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

CIRCUIT CIVIL DIVISION AI
CASE NO. 50-2013-CA-015257-XXXX-MB

HAROLD PEERENBOOM,
Plaintiff/Petitioner
vs.
ISAAC IKE PERLMUTTER, LAURA PERLMUTTER, ROBERT DAVIDOW, et al.,
Defendant/Respondents.
_____/

ORDER GRANTING THE PERLMUTTERS' MOTION FOR SUMMARY JUDGMENT AS TO COUNTS I-V OF HAROLD PEERENBOOM'S FIFTH AMENDED COMPLAINT
AND
FINAL JUDGMENT ON SUMMARY JUDGMENT DISMISSING COUNTS I THROUGH V (THE "HATE MAIL" CLAIMS) OF PLAINTIFF'S FIFTH AMENDED COMPLAINT

THIS CAUSE came before the Court on The Perlmutters' Motion for Summary Judgment as to Counts I-V ("the Hate Mail Claims") of Harold Peerenboom's Fifth Amended Complaint (D.E. # 1807). Harold Peerenboom filed his response on July 28, 2021 (D.E. # 1870). The Perlmutters filed a reply on August 2, 2021 (D.E. # 1873). The motion was heard on August 5, 2021. The Court has considered the submissions of the parties, the arguments of their counsel, and is otherwise advised of the premises.

UNDISPUTED MATERIAL FACTS

Peerenboom alleges that he was the target of a "hate mail" campaign that allegedly started in June 2011 and ended in July 2016. Peerenboom initiated this action on October 7, 2013, first as a complaint seeking a pure bill of discovery. (D.E. # 5.) Peerenboom filed his first amended complaint on March 6, 2014 (D.E. # 55) and has amended four more times, to the current fifth amended complaint (D.E. # 1023).

It is undisputed that that Isaac Perlmutter issued a mailing in June 2011. As explained in a companion order dismissing Count VI of Peerenboom's fifth amended complaint, Peerenboom

knew at least by April 2012 that Mr. Perlmutter was the source of the June 2011 mailing, and accordingly Count VI of the fifth amended complaint (defamation by implication), which focused upon the June 2011 mailing, was barred by the two-year statute of limitations contained in section 95.11(4)(g), Florida Statutes.

It has since been established that all other alleged "hate mail" generated after the June 2011 episode was not done by the Perlmutters, but instead by David Smith, a Canadian national and a former employee of Peerenboom's company, and Thomas Thorney. There is no evidence whatsoever that the Perlmutters had any hand in those mailings.

The focus of Counts I-V of Peerenboom's complaint against the Perlmutters thus is limited to and focuses upon the June 2011 mailing that Mr. Perlmutter admits issuing. In order to rule on the Perlmutters' motion for summary judgment on counts I-V, the actual content of the June 2011 must be recounted. It is undisputed that the June 2011 mailing by Mr. Perlmutter consisted of the following:

1. A "cover page" that stated, "Important Information For Members Of High Ridge Country Club" (Ex. 33 to motion, D.E. # 1808); and
2. Three documents consisting of (a) a four-page undated, unsigned affidavit titled, "The Toronto Computer Leasing Inquiry Affidavit of Harold Peerenboom" (the unsigned notary space suggesting the year 2003), (b) a five-page document attributed to the website, www3.sympatico.ca titled, "TORONTO & WATERLOO," which suggests a publication date in 2003, and (c) a two-page article dated April 18, 2006 purportedly published by the "Lake Ontario Waterkeeper" on its website, www.waterkeeper.ca. (*Id*.)

ANALYSIS AND RULINGS

(A) Peerenboom's response to the Perlmutters' summary judgment motion.

The Court first must address Peerenboom's response to the Permlutters' summary judgment motion, which is the subject of this Order. It does so because of current Florida Rule of Civil Procedure 1.510(a), which states in pertinent part:

> **(a) Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, ***identifying each claim or defense***--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment ***if the movant shows*** that there is no genuine dispute as to any material fact ***and the movant is entitled to judgment as a matter of law***.

(Emphasis add.)

