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

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| BRIAN CONNOLLY,<br><br>Plaintiff,<br><br>v.<br><br>ANTHONY MILAZZO, individually; DRAPER AND KRAMER, INC., an Illinois Corporation; and JOHN AND JANE DOES, individually,<br><br>Defendants. | ) | Case No. 12 L 8489<br><br>Judge Daniel T. Gillespie |

**MEMORANDUM RULING and ORDER ON DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT**

**Nature of the proceedings:** Plaintiff Brian Connolly (hereinafter "Plaintiff") initiated this action against Anthony Milazzo and Draper and Kramer, Inc. (hereinafter "Defendants") for defamation per se, defamation per quod, conspiracy to defame, violations of the Uniform Deceptive Trade Practices Act, conspiracy to deny Plaintiff's rights and protection under Illinois law, and breach of fiduciary duty. Defendants previously moved to dismiss and on November 11, 2013 that motion was granted upon this court's finding that Plaintiff's complaint did not rise to the level of defamation per se. However, this court granted Plaintiff leave to amend a third time. Defendants move to dismiss Plaintiff's Third Amended Complaint.

**Facts:** Plaintiff Brian Connolly is an owner and former board member at the 111 East Chestnut Condominium Association. Defendant Milazzo ("Milazzo") is the president of the condominium board and Defendant Draper and Kramer, Inc. ("D&K") is the management company that runs the day-to-day operations at 111 East Chestnut. Plaintiff became concerned with D&K's performance, voiced his concerns to Milazzo and the board around July 2, 2011, and then sought a formal performance review of D&K. *Pl's Third Amended Complaint*, p. 2, para. 12, 13 (hereinafter *"Pl's Complaint"*). Plaintiff asserts that Defendants then began a "campaign to seek and secure Connolly's removal from office" which culminated in an allegedly defamatory letter sent out 436 members of the Association detailing why Plaintiff should be removed from the Association's board of directors. *Pl's Complaint*, p. 4, para. 25, 28. According to Plaintiff, as a result of this letter he was not re-elected to his position on the board. *Pl's Complaint*, p. 5, para. 38.

**ANALYSIS**

The question presented by a § 2-615 motion to dismiss is whether the plaintiff has alleged sufficient facts which, if proved, would entitle the plaintiff to relief. *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475 (1991). When ruling on a § 2-615 motion to dismiss, the facts in the plaintiff's complaint are taken as true, and are viewed in a light most favorable to the plaintiff. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d. 482, 490 (1996).

**I. Motion To Dismiss Defamation Per Se Counts I and II Should Be Denied Because Plaintiff Alleged Sufficient Facts To State A Cause Of Action In His Third Amended Complaint.**

"In order to make out a claim for defamation, a plaintiff must set forth facts showing that the defendant made a false statement concerning the plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by the defendant, and that the plaintiff was damaged." *Myers v. The Tel.*, 332 Ill. App. 3d 917, 922 (2002). There are four types of statements that are considered defamation per se (1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome or communicable disease; (3) words that impute an inability to perform or a want of integrity in the discharge of duties of office; and (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession, or business. *Bryson v. News Am. Publications, Inc.*, 174 Ill. 2d 77 (1996).

In the instant case, Plaintiff alleged that Defendants published a letter to 436 members of their condo association falsely stating that Plaintiff was unfit to serve on the board, that Plaintiff acted in a harassing manner toward building staff creating a hostile work environment, and that Plaintiff's actions cost the association thousands of dollars in expenses and compliance fees. *Pl.'s Complaint* p. 6, para. 51-53. These statements impute an inability to perform and a lack of integrity in Plaintiff's discharge of his duties as a board member, are allegedly false, and were disseminated to the public. Therefore, Plaintiff put forth sufficient facts in his complaint and should survive Defendants' Joint Motion to Dismiss.

**II. Defendants' Joint Motion To Dismiss Plaintiff's Defamation Per Quod Counts III and IV Should Be Granted Because The Letter Is Potentially Defamatory Per Se, Not Defamatory Per Quod.**

Defendants' Joint Motion to Dismiss Counts III and IV of Plaintiff's Complaint should be granted. Statements are actionable as either defamatory *per se* or defamatory *per quod*. *Schaffer v. Zekman*, 196 Ill. App. 3d 727, 731 (1990). Statements that are defamatory *per quod* are those that need extrinsic facts or other innuendo to explain their meaning, whereas statements that are defamatory *per se* are obviously harmful. *Id.* at 731. The meaning of the allegedly defamatory letter sent by Defendants is plain and does not require any extrinsic facts, therefore Plaintiff's claim should be for defamation *per se*, and the defamation *per quod* counts should be dismissed.

**III. Defendants' Motion To Dismiss Plaintiff's Conspiracy To Defame Counts V and VI Should Be Denied Because Plaintiff Has Alleged Sufficient Facts to Support A Cause Of Action.**

"The elements of a civil conspiracy are: (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." *Fritz v. Johnston*, 209 Ill. 2d 302, 317 (2004). A plaintiff must allege an actual agreement and a tortious act in furtherance of that agreement in order to state a claim for civil conspiracy. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999).

Paragraph 29 of *Pl.'s Complaint* alleges that both Defendants co-authored the letter at issue, and the sections above established that Plaintiff set forth sufficient facts for a claim that the letter was defamatory. Thus, the plaintiff has sufficiently alleged that Defendants conspired and Counts V and VI should survive Defendants' Joint Motion to Dismiss.

