

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

Joseph Ponzio,

Plaintiff,

v.

Rocco D. Biscaglio, Rocco D. Biscaglio Financial
Services, Inc., an Illinois corporation f/k/a F.D.B.
Financial Services, Inc., and Rocco D. Biscaglio &
Associates, Ltd., an Illinois corporation,

Defendants,

and

Eugene F. Carpino, James Caporusso, Angelo "Skip"
Saviano, Gina M. Pesko, Jeffrey L. Sargent, Anthony
"Tony" Del Santo, Angelo J. Lollino, Philip Marcantelli,
Nick Pecora and Ray Soch,

Respondents in Discovery.

No. 13 L 4546

MEMORANDUM OPINION AND ORDER

This court's previous order denying the defendants' motion to dismiss focused on the issue of malice rather than on the arguable truth of the defendants' allegedly defamatory statements. With a redirected analysis, this court recognizes its error and, therefore, grants the defendants' motion to reconsider. On reexamination, this court recognizes that each statement in the defendants' political campaign mailing is either rhetorical hyperbole, true, or substantially true. Since such statements are not defamatory, this court also grants the defendants' motion to dismiss the complaint with prejudice.

FACTS

Joseph Ponzio is a lifelong resident of Elmwood Park, Illinois. Between 2000 and 2001, Ponzio worked to secure a career as a financial advisor in the field of stocks, bonds, and publically traded securities. To that end, he passed four examinations in those subjects and two more in the field of insurance.

In 2009, Ponzio opened an investment advisory firm, which he registered with the Illinois Secretary of State, and he registered as an investment advisor with the Illinois Department of Securities. Also in 2009, Ponzio published a book entitled, "F Wall Street." During the summer of 2010, Amazon ranked the book as the number one best-selling business-and-investing book in its investing category and as the twenty-third best-selling book in the overall business-and-investing category. During the same period, Ponzio appeared on local and nationally syndicated television and radio shows, and his articles appeared on various financial websites.

Ponzio also took an interest in village affairs. To that end, he examined 12 years of Elmwood Park's financial audits, including contracts and invoices. He attended the village's finance committee meetings and the board of trustees' budget hearings. In July 2012, Ponzio announced that he would run for village president as a member of the Elmwood Park Voice Party. At an election kickoff, Philip Marcantelli, also an Elmwood Park Voice Party member, publically stated that: "We cut waste out of the budget, which Mr. Ponzio, who is an absolute expert on this, is going to speak about later."

After the election kickoff, Ponzio circulated petitions asking the village board to reconsider an annual water rate increase. In July 2012, the village president and board of trustees received nearly 1,000 petition signatures, and the following month the board adopted an ordinance repealing the scheduled water rate increase. During this period, Ponzio also addressed the village board on issues such as pension underfunding, property taxes, and expenditures.

In December 2012, Angelo Saviano announced that he, too, would seek the village president post, but on the People's Choice Party ticket. In January 2013, Marcantelli, who had been an Elmwood Park Voice Party member only six months earlier, sent a letter to village residents stating that he was going to work as a political advisor and coordinator for the People's Choice Party. Marcantelli soon became a paid consultant to that party.

At some point during the campaign, the Elmwood Park Voice Party produced and distributed for Ponzio a double-sided campaign mailing. On one side, the mailing states that Ponzio is a "best-selling author and nationally recognized financial consultant." The reverse side states, among other things, that:

**JOE PONZIO'S HARD WORK FOR ELMWOOD PARK IS
STARTING TO PAY OFF**

- ✓ The first **property tax cut** since 1993
- ✓ **Frozen water rates** avoiding a scheduled 15% increase in our bills

On the same side, the mailing further states: “**Joe Ponzio** is ‘an **absolute expert**’ on the Village’s budget. Angelo Saviano’s campaign strategist (7/13/12).”

