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OLGA MARCELA ESCOBAR-ECK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

JOSHUA BILLAUER,

Plaintiff,

vs.

OLGA MARCELA ESCOBAR-ECK; and DOES 1 through 1,000,

Defendants.

CASE NO. 37-2021-00006367-CU-DF-CTL

[Assigned to Hon. Kenneth J. Medel, Dept. C-66]

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF DEFENDANT'S DEMURRER TO COMPLAINT

[*Filed Concurrently with Notice of Demurrer and Demurrer, Declaration of Scott McCaskill, and [Proposed] Order*]

Date: October 1, 2021
Time: 9:30 a.m.
Dept.: C-66

Complaint Filed: February 16, 2021
Trial Date: None Set

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Olga Marcela Escobar-Eck ("**Defendant**") demurs to the Complaint of plaintiff Joshua Billauer ("**Plaintiff**"). The Complaint alleges two causes of action for "Libel *Per Se*", and "Intentional Infliction of Emotional Distress", neither of which state a cause of action.

Plaintiff and Defendant are on opposite sides of a debate over a land use issue. Plaintiff alleges Defendant published a social media post stating plaintiff was "engaged in cyberbullying",

which plaintiff contends is libelous on its face because it accuses plaintiff of a crime. However, there is no recognized crime of "cyberbullying" in California. Indeed, the Complaint fails to identify any statute that would be implicated by Defendant's tweet. As the tweet is not libelous *per se*, plaintiff must plead special damages in order to state a claim for libel, which the Complaint fails to do. As such, the Complaint fails to state a claim for libel

Further, the tweet at issue is not sufficiently "outrageous" to constitute a claim for IIED. Moreover, Plaintiff fails to plead the nature and extent of any emotional distress he has suffered, further dooming the claim. Thus, Defendant respectfully requests this Court grant the Demurrer as to Plaintiff's Complaint.

II. FACTUAL BACKGROUND

A. Parties in Dispute Over Land Use Issue

Plaintiff alleges Defendant published a "tweet" on the Twitter social media platform that stated plaintiff was "engaged in cyberbullying" (the "**Tweet**"). (Complaint, p. 3:5-6.) Plaintiff admits the Tweet was posted in response to statements Plaintiff made to Defendant in the course of Plaintiff's "expression of opinions about economic growth and development in [plaintiff's] community and the impact thereof on the quality of life in [plaintiff's] community." (Complaint, p. 3:27-4:2.) Indeed, the Tweet was part of an ongoing disagreement between Plaintiff and Defendant as to the land use issue, in connection with which plaintiff operates a Twitter account named @SaveDelCerro. (Complaint, p. 2:11-12; *see also* Exhibits B, C.)

B. The Complaint

In his Complaint, Plaintiff asserts two causes of action: (1) Libel *Per Se* and (2) Intentional Infliction of Emotional Distress ("**IIED**").

III. LEGAL STANDARD FOR DEMURRER

Under California Code of Civil Procedure section 430.10, a party against whom a complaint has been filed may object by demurrer on the grounds that the pleading does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The principal function of a demurrer is to test the sufficiency of a pleading by raising questions of

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law. (*Songer v. Cooney* (1989) 214 Cal.App.3d 387, 390). A demurrer admits all material facts properly pleaded, but it does not admit contentions, deductions, or conclusions of fact or law. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713; *White v. Davis* (1975) 13 Cal.3d 757, 765.) Allegations of fact or law that are merely conclusory are properly disregarded by the court upon demurrer. (*Burt v. County of Orange* (2004) 120 Cal.App.4th 273, 277.) In determining the sufficiency of a complaint against demurrer the court considers not only the contents of the complaint but also matters of which judicial notice may be taken. (Code Civ. Proc., § 430.30, subd. (a); *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754.)

IV. LEGAL ANALYSIS

A. The Cause of Action for Libel *Per Se* Fails to State a Cause of Action and is Subject to Demurrer per C.C.P. § 430.10(e)

1. Need for Extrinsic Evidence Defeats Libel *Per Se* Claim

A statement is libelous *per se* if it defames the plaintiff on its face, that is, without the need of extrinsic evidence to explain the statement's defamatory nature. (Cal. Civ. Code § 45a.) Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves he has suffered special damage as a proximate result thereof. (*Bartholomew v. YouTube*, LLC. (2017) 17 Cal.App.5th 1217, 1226.)

a. Statements Made in Public Debate Considered Opinion, Not Fact

Where potentially defamatory statements "are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole," language which generally might be considered as statements of fact "may well assume the character of statements of opinion." (*Gregory v. McDonnell Douglas Corp*. (1976) 17 Cal.3d 596, 601.)

