Circuit Court for Baltimore City
Case No. 24C15001200

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1609

September Term, 2016

FLAUBERT MBONGO

v.

BOMBARDIER TRANSPORTATION SERVICES USA CORPORATION, ET AL.

Eyler, Deborah S.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: October 26, 2017

Flaubert Mbongo, appellant, filed a five-count complaint in the Circuit Court for Baltimore City against Bombardier Transportation Services USA Corporation (BTS) and three of its employees: E.W. Smith, Leonard Sullivan, and Christopher Difatta (collectively, the appellees). The gist of appellant's complaint was that he had been wrongfully removed and banned from riding the MARC train. Appellees prevailed on their motion for summary judgment in which they argued that they were legally justified in removing and banning appellant from the train because he had been disorderly. Appellant essentially raises one question on appeal: Did the circuit court err in granting summary judgment because there were material issues of fact in dispute?[1] [2] For the reasons set forth below, we shall reverse.

[1] Appellant specifically raised the following questions in his appellate brief:

> I. The circuit court erred when it granted a blanket summary judgment for the defendants despite material issues of facts beyond some metaphysical doubt.
>
> II. The circuit court erred when it granted defendants' motion for summary judgment when it held that Mr. Mbongo failed to set forth sufficient facts to prove the claims asserted in his complaint.
>
> Appellant Mr. Mbongo supplies sufficient evidence to make a genuine issue of material facts and prove therefore the claims asserted in his complaint[.]

[2] Appellant was represented by counsel in the circuit court but has appealed *pro se*. Although a *pro se* document is to be "liberally construed" and held to less stringent standards than those documents drafted by lawyers, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), "the procedural, evidentiary, and appellate rules apply alike to parties and their attorneys. No different standards apply when parties appear *pro se*[,]" *Tretick v. Layman*, 95 Md. App. 62, 86 (1993).

FACTS

The sole question on appeal is whether the grant of summary judgment by the circuit court was appropriate. Accordingly, we look to the record, including the pleadings, depositions, and other materials on file. *Philadelphia Indem. Ins. Co. v. Maryland Yacht Club, Inc.*, 129 Md. App. 455, 465 (1999) (citations omitted). Additionally, we view the allegations pled in favor of appellant, the non-moving party. *Piscatelli v. Van Smith*, 424 Md. 294, 305 (2012)("[R]easonable factual inferences from the well-pled factual allegations are assumed in favor of the non-moving party.") (citations omitted).

According to appellant's complaint and other filings, appellant regularly used the Camden Line of the MARC rail system operated by BTS to commute to his job during the week, and he had done so since 2008 until 2014 without incident. Appellant's weekday morning routine was to catch the train at the Muirkirk Station in Beltsville and ride it to the Camden Station in Baltimore, and then reverse the trip in the evenings.

Around March 8, 2014, several passengers circulated a complaint letter addressed to the "MARC Train Company." The letter related that E.W. Smith, a conductor on the Camden Line, was "rude" and had a practice of opening only the last door of the train for boarding at the Camden Station, even though many people waited to board the train. Appellant had asked Smith on prior occasions why he only opened one door of the train when so many people waited. Five people signed the letter, including appellant. It is unclear whether Smith ever saw the letter, but after it was written and signed, Smith proceeded to open both doors of the train car.

Nine days later, around March 17, appellant boarded the train in Camden and took a seat. Smith approached him and accused him of pushing other passengers on the platform. Appellant denied that he pushed anyone, and when he asked who had made the allegations against him, Smith said he would not tell him. Smith told appellant that if he received any further complaints, appellant would be removed from the train.

On March 28, 2014, appellant boarded the Camden train and asked Smith why he had returned to opening only one door. Smith told appellant to return to his seat and keep quiet. Appellant did as he was told. As appellant got off the train, both Smith and Leonard Sullivan, another conductor on the Camden Line, met appellant on the platform and, in the presence of other commuters, loudly told him that if they received any further complaints about him he would be banned from riding the trains. Appellant told them he had done nothing to receive any complaints.

