IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CHRISTOPHER COMINS,

Plaintiff,

v. Case No.: 2009-CA-015047-O

MATTHEW FREDERICK VAN VOORHIS,

Defendant.
_____/

ORDER
GRANTING MOTION FOR SUMMARY JUDGMENT

This matter came before the Court in a hearing on June 10, 2011, on Defendant's, MATTHEW FREDERICK VAN VOORHIS ("VAN VOORHIS" or "Defendant"), Motion for Summary Judgment on multiple grounds, and after reviewing the various memoranda and the case law filed and cited by all parties, the argument of counsel and the evidence on record[1] that could be considered by the Court pursuant to Florida Rule Civil Procedure 1.510, the Court finds as follows:

This is a libel case.

Defendant made various arguments in support of his Motion for Summary Judgment. They include (1) Plaintiff's failure to comply with, section 770.01, Florida Statutes, bars his libel claim; (2) that VAN VOORHISS's statements did not constitute defamation, (3) that said statements were matters of opinion, (4) that the statements constituted rhetorical hyperbole, (5) that if Plaintiff was a public figure, there is no showing of the required actual malice necessary, and (6) that any statements made did not tortiously interfere with COMINS's business.

In light of the Court's finding that the Plaintiff failed to fully comply with section 770.01, Florida Statutes, it is unnecessary for the Court to address Defendant's other arguments

[1] A Motion for Consideration of Summary Judgment Evidence was filed after the hearing under certificate of June 20, 2011, and set and heard on June 15, 2011 regarding a DVD with video and audio that had not been entered into evidence in timely manner by the date of the summary judgment hearing. Subsequently, a "Defendant's Notice of Withdrawal of Motion For Consideration of Summary Judgment Evidence, and Request For Ruling on Motion For Summary Judgment" was filed under certificate of June 17, 2011. Accordingly such evidence was not considered.

summarized above.

Section 770.01, Florida Statutes (hereinafter "Defamation Notice Law"), is entitled "Notice condition precedent to action or prosecution for libel or slander." It provides that:

> Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory.

§ 770.01, Fla. Stat. (2008).

Here, the Defendant is a blogger and the Plaintiff claims that he was libeled by statements posted by Defendant on the blog. The parties do not dispute that Defendant is neither a newspaper nor periodical. The issue, then, is whether or a not Defendant's blog falls under the rubric of "other medium" as used in section 770.01. Plaintiff contends that it does not. The Court disagrees and concludes that Defendant's blog is a "medium" covered by the Defamation Notice Law.

Plaintiff argues that section 770.01 does not apply here because the Defendant "was under no pressure whatsoever to deliver any information at all, much less deliver it quickly." (Opp to Mot. Sum. J. at 15). This, Plaintiff contends, weighs against application of section 770.01 because "[t]he rationale behind notice statutes throughout the country provides that the more time a defendant has to ascertain the truth of his accusations before publishing them, the less deserving he is of notice and an opportunity for retraction." (Opp. Mot. Summ. J. at 15). In support of this characterization of notice statutes "throughout the country," Plaintiff cites two cases-both from California. The Court finds them inapposite. The cases upon which Plaintiff relies do not express any national purpose of libel notice statutes. Instead, they interpret only the California statute which, by its express terms, requires notice only to "newspapers." The California cases resist any effort at judicial expansion of this word to other media.

The Florida law at issue here is far more broad. It applies not only to newspapers but also to periodicals and, of import here, to any "other medium." The Court, then, rejects Plaintiff's argument that the "public policy behind . . . notice statutes simply does not apply to Defendant or his behavior." (Opp. Mot. Sum. J. at 15.) The public policy of Florida, as expressed in section 770.01, is that the entities entitled to notice of an alleged defamation make up a large class, not the narrow one expressed in the California statute and embraced by the Plaintiff.

