

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Casella Waste Systems, Inc.

v.

Jon Swan & Save Forest Lake, et al.

No. 217-2020-CV-212

MOTION FOR RECONSIDERATION AND CLARIFICATION

1. Save Forest Lake moves for reconsideration of the Court’s August 10, 2020 Order because the Court overlooked or misapprehended facts and law that required dismissal non-actionable statements. *See* N.H. Super. Ct. R. 12(e). In addition Save Forest Lake seeks clarification as to which of the Complaint’s statements, specifically, the Court dismissed as non-actionable.

Part I: Clarification

2. The Court dismissed Plaintiff’s claims based upon statements or assertions that were “strongly worded opinion or hyperbole.” *See* Order of August 10, 2020 at 10 (“[A]ssertions such as that Casella is ‘predatory,’ ‘greedy,’ ‘a bad business partner,’ or even a poor ‘steward of the environment,’ do no reasonably imply any underlying fact that conveys a defamatory meaning.”).

3. As a matter of clarity, and to focus the parties on the statements that the Court has deemed, at least as of now, actionable, Save Forest Lake asks the Court expressly to dismiss or strike the statements enunciated in the following paragraphs of the Plaintiff’s Complaint:

- a. ¶17(a) (“Casella needs New Hampshire so it can continue its predatory exploitation of our resources for its own greed.”).
- b. ¶17(c) (“Plaintiff has ‘poor management and bully tactics.’”).
- c. ¶17(e) (“Plaintiff ‘is a very unscrupulous company that only cares about the bottom line and not the environment.’”).
- d. ¶17(f) (“We do not want this poorly run garbage profiteer and polluter anywhere near Forest Lake and we look forward to their expulsion from Bethlehem in or before 2023.”).
- e. ¶17(g) (“Plaintiff is a ‘true community predator ... proven to be a bad neighbor and a corporate bully. Garbage profiteers!’”).
- f. ¶18 (“Alvarez published a video and transcript in which he equated Casella with the National Socialist German Workers (or “Nazi”) Party and its chief executive officer with Adolph Hitler.”).
- g. ¶21 (“YET ANOTHER example of [plaintiff’s] poor management of YET ANOTHER of their landfills in recent months.”).
- h. ¶21(c) (“Engaging in a ‘very sneaky’ lot-line adjustment.”).
- i. ¶24(a) (“... we know a landfill in Dalton represents billions of dollars for greedy Casella and their [sic] garbage empire.”).
- j. ¶24(b) (“Casella is a ‘predatory out-of-state corporation that sought to prey on our vulnerability.’”).
- k. ¶24(c) (“Plaintiff is a ‘predatory landfill company.’”).
- l. ¶25 (“Alvarez considers himself ‘at war’ with plaintiff.”).
- m. ¶25(a) (“If you haven’t figured out by now that I’m at [expletive] war, you’ve not been paying attention.”).
- n. ¶26 (“Alvarez has expressly stated he is trying to disrupt plaintiff’s existing and future business and facilities in New Hampshire.”).
- o. ¶27 (“Defendants has engaged in efforts to prevent plaintiff’s subsidiary, NCES from obtaining an expansion permit for its Bethlehem facility.”).

- p. ¶28(a) (“Lets kick [plaintiff] OUT of NH!”).
- q. ¶28(b) (“NCES has been a bad business partner for the North Country and an expansion for them to import more trash is not what we need. Close it down when it reaches Stage V capacity in April, 2020. NO STAGE VI EXPANSION.”).
- r. ¶29(a) (portion stating “Plaintiff is a ‘corporate predator[.]’”).
- s. ¶29(b) (“It is time to close the NCES landfill in Bethlehem. New Hampshire does not need Casella Waste Systems and its greedy practice of importing out of state trash in order to increase its own profitability.”).
- t. ¶29(c) (“We do not need Casella and its greed. On the contrary, Casella needs NH to continue to profit from importing trash.”).
- u. ¶30 (“Defendants made defamatory statements about the alleged impact that plaintiff’s proposed new facility would have in Dalton, New Hampshire and surrounding towns.”).
- v. ¶31 (“Alvarez published a photoshopped view from Forest Lake depicting a landfill rising over one hundred feet above the ridgeline between the site and lake when, in fact, the proposed landfill would be screened from the lake and its surrounding homes.”).
- w. ¶33 (“Alvarez published online a Letter to the Editor he submitted on July 7, 2019, in which he falsely stated Casella ‘claims to be a steward for the environment but the reality at each of their [sic] facilities speaks to the contrary.”).

4. With that clarification, the Parties can focus on the statements that Court considered to be actionable as of the time of its August 10, 2020 Order: ¶19(a), ¶19(b), ¶20(a), ¶20(b), ¶21(a), ¶21(b), ¶22, ¶23, ¶29(a) (portion stating Casella “tried to ‘influence the vote on zoning in the Town of Dalton with their blatant distortions of reality in their numerous emails sent to voters.”), ¶32, ¶34(a), ¶34(b), ¶34(c), ¶35, ¶36, ¶37, ¶38, ¶38(a), ¶38(b), ¶38(c), ¶39, ¶39(a), ¶39(b).

Part II: Reconsideration

5. With regard to the remaining actionable statements, Save Forest Lake asks that the Court reconsider its Order as follows:

Statements not of and concerning Plaintiff, not defamatory, or that are judgment or opinion by their nature.

