

DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO 201 LaPorte Ave. Fort Collins, CO 80521	DATE FILED: January 11, 2019 10:41 AM FILING ID: 6DED0AF828F8E CASE NUMBER: 2018CV220
Plaintiff: STACY LYNNE v. Defendants: NOAH BEALS , Senior Planner, City of Fort Collins, in his individual and official capacity JEREMY CALL , Senior Associate – Logan Simpson Design, Contractor for the City of Fort Collins, in his individual and official capacity	▲ COURT USE ONLY ▲
<i>Attorney for Plaintiff:</i> Theresa L. Corrada, #22301 Benezra & Culver, P.C. 633 17th Street, Suite 1450 Denver, CO 80202 (303) 716-0254 phone (303) 716-0327 fax tlcorrada@bc-law.com	Case No: 18CV220 Div./Ctrm: 3C
DEFENDANT CALL'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(5)	

Defendant Jeremy Call, by and through undersigned counsel, submits the following Motion to Dismiss pursuant to C.R.C.P. 12(b)(5).

I. INTRODUCTION

Plaintiff Stacy Lynne sues Noah Beals, a Planner who works for the City of Fort Collins, and Jeremy Call, who works for a firm that is a contract consultant for the City. Her sole claim is defamation. Lynne's defamation claim against Call must be dismissed pursuant to C.R.C.P. 12(b)(5) because it fails to contain plausible allegations which, if proved, would sustain her claim for defamation against Call. See *Warne v. Hall*, 2016 CO 50, ¶ 27.

II. FACTUAL ALLEGATIONS

For purposes of a C.R.C.P. 12(b)(5) motion, courts must accept all well-pleaded facts as true but are not required to accept as true legal conclusions couched as factual allegations. *Vickery v. Evelyn V. Trumble Living Tr.*, 277 P.3d 864, 869 (Colo. App. 2011). Lynne's Complaint does not comply with the pleading requirements of C.R.C.P. 8. For purposes of ruling on this motion, the Court must disregard all non-factual material, including argumentation, rhetoric, and other speculative and conclusory statements, in the Complaint. The following is a recitation all facts pled that are relevant to the claim against Call.¹

"Stacy Lynne is an investigative journalist," who for 10 years has investigated "local government issues" (p. 2, ¶ 1, ¶ 1). "Jeremy Call is a senior associate at Logan Simpson Design and is employed as a contractor for the City of Fort Collins" (p. 2, ¶ 3).

¹ This recitation is not intended as an admission of the alleged facts by Call.

Investigative journalism involves “the analysis and exposure of all relevant facts to the public” (p. 3, first par.).

In 2018, Lynne “noticed a reference to the sign code update in a city council agenda item summary” on the City’s website. (p. 8, first par.). In early February 2018, two “[s]ign code update public meetings” were held. Lynne attended the meetings. At the meetings, Call and Beal “used photos of . . . private businesses to show the public what the City and the consultant are ‘reconsidering’” (p. 8, second par.). The proposed changes to the sign code were “substantial.” (p.9, first par.). In Lynne’s opinion, “The public meetings were sparsely attended. Stakeholders were noticeably absent” (p.9, first par.). Those who attended the meetings “were given voting devices, shown pictures of local business signs from the downtown zone, and then the attendees . . . were told to vote on changes to the privately-owned signs” (p.9, first par.). The votes on each question were tallied and displayed in percentages “on the question slide [of a powerpoint presentation] in red numbers” (p. 10, Letter from Lynne to Beals).

After the meetings, Lynne “walked door to door to talk with business owners about their thoughts regarding the sign code update” and provided information that was in the “materials that were disseminated by Noah Beals and Jeremy Call” and also posted on Facebook @Focus Fort Collins (p.9, second par.). Lynne told the business owners that “votes” had been taken at the sign code update meetings (p.10, first par.). Stacy Lynne “talked with a long list of people who were not included in this significant public matter” (p.10, Letter from Lynne to Beals).