Thus, in *Greenbelt Co-op. Pub. Ass'n v. Bresler* (1970) 398 U.S. 6, 13-14, for example, the United States Supreme Court acknowledged use of the word 'blackmail' as descriptive of the plaintiff's negotiating position in the context of the particular circumstances involved in that case was not libelous. Similarly, in *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers,*

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AFL-CIO v. Austin (1974) 418 U.S. 264, 268, the Supreme Court held that the publication of Jack London's definition of 'scab,' containing the phrase "traitor to his God, his country, his family and his class" and other words suggesting that plaintiffs had 'rotten principles' and 'lacked character,' did not constitute libel. Instead, the Court held "[s]uch words were obviously used . . . in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law." (*Id*. at 284.) The high tribunal, reversing a state court injunction of union picketing, stated in *Cafeteria Union v. Angelos* (1943) 320 U.S. 293, 295 that ". . . to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts."

b. Tweet is not Libelous Per Se

Plaintiff alleges the Tweet is libelous *per se* because "[c]yberbullying is a crime throughout the United States of America and its various territories". (Complaint, ¶ 10(A).) While it is true that allegations that a plaintiff committed a crime can be libelous on its face, there is no recognized crime of "cyberbullying" in the state of California or, indeed, throughout the country. (See, e.g., Williams, Jamie L., Teens, Sext, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Law, 20 Wm. & Mary Bill Rts. J. 1017, 1039 (Mar.2012) [discussing failed federal attempts to criminalize cyberbullying].) Instead, the term "cyberbullying" is a vague, amorphous concept that does not refer to a specific crime the way "assault" or "theft" does. Indeed, the Complaint fails to identify any criminal statute that prohibits, or even uses the word, "cyberbullying". As such, the Complaint fails to allege Defendant accused Plaintiff of a crime, and thus the tweet at issue is not libelous *per se*.

Instead, it is clear from the context that the Tweet was issued in the context of a heated zoning dispute Defendant and Plaintiff are both involved in. Just as the allegation of "blackmail" in *Bresler* was not libelous, neither is the statement here that Plaintiff was engaged in "cyberbullying". Rather, the charge of cyberbullying was clearly related to the back-and-forth

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online exchanges between the parties in a heated public debate, not to allegation of criminal conduct. Thus, beyond not being libelous on its face, the Tweet is not libelous at all and the claim fails.

3. Complaint Fails to Plead Special Damages

As the Tweet is not libelous *per se*, Plaintiff must plead special damages in order to state a claim for libel. Allegations that a plaintiff "has suffered in an amount, which, as yet, cannot be ascertained and which will be proven at trial" are insufficient to allege special damages in a libel claim. (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 807.) Instead, a plaintiff must be "able to plead injury to property, business, trade, profession or occupation, if these interests have been injured even though the monetary extent might not have been ascertainable." (*Id*.)

For example, in *Washer v. Bank of America* (1943) 21 Cal.2d 822, 825, overruled on other grounds, 52 Cal.2d 551, 343 P.2d 36, the plaintiff bank manager met the requirement by alleging he had been refused employment at various banks and would be unable to secure employment at any other bank. (*See also Peabody v. Barham* (1942) 52 Cal.App.2d 581, 585 disapproved of on other grounds by *MacLeod v. Tribune Pub. Co*. (1959) 52 Cal.2d 536 [holding allegations that by reason of the publication of the "defamatory article plaintiff has been by it injured in her good name, fame and reputation and has suffered damage thereby in the sum of $50,000 [] utterly fail to meet the requirements for alleging special damages."].)

In *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 940, the plaintiff suffered no financial out-of-pocket losses as a result of the allegedly defamatory article; he lost no time from work, incurred no medical or other bills, and no economic loss in his employment. The appellate court ruled plaintiff failed to allege, much less prove, he incurred any special damages stemming from the article at issue. (*Id*.)

