Background.

On July 7, 2015, Dennis F. Harrup III ("Plaintiff") in his capacity as owner of Harrup Real Estate, LCC signed a Deed of Trust with Blue Ridge Bank, N.A. in exchange for a $1,023,200 loan. The Deed of Trust between Harrup Real Estate and Blue Ridge Bank created liens on several properties owned by Harrup Real Estate throughout Petersburg, Richmond, and Lancaster, including the property located at 216 N. Jefferson Street ("Property"). The parties also signed an Assignment of Rents for the properties conveyed in the Deed of Trust. Both the Deed of Trust and Assignment of Rents were recorded by an agent of Harrup Real Estate in the Petersburg Clerk's Office.

Despite the Deed of Trust's restrictions on the sale of lien-subject properties, Harrup Real Estate sold the Property to New Costa Properties, LLC on March 12, 2020. Mark A.

Fleckenstein, Esq. prepared the ALTA Commitment of Title Insurance issued by Bon Air Title Agency. However, the title search did not reveal the liens Blue Ridge Bank had on the Property. This clear inaccuracy did not deter the Plaintiff. He signed the Deed of Bargain and Sale in his capacity as owner of Harrup Real Estate conveying the Property to New Costa Properties. That same day, he signed a No Financing Agreement in his *personal* capacity recognizing that *he* owned the Property without any liens or encumbrances.

On May 27, 2020, Mr. Collison F. Royer, an attorney at Royer Caramanis, PLC, sent the Plaintiff a letter on behalf of Blue Ridge Bank. Blue Ridge Bank discovered the Plaintiff sold the Property to New Costa Properties without adhering to the provisions in the Deed of Trust and asserted that the representations made by the Plaintiff in the No Financing Agreement were knowingly false. The Plaintiff filed a Complaint against Blue Ridge Bank, Mr. Royer, and Royer Caramanis one year later, alleging two counts: defamation *per se* and insulting words.

On March 2, 2022, this Court granted the Defendants' Motions Craving Oyer, thereby including the five documents originally attached to the Royer Letter in the Plaintiff's Complaint. All three Defendants filed Demurrers to the defamation *per se* and insulting words counts. Mr. Royer and Royer Caramanis additionally filed a Plea in Bar and a Motion for Sanctions.

II. Standard of Review.

The Court must review the Defendants' Demurrers to the Plaintiff's Complaint in light of settled Virginia law. In Virginia, it is well established that "the purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted." *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013) (quoting *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 556 (2001)). A demurrer readily admits to the truth of all properly pleaded material facts. *See Glazebrook v. Board of Supervisors*, 266 Va.

550, 554 (2003). Additionally, "all reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382 (1997) (quoting *Fox v. Custis*, 236 Va. 69, 71 (1988)). Finally, a demurrer is limited to "the four corners" of the document from which to obtain properly pleaded material facts. *See One Stop Pet, Inc. v. Eastern Business Machines, Inc.*, 29 Va. Cir. 221, 223 (1999).

III. Analysis.

i. Defamation Per Se

On Count I, the Defendants maintain that the Plaintiff failed to state a defamation *per se* claim against Blue Ridge Bank, Mr. Royer, and Royer Caramanis.

Under the common law, statements which tend to injure an individual's business or profession are actionable as defamation *per se*. *See Carwile v. Richmond Newspaper, Inc.*, 196 Va. 1, 7 (1954); *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 518 (1944). A plaintiff claiming defamation *per se* must demonstrate that: (1) there was a publication about the plaintiff or his business, (2) the publication contained an actionable statement; and (3) the defendant(s) had the request intent to defame the plaintiff. *See Chapin v. Greve*, 787 F. Supp. 557, 562 (E.D.Va. 1992), *aff'd sub. nom Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) (quoting Restatement (Second) of Torts § 559).

The Plaintiff argues that the statements in the Royer Letter affect his reputation as the owner of Harrup Real Estate. He contends that the letter was sent to more parties than strictly necessary, constituting its publication. Although he does not indicate specific defamatory statements in the letter, he argues they exist. Finally, he believes the Defendants had the intent to defame him as punishment for his failure to pay his debts.

The Court is focused on the second element of defamation *per se* since the determination of an "actionable statement" can resolve this matter. *See Chaves v. Johnson*, 230 Va. 112 (1985) (declaring an actionable statement as a matter of law must be determined by the courts). An actionable statement must be both false *and* defamatory. *See Chapin*, 787 F. Supp. at 562. Therefore, truth is an absolute defense to a defamation claim. *See Freelander v. Edens Broadcasting, Inc.*, 724 F.Supp. 221, 226 (E.D.Va. 1990).