At some other point during the campaign, the Elmwood Park Voice Party sent another mailing to village residents. This mailing included the statement: “EVEN OUR OPPONENTS SAY IT: **JOE PONZIO IS ‘AN ABSOLUTE EXPERT’ ON THE VILLAGE’S BUDGET.** Quote Source: Angelo Saviano’s political strategist (7/13/12).” The mailing also stated: “**As neighbors in town, the Elmwood Park Voice Party helped bring you this year’s water rate freeze and next year’s property tax cut.**”

From January to March 2013, Rocco Biscaglio worked behind the scenes for Saviano. During that period, the Friends for Saviano political committee donated more than \$92,000 to the People’s Choice Party. During this same period, Biscaglio assisted in writing, printing, and publishing a two-sided mailing on Saviano’s behalf paid for by the Illinois Taxpayers for Truth. Biscaglio also assisted in distributing the mailing to thousands of village residents in March 2013.

At the top of one side of Biscaglio’s mailing are the words: “*The PONZIO SCHEME.*” In the middle of the page are the words, “Joe Ponzio is Trying to Deceive the Residents of Elmwood Park. . . [.]” At the bottom of the page is a drawing depicting a pile of \$100 bills. The reverse side of the mailing states at the top of the page, “Joe Ponzio is trying to deceive you because he wants control of your hard earned tax dollars.” In the center of the page is a photograph of Ponzio and the words: “THE FACTS about Joe Ponzio . . .” below which are two columns stating:

“Joe Ponzio says . . .”

“The Truth”

“He cut taxes and froze water rates”

“The current Village President and Trustees did that”

“He’s an Expert on the on the Village Budget”

“He uses an anonymous person as his source”

“He’s a ‘Best Selling Author’”

“He is listed 98,074 on amazon.com”

“He’s a Nationally
Recognized Financial
Consultant”

“He has no professional designations/
certifications as a financial consultant
or investment advisor”

Below these columns are two more statements: “We can’t trust Joe Ponzio as Elmwood Park Mayor,” and “Vote NO to ‘The Ponzio Scheme’ on April 9th.”

Saviano beat Ponzio for village president in the April 9, 2013 election, winning by 509 votes out of 4,654 cast. Less than one month later, on May 2, 2013, Ponzio filed a one-count complaint for defamation against Biscaglio and his past or present companies (together, “Biscaglio”) for writing, publishing, and distributing his mailing.¹ The complaint alleges that Biscaglio’s mailing was false and defamatory because it imputed that Ponzio engaged or was engaging in a criminal financial enterprise known as a Ponzi scheme and, therefore, was morally and ethically unfit to hold the village presidency. The mailing was also defamatory, according to Ponzio, because it imputed that he was engaging in a criminal scheme to deceive village residents.

The complaint sets out the specific statements in the two columns of Biscaglio’s campaign mailing that Ponzio alleges are false and defamatory. According to Ponzio, the four statements under the “Joe Ponzio says” column are false, never occurred, or are not attributable to him. To support these allegations, Ponzio refers to his own campaign mailings. Ponzio alleges that in contrast to the truthful statements contained in his mailings, the statements under “The Truth” column in Biscaglio’s mailing intentionally misled the reader. As to the first statement, Ponzio alleges that his mailing never stated that he “cut taxes and froze water rates” but that:

Ponzio knows first-hand that Elmwood Park’s water bills and property taxes have grown out of control. That is why he has spent the last two years reviewing Elmwood Park’s audits and contracts, and offering suggestions to reduce spending, waste and taxes.

* * *

Joe Ponzio’s hard work for Elmwood Park is starting to pay off
[. . .]

The first property tax cut since 1993.

Frozen water rates, avoiding a scheduled 15% increase in our bills.

¹ The complaint attaches as exhibits a copy of Ponzio’s two campaign mailings as well as Biscaglio’s campaign mailing.

Less government spending resulting in more money in your pocket.
A bright future for our community.