Here, Plaintiff simply alleges "[a]s a result of the publication and/or re-publication of the Criminal Tweet, PLAINTIFF has been exposed to hatred, contempt, ridicule, and/or obloquy; has been shunned or avoided; and/or has tended to be injured in his occupation." (Complaint, ¶

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10(A)(v).) These general allegations fail to identify any item of specific damages, and thus fail to state a claim for libel and the demurrer should be sustained.

B. The Cause of Action for Intentional Infliction of Emotional Distress Fails to State a Cause of Action and is Subject to Demurrer per C.C.P. § 430.10(e)

A cause of action for IIED exists when there is:

> (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress;
>
> (2) the plaintiff's suffering severe or extreme emotional distress; and
>
> (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

(*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–51) (*Hughes*.) A defendant's conduct is "outrageous" when it is so "extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Id*.) The defendant's conduct must be "intended to inflict injury or engaged in with the realization that injury will result." (*Id*.) Importantly, "[l]iability for intentional infliction of emotional distress 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" (*Id*. at 1051.)

1. Complaint Fails to Allege Outrageous Conduct

Plaintiff's allegations do not support a claim that Defendant engaged in extreme and outrageous behavior, which is defined as "conduct so extreme it goes beyond all possible bounds of decency." (CACI No. 1602.)

a. Mere Insults Are Not Sufficiently Outrageous

In evaluating whether a defendant's conduct was outrageous, 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." (Rest.2d Torts, § 46, com. d.) Liability has been found "only where the conduct has been so

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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*.)

"[M]ajor outrage is still essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurts, is not enough." (*Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 297, fn. 2, disapproved on other grounds by *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 740, fn. 9, quoting Rest.2d Torts, § 46, com. f.)

Courts have long held that "plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.) There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.... " (*Id*.)

b. Case Law Clarifies Conduct that is Sufficiently "Outrageous"

Examples of decisions where a defendant's conduct was deemed sufficiently outrageous include: *Sanchez–Corea v. Bank of America* (1985) 38 Cal.3d 892, 909 (bank failed to advise plaintiffs, who were small business operators, that the bank would give no further loans, bank misrepresented that further loans would be made if plaintiffs assigned all past, present and future accounts receivable to the bank, then refused further loans after plaintiffs did so, bank forced plaintiffs to execute excessive guarantees and security agreements, and bank employees publicly ridiculed plaintiffs, including the use of profanities); *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496–497 (plaintiff employee, who was black, alleged he was fired in a despicable manner when his supervisor did so while shouting various racial epithets); *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 293 (When tenant got involved in rent protest, landlord shouted at her, ordered her out of her apartment within three days, threatened to throw her out personally, and said "We are going to handle this the way we do down South.").

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In contrast, cases where a defendant's conduct was not deemed outrageous include: *Schneider v. TRW, Inc*. (9th Cir.1991) 938 F.2d 986, 992–993 (applying California law, granting summary judgment held proper where plaintiff's evidence showed her supervisor screamed, yelled, and made threatening gestures while criticizing her job performance); *Ankeny v. Lockheed Missiles and Space Co*. (1979) 88 Cal.App.3d 531, 536-537 (demurrer proper where plaintiff alleged his employer prevented him from becoming a union steward, transferred him from job to job, wrongly denied him promotions, assigned him inappropriate job tasks, and personally insulted him).

Pertinent to the present case, in *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 498, the parties to an intimate relationship gone badly were feuding. Those feuds are often accompanied by an exchange of hostile unpleasantries "intended to sting whoever sits at the delivery end." (*Id*.) The court held that "[w]hile the pain inflicted might be real, the tort of intentional infliction of emotional distress was never intended to remove all such barbs. To hold otherwise would needlessly congest our courts with trials for hurts both real and imagined which are best resolved elsewhere." (*Id*.)

c. Complaint Does Not Allege Outrageous Conduct

Plaintiff makes three allegations in support of the cause of action for IIED in paragraph 10 of the Complaint:

¶ 10(B)(i)	Defendants' publication and/or re-publication of the Criminal Tweet was outrageous.
¶ 10(B)(ii)	When publishing and/or re-publishing the Criminal Tweet, Defendants intended to cause harm to PLAINTIFF and/or acted with reckless disregard for the likelihood that PLAINTIFF would suffer emotional distress as a result of the publication and/or re-publication.
¶ 10(B)(iii)	As a result of the publication and/or re-publication of the Criminal Tweet, PLAINTIFF has suffered severe emotional distress. The publication and/or re-publication constituted a substantial factor in causing such distress.