The rule goes on to prescribe the procedure by which the movant is to state undisputed issues of fact and the opponent is to respond to them. Fla. R. Civ. P. 1.510(c). The rule does not expressly prescribe that the opponent also must address, in its opposition, the inherent question on summary judgment: Whether the movant "is entitled to judgment as a matter of law."[1] If an opponent does not (or cannot) explain why its factual disputes and retorts are material to sustain the legal elements of "each claim" (Rule 1.510(a)) on which the movant seeks summary judgment, the opponent impliedly concedes the point. "It is settled that a litigant faced with a sufficiently supported motion for summary judgment cannot simply sit back and say 'I have a good answer to all this but I won't disclose it now.'" *In re B.D. Intern. Discount Corp.*, 701 F.2d 1071, 1077 n. 11 (2d Cir.), *cert. denied*, 464 U.S. 830 (1983) (citations omitted).

In his response, Peerenboom meets the Rule's requirement for addressing the Perlmutters' statements of fact. He admits some, denies others, and often provides qualified responses based on characterization and explanation. He does not, however, relate his asserted factual disputes to the legal elements of the causes he asserts against the Perlmutters.

Peerenboom's legal arguments in opposition to the Perlmutters' motion rest on two grounds. First, he argues that the deposition of the established "hate mailer," Mr. Smith, has not been completed, and Mr. Smith has pleaded the Fifth Amendment on questions that might somehow possibly link the Perlmutters to Mr. Smith's actions. Yet Mr. Smith has testified that he does not know the Perlmutters, and the Perlmutters had no involvement in his mailings. And at this stage of a now nearly eight year-old case, Peerenboom concedes that he has no evidence linking the Perlmutters to anything except the June 2011 mailing, which Isaac Perlmutter has admitted to sending. This leads to Peerenboom's second argument: Mr. Smith is a liar and therefore the Perlmutters cannot rely on anything Smith has said, under oath or otherwise, in

denying any connection to the Perlmutters. Yet, again, Peerenboom has conceded that he can produce no evidence to the contrary in order to present a genuine issue of material fact.

His third argument is that on summary judgment, the Court must consider the facts in the light most favorable to the non-movant. That is a correct but incomplete statement of the law governing summary judgment under the "new" Rule 1.510. The summary judgment Rule has not been amended in Florida, which mirrors the directed verdict standard. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1985) (summary judgment standard mirrors directed verdict standard). Accordingly, the Court applies the following, long-established directed verdict standard applied under Florida law in adjudicating the Perlmutters' motion: "Power to direct a verdict should be cautiously exercised and the same should never be granted **unless the evidence is such that under no view which the jury might lawfully take of the evidence favorable to the adverse party** could a verdict for the adverse party be sustained." *Katz v. Bear*, 52 So. 2d 903, 904 (Fla. 1951) (emphasis added), *accord*, *Little v. Publix Supermarkets, Inc*., 234 So. 2d 132, 133 (Fla. 4th DCA 1970) (citation omitted).

(B) Claims relating to "hate mail" issued after June 2011.

First, the Court grants summary judgment in favor of the Perlmutters on all claims relating to "hate mail" issued after the June 2011 mailing. Peerenboom concedes in his response to the Perlmutters' motion that "he is not in possession of any direct, affirmative evidence linking the Perlmutters to the Hate Mail campaign." (Resp. at 2, footnote omitted.) Peerenboom also states, "Yes, there is currently no admissible evidence linking the Perlmutters to [David] Smith." (*Id*. at 17.) In addition to these admissions, the record richly establishes that David Smith and Thomas Thorney were the perpetrators of the Hate Mail campaign. The evidence against Mr. Smith and Mr. Thorney – and excluding the Perlmutters from any involvement – is detailed in the Perlmutters' Statement of Undisputed Facts at paragraphs 16-26, 32, 35-41, 51-62, with references to exhibits. Rather than unnecessarily elongating this Order by reproducing all of that information, the Court incorporates those paragraphs and associated exhibits by reference. In his response, Peerenboom generally admits the statements contained in those paragraphs. (D.E. #

1870.) Based upon these facts and admissions, no reasonable jury could find that the Perlmutters had any involvement in the Hate Mail campaign conducted by Mr. Smith and Mr. Thorney, which started in December 2012 and ended in July 2016. Accordingly, insofar as Counts I through V of the fifth amended complaint are based upon anything other than the June 2011 mailing (which Mr. Perlmutter has admitted sending), summary judgment is granted.

