

IN THE CIRCUIT COURT OF THE 15TH  
JUDICIAL CIRCUIT IN AND FOR PALM  
BEACH COUNTY, FLORIDA

CASE NO.: 502021CA009294XXXXMB

POTIONS IN MOTION, LLC, a Florida limited  
liability company, and JASON SAVINO, an  
individual,

Plaintiffs,

vs.

SEVEN BRIDGES HOMEOWNERS  
ASSOCIATION, INC., a Florida corporation,

Defendant.

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**DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

Defendant, SEVEN BRIDGES HOMEOWNERS ASSOCIATION, INC., by and through undersigned counsel, hereby files this Motion to Dismiss Plaintiffs' Complaint, and as grounds in support thereof, hereby states as follows:

1. On or about August 6, 2021, Defendant, SEVEN BRIDGES HOMEOWNERS ASSOCIATION, INC., was served with the Plaintiffs' Summons and Complaint.
2. Plaintiffs' Complaint is an action for damages based on allegations of defamation and breach of a non-disparagement provision of restaurant and lounge mutual separation agreement between the Defendant and non-party, Devinos, LLC, allegedly as third-party beneficiaries to the contract.

3. Count I of the Plaintiffs' Complaint alleges "Defamation."

4. Count II of the Plaintiffs' Complaint alleges "Breach of Contract."

5. As the Plaintiffs' Complaint is legally insufficient on its face, Counts I and II of the Plaintiffs' Complaint should be dismissed as a matter of law. *See generally Vienneau v. Metropolitan Life Ins. Co.*, 548 So.2d 856, 858 (Fla. 4th DCA 1989)(providing that a motion to dismiss challenges the legal sufficiency of a claim and that the facts alleged must be assumed true with all reasonable inferences from those facts being made in favor of the non-moving party).

**I. COUNT I OF THE PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE THE DEFENDANT HAD A QUALIFIED PRIVILEGE TO PUBLISH THE ALLEGED STATEMENTS TO ITS MEMBERSHIP, AND THE ALLEGED DEFAMATORY STATEMENTS WERE MERELY PURE OPINION AND NOT STATEMENTS OF FACT AND/OR NOT READILY CAPABLE OF BEING PROVEN FALSE**

Under Florida law, a Plaintiff alleging a cause of action for Defamation must allege these five elements: (1) publication; (2) falsity; (3) the statement was made with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) the statement must be defamatory. *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008).

However, Florida law recognizes two different defamation causes of action, to wit: defamation "per se," which is actionable on its face and presumes express malice and

defamation “per quod” which requires additional explanation of the words used to show that they have a defamatory meaning or that the person defamed is the Plaintiff. *Hood v. Connors*, 419 So.2d 742 (Fla. 5th DCA 1982). In per se actions, general damages are presumed as opposed to per quod actions where the Plaintiff must allege and prove special damages. *Id.* An example of a per se action would include an oral communication that imputes to another conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession or office. *Campbell v. Jacksonville Kennel Club*, 66 So.2d 495 (Fla.1953); *Wolfson v. Kirk*, 273 So.2d 774 (Fla. 4th DCA 1973).

In ¶ 25 of the Complaint, the Plaintiffs alleged that the “Defendant’s statements constitute actionable defamation per se.” (Underline added). As such, the Plaintiffs’ Complaint must show that the alleged defamatory statements, on their face, must impute conduct deemed actionable to avoid proving express malice and alleging specific damages.

A. THE DEFENDANT HAD A QUALIFIED PRIVILEGE TO MAKE THE ALLEGED STATEMENTS TO ITS HOMEOWNERS ASSOCIATION MEMBERS

“One who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused.” *Nodar v. Galbreath*, 462 So.2d 803, 809 (Fla. 1984)(quoting Restatement (Second) of Torts § 593 (1976). “A communication made

in good faith on any subject matter by one having an interest therein, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which would otherwise be actionable, and though the duty is not a legal one but only a moral or social obligation." *Nodar at 809* (quoting 19 Fla.Jur.2d *Defamation and Privacy* § 58 (1980)). In addition, "The determination that a defendant's statements are qualifiedly privileged eliminates the presumption of malice attaching to defamatory statements by law. The privilege instead raises a presumption of good faith and places upon the plaintiff the burden of proving express malice—that is, malice in fact as defined by the common-law doctrine of qualified privilege." *Nodar at 810*.

The essential elements of a qualified privilege are (1) good faith; (2) an interest in the subject by the speaker or a subject in which the speaker has a duty to speak; (3) a corresponding interest or duty in the listener or reader; (4) a proper occasion, and (5) publication in a proper manner. *American Ideal Management, Inc. et al. v. Dale Village, Inc., etc., et al.*, 567 So.2d 497, 499 (4th DCA 1990)(citing *Nowik v. Mazda Motors of America (East)*, 523 So.2d 769 (Fla. 1st DCA 1988)). The qualified privilege vanishes, however, when the defamatory statement is made with express malice. *Dale Village at 499* (citing *Nodar at 810*; *Abraham v. Baldwin*, 52 Fla. 151, 42 So. 591 (1906); *Glynn v. City of Kissimmee*, 383 So.2d 774 (Fla. 5th DCA 1980)). Notwithstanding, "The determination that a defendant's statements are qualifiedly privileged eliminates the

presumption of malice attaching to defamatory statements by law. The privilege instead raises a presumption of good faith and places upon the plaintiff the burden of proving express malice—that is, malice in fact as defined by the common-law doctrine of qualified privilege." *Nodar at 810*.