However, name-calling via Twitter does not provide a basis to claim outrageous conduct. As such, the cause of action fails to state a claim and the demurrer should be sustained.

2. Complaint Fails to Allege Severe Emotional Distress

In order to state a cause of action for IIED, a complaint must plead specific facts that establish severe emotional distress resulting from defendant's conduct. (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1114.) Severe emotional distress means "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." (*Hughes, supra,* 46 Cal.4th at 1051.)

a. Complaint Must Plead Nature and Extent of Distress

Conclusory allegations of distress are insufficient. Instead, a plaintiff must "set forth any facts which indicate the nature or extent of any mental suffering incurred as a result of the allegedly outrageous conduct. (*Bogard v. Employers Casualty Co*. (1985) 164 Cal.App.3d 602, 617–618.) For example, in *Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1376, evidence of losing sleep, upset stomach and anxiety did not constitute severe emotional distress of such lasting and enduring quality that no reasonable person should be expected to endure. In *Hughes*, the plaintiff's assertions that "she has suffered discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of defendant's comments to her on the telephone" were held to "not comprise emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." (*Hughes, supra,* 46 Cal.4th at 1051.)

b. Complaint Fails to Plead Facts Showing Distress

Here, the Complaint simply alleges "[a]s a result of the publication and/or re-publication of the Criminal Tweet, PLAINTIFF has suffered severe emotional distress. The publication and/or re-publication constituted a substantial factor in causing such distress." (Complaint, ¶ 10(B)(iii).) The Complaint fails to state any particular emotional distress plaintiff allegedly suffered, much less severe emotional distress. As a result, the Complaint fails to sufficiently state a claim for IIED and the claim fails on this ground as well.

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C. Demurrer Should Be Sustained Without Leave to Amend

A demurrer must be sustained without leave to amend if the plaintiff cannot show it is reasonably possible that the defect can be cured by amendment. (*Lacher v. Superior Court* (1991) 230 Cal. App. 3d 1038, 1043). The plaintiff bears the burden of proving that amendment could cure the defect. (*Torres v. City of Yorba Linda* (1993) 13 Cal. App. 4th 1035, 1041; *Lacher*, 230 Cal. App. 3d at 1043.) Once a defendant establishes that a complaint does not state facts sufficient to state a cause of action, the plaintiff must show "in what manner he can amend the complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal. 3d 335, 349, internal citations omitted.) Where, as here, there is no possibility that the defect can be cured by amendment, the Court must sustain the demurrer without leave to amend. (*Id.*; see also *Melton v. Boustred* (2010) 183 Cal. App. 4th 521, 529.)

1. Libel *Per Se* Claim Cannot Be Cured By Amendment

Here, the cause of action for libel *per se* is predicated on a Tweet made during a heated public zoning dispute. The Tweet is merely an expression of opinion, not an accusation of a crime. As such there is no way for Plaintiff to amend to state a cause of action for libel. Thus, the demurrer should be sustained without leave to amend.

2. IIED Claim Cannot Be Cured by Amendment

Likewise, the entirety of the cause of action for IIED is based on the Tweet which is not sufficiently outrageous to form the basis for a claim of IIED. There are no facts which could be pled to correct the fatal deficiency to the IIED cause of action and thus the demurrer should be sustained without leave to amend.

IV. CONCLUSION

The cause of action for "Libel *Per Se*" fails to state a cause of action because the Tweet at issue does not accuse Plaintiff of a crime. As Plaintiff fails to plead any special damages, the claim for libel fails. In addition, the claim for IIED fails as the conduct at issue is not sufficiently outrageous and Plaintiff fails to plead the nature and extent of any distress he

allegedly suffered. For the foregoing reasons, Defendant respectfully requests the demurrer be sustained without leave to amend.

Respectfully submitted,

Dated: April 28, 2021

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