The remainder of this Order addresses Counts I through V only with respect to the June 2011 mailing, which Isaac Perlmutter admits sending.

Count I – *Defamation and Defamation Per Se*.

Count I of the fifth amended complaint (defamation and defamation *per se*) is dismissed as barred by the two-year statute of limitations for defamation claims contained in section 95.11(4)(g), Florida Statutes. The undisputed evidence is that the publication occurred in June 2011. The original complaint in this action was not filed until October 7, 2013, more than two years after the allegedly defamatory June 2011 mailing was issued.

The two-year statute of limitations accrues upon publication. *Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So. 2d 113, 114–15 (Fla. 1993).

In *Wagner*, the Florida Supreme Court stated:

> The legislature has established unequivocal guidelines governing the statute of limitations for defamation suits and has decided on a two-year period . . . A cause of action for defamation accrues on publication . . . The cause of action for damages founded upon a single publication or exhibition or utterance ... shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state . . . We hold the above statute applicable to all civil litigants, both public and private, in defamation actions. To rule otherwise would allow potentially endless liability since Florida Statutes contains no statute of repose for this particular tort. We doubt the legislature would have intended this.

Wagner, at 114–15. (internal citations and quotations omitted).

Based on the foregoing, the Court grants summary judgment as to Count I, which is dismissed.

Count II – Intentional Infliction of Emotional Distress.

The elements of a cause of action for intentional infliction of emotional distress are:

(1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior

when he knew or should have known that emotional distress would likely result;

(2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;

(3) the conduct caused emotional distress; and

(4) the emotional distress was severe.

Deauville Hotel Management, LLC v. Ward, 219 So. 3d 949, 954-55 (Fla. 3d DCA 2017). Whether the conduct constitutes "outrageous" conduct is a question of law for the Court to determine. *Id*. at 955.

As explained in *Deauville Hotel*, the conduct "must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id*. (quoting *Clemente v. Horne*, 707 So. 2d 865, 867 (Fla. 3d DCA 1998). "It is not 'enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.'" *Gallogly v. Rodriguez*, 970 So.2d 470, 471–72 (Fla. 2d DCA 2007) (quotation omitted). In other words, even purposeful conduct that one knows is going to hurt another is not outrageous enough to support a claim.

In *Byrd v. BT Foods, Inc.*, 948 So.2d 921, 928 (Fla. 4th DCA 2007), the Fourth District Court of Appeal considered the application of the tort of intentional infliction of emotional distress in the context of the teasing of a plaintiff with the human immunodeficiency virus ("HIV"). The Fourth District stated:

> To successfully pursue a cause of action for intentional infliction of emotional distress, the plaintiff must show "conduct 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' "Whether alleged conduct is outrageous enough to support a claim of intentional infliction of emotional distress is a matter of law, not a question of fact." *The teasing of Byrd by other employees did not rise to the level of outrageous conduct required to sustain the tort.*

(Internal citations omitted. Emphasis added.)

Applying these standards, and having reviewed the materials contained in the June 2011 mailing (Ex. 33 to the Perlmutters' motion, D.E. 1809), the Court determines as a matter of law that June 2011 mailing and its content do not rise to the level of "outrageousness" required to meet the second element of a cause of action for intentional infliction of emotional distress. The first document is an unsigned affidavit purportedly authored for Mr. Peerenboom's signature about his recollection of whether he traveled with a fellow Toronto Harbor Commission board member to a professional hockey game in 1999. The second is a 2003 article published by *Sympatico* that centered on whether a firm that leased computer equipment to the city of Toronto, the gist of the article being that the firm had engaged in improper socializing with harbor commission board members, including the 1999 hockey game, in order to gain the computer contract with the city. The third is a 2006 article published by *Lake Ontario Waterkeeper* recounting alleged improprieties by the former Toronto Harbor Commission, which had been since been dismantled and replaced with the Toronto Port Authority.

These are not the things of which a claim for intentional infliction of emotional distress is made. As described in *Deauville Hotel*, neither calling a minister a thief in front of his parishioners, nor a supervisor using the worst racial epithets towards an employee, met the "outrageous" requirement. *Id*. at 955 (citations omitted). Neither does the mailing of these materials, even if Mr. Perlmutter was motivated by spite. Accordingly, the Court grants summary judgment as to Count II of Peerenboom's fifth amended complaint, which is dismissed.