Three days later, on March 31, as appellant was about to board the train at the Camden Station, Smith pointed appellant out to Christopher Difatta, a "transportation coordinator" with BTS. Difatta approached appellant and told him that he had received an e-mail the night before from Sullivan, who had included e-mails from passengers complaining that appellant had pushed them on the platform and that appellant had "flipped" his finger in Sullivan's face. Appellant told Difatta that the accusations were false. Nevertheless, Difatta told appellant that he was banned from the 5:15 p.m. train but

could ride the 3:30 p.m. or 6:15 p.m. train.[3] Appellant told Difatta that he could not ride the earlier train because he was still working, and he could not ride the later train because his son's daycare would be closed by then. Appellant asked Difatta to look at the surveillance cameras and conduct his own investigation. Difatta agreed to do so and told appellant to contact him in two days' time. When appellant did, Difatta said he did not contact the passengers who had allegedly complained nor review any tapes because he believed what the conductors had told him. On May 15, 2014, appellant filed a complaint in the District Court for Baltimore City against Smith, Sullivan, and Difatta.[4]

After the encounter on March 31, 2014, appellant rode the 6:15 p.m. train home until June, 20, 2014.[5] On that date Difatta sought the assistance of Metropolitan Transit Authority (MTA) police officers and had appellant forcibly removed from the train at the Camden Station. Difatta falsely told the officers that appellant was banned from riding the trains because he was disrespectful to the conductors and had pushed passengers. This was apparently the first time Mbongo was told that he was disrespectful to the conductors.

[3] Contrary to what Difatta verbally told appellant, Difatta wrote on the back of his business card that he handed to appellant "Customer is Banned from riding any MARC Train."

[4] This complaint was dismissed without prejudice on January 26, 2015. It is unclear whether the defendants received notice of the complaint because it was not served on them personally.

[5] Appellees point out in their appellate brief that it is unclear whether appellant first attempted to ride the 5:20 p.m. train but was removed and then rode the 6:15 p.m. train home, or whether he just took the 6:15 p.m. train home without incident. Nonetheless, appellees agree that it is immaterial to the case which scenario occurred.

Appellant was then forced to take a cab from the Camden Station to the Muirkirk station where his car was parked. From June 20 until the end of the year, appellant drove from his home in Silver Spring to Baltimore for work every weekday.

On March 11, 2015, appellant filed a five-count complaint in circuit court against the appellees alleging breach of contract, tortious interference with contract and prospective advantage, defamation, violation of appellant's right to intrastate travel, and civil conspiracy. In his breach of contract count, appellant alleged that BTS breached its contract with him when he purchased a ticket to ride the train on June 20, 2014, but was removed from the train, even though he did nothing to warrant his removal. In his tortious interference with contract and prospective advantage count, appellant alleged that Smith, Sullivan, and Difatta unlawfully interfered with his contract with BTS to ride the train. In his defamation count, appellant alleged that Smith, Sullivan, and Difatta falsely and with malice communicated to MARC train passengers and MTA police officers, between March 31, 2014 and June 20, 2014, that appellant had engaged in criminal conduct by assaulting passengers and had violated the rules governing the riding of the MARC train. In his violation of his right to intrastate travel count, appellant alleged that the appellees had unlawfully banned him from riding the 5:20 p.m. train from March 31, 2014, and from riding any train after June 20, 2014, and that the appellees had acted with malice. In his civil conspiracy count, appellant alleged that the appellees unlawfully and with malice conspired to interfere with his right to ride the MARC train and engage in intrastate travel. Appellant sought compensatory damages, due to his increased transportation costs, and punitive damages.