When a court grants oyer over documents, "the court ruling on a demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 384 (1997). Therefore, the Deed of Trust, Assignment of Rents, Deed of Bargain and Sale, Title Insurance Commitment, and No Financing Affidavit are rightly absorbed into the "four corners" of the Complaint and must be accepted as true for purpose of ruling on the Demurrer. *See One Stop Pet Shop,* 29 Va. Cir. at 223; *Chapin*, 787 F. Supp. at 562.

As the five above documents are now contained in the Complaint, it follows that the defamatory statement contained in the Royer Letter cannot be actionable because the Plaintiff failed to allege facts demonstrating how the alleged defamatory statement was false. The Plaintiff represented in the No Financing Agreement that he owned the Property free from liens. However, as made clear from the four other documents, both statements are inaccurate. Harrup Real Estate, not the Plaintiff, owns the Property and Blue Ridge Bank has a significant lien on the Property. Therefore, the Royer Letter's claims that the Plaintiff made knowingly false representations in the No Financing Agreement are not defamatory, but rather substantiated by the supplementary documents.

Having found that the statements in the Royer Letter are not actionable because the Plaintiff failed to allege facts that the statement was false, the Court need not address the remaining elements of defamation *per se*. The Demurrers on Count I are granted for Plaintiff's failure to state a defamation *per se* claim.

a. Perjury

Additionally, the Court wishes to emphasize for the parties, and their respective attorneys, why potential criminal penalties, namely perjury, are not at issue in this proceeding. The Plaintiff's Memorandum in Opposition claims the Royer Letter's allegation of false representations in the No Financing Agreement places the Plaintiff in danger of a perjury charge, thereby rationalizing the Plaintiff's defamation *per se* and insulting words claims. However, such penalties are impossible under this set of facts.

Under Va. Code Section 18.2-434: "if any person in a written declaration, certificate, verification, or statement under penalty of perjury pursuant to Section 8.01-4.3 willfully subscribes as true any material matter which he does not believe is true, he is guilty of perjury." Va. Code Section 8.01-4.3 ensures that there is written documentation regarding the hazard of perjury in the declaration, certification, verification, or statement. The standard example given is: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct."

As evidenced by a cursory glance at the No Financing Agreement, there is no such threat of perjury placed upon the Plaintiff. Instead, the No Financing Agreement was merely *acknowledged* by a notary. This does not negate the offense of false representation but does repudiate potential criminal penalties. Therefore, there is no claim for perjury in this matter and no defamation *per se* claim can be formed on that theory.

ii. Insulting Words

On Count II, the Defendants argue the Plaintiff failed to state a claim for insulting words against Blue Ridge Bank, Mr. Royer, and Royer Caramanis.

Va. Code Section 8.01-45 states: "All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace." This statute was originally enacted in 1849 to prevent dueling, so it does not require the publication of the insulting words. *See W.T. Grant Co. v. Owens*, 149 Va. 906, 913 (1928); *O'Neil v. Edmonds*, 156 F.Supp. 648, 651(E.D.Va. 1958). Today, the statute is used to subject "those who are hasty of temper and inconsiderate of the feelings of others" to damages and is often brought alongside defamation *per se* claims. *See Hines v. Gravins*, 136 Va. 313, 320 (1922).

Virginia courts use a two-part test to determine if a Plaintiff has stated a claim for insulting words. First, a Plaintiff must plead words that would be construed as insults in their "usual construction" and as commonly accepted in the community. *Goulmamine v. CVS Pharmacy, Inc.*, 138 F.Supp.3d 652, 668 (E.D.Va. 2015). Second, a Plaintiff must demonstrate that the words "tend towards violence and breach of the peace. *Id.* If either or both of these factors are not met, there is no cause of action for insulting words. *Id.*

It is evident the Plaintiff did not demonstrate a claim for insulting words. In common parlance and with their "usual construction," none of the words in the Royer Letter would lead a rational person to violence, regardless of the truth or falsity of the accusations. The statute is not designed to protect against any and all allegations. Rather, it protects only those so heinous, loathsome, and provoking that unsafe situations could logically follow. *See Goulmamine*, 138 F.Supp.3d at 668. The Royer Letter sets out facts, accusations, and demands in an unprovocative

manner threatening only litigation, not a breach of the peace. Furthermore, although false accusations of a crime are insulting and tend towards violence and breach of the peace under Virginia law, no criminal accusations were levied against the Plaintiff in the Royer Letter. *See Trial v. General Dynamics Armament and Technical Products, Inc.*, F.Supp.2d 654 (2010) (acknowledging that the Virginia Supreme Court views false criminal accusation stated in writing as insulting words). Finally, like in defamation *per se*, truth is a complete defense for insulting words. *See Alexandria Gazette Corp. v. West*, 198 Va. 154, 159 (1956) (referencing *Rosenberg v. Mason*, 157 Va. 215, 228 (1931)). As established in the Court's defamation *per se* analysis, because the Plaintiff did not put forth evidence of falsity regarding the statement made in the Royer Letter, this easily negates any potential insulting words claim.

