

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JAY MARVIN

Plaintiff,

v.

JANICE SHELL, aka JANICE 456,
JOHN DOE I, aka SCION, and
JOHN DOE II, aka SALEMSHEXNY

Defendants.

Case No.: 02 C 2963

Judge Manning

Magistrate Judge Schenkier

NOTICE OF MOTION **DOCKETED**

NOV 07 2002

TO: Richard C. Balough, Esq.
656 West Randolph Street
Suite 500 West
Chicago, Illinois 60661

FILED-ED4
02 NOV - 1 AM 9:55
U.S. DISTRICT COURT
SCHENKIER

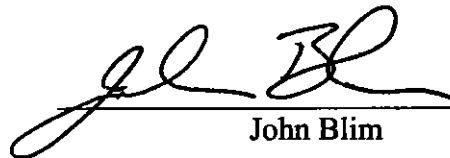
On November 7, 2002, at 11:00 a.m. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Blanche M. Manning or any Judge sitting in that Judge's stead, in the courtroom usually occupied by him/her, located in Courtroom 2125 at the United States District Court, Northern District of Illinois, 219 South Dearborn Street, Chicago, Illinois, 60604 and present Janice Shell's Motion To Dismiss, a copy of which is herewith served upon you.

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CERTIFICATE OF SERVICE

John Blim, an attorney, hereby certifies that he served Janice Shell's Motion To Dismiss upon the person(s) to whom the preceding Notice of Motion is addressed by hand delivery before 4:00 p.m. on November 1, 2002.


John Blim

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FILED-ED04
02 NOV - 1 AM 9:55
U.S. DISTRICT COURT

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JANICE SHELL'S MOTION TO DISMISS

Defendant Janice Shell respectfully requests that this Court enter an order dismissing this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In support of her motion, Shell states as follows:

1. Plaintiff Jay Marvin's First Amended Complaint ("Complaint") is putatively brought in diversity and seeks to state claims against Shell under Illinois law for defamation, "false light" invasion of privacy, and tortious interference with contract. The first two claims are bottomed on Shell's "chat room" postings on a web-site devoted to financial matters, including discussion of various companies' stocks. *See* Complaint ¶ 19. Marvin's tortious interference claim arises from a single e-mail sent by Shell to Marvin's boss at a Chicago AM radio station. *See id.* ¶ 18. The crux of all of Shell's supposedly offending statements is in fact her complaint that Marvin has been harassing her through his own internet postings and the hiring of a private detective to investigate her. *See id.* ¶¶ 18-19 & Exhibits C-J.

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Rule 12(b)(1) Grounds: Subject Matter Jurisdiction

2. As a threshold matter, the Complaint must fail in its entirety because it does not adequately allege the necessary amount in controversy to support diversity jurisdiction. (In an Order dated June 10, 2002, this Court dismissed Marvin's original complaint *sua sponte* for its failure to allege complete diversity of citizenship among the parties.)

3. The closest Marvin gets to satisfying the requirements of 28 U.S.C. § 1332(a) is his allegation that "the amount in controversy exceeds the jurisdictional minimum of \$75,000." Complaint ¶ 3. Although this appears to conform to the jurisdictional statute at first blush, closer examination reveals that it omits the requisite qualifying language "exclusive of interest and costs." See *Hemmings v. Barian*, 822 F.2d 688, 693 (7th Cir. 1987) (Posner, J.) (stating that, although plaintiff alleged amount in controversy exceeded the then-current minimum of \$10,000, "the statute requires that the amount in controversy exceed \$10,000 exclusive of costs and interest, and this allegation is missing; maybe Hemmings needs costs and interest to get above \$10,000"). And unlike the complaint in *Hemmings*, Marvin's Complaint contains no other clue as the amount supposedly at stake as a result of Shell's alleged wrongdoing.

4. Marvin's omission of the mandatory allegation may have been inadvertent (in which case, he can cure it by repleading); alternatively, if it was not, this Court has no power to hear his case. The very point of the Seventh Circuit's strict requirements for pleading subject matter jurisdiction is that neither the defendant nor the district court should be required to guess which is the truth -- indeed, this Court is not allowed to guess when it comes to jurisdictional matters. On this basis alone, the Complaint must be dismissed.

Rule 12(b)(6) Grounds: Failure To State a Claim

5. The rest of Marvin's Complaint suggests that his failure to properly allege the amount in controversy may not be the technical oversight that it first appears (although, as explained above, it is at least temporarily fatal, whether an oversight or not). All three of his claims omit mandatory allegations, allegations that bear directly on the question of whether he was injured at all. Thus, quite apart from the jurisdictional issue, the Complaint should be dismissed for its failure to state any valid claim. "A complaint is properly dismissed under 12(b)(6) if looking only at the pleadings, taking all the facts alleged by the plaintiff to be true, and construing all inferences in favor of the plaintiff, the plaintiff fails to state a claim upon which relief can be granted." *Pleva v. Norquist*, 195 F.3d 905, 911 (7th Cir. 1999).

First Claim: Defamation

6. Claims for defamation under Illinois law fall into one of two categories: either *per se* or *per quod*. The distinction is particularly important in federal court, because claims of defamation *per quod* trigger rules under both Illinois law and Fed. R. Civ. P. 9(g) requiring that damages (which are "special damages" in such circumstances) be pleaded with specificity. *See, e.g., Mader v. Motorola*, No. 92 C 8089, 1998 WL 164880, *7 & *9 (N.D. Ill. April 3, 1998) (Manning, J.).