In *Dale Village*, the 4th DCA encountered facts similar to the subject case. In that matter, a mobile home cooperative homeowner's association decided to terminate a contract with the appellant management company. Due to a controversy in the community over the contract termination, the Defendant posted two bulletins outlining the decision to terminate the management company's contract along with a letter that was sent by the Defendant to the management company outlining the issues between them on the front door of the recreation hall which was the normal method of communication at the park. In addition, the bulletins and letter were distributed to the residents attending an HOA board of directors meeting. However, an important distinction existed in that matter in that the recreation hall was visited by both residents and non-residents alike. As such, the Court determined that, "The communication reached not only owners and residents of the park who would have a corresponding interest but also there is at least circumstantial evidence that it reached nonresidents." *Dale Village at 500*. (Underline added). As such, *inter alia*, the issue before the Court was whether the statements might have reached non-residents (those with undetermined interests in the statements).

In this current matter, the Plaintiffs alleged in their Complaint that Defendant reported the commission of a crime to the local authorities and that the incident report was "utilized by [the Defendant] during subsequent board meetings (in which several members of the community were present) to openly discuss the accusations of breaking and entering into the office, and to support [the Defendant's] decision to hire a different operator." (Complaint ¶¶ 14 & 15). Further, the Plaintiffs alleged that the Defendant "openly discussed at its board meetings its allegations that [non-party] Devinos, LLC's (through Jason Savino), failed or refused to provided certain financial information requested by the Defendant to falsely support its claims that Devinos, LLC breached its contract with [the Defendant] to further support [the Defendant's] decision to hire a different operator." (Complaint ¶ 16).

In addition, the Plaintiffs alleged that on or about July 13, 2021, pursuant to "comments or questions made to the Association regarding entering into a new contract [with the Plaintiffs] ... [the Defendant] composed and published additional defamatory statements via email to all of the unit owners and members of the Association that the Plaintiffs' "past business practices and behavior had not been consistent with the high standards set by the previous board or this board for all vendors that we deal with." (Complaint ¶ 19 & 20).

Finally, the Plaintiffs alleged that publications were made with "malicious intent to injure Plaintiffs in their business, reputation, and credit..." (Complaint ¶ 20).

Returning to the elements of a qualified privilege, as discussed in *Dale Village*, residents and members of a homeowners association have interest in the operations and decision-making of its board as these decisions directly affect their lives and the board has a duty to inform its membership regarding same. In addition, the Complaint alleges (and acknowledges) that the publications were made either "at board meetings" or "via email to all of the unit owners and members of the Association" and further that the publications were made "to support [the Defendant's] decision to hire a different operator." As such, the four corners of the Complaint concede that the publications were made in good faith, at a proper occasion, and in a proper manner to interested third parties. Lastly, the Plaintiffs statement that the Defendant acted with "malicious intent" is conclusory without factual support to overcome the shift of the burden to the Plaintiffs due to the Defendant's qualified privilege as the Plaintiffs admitted that the board published the information to its membership as support for its decision in regard to the Plaintiffs.

B. THE ALLEGED DEFAMATORY STATEMENTS WERE EITHER PURE OPINION OR NOT READILY CAPABLE OF BEING PROVEN FALSE

True statements, which are statements that are not readily capable of being proven false, and statements of pure opinion are protected from defamation actions by the First Amendment. See *Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 714–15, 717 (11th Cir. 1985) (applying Florida law); *Blake v. Giustibelli*, 182 So.3d 881, 884 n.1 (Fla. Dist. Ct. App. 2016) ("Statements of pure opinion are not actionable."); *Anson v. Paxson*

*Commc'ns Corp.*, 736 So.2d 1209, 1211 (Fla. Dist. Ct. App. 1999); *Miami Child's World, Inc. v. Sunbeam Television Corp.*, 669 So.2d 336, 336 (Fla. Dist. Ct. App. 1996).

In the determination of whether a statement is one of fact or opinion and whether a statement of fact is susceptible to defamatory interpretation are questions of law for the court. *Keller* at 715; *Fortson v. Colangelo*, 434 F.Supp.2d 1369, 1379 (S.D. Fla. 2006). When making the determination of whether a statement is one fact or opinion and whether a statement of fact is defamatory, a court should construe statements in their totality with attention given to any cautionary terms used by the publisher in qualifying the statement. *Keller* at 717. Further, the court needs to assess "whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct." *Stembridge* at 446 (quoting Restatement (Second) of Torts § 566, comment c).

