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Case No. S17C-02-020 ESB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LYNN J. ROGERS,	)	
	)	
Plaintiff,	)	
	)	C.A. No. S17C-02-020 ESB
v.	)	
	)	
JOHN F. BUSHEY,	)	TRIAL BY JURY OF
	)	TWELVE DEMANDED
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, John F. Bushey ("Mr. Bushey"), by and through his undersigned counsel, hereby moves this Honorable Court for the entry of an Order dismissing Plaintiff's Complaint[1] with prejudice, and avers as follows:

1. Plaintiff, Lynn J. Rogers ("Rogers" or "Plaintiff") instituted the above-captioned civil action by the filing of his Complaint on February 15, 2017. A true and correct copy of the Complaint is attached hereto as Exhibit "A."

2. Plaintiff's 134-paragraph Complaint sets forth three (3) causes of action: (I) Defamation; (II) Civil Conspiracy; (III) Intentional Infliction of Emotional Distress. All of Plaintiff's claims are either time-barred, otherwise

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[1] Plaintiff has also filed a verified complaint against Milton Fire Department ("MFD") in the Court of Chancery (the subsequent, amended version is attached hereto as Exhibit "B"). In addition, Plaintiff has also filed a separate complaint in the Superior Court against Milton Fire Department (attached hereto as Exhibit "C"), and the causes of action set forth therein arise from the same facts as the instant matter as well as the Court of Chancery case against MFD. It is not clear why Plaintiff chose to file three separate actions in two different courts despite the fact that all of Plaintiff's claims in the three cases arise from the same facts and involve the same parties. In fact, the factual averments in each of the three complaints are largely identical.

barred by statute, inadequately pled as a matter of law, or some combination of the three.

3. On a motion to dismiss under Superior Court Civil Rule 12(b)(6), the Court must "accept the well-pled allegations of the [Complaint] as true, and draw reasonable inferences in favor of [Rogers]," but "conclusory allegations need not be treated as true, nor should inferences be drawn unless they truly are reasonable." *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 & n.3 (2007) ("labels and conclusions" or a "formulaic recitation of the elements of the cause of action will not do").

Count I – Defamation

4. Count I of Plaintiff's Complaint alleges claims of libel, slander, and slander *per se*. See Exhibit A, ¶ 115.

5. First, Count I of Plaintiff's Complaint appears to rely to some extent upon allegedly defamatory statements purportedly made by "certain other members" of MFD who are not parties to this action. Statements alleged to have been made by non-parties are irrelevant.

6. Second, defamation actions in Delaware are governed by the two-year statute of limitations for personal injuries. *DeMoss v. The News-Journal Company*, 408 A.2d 944 (Del. 1979). The most recent allegedly defamatory statement complained of in Count I of Plaintiff's Complaint is alleged to have been made in

October 2014. See Exhibit A, ¶ 115(e). Accordingly, Count I of Plaintiff's Complaint must be dismissed.

Count II – Civil Conspiracy

7. Count II of Plaintiff's Complaint alleges a civil conspiracy among MFD members, including Mr. Bushey, to expel Rogers from membership and violate his constitutional rights.

8. Civil conspiracy is not an independent cause of action and can only be maintained in parallel with an underlying tort or statutory violation. *NACCO Indus., Inc. v. Applica Inc.*, 2009 WL 4981577, at *31 (Del. Ch. Dec. 22, 2009) (noting that "[a] breach of contract is not an underlying wrong that can give rise to a civil conspiracy claim") (citing *Empire Fin. Servs. v. Bank of N.Y. (Del.)*, 900 A.2d 92, 97 (Del. 2006)). To the extent that Plaintiff's other claims are dismissed, Count II must also be dismissed.

Count III – Intentional Infliction of Emotional Distress

9. Count III of Plaintiff's Complaint alleges intentional infliction of emotional distress ("IIED"). It should be dismissed with prejudice because it is barred by the applicable statute of limitations and otherwise fails to state a claim upon which relief may be granted. On its face, the Complaint does not adequately plead a cause of action for IIED.

10. First, the claim is barred by the two-year statute of limitations applicable to personal injuries because Plaintiff asserts in paragraphs 121 through 124 of his Complaint that MFD's members in essence did nothing to reverse their October 2014 decision regarding his membership status after his wife passed away in 2016. It is readily apparent that Plaintiff's real grievance is with MFD's October 2014 decision regarding his membership status.

11. The Restatement (Second) of Torts, as adopted in Delaware, attaches liability for IIED to one who "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." Plaintiff appears to allege that MFD's members did not consider an appeal after his wife's death, although Plaintiff does not even allege that he requested an appeal at that time. In any event, mere maintenance of the status quo following the death of Plaintiff's wife does not constitute the sort of conduct that gives rise to a claim of IIED as a matter of law. Not only does Plaintiff not describe any "extreme and outrageous" conduct, but Plaintiff does not actually describe any conduct at all. Notably, Plaintiff does not allege that MFD did or said anything that actually caused him any emotional distress, let alone severe emotional distress. Instead, Plaintiff alleges in paragraphs 123 and 124 of his Complaint that there was a "hardening of the hearts" which led to "awkwardness." A "hardening of the hearts" is Plaintiff's entirely subjective perception and does not describe any conduct on the part of Mr. Bushey, MFD or

its other members, let alone extreme and outrageous conduct. “Awkwardness” is, as a matter of law, not the sort of harm that is sufficient to maintain a claim of IIED. *See, e.g., Beckett v. Trice*, 1994 Del. Super. LEXIS 599 (Del. Super. Ct. Nov. 4, 1994) (*aff’d*, 660 A.2d 393 (Del. 1995)) (finding that “the humiliation, embarrassment, and anxiety plaintiff has asserted do not constitute extreme emotional distress.”).

12. Plaintiff goes on to allege in paragraphs 126-134 of his Complaint that he was “devastated” to find out that he might not be able to participate as planned in a colleague’s funeral, but that he in fact ended up participating exactly as planned. Nowhere does Plaintiff allege any extreme or outrageous conduct on the part of Mr. Bushey or anyone else. Instead, Plaintiff recounts a perfectly normal conversation he had with President Hopkins which ultimately resulted in Plaintiff doing what he had planned to do anyway, with no negative consequences or ill effects. Although Plaintiff alleges that some entirely vague actions on the part of Mr. Bushey, MFD, or its other members were intended to cause him emotional pain, Plaintiff does not allege that he experienced any emotional pain. Even if he did allege that he experienced emotional pain, he does not allege any conduct that a reasonable finder of fact could possibly regard as extreme and outrageous.

13. Plaintiff’s Count III fails to state a claim upon which relief may be granted, and it must be dismissed.

WHEREFORE, for all of the foregoing reasons, Defendant John F. Bushey respectfully requests that this Honorable Court enter an Order in the form attached hereto dismissing Plaintiff's Complaint with prejudice and granting such other and further relief to Defendant as the Court deems proper and just.

Respectfully submitted,

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