Second, Ponzio alleges that his campaign mailing did not state that he was “an expert on the Village Budget.” Rather, his mailing stated that someone else said it for him: “Even our opponents say it: Joe Ponzio is ‘an absolute expert’ on the Village’s Budget. Quote source: Angelo Saviano’s political strategist (7/13/12).” According to Ponzio, his mailing did not deceive voters by attributing the quotation to an “anonymous person,” rather than to Marcantelli by name.

Third, Ponzio alleges that he was a best-selling author and that Biscaglio’s mailing was defamatory by inferring that Ponzio was not because he was “listed 98,074 on amazon.com.” Ponzio does not disagree that the absolute ranking is correct, but alleges that Amazon.com lists more than one million titles, placing his book within the top 10 percent; thus, the statement in Biscaglio’s mailing that Ponzio was trying to deceive village residents as to his best-selling-author status was untrue.

Fourth, Ponzio alleges that the Biscaglio mailing’s statement that Ponzio “has no professional designations/certifications as a financial consultant or investment advisor” is false. Ponzio filed an investment advisor representative public disclosure report with the Illinois Department of Securities, which he attaches to his complaint as an exhibit. The report discloses that Ponzio “has reported 0 professional designations,” but also discloses that he passed “all required state securities exams” necessary to work as an investment advisor. Further, Ponzio registered his company with the Department of Securities to engage in that profession. The department’s website makes plain that a professional designation is not required for registration as an investment advisor and that Ponzio had passed all qualifying exams. Biscaglio’s mailing, therefore, wrongfully accused Ponzio as deceiving the public.

Ponzio alleges that the mailing’s point-counterpoint columns were intentionally misleading by placing Ponzio in a false light in the eyes of voters to frustrate his efforts at public service and portray him as lacking the integrity to perform the duties of an elected official as well as being morally and ethically unfit to be elected village president. Ponzio alleges that Biscaglio acted maliciously because he either knew that his mailing’s contents were false, entertained serious doubts as to their truth, or acted recklessly as to their truth or falsity. Ponzio further alleges that Biscaglio had no reasonable grounds for believing anything to the contrary, and was motivated by actual malice to impugn Ponzio’s reputation and help defeat

him in his campaign for village president. Further, Biscaglio timed the distribution of the mailing so close to the election date that Ponzio would be unable to respond to the alleged false and defamatory statements. Based on these allegations, Ponzio states that his defamation cause of action meets the requirements of *Sandholm v. Kuecker*, 2012, IL 11143 (2012), and permits him to seek redress for damages arising from the defamation. He seeks \$1 million in actual damages and \$500,000 in punitive damages.

On January 14, 2014, this court granted the defendants' motion to dismiss the complaint because it inadequately pleaded malice. On February 25, 2014, the court granted Ponzio's motion to reconsider and found that malice had been sufficiently pleaded. On February 28, 2014, Ponzio filed a first-amended complaint raising two counts. The first is for defamation *per se* and is identical to the one in the original complaint. The second has no designation, but is directed at the respondents in discovery. Ponzio alleges that they, individually or in concert, worked for or were members of two political organizations – Friends for Saviano and the People's Choice Party of Elmwood Park. Ponzio further alleges that the Illinois Taxpayers for Truth in conjunction with the defendants designed, printed, and distributed the mailing for the benefit of the People's Choice Party.

On March 4, 2014, Biscaglio filed a motion asking this court to reconsider its February 25, 2014 order. The gist of the motion was that the court had previously focused improperly on whether Ponzio had sufficiently pleaded malice. Biscaglio argued that the court overlooked the fundamental issue that the defendants' statements were, as a matter of law, true or substantially true and, therefore, not actionable. In his reply brief in support of his motion to reconsider, Biscaglio attached various exhibits that were not previously part of the record. Ponzio responded with a motion asking the court to strike those exhibits as untimely. In a subsequent letter, Biscaglio voluntarily withdrew the exhibits from the court's consideration.