Count III – Tortious Interference with Advantageous Business Relationships.

Peerenboom's claim of tortious interference with advantageous business relationships also fails to survive summary judgment. First, insofar as it is based upon "hate mail" other than the June 2011 mailing (*i.e.*, the mailings that occurred between December 2012 and July 2016), the Court has ruled that Peerenboom admittedly cannot offer any evidence linking them to those mailings. Otherwise, Peerenboom has failed to establish genuine issues of material fact regarding whether the June 2011 mailing meets the elements of this tort.

The elements of this cause of action are "(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship." *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127 (Fla. 1985). Peerenboom offers only conclusory allegations in his complaint, never specifically linking the June 2011 mailing to any interference with any business relationship or resulting damages. As previously noted, in his response to the Perlmutters' motion for summary judgment, still he fails to present any evidence demonstrating a genuine issue of material fact on this claim. One of the trilogy of cases establishing the "federal standard" is *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), in which the United States Supreme Court held, "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

This is such a situation. Peerenboom as plaintiff has the burden of proof on his tortious interference claim, and his failure to present facts establishing any of the elements of that claim entitles the Perlmutters to summary judgment dismissing Count III of the fifth amended complaint. Accordingly, the Court grants summary judgment as to Count III, which is dismissed.

Count IV – Civil Conspiracy.

"In order to plead a cause of action for civil conspiracy there must be an underlying independent wrong or tort." *Rushing v. Bosse*, 652 So. 2d 869, 875 (Fla. 4th DCA 1995.) "[If the underlying tort which forms the basis for a civil conspiracy is not proved, then there can be no recovery for the alleged conspiracy itself." *Lake Gateway Motor Inn, Inc. v. Matt's Sunshine Gift Shops, Inc.*, 361 So. 2d 769, 772 (Fla. 4th DCA 1978). The Court has granted summary judgment on all of the possible underlying torts asserted by Peerenboom in his fifth amended

complaint. Therefore, there is no basis for his civil conspiracy claim. Based on the foregoing, the Court grants summary judgment as to Count IV, which is dismissed.

Count V – Injunction.

Peerenboom seeks injunctive relief in Count V of his fifth amended complaint, asking the Court to enjoin the Perlmutters from "resuming their defamatory campaign." Once again, there is no evidence supporting Peerenboom's allegations that the Perlmutters were part of any sustained "hate mail" campaign; the only "evidence is Mr. Perlmutter's admission that he sent the June 2011 mailing containing the unsigned affidavit and the *Sympatico* and *Lake Ontario Waterkeeper* articles. Once again, the Court has granted summary judgment on all of Peerenboom's causes of action.

Moreover, "Injunctive relief is an extraordinary remedy. . . 'Generally, injunctive relief is available to prevent a threatened harm but is not available to redress harm which has already occurred' . . . Accordingly, under Florida law, " 'an injunction will not be granted where it appears that the acts complained of have already been committed and there is no showing by the pleadings and proof that there is a reasonably well grounded probability that such course of conduct will continue in the future . . . *Dolencorp, Inc. v. Winn-Dixie Stores, Inc.*, 2 So. 3d 325, 327-28 (Fla. 4th DCA 2008) (citations omitted). Giving due regard to the fact that Mr. Perlmutter admitted sending the June 2011 mailing, and assuming *arguendo* that the mailing could possibly have any actionable grounds, nonetheless that was an isolated incident from the now-distant past, and there is no evidence or even a suggestion that Mr. Perlmutter might continue such conduct in the future. Accordingly, pursuant to *Dolencorp*, the Court grants summary judgment as to Count V of the fifth amended complaint, which is dismissed.

Based on the foregoing, the Perlmutters' Motion for Summary Judgment as to Counts I-V of Harold Peerenboom's Fifth Amended Complaint (DE#1807) is granted. Counts I-V are dismissed.

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[1] Likewise, Rule 1.510's federal counterpart, Federal Rule of Civil Procedure 56, on which the Florida rule is substantially modeled, does not expressly prescribe this inherent requirement

to an opponent's resistance of summary judgment.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida.

50-2013-CA-015257-XXXX-MB 09/27/2021
Cymonie Rowe
Circuit Judge

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