Precious little case law appears available on this issue. It is clear that the "purpose of the requirement of statutory notice to the publisher is to enable him to retract any false statements, or statements contended by the offending party to be false." Cook v. Pompano Shopper, Inc., 582

So.2d 37, 39 (Fla. 4th DCA 1991)(quoting Adams v. Atlanta Journal-Constitution, 84 So.2d 649, 553 (Fla. 1956)). At least one court has held that the term "other medium" as used in section 770.01, included the internet and internet forums for the required notice under that law. Alvi Armani Med., Inc. v.. Hennessey, 629 F. Supp. 1302 (S.D. Fla. 2008) (citing Canonico v. Calloway, 35 Med. L. Rptr. 1549 (Fla. Cir. Ct. Feb. 22, 2007) (story posted an the internet website) and Holt v. Tampa Bay Television, Inc., 34 Med. L. Rptr. 1540, 1542 (Fla. Cir. Ct. Mar. 17, 2005), affirmed 976 So.2d 1106 (Fla. 2nd DCA 2007) (noting that "other medium" included the internet.)

The Court finds Alvi Armani persuasive and plaintiff cites no case to the contrary.

The view adopted by the Court herein also comports with the applicable rule of statutory construction.

In State v. City of Jacksonville, 50 So 2d 532 (Fla. 1951), the municipality filed its petition for validation of a "Radio Station Revenue Certificate in the aggregate principal amount of $400,000 to aid in Financing the Cost of the Enlargement, Extension and Improvement of the Municipal Radio Broadcasting Station." Id. at 534. The State objected that Jacksonville was proposing to acquire equipment and facilities for a television station, not a radio station, and that it had no legal authority to construct, operate or issue revenue certificates for such a project. The applicable statute provided that: "The City of Jacksonville shall have the power, and it is hereby authorized to acquire, construct, own and operate * * * radio broadcasting stations * * * and all such buildings and improvements as said City may deem necessary or desirable for use in connection therewith. . . ." Id. at 535. The State contended that this law gave Jacksonville no authority to operate a television station in its radio facility because it "[made] no mention of television (the word 'television' being commercially unknown at the time of the enactment of the statutes) . . . ." Id. The Florida Supreme Court rejected this position and concluded that:

> While the general rule is that the words of a statute should ordinarily be taken in the sense in which they were understood at the time the statute was enacted, the rule is subject to the well-accepted qualification that where the statute to be construed in couched in broad, general and comprehensive terms and is prospective in nature, it may be held to apply to new situations, cases, conditions, things, subjects, methods, persons or entities coming into existence since the enactment of the statute; provided they are in the same general class as those treated in the statute, can be reasonably said to come within the general purview, scope, purpose and policy of the statute, and there is nothing in the statute indicating an intention that they should not be brought within its terms.

Id. at 536 (citing cases).

Thus, in City of Jacksonville, "television" was not available when the applicable statute was enacted. Because that law was very broad, however, the Florida Supreme Court interpreted the word "radio" to impliedly include the TV. In the case at bar, the Court follows the rule of statutory construction explained in City of Jacksonville and concludes that the words "other medium," adopted in 1976, to be expansive enough to include the internet and a blog.

As the title of section 770.01 makes clear, giving the notice prescribed therein is a condition precedent to an action for libel or slander. That condition has not been met here.

Plaintiff contends, alternatively, that even if the Defendant is entitled to notice under section 770.01, he has waived his right to it. Plaintiff fails to cite any case, either dealing with section 770.01 or addressing the elements of waiver, generally, in support fo his waiver argument. Further, Plaintiff does not point to any record evidence in support of this argument. The Court, therefore, rejects Plaintiff's waiver argument as without factual or legal basis.

WHEREFORE, Defendant's, MATTHEW FREDERICK VAN VOORHIS, Motion for Summary Judgment is GRANTED.

DONE AND ORDERED in Orlando, Orange County, Florida this 28 day of June, 2011.

JOHN MARSHALL KEST,
CIRCUIT COURT JUDGE

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed this 28 day of June, 2011 with the Clerk of Courts by using the ECF System, which will send a Notice of Electronic Filing to Frank H. Killgore, Jr., and Christopher M. Harne, Esq., Post Office Box 1913, Orlando, FL 32802-1913; Marc J. Randazza, Esq., 3969 Fourth Avenue, Suite #204, San Diego, FL 92103; and Paul S. Jones, Esq., and Douglas J. Petro, Esq., 255 South Orange Avenue, Suite 750, Orlando, FL 32801.

Diane Lacore

Judicial Assistant