ANALYSIS

Motion to Reconsider

The first issue to be decided is whether there exists a basis for this court to reconsider its February 25, 2014 order granting Ponzio's motion to reconsider and vacating the previous dismissal order. The purpose of a motion to reconsider is to alert the court to newly discovered evidence unavailable at the first hearing, changes in the law, or errors in the court's application of the law. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 20, citing *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 97 (1st Dist. 2004). Biscaglio's argument is based on the third element.

Biscaglio argues that the court erred by focusing incorrectly on whether Ponzio pleaded malice rather than on Biscaglio's argument that his statements are not actionable because they are either rhetorical hyperbole, true, or substantially true. A second review of the amended complaint confirms that Ponzio sufficiently pleaded malice as a matter of law. Yet malice is merely an evidentiary requirement for a public figure to obtain damages, *see Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 394 (2008), and Ponzio's complaint implicitly concedes that he was a public figure (for purposes of this lawsuit) since he ran for public office. *See Troman v. Wood*, 62 Ill. 2d 184, 190 (1975), *citing St. Amant v. Thompson*, 390 U.S. 727 (1968), *Monitor Patriot Co. v. Roy*, 201 U.S. 265 (1971), and *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971). In other words, even if Ponzio has pleaded malice sufficiently, Biscaglio's statements must be defamatory to be actionable. Biscaglio is, therefore, correct that this court left unanswered the fundamental question of whether the statements in Biscaglio's mailing are defamatory. It follows that the motion to reconsider must be granted.

Motion to Dismiss

The decision to reconsider Biscaglio's motion to dismiss brings the court back to square one when it first considered his motion to dismiss. 735 ILCS 5/2-615. A section 2-615 motion attacks only a complaint's legal sufficiency, *DeHart v. DeHart*, 2013 IL 114137, ¶ 18, does not raise affirmative factual defenses, and alleges only defects appearing on the complaint's face. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A section 2-615 motion must identify the complaint's defects and specify the relief sought. 735 ILCS 5/2-615(a). All well-pleaded facts and reasonable inferences arising from the complaint must be accepted as true, *Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, *Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). The paramount consideration is whether the complaint's allegations construed in the light most favorable to the plaintiff are sufficient to establish a cause of action for which relief may be granted. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of a cause of action. *DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488.

The analysis of any defamation claim must begin with reference to the constitutional principle that, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. Const., amend. I. The first amendment has long been binding on the states through the fourteenth amendment. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).

There are, of course, various constitutional limitations to free speech. One such limitation affects the standard of liability (and has been noted above) – public figures must plead and prove actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). A second limitation focuses on the content of the speech and affects potential damages – if the speech relates to a matter of public concern, punitive damages are prohibited absent a showing of actual malice. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). A third limitation affects both liability and damages – if the speech relates to a matter of public concern and is brought against a media publisher, the plaintiff must establish falsity as well as fault. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990).

Against this backdrop of federal constitutional principles are state laws determining the degree of fault necessary to establish defamation. See *Gertz v. Welch*, 418 U.S., 323, 345-46 (1974). In Illinois, ordinary negligence is sufficient. *Edwards v. Paddock Pubs., Inc.*, 327 Ill. App. 3d 553, 562 (1st Dist. 2001). Thus, to state a common-law defamation claim in Illinois, a plaintiff must allege facts that: (1) the defendant made a false statement about the plaintiff; (2) the defendant made an unprivileged publication of the statement to a third person; and (3) the publication damaged the plaintiff. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). Statements are defamatory if they tend to harm a person's reputation by: (1) lowering that person's reputation in the community; or (2) deterring others from associating with that person. *Id.*, citing *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 10 (1992); see also *Tuite v. Corbitt*, 224 Ill. 2d 490, 501 (2006), citing *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 579 (2006).

