IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JAMES C. JAEGER and J.C.J. DEVELOPMENT, INC., Plaintiffs, vs. THOMAS OKON, Defendant.	)	DEFENDANT'S MOTION TO DISMISS THE COMPLAINT PURSUANT TO 735 ILCS 2-615(a) Case No. 2007 L 004940 Honorable Ronald S. Davis

MOTION TO DISMISS

NOW COMES Defendant, Thomas Okon, by and through his attorneys at Saper Law Offices, pursuant to 2-615(a) of the Illinois Code of Civil Procedure, and moves this Court to dismiss with prejudice Plaintiffs' Complaint for defamation ("Complaint"). In support of his motion, Defendant states as follows:

INTRODUCTION

Defamation lawsuits can have a serious impact on an individual's speech. They can be used in an attempt to silence a critic, prevent dissemination of information, or otherwise prevent an individual's participation in public debate. As a result, the courts in Illinois and throughout the United States have placed limitations on defamation claims.

To support an allegation of defamation a plaintiff needs to demonstrate that a *verifiably untrue* statement could result in damage to the plaintiff. *Van Horne v. Muller*, 185 Ill. 2d 299, 307 (1998). A defamation claim can either be *per se* or *per quod*. Defamation *per se* statements are ones that "are thought to be so obviously and materially harmful to the plaintiff that injury to

[his] reputation may be presumed." *Bryson v. News America Publications*, 174 Ill. 2d 77, 87 (1996). Illinois law recognizes five categories of defamatory per se statements: (1) those that impute the commission of a criminal offense; (2) those that impute infection with a loathsome communicable disease; (3) those that impute an inability to perform or want of integrity in the discharge of duties of office or employment; (4) those that prejudice a party or impute lack of ability in the party's profession or business; and (5) those that impute adultery or fornication. *Id.*, at 88-89.

Alternatively, a defamation *per quod* statement is a defamatory statement that does not fit into a *per se* category, but can still be established to cause damage to the Plaintiff's reputation. *Bryson*, 174 Ill.2d at 103. Both claims are based on actual damage to the Plaintiff's reputation, and a defense establishing that no reasonable person would have trusted or believed the statements as written will successfully defeat a defamation claim. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).

Statements expressing mere opinions or commentary do not constitute defamation. *See id.* Indeed, Illinois courts have repeatedly dismissed defamation claims at the pleading stage to protect an individual's ability to express opinions, level criticism, and participate in debate. *See, e.g., Seith v. Chicago Sun-Times, Inc.*, 371 Ill. App. 3d 124 (1st Dist. 2007) (affirming dismissal under Section 2-615). The statements at issue in this case are not defamatory and accordingly this case should be dismissed with prejudice.

CASE HISTORY

On May 10, 2007, Thomas Okon posted his opinions about a proposed development project planned by Plaintiffs in his Chicago neighborhood. (*See* Exhibit A attached to Plaintiffs'

Complaint). The post, entitled "North Center Chamber sides with JCJ Development," uses rhetorical hyperbole and editorial speculation to express Mr. Okon's general frustration with this new development in his neighborhood.

On May 11, 2007, one day after Mr. Okon's posting, Plaintiffs filed this lawsuit against Mr. Okon alleging two counts of defamation. Plaintiffs served the complaint on Thomas Okon on June 27, 2007.

ALLEGED DEFAMATORY STATEMENTS

Plaintiffs' defamation allegations rest solely on the statements identified in Paragraphs 8 and 14 of their Complaint. These statements are as follows:

a. *Our meeting with the chamber that we thought would be friendly and amicable turned out to be a sham. Based on prior meetings and statements, I thought we had support from key members of the Chamber. That support now appears to be non-existent. The chamber seems to have swallowed Jim Jaegers [sic] BS hook line and sinker. I guess the large $3,500 donation he gave them really did the trick.*

b. *Well it seems [the Chamber of Commerce] only care about how much money and power they have. Perhaps Mr. Jaeger also personally wrote them each a check… who knows for sure…*

c. *This comes down now to business against residents. The businesses want more density and more people on Irving Park Road so they can line their pockets. They care nothing about our safety or quality of life. They would be happy to see Irving Park Road so crowded you can not even walk down it, as long as those people are waiting in like to patronize the business. […] This developer is one of the worst offender's [sic] of that practice.*

Most of these statements are targeted at the "Chamber of Commerce" and "businesses" along Irving Park Road, rather than the Plaintiffs. But even if the statements can be read to imply something about Plaintiffs Jaeger and JCJ Development, they are still legally insufficient to support a claim of defamation *per se* or *per quod*. As discussed below, the statements are (a) mere rhetorical hyperbole and speculation, (b) made in a forum that readers recognize as

subjective, and (c) not objectively verifiable. Because all of the allegedly defamatory statements in Plaintiffs' Complaint are non-actionable opinions, Defendant cannot, as a matter of law, be held liable for defamation. Accordingly, this Court should dismiss Plaintiffs' Complaint in its entirety.

