

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-031553

03/25/2025

HONORABLE MICHAEL J. HERROD

CLERK OF THE COURT
J. Eaton
Deputy

OLEG BORTMAN

KIM ROBERT MAEROWITZ

v.

FIRST SERVICE RESIDENTIAL ARIZONA L L ERIN E MCMANIS
C

JUDGE HERROD

UNDER ADVISEMENT RULING

The Court has under advisement, following oral argument on March 21, 2025, Defendants' January 13, 2025 Motion to Dismiss; Plaintiffs' January 17, 2025 Response; and Defendants' January 27, 2025 Reply.

Defendants seek dismissal of Counts One and Two which are counts alleging Defamation/Libel and Interference with Prospective Economic Advantage based on lack of standing. Defendants also seek dismissal of Counts One and Two because the alleged statements cannot be defamatory.

Defendants seek dismissal of Counts Three and Four which are breach of contract and breach of the implied covenant of good faith and fair dealing because Plaintiffs are not parties to the alleged contract.

Defendants seek dismissal of Count Five seeking injunctive relief because there are no actions to enjoin.

Finally, Defendants seek dismissal as to the individual board members, the management company, and the general manager of the management company because they are inappropriate parties.

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Background Factual Allegations

For purposes of a motion to dismiss, the Court considers all well-plead facts in the First Amended Complaint (FAC) to be true. Plaintiffs are Oleg Bortman and JIMBO, LLC. Mr. Bortman is the managing member of JIMBO. JIMBO owns a first-floor business condominium in the Safari Drive Condominium complex. Mr. Bortman operates a real estate brokerage business called The Brokery out of the condominium owned by JIMBO. The Brokery is not a party to the lawsuit, and the Court has no information concerning the structure or ownership of The Brokery.

The condominium complex has an association called Safari Drive Condominium Association. The Association is a non-profit corporation run by a board. Defendants Vogel, Claussen, Beesmeyer, Brady and Ray are members of the Board of Directors of Safari. First Service Residential Arizona, LLC (FRS) is the property manager, and Suzanne Hawk is the general manager of FRS.

Bortman set up The Brokery office on the premises, in part, with the expectation that The Brokery would be in a uniquely favorable position to market units in the complex. The complex contains both residential and commercial units.

Counts One and Two

Count One of the FAC alleges defamation: libel and slander against all Defendants based on the September 27 Newsletter published by the Association. The Newsletter contained a simple list of recent sales in the complex. There were no comments about any of the sales. One of the sales shows the listing agent as Ronn Wadsworth of The Brokery. Based on information and belief, Plaintiffs allege that Defendants (unspecified) cherry-picked certain sales for a certain time-period, so that the only sale listed for The Brokery was for an under-market sale.

Count Two of the FAC alleges interference with prospective economic advantage. This count is also based on the contents of the September 27 Newsletter. Count Two also relies on the factual allegations in paragraph 13. Paragraph 13 alleges that Defendants (unidentified) listed two units with another broker; alleges the publication of the September 27 Newsletter; alleges that Defendants refused to allow The Brokery to put electronic monitors near windows as a promotional tool; alleges that The Brokery was not allowed to do an open air event in the common area although others had been allowed to do so; and alleges that during a November 12, 2024 open session of the Safari Board, the Board announced that Bortman had filed a frivolous and meritless lawsuit against Safari and the Safari Board.

The Plaintiffs are Bortman and JIMBO, LLC, but the party that was allegedly damaged is a business called The Brokery. The FAC does not explain the relationship between The Brokery and Plaintiffs. The Court agrees that, even if true, the allegations in Count One apply to The Brokery, not to Bortman or JIMBO. On the facts alleged, Bortman and JIMBO lack standing to sue on behalf of The Brokery. The same is true of Count Two.

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Defendants also argue that the factual allegations supporting Counts One and Two cannot be defamatory because the allegations are true. Plaintiffs argue that the newsletter sales list is not true because it is not a complete listing of sales and is cherry-picked to make The Brokery look weaker.

The Court finds that the facts set forth in the September 27 Newsletter were true, even if not complete. Therefore, those facts cannot be defamatory.

Plaintiff argues that the statement that the lawsuit is frivolous and meritless is defamatory. Plaintiff does not name who made the statement, and attributes the statement to the entire board. The statement is not a statement of fact that can be true or false but is a statement of opinion. Such a statement is not defamatory.

While statements cast as subjective beliefs are generally insulated from defamation liability, “statements of opinion *are* actionable when they imply a false assertion of fact.” *Turner*, 174 Ariz. at 208, 848 P.2d at 293 (internal quotation omitted and emphasis added). In other words, if a statement of opinion may be proven false, “it is actionable as defamatory,” *Dube v. Likins*, 216 Ariz. 406, 419, ¶ 46, 167 P.3d 93, 106 (App. 2007), but a statement is not actionable if it does not present “the kind of empirical question a fact-finder can resolve,” *Yetman*, 168 Ariz. at 81, 811 P.2d at 333.

Takieh v. O'Meara, 252 Ariz. 51, 57, 497 P.3d 1000, 1006 (Ct. App. 2021).

The statement that the lawsuit is frivolous and without merit is just such a statement of opinion. It does not imply a false assertion of fact. The statement is a subjective belief of the speaker, not an objective statement of fact that is demonstrably false.

The Court finds that the statement that the lawsuit was frivolous and without merit is not defamatory.

Counts Three and Four

Count Three alleges breach of contract by the Association and the Safari Board. Count Four alleges breach of the implied covenant of good faith and fair dealing by the Association and the Safari Board. The alleged contract is the Board Members Code of Conduct adopted by the Safari Board. It is attached to the FAC as Exhibit 1 and sets forth principles and guidelines to constitute a code of conduct for Board members. Plaintiff alleges that the code of conduct is signed by each board member upon becoming a member of the board.

Although some parts of the code of conduct applies to behavior towards association members, members of the association are not overtly named as third-party beneficiaries to the code of conduct.

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The Court finds that the Code of Conduct is not a contract based upon which an individual member of the association can bring a breach of contract action or allege a breach of the implied covenant of good faith and fair dealing.

Count Five

Count Five seeks injunctive relief to prevent Defendants from disparaging Bortman's real estate brokerage business and from taking any action to unreasonably interfere with that business. The relief sought in Count Five is not something that injunctive relief can solve. The Court cannot order the Board or the Association "not to say that." Defamation cases allow for damage awards to deter conduct. Injunctive relief is not appropriate in this type of case.

Individual Directors, the Management Company, and the General Manager of the Management Company

The FAC lists individual members of the Board of Directors as defendants but makes no individual allegations as to any of them. Likewise the FAC names the management company and the general manager of the management company, Suzanne Hawk, but lists no individual allegations as to the management company or Ms. Hawk.

The directors are directors of a non-profit corporation. Unless specific actions of specific directors are identified, any action taken by the directors as a group are the actions of the association and there is no individual liability.

The Court finds that the individual directors cannot be held individually liable for the actions alleged in the FAC.

The management company and Ms. Hawk are agents of the Board and the Association. They cannot be liable for alleged actions by the Board or the Association, unless the management company or Ms. Hawk committed specific acts, outside of board authority, that damaged Plaintiffs. No such acts are alleged.

The Court finds that the management company and Suzanne Hawk are not appropriate parties.

IT IS ORDERED dismissing the Complaint without prejudice.

IT IS FURTHER ORDERED that Defendants submit a proposed form of judgment and an Application and Affidavit for attorneys' fees.