Illinois recognizes defamatory statements *per se* and *per quod*. *Tuite*, 224 Ill. 2d at 501, citing *Kolegas*, 154 Ill. 2d at 10. "A statement is defamatory *per se* if its defamatory character is obvious and apparent on its face and injury to the plaintiff's reputation may be presumed." *Tuite*, 224 Ill. 2d at 501, citing *Owen v. Carr*, 113 Ill. 2d 273, 277 (1986). Five types of statements are considered defamatory *per se*, those that impute a person: (1) committed a crime; (2) is infected with a communicable disease; (3) cannot perform or lacks integrity to perform employment duties; (4) lacks professional ability; and (5) engaged in consensual sexual intercourse with an unmarried person or with someone outside of marriage. See *Solaia*, 221 Ill. 2d at 579-80. Damages are presumed in a claim of *per se* defamation. *Harrison v. Addington*, 2011 IL App (3d) 100810 ¶ 39, citing *Bryson v. News Amer. Pubs., Inc.*, 174 Ill. 2d 77, 87 (1996). In contrast, "[i]n a defamation *per quod* action, damage to the plaintiff's reputation is not presumed; rather, the plaintiff must plead and prove special damages to recover." *Tuite*, 224 Ill. 2d at 501.

A complaint for defamation *per se* need not allege the precise defamatory words, but their substance must be pleaded with sufficient precision and particularity to permit judicial review of the defamatory content. See *Mittelman v. Witous*, 135 Ill. 2d 220, 229-30 (1989). Precision and particularity are also necessary so that the defendant may formulate an answer and identify potential affirmative defenses. See, e.g., *Krueger v. Lewis*, 342 Ill. App. 3d 467, 470 (1st Dist. 2003). It is equally true that whether any particular statement is defamatory and whether any particular statement is an opinion or a factual assertion are both questions of law. *Tuite*, 224 Ill. 2d at 511; *Brennan v. Kadner*, 351 Ill. App. 3d 963, 969 (1st Dist. 2004). In short: "If a statement is factual, and it is false, it is actionable." *Solaia*, 221 Ill. 2d at 582; see also *Seitz-Partridge v. Loyola Univ. of Chicago*, 2013 IL App (1st) 113409 ¶ 29 ("[s]tatements that are capable of being proven true or false are actionable, whereas opinions are not"), citing *Moriarty v. Greene*, 315 Ill. App. 3d 225, 233 (1st Dist. 2000).

Statements that are otherwise defamatory *per se* are not actionable if they are reasonably capable of an innocent construction. See *Green*, 234 Ill. 2d at 499. "Under the 'innocent-construction rule,' a court must consider the statement *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning." *Id.* (emphasis in original), citing *Kolegas*, 154 Ill. 2d at 11. If a statement may reasonably be innocently interpreted, it cannot be actionable *per se*. *Id.*, citing *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982). Courts are not to undertake a balancing of reasonable constructions. See *Mittelman*, 135 Ill. 2d at 232.

Yet the line between fact and opinion is not always easy to draw. "While in one sense all opinions imply facts, the question of whether a statement of opinion is actionable as defamation is one of degree; the vaguer and more generalized the opinion, the more likely the opinion is nonactionable as a matter of law." *Wynne v. Loyola Univ. of Chicago*, 318 Ill. App. 3d 443, 452 (1st Dist. 2000). This legal middle ground may also apply to rhetorical hyperbole. See *Imperial Apparel*, 227 Ill. 2d at 397, citing *Solaia*, 221 Ill. 2d at 581, and other cases. Indeed, "ill-informed, mean-spirited hyperbole is not necessarily defamatory *per se*." *Maag v. Illinois Coalition for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844, 850 (5th Dist. 2006). As noted in *Maag*, political and judicial campaigns are particularly ripe for outrageous, ridiculous, and inflammatory statements that are also wholly protected and non-actionable forms of speech. As the Illinois Supreme Court noted nearly a century ago:

When anyone becomes a candidate for a public office, conferred by the election of the people, he is considered as putting his

character in issue, so far as it may respect his fitness and qualifications for office, and everyone may freely comment on his conduct and actions. His *acts* may be canvassed and his *conduct* boldly censured.

Ogren v. Rockford Star Printing Co., 288 Ill. 405, 417 (1919) (emphasis in original), *cited by Maag*, 368 Ill. App. 3d at 850.