ARGUMENT

I. Applicable Standard for a Section 2-615 Motion to Dismiss

The question of whether a statement is actionable under a theory of defamation is a question of law for the court, and each case must be decided on its own facts and circumstances. *See Seith*, 371 Ill. App. 3d at 134-5. A Section 2-615 motion to dismiss admits all well-pleaded facts and attacks the legal sufficiency of the Complaint, alleging defects as to the "four corners" of the pleading itself. *See* 735 ILCS 5/2-615(a). Such a motion should be granted when a pleading, or portion thereof, is legally insufficient. *See Taradash v. Adelet/Scott-Fetzer Co.*, 260 Ill. App. 3d 313, 318-19 (1st Dist. 1993). When opposing a Section 2-615 motion, a plaintiff cannot rely simply on mere conclusions of law or fact unsupported by detailed factual allegations. 735 ILCS 5/2-615(a). A dismissal with prejudice is proper when no set of facts can be proven that would entitle the plaintiff to recover. *See Seith*, 371 Ill. App. 3d at 133.

II. This Court Should Dismiss Plaintiffs' Complaint Because Defendant's Statements Are Merely Non-Actionable Opinions and are Not Stating Facts.

The U.S. Supreme Court has confirmed the idea that defendants in defamation suits receive First Amendment protection for their statements if they cannot reasonably be construed to be stating actual facts. *See Milkovich*, 497 U.S. at 19. Even statements that fall into a *per se* libel category can be protected under the First Amendment. *Barakat v. Matz*, 208 Ill. App. 3d

662, 667 (1st Dist. 1995). To determine if an allegedly defamatory statement has a factual implication, courts in Illinois review three considerations: (1) whether the statement has a "precise and readily understood meaning" and is not "overly loose, figurative, rhetorical, or hyperbolic language," (2) whether the context or forum in which the statement is made lends itself to the credibility of the statement, and (3) whether a fact finder would be able to objectively determine the statement's veracity. *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 518-519 (1st Dist. 1998). If the statement does not present or imply facts about the plaintiff, then it is a non-actionable opinion and cannot provide a basis for a defamation claim. *See id.* In this case, consideration of these three factors shows that Defendant's alleged defamatory statements are merely non-actionable opinions.

a. Defendant's statements are non-actionable opinions because they were hyperbolic and amounted only to mere ridicule.

First, the Court must consider whether the allegedly defamatory statement has a "precise and readily understood meaning." *Id.* The use of exaggerative or hyperbolic language, or language intended to be mere ridicule or abuse is not defamatory. *Id.* For instance, in *Horowitz v. Baker*, the court found that the defendants' reference to the plaintiff's purchase of bricks as "sleazy," "cheap," "secret," and "ripped off" amounted to non-actionable opinion. 168 Ill. App. 3d 603, 608 (3rd Dist. 1988). The Appellate Court found that dismissal was proper, agreeing with the lower court that the statements were no more than "rhetorical hyperbole." *Id.* at 609.

Here, Mr. Okon's posting uses hyperbolic and figurative words and phrases like "sham," "swallowed Jaegers BS hook line and sinker," and "really did the trick" that are wholly without the required "precise and readily understood meaning[s]." *See Hopewell,* 299 Ill. App. 3d at 519. Mr. Okon's rhetorical speculation that "[p]erhaps Mr. Jaeger also wrote them each a check… who knows for sure…" cannot even be considered a statement of fact. The remaining comments

likewise editorially speculate that the Chamber of Commerce and the Plaintiffs are power and money hungry and against residents because they, for example, "want more density and people on Irving Park Road so they can line their pockets." The statements listed in Plaintiffs' Complaint conclude with a blatant example of rhetorical hyperbole saying "[t]he developer is one of the worst offender's [sic] of that practice."

All of the statements listed in Plaintiffs' Complaint are either speculation or rhetorical hyperbole. None of these statements can be considered as being a statement of fact with a "precise and readily understood meaning." As a result, the statements are non-actionable opinion and this Court should dismiss Plaintiffs' Complaint in its entirety.

b. Defendant's statements are non-actionable opinions because they were made in the context of a subjective forum and no reasonable person would trust them to be assertions of fact.

Next, the statements must be considered in the context or forum in which they were made to see if the context or forum lends to the credibility of the statement. *Hopewell*, 299 Ill. App. 3d at 519. For a defamation suit, either *per se* or *per quod*, a written statement is to be considered in its context, with words and implications read with their most natural and obvious meaning. *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982).

The context of the publication itself will often play a role in determining if the average reader will take the writing to be fact or opinion. Courts have found that when material is published in a location typically known for its subjective writings or in a forum where veracity and accuracy are not expected, the writing is more likely to be construed as non-actionable opinion. *See, e.g., Arrington v. Palmer*, 971 P.2d 669 (Colo. Ct. App. 1998) (considering to the subjective nature of political flyers in finding that statements were non-actionable); *Wampler v. Higgins*, 752 N.E.2d 962 (Ohio 2001) (discussing the subjective nature of a letter to the editor in

finding that statements were non-actionable expressions of opinion); *Flowers v. Carville*, 310 F.3d 1118 (9th Cir. 2002) (finding that academic audiences were likely to recognize subjective statements); *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 88 Cal. Rptr. 2d 843 (2d Dist. 1999) (finding that adversarial settings are likely to discourage belief of factual representation of opposite side).