On February 15, 2018, a Downtown Business Association membership meeting was held (p. 9, third par.). “[A] lot of the business owners were there. They were very unhappy and emotional” (p. 11, Feb. 23 Lynne quote). At the meeting, Beals told the business owners that “no votes were taken” at the public sign code update meetings (p. 11, Feb. 23 Lynne quote). Lynne claimed that Beals’ statement was defamatory because Lynne had told the business owners that votes *were* taken (p. 11-12, Feb. 23 Lynne quote).²

On March 7, 2018, Lynne met with Laurie Kadrach, the City’s Director of Planning, Development and Transportation, to discuss “how to resolve the defamation problems caused by Noah Beals” (p. 12). Kadrach confirmed that the word “vote” was used on the powerpoint presentation and said that she told Beals, “Well, I would never use the word vote in that type of presentation because really, you are just using the polling technology – we call it clicker technology. . . . Nothing is firm in that and if you use the word vote it can mean something official right?” (p.12, Kadrach quote).

Thereafter, Lynne met with various other City officials to discuss the matter (pp. 10-14).³

Lynne served a Colorado Open Records Act request on the City concerning the sign code update (p.13). The documents she received in response to the request

are laced with memorandums, emails, and cell phone screenshots to and from Noah Beals and Jeremy Call and between business owners and community members. Those communications repeatedly use the phrase

² Lynne does not allege that Call was present at the meeting.

³ Lynne does not allege that Call participated in the meetings.

“misinformation campaign”, “inaccurate information”, “misinformation that has been circulating”, “staff should address the myths”, and “confusion.”

(p.15, first par.)⁴

Lynne’s sole allegation pertaining to any statement made specifically by Call is:

Jeremy Call knew when he told numerous people that Stacy Lynne was on a ‘misinformation campaign’ that he was lying. Jeremy Call intentionally lied about Stacy Lynne to cover up his own mistakes. And he broadcast those lies to numerous third parties.

(p. 20, third par.).

III. ARGUMENT

A. Elements of Defamation Involving Matters of Public Concern

The elements of 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.” *Williams v. Dist. Court*, 866 P.2d 908, 911 n. 4 (Colo.1993).

As to the third element, where the alleged defamation involves a matter of public concern, the plaintiff must prove more than mere negligence. She must prove that the defendant published the defamatory statement with actual malice, that is, with actual knowledge that it was false or in reckless disregard of the truth. *Smiley's Too, Inc. v.*

⁴ The Complaint gives two examples of such communications, neither of which are statements made by Call (p. 15).

Denver Post Corp., 935 P.2d 39, 41 (Colo.App.1996); *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo.1982); *Lewis v. McGraw–Hill Broad. Co.*, 832 P.2d 1118, 1122–23 (Colo.App.1992). “Recklessness implies a higher degree of culpability than negligence. A failure to exercise ordinary or reasonable care in ascertaining the truth of published material does not, standing alone, constitute recklessness.” *Diversified Mgmt.*, 653 P.2d at 1109.

B. The Facts Alleged Do Not Show That Call Made a False, Defamatory Statement Concerning Lynne.

Substantial truth is an absolute defense to a defamation claim. *Gomba v. McLaughlin*, 180 Colo. 232, 235, 504 P.2d 337, 338 (1972); *Gordon v. Boyles*, 99 P.3d 75, 81 (Colo.App.2004). A defendant is not required to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting, of the matter is true.” *Gomba*, 180 Colo. at 236, 504 P.2d at 339. In cases involving matters of public concern, the plaintiff has a heightened burden and must prove a statement’s falsity by clear and convincing evidence. *Lockett v. Garrett*, 1 P.3d 206, 210 (Colo.App. 1999).

Lynne’s Complaint contains no plausible “clear and convincing” basis for concluding that Call’s statement that Lynne was on a “misinformation campaign” was false. To the contrary, the facts alleged show that the gist of Call’s words was true. Misinformation is defined as “incorrect or misleading information.” www.merriam-webster.com/dictionary/misinformation. The Complaint shows that Lynne went on a “campaign” (“a connected series of operations designed to bring about a particular result,” www.merriam-webster.com/dictionary/campaign) to inform a “long list” of

business owners about the sign code amendment meetings. She showed them the powerpoint slides in which Beals' had used the word "vote" and told them that "votes" had been taken in the meetings in their absence. Lynne created the mistaken impression in the minds of the business owners that an official vote on sign code amendments had been taken without notice to them, causing them to become "very unhappy and emotional." In fact, as Lynn knew, there had been no *official* vote, only an informal clicker poll. Nevertheless Lynne did not correct the false impression she had created and continued to argue that "votes" had been taken. Lynne's communications with the business owners were misleading to the extent that Beals had to explain to them that no official vote had been taken and that the word "vote" in the presentation merely referred to a clicker poll.