To divine the difference between fact and opinion, Illinois courts have consistently employed a reliable measuring stick. "The test for determining whether a statement is protected from defamation claims under the first amendment is whether it can reasonably be interpreted as stating actual fact." *Imperial Apparel*, 227 Ill. 2d at 398. *See also Seitz-Partridge*, at ¶ 29, *quoting Wynne*, 318 Ill. App. 3d at 452. A totality-of-the-circumstances approach to identify facts considers whether the statement: (1) has a precise and readily understood meaning; (2) is verifiable; and (3) has literary or social context that indicates the statement has factual content. *See Imperial Apparel*, 227 Ill. 2d at 398, *citing Solaia*, 221 Ill. 2d at 581. The statement is considered from an ordinary reader's point of view; however, whether the statement is a factual assertion is a legal decision for the court. *Imperial Apparel*, 227 Ill. 2d at 398, *citing cases*.

Illinois' defamation law means that, in cases brought by a public figure, such as Ponzio, allegedly defamatory statements are protected by the first amendment unless he can show that they are factual and false. In this case, Biscaglio argues that two of his mailing's statements about Ponzio are rhetorical hyperbole, making them opinion, not facts, and, therefore, not actionable as defamatory speech. A statement may be considered rhetorical hyperbole only if the language, "in context, was obviously understood as an exaggeration, rather than a statement of literal fact." *Kolegas*, 154 Ill. 2d at 17, *citing Greenbelt Coop. Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970) (in context, "blackmail" referred not to criminal conduct, but unreasonable negotiating practices); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974) (characterizing union "scab" as a "traitor" was understood to mean plaintiffs' acts were reprehensible, not treasonous).

The first statement to be analyzed as rhetorical hyperbole is: "Ponzio Scheme." To Ponzio, this statement is defamatory because it implicates him in a criminal Ponzi scheme or a scheme to deceive Elmwood Park voters. To be sure, Biscaglio employed the malapropism to get the reader to make a mental leap from "Ponzio" to "Ponzi." There is, however, no such thing as a "Ponzio Scheme" that is criminal in nature; consequently, the phrase has no precise and readily understood meaning and is unverifiable. As to a scheme to deceive voters, the phrase "Ponzio Scheme" is a conclusion that Biscaglio

hopes the reader will draw based on the point-counterpoint comparison on the reverse side of the mailing. Contextually, there is no suggestion that a "Ponzio Scheme" is related to Ponzio's profession; rather, it refers to his alleged election activities. "Ponzio Scheme" encapsulates, in a lowbrow-campaign-humor manner, Biscaglio's opinion that Ponzio is misstating his person and achievements with voters. In short, the phrase, "Ponzio Scheme" is merely rhetorical hyperbole and opinion and, therefore, not actionable.

The second statement that Biscaglio identifies as rhetorical hyperbole is the repeated use of the word "deceive" in relation to what Ponzio is allegedly attempting to do to Elmwood Park residents. The word "deceive" is directly related to the "Ponzio Scheme" phrase, discussed above, and suggests that Ponzio is being deceitful to Elmwood Park voters by failing to state fully or accurately his qualifications or that he is at fault for puffery. In other words, Biscaglio's mailing attempts to link Ponzio's deceit with his goal of winning the village presidency and, thereby, controlling residents' tax dollars. While it is true that the village president has some control over taxpayer dollars, it is an opinion that Ponzio's deceit will achieve his goal. Plainly, Ponzio does not believe he is deceiving anyone, but Biscaglio does. As a literary device, the word "deceive" is a conclusory opinion and certainly far less offensive than being called a blackmailer, scab, or traitor. The word "deceive" is, therefore, rhetorical hyperbole and not actionable.