For the above reasons, the Court grants the Defendants' Demurrers on Count II, insulting words.

iii. Doctrine of Futility

Moreover, the Court is not convinced it should grant the Defendants' Demurrers and further grant the Plaintiff leave to amend his Complaint. Supreme Court of Virginia Rule 1:8 controls the Court's determination of this issue. It states: "[n]o amendments shall be made to any pleading after it is filed save by leave of the court. Leave to amend shall be liberally granted in furtherance of the ends of justice." Amendments to pleadings, therefore, "are not a matter of right," but rather within the discretion of the court and should be given freely. *See Ford Motor Co. v. Benitez*, 273 Va. 242, 254 (2007) (citing *Mortarino v. Consultant Eng'g Servs.*, 251 Va. 289, 295-96 (1996)); *Jacobson v. Southern Biscuit Co.*, 198 Va. 813, 817 (1957) ("leave to amend shall be liberally granted in furtherance of the ends of justice."); *Peterson v. Castano*, 260 Va. 299, 302 (2000).

However, "[d]emonstrated futility may lead the Court to conclude, in the exercise of its discretion, that the ends of justice would not be advanced" by allowing amendment. *Booher v. Board of Supervisors of Botetourt County*, 65 Va. Cir. 53, 60 (2004) (citing *Tsapel v. Anderegg*, 51 Va. Cir. 139, 142 (1999) (denying the plaintiff's motion to amend because such amendment "would not survive" the facts stipulated alongside the defendant's motion); *see also In re Episcopal Church Prop.*, 76 Va. Cir. 873 (2008). Therefore, a court should not grant leave to amend when the amendment is "futile and 'would accomplish nothing more than provide opportunity for reargument of the question already decided." *See Barrett v. Minor*, No-0173-14-3, 2015 WL 2189966 at *7 (Va. App. May 12, 22015) (*quoting Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 403 (1985)).

In the case before the Court, it would be futile to allow the Plaintiff to amend his Complaint. *See Freeman v. Curtis Bay Medical Waste Services Virginia, LLC*, 102 Va. Cir. 245 (2019). The documents added to the Complaint through the Motion Craving Oyer negate any cause of action for defamation *per se* or insulting words. The documents demonstrate that Harrup Real Estate, LLC owned the Property and Blue Ridge Bank had substantial liens on the Property through a recorded Deed of Trust and Assignment of Rents. The No Financing Agreement displays a false representation made by the Plaintiff, indicating that he owned the Property in his personal capacity and that it was not subject to liens. Thus, with no facts to demonstrate falsity, no defamation *per se* or insulting words claim can be asserted, regardless of amendments to the Complaint. Allowing amendment of the complaint with the appended documents contradicting assertions of defamatory words would be futile and contrary to the pursuit of justice.

iv. *Sanctions*

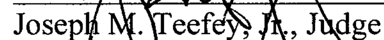
Because "the wisdom of hindsight should be avoided," the Court declines to impose sanctions on Mr. Biss pursuant to Va. Code § 8.01-271.1. *See Tullidge v. Board of Supervisor*, 239 Va. 611, 614 (1990). It appears Mr. Biss' oversight, however imprudent, was not intended to deter or impede the litigation at hand. This is only bolstered by the fact that the letter came directly from the Defendants in this case and that the issue of absolute privilege is no longer in play. The Court declines to impose sanctions but anticipates Mr. Biss will be more fastidious in future proceedings.

IV. Conclusion.

The Court grants the Defendants' Demurrers for Count I, defamation *per se*, and Count II, insulting words, for the Plaintiff's failure to state claims on which relief can be granted. Through the incorporation of the Deed of Trust, Assignment of Rents, Deed of Bargain and Sale, Title Insurance Commitment, and No Financing Agreement into the Complaint, no falsity can be found within the Royer Letter, negating the Plaintiff's claims for both defamation *per se* and insulting words. The Doctrine or Futility and non-threat of criminal prosecution further corroborate this decision. Finally, the Court selects not to rule on the issue of absolute privilege and declines to impose sanctions on the absent-minded Mr. Biss.

The Clerk shall forward a copy of this Order to the parties. Endorsements are dispensed with pursuant to Rule 1:13 of the Va. Sup. Ct. It is so ORDERED.

Enter: 11 August, 2022



Joseph M. Teefey, Jr., Judge