Appellees responded to the complaint and deposed appellant, after which they filed a motion for summary judgment. The basis of the motion was that there was "no genuine issue of material facts" because they were legally justified in removing appellant from the train, "due to numerous complaints received regarding [appellant] shoving passengers on the loading platforms and his general rude behavior to train personell [sic]." Appellees alleged that appellant was removed because of "persistent complaints received about [appellant's] behavior on the train and platform" and that he "posed a potential safety risk to nearby passengers[.]" Appellees attached to their motion a MARC Riders Guide, a several page pamphlet that provided, in pertinent part:

> WHAT TO EXPECT DURING YOUR RIDE
>
> Safety and Security
>
> * * *
>
> - **The conductor is in charge of the train**. Follow his/her instructions while riding any MARC Train. Please inform the conductor of any service problems you may experience or if you need assistance prior to arriving at your destination.
>
> - Improper conduct, intoxication, offensive actions or language that is objectionable to other passengers and/or the train crew or is disruptive to the safe operation of the train is not permitted. Passengers displaying disorderly conduct will not be transported and will be asked to leave the train. No refunds will be made to passengers who have been removed from the train under these circumstances.

(Emphasis in original).

Appellees advanced several other arguments in support of their motion. As to the tortious interference with contract or prospective advantage count, appellees argued that the theory requires that a "third party" interfere with the rights of a party to a contract.

Because the three named defendants, Smith, Sullivan, and Difatta, were employees of BTS and had acted within the scope of their employment, they were not third parties. As to the defamation count, appellees argued that "pushing" does not impute "criminal activity" and therefore there was no defamatory communication. Additionally, there was no evidence that any defamatory communication was made negligently, recklessly, or with knowledge of the falsity of the communication, and appellant had not suffered actual damages. Likewise, as to the civil conspiracy count, appellees argued that appellant did not demonstrate that he suffered any actual damages. Lastly, appellees argued that appellant did not allege sufficient facts of malice to sustain his claim for punitive damages, which in any event are not recoverable in Maryland in a breach of contract action.

The circuit court granted appellees' motion for summary judgment after a hearing, stating only in extremely summary terms, "that the Plaintiff did not provide sufficient facts to prove the claims asserted in his complaint and there is no genuine dispute as to a material fact[.]"

DISCUSSION

Appellant argues on appeal that the circuit court erred in granting the appellees motion for summary judgment because there were issues of material facts that were in dispute. Appellees argue to the contrary. We agree with appellant and shall reverse.

"To defeat a motion for summary judgment, the party opposing the motion must produce evidence demonstrating that the parties genuinely dispute a material fact." *College of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.*, 132 Md. App. 158, 166-67 (2000)(citations omitted). "A material fact is one that will alter the outcome of the case,

depending upon how the fact-finder resolves the dispute." *Blackwell v. CSX Transp., Inc.*, 220 Md. App. 113, 120 (2014) (quotation marks and citations omitted). As we said above, we are mindful that we view the factual allegations pled in the record and reasonable inferences from those allegations, in the light most favorable to the non-moving party, appellant. *Piscatelli*, 424 Md. at 305. Whether the trial court properly granted summary judgment is a question of law that we review *de novo* on appeal. *Springer v. Erie Ins. Exchange*, 439 Md. 142, 156 (2014) (citations omitted). "The function of a summary judgment proceeding is not to try the case or to attempt to resolve factual issues, but to determine whether there is a dispute as to a material fact sufficient to provide an issue to be tried." *Berkey v. Delia*, 287 Md. 302, 304 (1980) (citations omitted). "[W]e review only the grounds upon which the trial court relied in granting summary judgment." *Springer*, 439 Md. at 156 (quotation marks and citations omitted). We are mindful that summary judgment is generally not advisable in tort actions, constitutional cases, and cases that raise fraud or intent "due to the need for greater than usual factual development[.]" *Berkey*, 287 Md. at 305-06 (citation omitted).