Moreover, the statement Call made was not defamatory. In ruling on a C.R.C.P. 12(b)(5) motion, the meaning of allegedly defamatory words is a matter of law left to the court—not a factual allegation to which it must defer. *Fry v. Lee*, 2013 COA 100, ¶ 29 (citing cases). Accordingly, the court is not required to accept Lynne's views regarding the defamatory meanings of words. *Id.* Whether a statement is defamatory is a question of law. *Gordon*, 99 P.3d at 79.

To be actionable, an allegedly defamatory statement must be "likely to cause reasonable people to think 'significantly less favorably' about the plaintiff" than if they knew the whole truth. *Fry*, 2013 COA at ¶ 50. The Complaint contains no details about when and to whom the "misinformation campaign" statement was made, nor does it

provide the context for the statement. Call's words contained no factual information about Lynne that was not generally known, and there is nothing in the Complaint to suggest that the recipient of the statement did not already know about Lynne's activities. Words that amount to nothing more than a subjective judgment cannot constitute an assertion of actual fact sufficient to support a defamation claim. *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.*, 879 P.2d 6, 12 (Colo. 1994). Call's characterization of Lynne's activities as a "misinformation campaign" could not have caused reasonable people to think significantly less favorably about Lynne than if they knew the whole truth.

C. The Alleged Defamatory Statement Involved Matters of Public Concern, and Lynn Has Failed to Plead Actual Malice.

Generally, a matter is of public concern whenever "it embraces an issue about which information is needed or is appropriate," or when "the public may reasonably be expected to have a legitimate interest in what is being published." *Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10, 17 (Colo. App.1996). Here, the Complaint makes it clear that Call's statement concerning a "misinformation campaign" occurred in the context of discussion of a public matter: the meetings in February 2018 were held to identify public preferences regarding the range of possible amendments to the city's sign code. The words referred to the fact that Lynne had apparently led business owners to believe that the City was moving forward on proposed amendments (i.e., had taken "votes") without giving them notice or an opportunity to participate. This is quintessentially a matter of public concern.

Thus, in this case, Lynn must plead facts showing actual malice with clear and convincing evidence. *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); *DiLeo v. Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980); *Diversified Mgmt.*, 653 P.2d at 1108. Whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law for the court to decide. *Barnett v. Denver Publ'g Co.*, 36 P.3d 145, 147 (Colo.App.2001); *Lockett*, 1 P.3d at 210.

Lynne merely asserts, without supporting facts, that Call knew he was lying when he told others that she had engaged in a “misinformation campaign.” There is no factual basis for this conclusory assertion, and it must be disregarded. See *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011) (affirming dismissal of complaint “fail[ed] utterly to allege a single non-conclusory fact” supporting its contentions). To the contrary, the facts show that there was a reasonable basis for Call’s belief that Lynne had misinformed the business owners. Lynne fails to assert any plausible fact that, if proven, would constitute clear and convincing evidence that Call knew the statement was false or recklessly disregarded whether the statement was true. Thus, her Complaint must be dismissed. *Fry*, 2013 COA at ¶ 57.

IV. CONCLUSION

Because the threat of protracted litigation could have a chilling effect on the constitutionally protected right of free speech, prompt resolution of defamation actions, by summary judgment or motion to dismiss, is appropriate. *Barnett*, 36 P.3d at 147. The

plaintiff's factual allegations do not support a defamation claim against Call as a matter of law, and her Complaint must be dismissed pursuant to C.R.C.P. 12(b)(5).

Defendant requests an award of attorney fees pursuant to section 13-17-201, C.R.S.; *Barnett*, 36 P.3d at 148 (An award of attorney fees is mandatory when a trial court dismisses a defamation action under C.R.C.P. 12(b).).

Respectfully submitted this 11th day of January, 2019.

BENEZRA & CULVER, P.C.

By: s/Theresa L. Corrada

Attorney for Defendant Jeremy Call

In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served the foregoing on the parties via email to the following and/or via ICCES:

Stacy Lynne at stacy_lynne@comcast.net
Kimberly B. Schutt @ kschutt@wicklaw.com

By: s/Theresa L. Corrada