

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION**

In re:

Chapter 7

KEVIN W. KULEK,

Case No. 16-21030

Hon. Daniel S. Opperman

Debtor.

RANDALL L. FRANK, TRUSTEE,

Plaintiff/Counter-Defendant,

v.

Adv. Pro. No. 17-02002

PAUL B. MALETICH and
VIRTUAPIN CABINETS, INC.,

Defendants/Counter-Plaintiffs.

**COUNTER-PLAINTIFFS' RESPONSE TO COUNTER-DEFENDANTS'
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
COUNTER-DEFENDANTS' MOTION TO DISMISS**

Counter-Plaintiffs, Paul B. Maletich and VirtuaPin Cabinets, Inc. (collectively "Maletich"), by and through counsel, Schafer and Weiner, PLLC, for their *Response* (the "Second Response") to *Counter-Defendants' Supplemental Memorandum in*

Support of Counter-Defendants' Motion to Dismiss [DN 59] (the "Memorandum")
state as follows:¹

INTRODUCTION

"When in doubt, obfuscate."

This saying can occasionally be overheard in the legal profession. The Counter-Defendants (collectively, the "Trustee") apparently find merit in the saying, as they have put it into practice in their filings responsive to the Counterclaim. Even after presenting every imaginable argument- *and some unimaginable*- in their Motion to Dismiss (many of which appear to be made for the sole purpose of obfuscating), the Trustee filed their rogue Memorandum raising completely new arguments.² Notwithstanding the Trustee's obfuscation, the Court should see through the dust, and find that there is no basis for denying Maletich their fair day in Court, especially under Fed. R. Civ. P. 12(b)(6).

¹ This Second Response is filed with permission granted from this Court on August 1, 2017. This Second Response only addresses new arguments raised in the Memorandum, not arguments that simply reply to the arguments made by Maletich in their Response to the Motion to Dismiss. Maletich presumes they will be given the opportunity to respond to the Trustee's other arguments at the hearing on the Motion to Dismiss as is common practice.

² Trustee was only permitted to file a seven (7) page reply to the Response to Counter-Defendants' Motion to Dismiss. *See* L.B.R. 9014-1(f)(5). Trustee filed an eight (8) page Memorandum that raises arguments not included in their Motion to Dismiss and that are not responsive to arguments made in Maletich's Response to the Motion to Dismiss. The Memorandum also does not comply with the requirements set forth in L.B.R. 9029-1.

ARGUMENT

In the Counterclaim, Maletich identifies four false and defamatory statements:

- a. Defendant was involved in the Debtor's "business" (SkitB Pinball) and involved in the fraud of obtaining money from approximately 250 prospective purchasers of a "Predator" pinball machine. *See* Application for Default Judgment, ¶6.³
- b. That Defendant...marketed the pinball machine for sale and collected 'deposits' for the purchase, ranging from \$250 to \$4,750.00 per person, with most of the 250 purchasers paying \$4,750.00. *See* Application for Default Judgment, ¶8.⁴
- c. Defendants closely associated themselves with the Debtor and assisted the Debtor in the fraud including such actions as: (a) providing Debtor with false invoices for materials and goods which were never provided and would never

³ Trustee claims that this statement is true. It isn't and there is ample evidence to prove its falsity. But whether the statement is true or false is not something to be decided on a Fed. R. Civ. P. 12(b)(6) motion. "On a Fed. R. Civ. P. 12(b)(6) motion, all of the allegations contained in the plaintiff's complaint are accepted as true, and the complaint is construed liberally in favor of the party opposing the motion...***It is not the function of the court to weigh evidence*** or evaluate the credibility of witnesses, instead, the court should deny the motion unless it is clear that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief." Miller v. Currie, 50 F.3d 373, 377 (6th Cir. 1995). *Also see*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2006); Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (When ruling on a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6) "a court must accept as true all of the allegations contained in the complaint..."). Maletich alleged that the statement is "completely, utterly, and wholly false." *See* Counterclaim, ¶22. The Court must accept that allegation as true when deciding the Motion to Dismiss.

⁴ This statement was identified in the Counterclaim because it appears to explain why the Trustee believes Maletich perpetrated a fraud. Maletich does not claim that the statement is necessarily defamatory on its own, but rather, it is capable of defamatory meaning when viewed in conjunction with the Trustee's other statements.

be provided to allow Debtor to draw off money from the PayPal account; (b) providing and generating false bills of costs and expenses; (c) assisting Debtor in obtaining money for use for personal expenses, with no intent of using same for the production and sale of the Predator pinball machine. *See* Application for Default Judgment, ¶11.

d. Defendants...attempt[ed] to ‘structure’ and avid [sic]⁵ what Defendants...believed to be IRS reporting requirements for transfers of money in excess of \$10,000... *See* Application for Default Judgment, ¶12.

See Counterclaim, ¶22.

Trustee now argues that statements a, b, and d are not defamatory. Notably, the Trustee does not argue that statement ‘c’ is not defamatory- implicitly acknowledging that this statement is indeed defamatory. Only one of the four statements must be defamatory for Maletich to have an actionable defamation claim. Thus, the Court can stop its analysis here.