Specifically, courts addressing defamation cases based on online blogs have noted that blogs are known for their personal, subjective, and mere opinion-based postings. In *Doe v. Cahill*, defendant posted derogatory comments on his blog about plaintiff's mental state and incapacity in his current job. 884 A.2d 451, 454 (Del. 2005). In finding that "no reasonable person could have interpreted these statements as being anything but opinions," the court discussed how blogs and chat rooms are widely known to be "normally and inherently unreliable" sources of information. *Id.* at 467. Other jurisdictions investigating the link between blogs and defamation cases have interpreted blogs the same way. *See, e.g., Hagaman v. Angel*, 2005 WL 1390360 at *6 (N.J. Super. Ct. Law Div. 2005) (finding that the statement in question, "in the context of the Gadfly blog, is only an opinion and that a reasonable person would recognize it as an opinion").

The material in the present case was posted in a blog which, as noted in *Cahill*, is a well-known subjective forum that is inherently unreliable as a source of factual information. The blog's purpose, as noted in the right column of the main page, is to be "ABSOLUTELY AGAINST ANY ZONING CHANGES in [this] area." (Complaint Exhibit B, page 3). It refers to the Plaintiffs' proposed structure as a "mammoth" building, further establishing the hyperbole and subjectivity present on the blog. *Id.* The entire website is built around this conflict and is a clear representation of only one party's side of the argument. Under *Hopewell* and its progeny,

courts must consider whether, in the context of the statement, a reasonable person would find the published statements credible. Here, a reasonable person is already likely to anticipate that they will be reading a subjective and opinion-based posting on a blog, just as one would when reading the political flyers in at issue in the *Arrington* case and the editorial letters at issue in the *Wampler* case. The fact that the blog has a singular purpose – to be against the construction of a large condominium building – only lends itself further to the fact that this blog is not to be relied upon for objective, factual information. As a result, the statements at issue should be considered non-actionable opinion and this Court should dismiss Plaintiffs' Complaint in its entirety.

c. Defendant's statements are non-actionable opinions because they are not objectively verifiable.

Finally, for an allegedly defamatory statement to be actionable, a fact-finder must be able to objectively determine the statement's veracity. *Hopewell*, 299 Ill. App. 3d at 519. When a statement is made with no reference to facts and is intended to be a pure demonstration of opinion with no verifiable or quantifiable question of fact involved, it represents a non-actionable opinion and is protected under the First Amendment. *See Sullivan v. Conway*, 157 F.3d 1092, 1097 (7th Cir. 1998). In *Sullivan*, the defendant, in a public forum, stated that plaintiff was "a very poor lawyer." *Id.* at 1094. Judge Posner, writing for the Seventh Circuit and applying Illinois law, found that the words stated a pure opinion that could be evaluated neither by judge nor jury, and fell into the protected realm of non-actionable opinions. *Id.* at 1097.

Paralleled with *Sullivan*, whether or not Plaintiffs' actions are "BS" and "did the trick" and whether the North Center Chamber of Commerce had a meeting that was a "sham" or "swallowed" those actions "hook line and sinker" are pure opinions that, as Judge Posner noted, are far beyond the evaluation of judge or jury. *Sullivan*, 157 F.3d at 1094. Likewise, Defendant's allegedly defamatory statement that "[p]erhaps Mr. Jaeger also personally wrote

them each a check… who knows for sure…" is purely within the realm of speculation and cannot be considered a statement of fact, much less a *verifiable* statement of fact. *See generally Brennan v. Kadner*, 351 Ill. App. 963 (1st Dist. 2004) (finding a speculative statement that plaintiff could have committed mail fraud as not objectively verifiable). Finally, it would be impossible for a fact-finder to determine how one measures whether a business wants to "line [it's] pockets" and cares "nothing about … safety or quality of life," much less how one determines who might be the "worst offender." Of the allegedly defamatory statements listed in Plaintiffs' Complaint, none are objectively verifiable statements.

Defendant's blog postings represent completely opinion-based publications. It is obvious to any viewer that the site is subjective and biased, that the statements made are done so with figurative and hyperbolic language, and that information contained in these statements is not to be taken as credible. Under the laws of this jurisdiction, these statements fall into a protected category of non-actionable opinions and Defendant cannot, as a matter of law, be found liable for defamation *per quod* or *per se*.

CONCLUSION

Because Plaintiffs' allegations do not merit a claim for defamation *per se* or *per quod*, or for any other requested relief, Defendant respectfully requests this Court to dismiss Plaintiffs' Complaint with prejudice, with all costs awarded to the Defendant, pursuant to §2-615(a) of the Illinois Code of Civil Procedure, and grant any additional relief this Court deems appropriate and just under the circumstances.

Dated: July 27, 2007

Respectfully submitted,

THOMAS OKON

By: _____
His Attorney

Daliah Saper
Saper Law Offices
203 N Wabash, Suite #2010
Chicago, IL 60601
312.641.1551
312.641.1611 facsimile
dsaper@saperlaw.com
ARDC No. 6283932
Cook County Atty. No. 41484