As discussed above, the Plaintiffs alleged in their Complaint that Defendant reported the commission of a crime to the local authorities and that the incident report was "utilized by [the Defendant] during subsequent board meetings (in which several members of the community were present) to openly discuss the accusations of breaking and entering into the office, and to support [the Defendant's] decision to hire a different operator." (Complaint ¶¶ 14 & 15). These statements fail the falsity element of the defamation cause of action in that these are statements that are not readily capable of



being proven false. The Defendant reported in good faith to interested parties the possible commission of a crime using a report provided to local authorities while the investigation was underway. At this time, the Defendant had an obligation to warn and educate its membership. In addition, this conduct, on its face, clearly does not exhibit any express malice.

In addition, as also previously reported, the Plaintiffs alleged that on or about July 13, 2021, pursuant to "comments or questions made to the Association regarding entering into a new contract [with the Plaintiffs] ... [the Defendant] composed and published additional defamatory statements via email to all of the unit owners and members of the Association that the Plaintiffs' "past business practices and behavior had not been consistent with the high standards set by the previous board or this board for all vendors that we deal with." (Complaint ¶ 19 & 20). Once again, notwithstanding the Defendant's qualified privilege, this allegation presents a clear example of a pure opinion. There are no specific factual allegations of any practices, behavior, or standards as these are general terms that can encompass a multitude of meanings. As such, the Defendant's determination that the Plaintiffs' conduct did not meet some undisclosed standard is pure opinion as opposed to a false statement of specific conduct with malicious intent.

As such, based on the foregoing arguments that the Defendant had a qualified privilege to make the alleged statements, the statements were merely pure opinion or

not readily capable of being proven false, and that the Defendant acted in good faith based on its duty to interested members, this cause of action should be dismissed.

**II. COUNT II OF THE PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE THE PLAINTIFFS' CLAIM OF THIRD-PARTY BENEFICIARY STATUS FAILS AS A MATTER OF LAW**

A cause of action for breach of third-party beneficiary contract consists of the following elements: (1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach. *Networkip, LLC v. Spread Enterprises, Inc.*, 922 So. 2d 355, 358 (Fla. 3d DCA 2006)(citing *Biscayne Inv. Group, Ltd. v. Guarantee Mgmt. Servs., Inc.*, 903 So.2d 251 (Fla. 3d DCA 2005)). A third party is considered a beneficiary to the contract only if the contracting parties intend to primarily and directly benefit the third party. *Networkip at 358* (citing *Cigna Fire Underwriters Ins. Co. v. Leonard*, 645 So.2d 28 (Fla. 4th DCA 1994)). As set forth by the Supreme Court in *Marianna Lime Prods. Co. v. McKay*, 109 Fla. 275, 147 So. 264, 265 (1933), the test is whether the parties to the contract intend that a third person be benefited by the contract, not whether a party to the contract is liable to a third person as a consequence of entering into the agreement. *Networkip at 358*. "The intention of the contracting parties, gleaned from the contract itself, is determinative. It is not enough that the ... services ultimately rendered accrue to

the [third party]." *Networkip at 358* (quoting *City of Tampa v. Thornton–Tomasetti, P.C.*, 646 So.2d 279, 282–83 (Fla. 2d DCA 1994)).

In ¶ 28 of the Complaint, the Plaintiffs' allege that, "As a related business and associated third party, POTIONS IN MOTION was an intended third-party beneficiary of the provisions of the Mutual Separation Agreement prohibiting non-disparagement by either party, and is the assignee of claims by Devinos, LLC arising out of the [n]on-disparagement agreement.." This allegation fails to meet the elements of a cause of action for breach of third-party beneficiary contract as held in *Networkip*. Specifically, Count II of the Plaintiffs' Complaint fails to allege in any paragraph the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the Plaintiffs. In support of their claims, the Plaintiffs attached a document titled Mutual Separation Agreement (hereinafter "Agreement") as Exhibit A to their Complaint. In the opening paragraph of the Agreement, it was stated that the Agreement was made and entered into between the Defendant and Devinos, LLC. The Plaintiffs are not named as parties to the Agreement nor are either signatories. Importantly, as it pertains to the element of a clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party, the Complaint fails to point to, nor is there, any specific language of the Agreement that would indicate any such relationship.

As such, based on the foregoing, the Plaintiffs failed to properly allege the elements of a cause of action for breach of third-party beneficiary contract, and as such, this cause of action should be dismissed.

WHEREFORE, Defendant, SEVEN BRIDGES HOMEOWNERS ASSOCIATION, INC., moves this honorable Court for an order dismissing Counts 1 and 2 of the Plaintiffs' Complaint with prejudice, reserving jurisdiction to award costs in favor of the Defendant and any other relief this honorable court deems reasonable and just.

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic Mail, to all counsel of record on the attached Service List, this 22<sup>nd</sup> day of September 2021.

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