I. The Statements are Defamatory Per Se

Trustee argues that Maletich does not cite any authority showing the statements are defamatory per se. *See* Memorandum, Pg. 2. This argument is just absurd.

First, Maletich is not intrinsically required to demonstrate that the statements are defamatory when responding to a motion to dismiss. It is the Trustee’s burden to not only raise the argument but prove it. *See e.g., Mediacom Southeast, LLC v. BellSouth Telcoms, Inc.*, 672 F.3d 396, 399 (6th Cir. 2012).

⁵ The Trustee spends at least three paragraphs of the Memorandum attempting to justify a typo: “avid” instead of “avoid.” One can only arch an eyebrow at this argument because the sentence makes no sense if the term “avid” is used.

Second, Maletich cited numerous cases in the Counterclaim explaining what defamation per se is and then applied that law to the facts of this case. Had the Trustee bothered to look at the relevant law prior to filing the Memorandum he would have quickly realized the statements are not only defamatory per se, but defamatory.

Statements that directly accuse someone of illegal conduct or strongly imply that someone is involved in illegal conduct are defamatory per se. Kevorkian v. AMA, 237 Mich. App. 1, 8 (1999) (“Statements that are...actionable include...direct accusations or inferences of criminal conduct. Language that accuses or strongly implies that someone is involved in illegal conduct crosses the line dividing strongly worded opinion from accusation of a crime.”) ***Trustee’s statements directly accuse Maletich of perpetrating a fraud and attempting to avoid IRS reporting requirements, both of which are illegal conduct.*** At the very least, the Trustee’s statements strongly imply that Maletich was involved in illegal conduct. Thus, the statements are defamatory per se.⁶

False and malicious statements injurious to a person in his or her business and statements that impugn a corporation in respect to its business, its ability to do

⁶ The Trustee appears to believe that Maletich is required to identify with laser accuracy the exact crime or crimes that they accused Maletich of committing. That is simply not the standard. Maletich was required to plead that the statements accuse him of illegal conduct. Maletich did just that. *See* Counterclaim, ¶32.

business, and its methods of doing business are also defamatory per se. *See e.g., Savage v. Lincoln Benefit Life Co.*, 49 F.Supp.2d 536, 541 (E.D. Mich. 1999); *Northland Wheels Roller Skating Ctr. v. Detroit Free Press*, 213 Mich. App. 317, 328; 539 N.W.2d 774, 780 (1995). Maletich alleged that the statements are defamatory per se on these bases. *See* Counterclaim, ¶¶ 32, 40. It does not appear that the Trustee takes issue with such allegations as they are not mentioned in the Memorandum. The Trustee focuses their attention only on whether the statements accuse Maletich of illegal conduct. The detailed and specific allegations in the Counterclaim demonstrate that the statements are defamatory per se on these bases.

II. The Statements are Defamatory

The Trustee also argues that the statements are not defamatory. “A communication is defamatory if, considering all the circumstances, it tends to so harm the reputation of an individual as to lower that individual’s reputation in the community or to deter third persons from associating or dealing with that individual.” *Kevorkian v. AMA*, 237 Mich. App. 1, 5 (1999). “Statements that are not protected and therefore are actionable include false statements of fact, i.e., those that state actual facts but are objectively provable as false...”

This Court does not even have to guess whether the statements tend to harm Maletich’s reputation or deter third persons from associating or dealing with him because there is ample evidence attached to the Counterclaim that people are

refusing to do business with Maletich because of the Trustee's statements. *See* Counterclaim, Exhibit 2. Maletich also specifically alleged in the Counterclaim that the statements are defamatory and harmful and gave reasons why. *See* Counterclaim, ¶¶33, 41.

What's more, the statements are proveable as false. A statement is proveable as false if it is objectively verifiable rather than a subjective assertion. Kevorkian, 237 Mich. App. at 6.⁷ Maletich can verify with evidence that (i) he was not involved in the Debtor's business, (ii) he did not market the Predator pinball machine for sale or collect deposits, (iii) he did not assist the Debtor in perpetrating a fraud, and (iv) he did not attempt to avoid IRS reporting requirements.

⁷ To demonstrate what statements are and are not proveable as false the Kevorkian court distinguished the actionable statement "In my opinion, Mayor Jones is a liar," from the nonactionable statement "In my opinion Mayor Jones shows is abysmal ignorance by accepting the teaching of Marx and Lenin."

CONCLUSION

The Trustee's new argument that their statements are not defamatory is meritless. The relevant case law demonstrates that they are. The Memorandum was just another attempt by the Trustee to obfuscate. The Court should deny the Trustee's Motion to Dismiss in its entirety.

Respectfully Submitted,

SCHAFFER AND WEINER, PLLC

/s/ Shanna M. Kaminski _____

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Dated: August 17, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2017 I filed *Counter-Plaintiffs' Response to Counter-Defendants' Supplemental Memorandum in Support of Counter-Defendants' Motion to Dismiss* with the Court using the ECF system, which will send notification of such filing to all counsel currently included on the Court's Electronic Mail Notice List.

/s/ Pamela Jozwiak, Legal Assistant to

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