If opinions are not actionable, neither are truthful or substantially truthful statements. The Illinois constitution enshrines truth as a sufficient defense to defamation, see Ill. Const. art. I, § 4, meaning that true statements cannot support a defamation claim. *Harrison*, 2011 IL App (3d) 100810 ¶ 39. Even statements that are defamatory *per se* are not actionable if they are "substantially true." *Harrison v. Chicago Sun-Times, Inc.*, 341 Ill. App. 3d 555, 563 (1st Dist. 2003). This principle derives from "the 'recognition that falsehoods which do no incremental damage to the plaintiff's reputation do not injure the only interest the law of defamation protects.'" *Republic Tobacco Co. v. North Atl. Trading Co., Inc.*, 381 F.3d 717, 727 (7th Cir. 2004) (applying Illinois law), quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993) (same). To determine whether a statement is "substantially true," a court is to consider whether the statement's gist or sting is true. A statement's gist or sting is true if it produces in the recipient's mind the same effect that the truth would have produced. See *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2d Dist. 2004); see also *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 71 (1st Dist. 2010). "While determining 'substantial truth' is normally a jury question, the question is one of law where no reasonable jury could find that substantial truth had not been established." *Moore*, 402 Ill. App. 3d at 71, quoting *Wynne*, 318 Ill. App. 3d at 451-52.

It bears mentioning that truth is a question of law and not an affirmative defense since a claim of falsity is a necessary element in any defamation cause of action. *See Voyles v. Sandia Mtge. Corp.*, 196 Ill. 2d 288, 300 (2001), citing cases. Even if truth were not a question of law, this court could consider the legal sufficiency of Ponzio's falsity claims since he attached as exhibits to his complaint copies of his two campaign mailings – allegedly telling the truth – as well as the one circulated by Biscaglio – allegedly telling falsehoods. *See* 735 ILCS 5/2-606 (exhibits constitute part of the pleading). *Cf. Bryson*, 274 Ill. 2d at 91-92 (if allegedly defamatory material not attached as exhibit to complaint but defendant attaches it to dispositive motion, court to consider motion under 735 ILCS 5/2-619, not 5/2-615). In short, this court's determination of truth or substantial truth is proper at this point given the complaint's content.

Biscaglio's motion to dismiss raises truth and substantial truth as defenses to the alleged defamatory statements made on his mailing's reverse side. The point-counterpoint format requires analysis of the truth or substantial truth of the statements Biscaglio attributes to Ponzio – the “Joe Ponzio says” column – as well as the mailing's depiction of the truth – “The Truth” column. If either statement is true or substantially true, it is not actionable.

The first statement in the “Joe Ponzio says” column is that, “He cut taxes and froze water rates,” while “The Truth” column states that, “The current Village President and Trustees did that.” Ponzio alleges that he never made the first statement, yet his campaign literature states: “Joe Ponzio's hard work for Elmwood Park is starting to pay off. . . . [.] The first property tax cut since 1993. Frozen water rates, avoiding a scheduled 15% increase in our bills.” Ponzio's message to voters is transparently that his hard work resulted in the property tax cut and frozen water rates. He omits the fact that village officials did, indeed, have the exclusive authority to and did make those changes. Ponzio's affirmative omission means, therefore, that the statements in Biscaglio's mailing attributable to him are substantially true while the statement that the village president and trustee acted to cut taxes and freeze water rates is undeniably true. Neither are actionable.

Second, the “Joe Ponzio says” column attributes to him the statement that, “He's an Expert on the Village Budget,” while “The Truth” column says that, “He uses an anonymous person as his source.” Ponzio admits that his campaign literature quotes Marcantelli's public statement that Ponzio is, “an absolute expert' on the Village Budget.” But rather than identify Marcantelli by name, Ponzio's literature identifies Marcantelli merely as “Angelo Saviano's political strategist.” By quoting Marcantelli, anonymously or

otherwise, Ponzio seeks to portray himself as a village budget expert precisely because his opponent's political strategist says so. The statement in Biscaglio's mailing is, therefore, either true because Marcantelli is correctly quoted or substantially true because Ponzio paraphrased Marcantelli to the same effect. As to "The Truth" column, the mailing does not deny that Ponzio is a budget expert, rather the mailing tries to minimize the statement by pointing to its anonymous source, thereby implying that the claim is suspect. Yet Ponzio's literature fails to identify Marcantelli by name; consequently, "The Truth" column statement is true and not actionable.