7. While the Complaint inaccurately characterizes Marvin's defamation claims as *per se*, such conclusory allegations do not control. Rather, defamatory words must be pleaded with particularity, and, even then, they are subject to the "innocent construction" rule, which dictates that putatively defamatory statements should be construed as innocent if doing so is reasonable. *Dornhecker v. Ameritech Corp.*, 99 F.Supp.2d 918, 933 (N.D. Ill. 2000) (holding

that defamatory statements must be pleaded with particularity); *Walls v. Lombard Police Officers*, No. 99 C 3016, 2000 WL 631302, *4 (N.D.Ill. May 12, 2000) (“innocent construction” rule requires finding allegedly defamatory statements non-defamatory if such a construction is reasonable). “Whether a statement is defamation per se is a question of law to be determined by the trial court.” *Mader*, 1998 WL 164880, at *7.

8. Viewed through the lense of these pleading and construction requirements, Marvin’s allegations amount, at the most, to an attempt to plead defamation *per quod*. This is so because *none* of the adequately pleaded statements attributed to Shell necessarily imputes to Marvin the commission of a crime punishable by imprisonment or the lack of ability or integrity in his job performance. *Id.*, 1998 WL 164880, at *7 (“A statement is defamation *per se* if it imputes the commission of a criminal act; inability to perform or want of integrity in the discharge of duties of office or employment, or [plaintiff’s] lack of ability in his or her job or trade, profession or business.”)

9. For example, Marvin says Shell accused him of “misappropriat[ing] the corporate assets of his employer,” Complaint ¶ 15; however, Shell’s actual words, contained in the Complaint and its exhibits, belie that characterization, showing that, while she questions whether or not Marvin used WLS money to have her investigated, her words never state that he did so without WLS’s knowledge (indeed, she clearly thinks it possible, if not likely, that WLS was aware of Marvin’s activities), *id.* ¶ 19. To say that someone has used his employer’s money, possibly with the employer’s consent, to conduct an investigation -- even if that investigation could be called “harassment” -- is not to accuse that person of a crime or of any unfitness in the performance of his work.

10. Further, Shell's accusation that Marvin participated in "stalking" her in no way necessarily suggests that Marvin committed the crime of stalking under the law of Illinois (or any other relevant jurisdiction). *See* Complaint ¶ 19. Indeed, when her statements are given their only reasonable construction -- plainly "innocent" in the relevant sense -- they show that she used the word as the lay person that she is, rather than as a criminal lawyer would.

11. The common usage of the term "stalking" fairly suggests something much less than what the law calls the crime of stalking. *Compare Webster's New Universal Unabridged Dictionary* (1994) (defining "stalk" as "to pursue or approach . . . stealthily"), with 720 ILCS 5/12-7.3 (stalking must include the communication of threat of imminent "bodily harm, sexual assault, confinement or restraint"). Unless the complaint pleads facts that clearly show the commission of a crime, it fails to state a claim for defamation *per se*. *See, e.g., Walls*, 2000 WL 631302, *3.

12. Marvin is left with only the possibility of defamation *per quod*, and he cannot state such a claim unless he pleads his special damages with specificity under Rule 9(g). He has not done so. The Complaint says only that "[a]s a result of defendant's [defamatory] actions, plaintiff has been injured in an amount in excess of the jurisdictional amount of this court." Complaint ¶ 22. Marvin's defamation claim must therefore be dismissed. *Mader*, 1998 WL 164880, at *7 & *9.

Second Claim: "False Light" Invasion of Privacy

13. To plead a false-light invasion of privacy, the complaint must allege that the defendant made false and offensive statements about the plaintiff *and* that the statements were "communicat[ed] to the public at large or to so many people that the matter must become one of

public knowledge.” *Mader*, 1998 WL 164880, at *12. Where the complaint does not make such an allegation, the claim must be dismissed. *Jones v. Sabis Educational Systems, Inc.*, No. 98 C 4252, 1999 WL 1206955, *8 (N.D.Ill. Dec. 13, 1999).

14. Here, the Complaint affirmatively makes it clear that the supposedly “false light” statements -- far from reaching the “public at large” -- were made only to Marvin’s boss and the readers of postings in one special-interest, financial web-site chat room. Marvin has thereby pleaded himself out of this cause of action, and it should be dismissed.

Third Claim: Tortious Interference

15. Finally, pleading a claim for tortious interference with a pre-existing business relationship under Illinois law requires an allegation that the relationship *has come to an end* as a result of such interference. Although Marvin does not specify whether he is an at-will or a tenured employee of WLS-AM, it makes no difference. The Illinois Supreme Court has repeatedly explained -- and numerous cases from this Court have recognized -- that a claim for interference with a pre-existing employment relationship requires the plaintiff to allege that the relationship has terminated. *See, e.g., Otterbacher v. Northwestern University*, 838 F.Supp. 1256, 1260 (N.D. Ill. 1993); *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk and Western Railway Co.*, 195 Ill. 2d 356, 369, 748 N.E.2d 153, 161 (2001).

16. Although Marvin alleges that Shell’s e-mail to his boss was “an *attempt* to discredit him and to have him fired,” Complaint ¶ (emphasis added), his only allegation of the actual effect of the e-mail was that it somehow caused some unspecified “damage[to] the business relationship between plaintiff and his employer in an amount in excess of the jurisdictional amount of this court,” *id.* ¶ 28.

17. Marvin has thus failed to make the necessary allegation that Shell caused him to lose his job. (Indeed, by tuning its radio to 890 AM on any weekday between 9:00 and 10:00 a.m. or between 6:00 and 7:00 p.m., this Court may take judicial notice that Marvin continues to be employed by WLS.) His claim for tortious interference is invalid and should be dismissed.

For the above-stated reasons, defendant Janice Shell respectfully requests that this Court enter an order dismissing plaintiff Jay Marvin's First Amended Complaint and granting Shell such other and further relief as the Court deems fit.

Dated: November 1, 2002

Respectfully submitted,

JANICE SHELL

By: 

one of her attorneys

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