**IV. Defendant's Joint Motion to Dismiss Plaintiff's Uniform Deceptive Trade Practices Act Counts Should Be Granted Because The August 17th Letter Did Not Disparage Plaintiff's Business Products.**

Defendants' Motion to Dismiss Counts VII and VIII of Plaintiff's complaint should be granted. The Illinois Deceptive Trade Practices Act (hereinafter "UDTPA") embodies the common law tort of commercial disparagement, which has traditionally been used when the quality of one's goods or services has been disparaged. *Crinkley v. Dow Jones & Co.*, 67 Ill. App. 3d 869, 876 (1978). "Illinois courts have construed the UDTPA to apply only to statements disparaging the quality of a business's products; statements that impute a want of integrity are not actionable under the UDTPA." *Republic Tobacco, L.P. v. N. Atl. Trading Co., Inc.*, 254 F. Supp. 2d 985, 997-98 (N.D. Ill. 2002) citing *Allcare, Inc. v. Bork*, 176 Ill. App. 3d 993, 999 (1988).

The allegedly defamatory letter sent out by Defendants speaks about Plaintiff as a person and does not mention any services Plaintiff provides or goods he produces. Therefore, Plaintiff has not properly alleged facts in his complaint to support a cause of action under the UDTPA.

**V. Defendants' Joint Motion To Dismiss Plaintiff's Second Conspiracy Counts (IX and X) For Denial Of Plaintiff's Property Rights Should Be Granted.**

The Illinois Condominium Property Act states: "The board of managers may disseminate to unit owners biographical and background information about candidates for election to the board if (i) reasonable efforts to identify all candidates are made and all candidates are given an opportunity to include biographical and background information in the information to be disseminated; and (ii) the board does not express a preference in favor of any candidate." 765 ILCS 605/18(a)(17). Furthermore, as stated above, to allege a civil conspiracy, the plaintiff's complaint must include facts indicating (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." *Fritz*, 209 Ill. 2d at 317.

Plaintiff asserts that both Defendants co-authored and disseminated the allegedly defamatory letter together. *Pl's Complaint*, para. 29, p. 4. But, Plaintiff has not alleged sufficient facts that would constitute a violation of this statute. Nowhere in his complaint does Plaintiff assert that he was not given an opportunity to include his own biographical information in the disseminated election materials. Additionally, the statute prohibits the board from expressing a preference in favor of any candidate; it does not prohibit the board from speaking out against a specific candidate. Thus, Plaintiff has not alleged sufficient facts to support the second element of a civil conspiracy, that Defendants' purpose was unlawful or that the lawful purpose was accomplished by unlawful means. Therefore, Defendants' Joint Motion to Dismiss Counts IX and X should be granted.

**VI. Defendants' Motion to Dismiss Plaintiff's Breach of Fiduciary Duty Complaints, Counts XI and XII, Should Be Denied.**

A claim for breach of fiduciary duty consists of allegations that (1) a fiduciary duty existed, (2) the defendants breached that duty, and (3) the plaintiff's damages were proximately caused by the defendant's breach of that duty. *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 32 (2003). In the instant case, Plaintiff has alleged in his complaint all three elements:

(1) Alleging that a fiduciary duty existed: "As Draper and Kramer was agent for the Association, it also owed members of the Association- including Connolly- a fiduciary duty." *Pl's Complaint*, p. 11, para. 86. "At all relevant times Defendants had a fiduciary relationship with Connolly." *Id.*, p. 11, para. 87.

(2) Alleging a breach of that duty by Defendants, Plaintiff states that Defendants squandered in excess of $24,000 of the Association's funds in which Plaintiff had a vested interest. *Id.*, p. 11-12, para. 91-94.
(3) Alleging damages caused by the breach: "The result of the Defendant's breach of duty is gross and intentional waste of the corporate assets in which Connolly has a vested interest." *Id.*, p. 11-12, para. 93.

Plaintiff has alleged sufficient facts in his complaint to state a cause of action for breach of fiduciary duty against the Defendants. Therefore, the Defendants' Joint Motion to Dismiss Counts XI and XII of Plaintiff's complaint should be denied.

**Conclusion:** Defendants' Joint Motion to Dismiss Plaintiff's Third Amended Complaint should be DENIED for Counts I and II (defamation per se), Counts V and VI (conspiracy to defame), and Counts XI and XII (breach of fiduciary duty). Defendants' Joint Motion to Dismiss Plaintiff's Third Amended Complaint should be GRANTED for Counts III and IV (defamation per quod), Counts VII and VIII (violations of the Uniform Deceptive Trade Practices Act), Counts IX and X (conspiracy to deny Plaintiff's rights and protections under Illinois law). The third amended complaint is Plaintiff's fourth complaint. Accordingly, those counts dismissed should be dismissed with prejudice.

**Order:** For the reasons stated above, Defendants' Joint Motion to Dismiss Plaintiff's Third Amended Complaint is denied as to Counts I and II (defamation per se), Counts V and VI (conspiracy to defame), and Counts XI and XII (breach of fiduciary duty). Defendants' Joint Motion to Dismiss Plaintiff's Third Amended Complaint is granted as to Counts III and IV (defamation per quod), Counts VII and VIII (violations of the Uniform Deceptive Trade Practices Act), Counts IX and X (conspiracy to deny Plaintiff's rights and protections under Illinois law). Those counts dismissed are dismissed with prejudice.

Defendants are given 21 days to answer. Each side is given 14 day to issue written discovery and 21 days thereafter to answer written discovery. The case is continued for case management on 11-5-14 at 10:15 am, Room 2202.

**Date:** September 19, 2014

**Enter:**_____
Judge Daniel T. Gillespie #1507

Associate Judge
Daniel T. Gillespie
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Circuit Court – 1507