Third, the "Joe Ponzio says" column attributes to him the statement that, "He's a 'Best Selling Author,'" while "The Truth" column says that, "He is listed 98,074 on amazon.com." Ponzio's campaign literature says that he is "[a] best-selling author. . . ." Further, his complaint alleges that ranking "F Wall Street" 98,074th out of the more than one million titles on Amazon.com means that the book was well within the top 10% of titles sold, implying that such a ranking makes him a best-selling author. That statement is, therefore, either true or substantially true if sales in the top 10% make a book a bestseller. Biscaglio's mailing plainly seeks to tarnish the luster of a best-selling raking by stating that "F Wall Street" ranked 98,074th in sales. That statement is, however, also true and, therefore, not actionable.

Fourth, the "Joe Ponzio says" column attributes to him the statement that, "He's a Nationally Recognized Financial Consultant," while "The Truth" column says that, "He has no professional designations/certifications as a financial consultant or investment advisor." Ponzio's own campaign literature says that he is a "nationally recognized financial consultant;" therefore, he admits that the statement is true. The complaint also admits that Ponzio's state filings indicate that he does not have any professional designations. Biscaglio's mailing points out this fact, plainly implying that Ponzio was not a licensed or a qualified investment advisor. Yet the statement is true based on Ponzio's own filing. The Biscaglio mailing's use of the word "certifications" makes the same implication in a different way. There is nothing in the record indicating that certifications are necessary to work as an investment advisor; indeed, there is nothing to indicate that they even exist, as opposed to a license, which is mandatory. Thus, it is true that Ponzio does not have any certifications, whatever they might be, to be a financial advisor, just as he does not have any permits, vouchers, specifications, instruments, or diplomas, each of which is also unnecessary, to be a financial advisor. Regardless of the implication Ponzio wishes to draw, it is undeniably true that he has no certifications and, therefore, the statement is not actionable.

Ponzio mentions in his complaint that Biscaglio's statements placed him in a false light. There are three elements to state a false-light claim:

First, the allegations in the complaint must show that the plaintiffs were placed in a false light before the public as a result of the defendants' actions. Second, the court must determine whether a trier of fact could decide that the false light in which the plaintiffs were placed would be highly offensive to a reasonable person. Finally, the plaintiffs must allege and prove that the defendants acted with actual malice, that is, with knowledge that the statements were false or with reckless disregard for whether the statements were true or false.

Kolegas, 154 Ill. 2d at 17-18, citing *Lougren v. Citizens First Nat'l Bk.*, 126 Ill. 2d 411, 419-23 (1989). The purpose of a false-light claim is to define and protect an area of privacy within which every citizen must be left alone. *Lougren*, 126 Ill. 2d at 420.

Although Ponzio's complaint mentions false light, he does not allege facts from which this claim could be supported. The statements in Biscaglio's mailing did not invade Ponzio's right to privacy since none of them concerned facts that could be construed in any way as being private. Further, Ponzio fails to allege any facts in the complaint from which it could even be inferred that the statements in Biscaglio's mailing were highly offensive to a reasonable person given that they were made during a political campaign. The false-light argument is both factually insufficient and legally waived.

CONCLUSION

A reconsideration of the first amended complaint's allegations and claims indicates that Ponzio has not and cannot state a claim for defamation or false-light intrusion. Consequently,

IT IS ORDERED THAT:

- (1) Biscaglio's motion to reconsider is granted;
- (2) Biscaglio's motion to dismiss is granted with prejudice;
- (3) The respondents in discovery are dismissed; and
- (4) The June 27, 2014 ruling date at 11:00 a.m. is stricken.

Judge John H. Ehrlich

JUN 13 2014

Circuit Court 2075


John H. Ehrlich, Circuit Court Judge