Applying the above law to the facts before us, we disagree with the circuit court that appellant "did not provide sufficient facts to prove the claims asserted in his complaint and there is no genuine dispute as to a material fact[.]" The gist of appellant's complaint was that he was unlawfully removed and banned from the MARC trains, because of the fraudulent claims by the named BTS employees that passengers had complained that appellant had shoved them on the platform. The gist of appellees' response is that appellant

had acted disorderly, which justified his removal from the train. Whether appellant had acted disorderly which justified his removal and banning from the train was a material fact in dispute. Whether appellees acted with actual malice, in removing and banning appellant to support a claim for punitive damages, is also a material fact in dispute. To resolve these issues the circuit court was required to make factual and credibility determinations, which is not the role of the trial court at the summary judgment stage.

As to the additional claims made by appellees, we note the following. Appellees are correct that the tort of intentional interference with contract requires a three-party relationship - the two parties to the contract and the interferer - and that an employee acting in the scope of employment cannot be liable for interfering as a third party. *Mates v. North American Vaccine, Inc.*, 53 F.Supp.2d 814, 827 (D.Md.1999) (citation omitted). *Bleich v. Florence Crittenton Services of Baltimore, Inc.*, 98 Md. App. 123, 147 (1993). However, an employee is acting outside the scope of his employment where the employee engages in unethical conduct, *Fraidin v. Weitzman*, 93 Md. App. 168, 188-92 (1992), *cert. denied*, 329 Md. 109 (1993); participates in a conspiracy, *Harnish v. Herald-Mail Co.*, 264 Md. 326 (1972); aids and abets unlawful conduct, *Fraidin*, 93 Md. App. at 235; or acts without intent to further the interest of his employer, *Pope v. Board of School Com'rs of Baltimore City*, 106 Md. App. 578, 591-92 (1995), *cert. denied*, 342 Md. 116 (1996). Because appellant alleged that appellees acted unlawfully, fraudulently, and in conspiracy in removing and banning him from the train, appellant's tortious interference with contract claim is viable as alleged.

In a defamation action, the plaintiff must show: (1) that the defendant made a defamatory communication to a third person, (2) that the communication was false, (3) that the defendant was at fault in making the communication, and (4) that the plaintiff suffered harm. *Offen v. Brenner*, 402 Md. 191, 198 (2007) (citation omitted). A "defamatory" communication is one "which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person." *Id*. (quotation marks and citation omitted).

Maryland distinguishes between defamatory communications that are *per quod*, which require extrinsic facts in the complaint and at trial to establish the defamatory character of the communications and evidence of actual damages, and defamatory communications that are defamatory *per se*, which require no extra pleadings or proof. *See Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 441–42 (2009) (citations omitted). Words that falsely impute criminal conduct to a plaintiff are defamatory *per se*. *Smith v. Danielczyk*, 400 Md. 98, 115 (2007) (citations omitted). *See also American Stores Co. v. Byrd*, 229 Md. 5, 14-15 (1962)(where Court of Appeals held that words of store manager who essentially accused a customer of larceny by asking her whether she took the money which he had placed on the counter constituted defamation *per se* when considered with all attending circumstances). Contrary to appellees' argument, appellant's defamation claim that appellees fraudulently told police officers and other passengers standing on the platform that appellant had pushed, i.e., assaulted passengers, and then was physically removed from the area, was a defamatory *per se* communication that did not require any additional pleadings or proof of actual damages.

To the extent that appellees argue that appellant did not sufficiently plead punitive damages or malice to survive their motion for summary judgment, we disagree. Based on the facts pled and reasonable inferences from those facts drawn in appellant's favor, we are persuaded that appellant has made plausible and specific allegations of bad faith and improper motivation to survive a motion for summary judgment. *Cf. Barbre v. Pope*, 402 Md. 157, 182-86 (2007)(discussing what constitutes sufficient allegations of malice to overcome a motion for summary judgment in the context of determining whether the defendants acted outside their scope of employment), and *Amalgamated Transit Union v. Lovelace*, 441 Md. 560, 575 (2015)(stating that damages are presumed when a plaintiff can demonstrate actual malice, by clear and convincing evidence, even in the absence of proof of harm)(citations omitted).

In sum, we shall reverse the circuit court's grant of summary judgment.

JUDGMENT REVERSED.

COSTS TO BE PAID BY APPELLEES.