6. The statement at ¶23 is not defamatory as to Casella, and the part that is arguably defamatory is not concerning Casella. That the Plaintiff ships “millions of gallons of leachate to the Concord and Franklin [wastewater treatment facilities]” is a non-defamatory assertion of fact.¹ The statement that these facilities have an “inability to treat it effectively before it is emptied into the Merrimack River,” even if considered a defamatory assertion of fact (it is actually a judgment, *see Grey v. St. Martin’s Press*, 221 F.3d 243, 248 (1st Cir. 2000)), is not “of and concerning” Casella and therefore not actionable. *Sturtevant v. Root*, 27 N.H. 69, 71 (1853).

7. The portion of the statement at ¶29(a) concerning Casella trying to “influence the vote on zoning in the Town of Dalton with their blatant distortions of reality in their numerous mailers sent to voters” is opinion concerning a non-defamatory implied assertion of fact: to wit, that Casella mailed the voters of Dalton in a direct marketing campaign to influence their thinking and voting on the issue at hand. Casella has its own speech rights to reach out to voters and attempt to sway them on a matter of public concern. Mr. Swan and Save Forest Lake are entitled to argue that those communications are “blatant distortions of reality,” a judgment about the content of the direct-mail communications protected by the First Amendment. *See Grey v. St. Martin’s Press*, 221 F.3d at 248.

¹ Unless the Plaintiff is willing to concede that shipping leachate itself tends to impair Casella’s public reputation.

8. The statement at ¶32 of Plaintiff's Complaint is Mr. Swan's opinion based upon the facts presented at a public hearing: "Alvarez falsely stated at the hearing that the proposed landfill in Dalton would release leachate that would contaminate groundwater and also affect surface water." This is speculation, and not actionable. *Haynes v. Alfred Knopf*, 8 F.3d 1222, 1227 (7th Cir. 1993). If this statement is construed to be actionable, no citizen can safely voice their opposition in an administrative action in this State. That cannot be the law.

9. The following statements, though arguably predicated upon assumed facts, are not defamatory because they do not hold the Plaintiff "up to contempt, hatred, scorn or ridicule, or tend to impair the Plaintiff's standing in the community." *Boyle v. Dwyer*, 172 N.H. 548, 554 (2019).

- a. ¶34(a): "The location of the proposed landfill in Dalton has 'high ground that drains into both Forest Lake and Alderbrook, both of which eventually drain into the Connecticut and Ammonoosuc Rivers.'"
- b. ¶34(b): "Bethlehem has some of the highest property taxes in the North Country as a result of their [sic] relationship with Casella." In addition, ¶34(b) speculates as to the connection between Bethlehem's taxes and its relationship with Casella. This is protected speech. *Grey v. St. Martin's Press*, 221 F.3d 243, 248 (1st Cir. 2000); *Haynes v. Alfred Knopf*, 8 F.3d at 1227.

10. The statement at ¶36 ("[C]riminal charges should be brought forth, why on earth is a leachate truck leaving the Coventry landfill, OWNED AND OPERATED by [plaintiff], at 3AM in the morning [sic]...") contains two clauses. The first portion is opinion ("charges should be brought forth") and the second is both not a defamatory (the factual predicate being that a leachate truck was leaving Casella's landfill at 3 o'clock in the morning is, in addition to being true, not a statement that would "impair Plaintiff's standing in the community" unless Casella's very business would subject it to "hatred, scorn, or ridicule" (*see Boyle v. Dwyer*, 172 N.H. at 154)).

11. With regard to ¶39, the statement alleged by Plaintiff to be defamatory “accuses [Horizons Engineering] of ... ‘knowingly attempt[ing] to deceive the Planning Board, abutters, and the public regarding an attempt by [plaintiff] to adjust property lines ...’ something that “constitutes professional malfeasance and possibly criminal conduct.” This statement is not “of and concerning” the Plaintiff and is not actionable. *Sturtevant v. Root*, 27 N.H. at 71.

12. The statement at ¶39(a) sets forth a non-defamatory fact—that Casella is using a reputable engineering firm for this project—followed by an opinion on those facts: “[Plaintiff] [us]ing the engineering company’s professional position to mask the property owner and proposed purchaser’s intent to install a large, 300 + sized piece of land carved out of a larger parcel, for a garbage landfill in a town with no zoning ordinances and skirting the abutting landowner notification process, which would include the NH Div. of Parks, is fraudulent and despite the failure of the attempt should be addressed accordingly by those responsible for licensing and permitting.” The assertion that there is “fraudulent” conduct is an opinion concerning the use of a contractor to negotiate the permitting process. *Grey*, 221 F.3d at 248. The assertion that licensing bodies should “address” it, is also opinion. *Id.* The implied assertion of fact that the “property owner and proposed purchaser ... inten[ded] to install a large, 300 + sized piece of land carved out of a larger parcel for a garbage landfill in a town with no zoning ordinances” is a non-defamatory statement of fact—and indeed, exactly what Casella was trying to do. Finally, the assertion that this effort “skirt[ed] the abutter notification process” is not defamatory and to construe it as such would render every complaint by aggrieved abutters about a defective administrative procedure in land use proceedings an actionable claim.

13. The statement at ¶39(b) is unalloyed opinion: “[T]his will surely lead to the subsequent contamination and destruction of wetlands and will constitute an environmental

catastrophe which will forever alter the ecosystem over a wide area of the north country, create economic hardship for an area which relies heavily on eco-tourism dollars from out of area vacationers, negatively impact the quality of life, health and property values for so many area residents. This proposed garbage landfill surely cannot be allowed to progress, which is likely the reason for the attempted deception and subterfuge.” These are personal judgments concerning Casella’s landfill project that are vigorously protected and not actionable. *Grey*, 221 F.3d at 248.

14. Thus, the Court should reconsider and find these statements to be not actionable because they are not “of and concerning” the Plaintiff, are judgment or opinion, or are not defamatory to begin with: Complaint ¶¶23, 29(a), 32, 34(a), 34(b), 36, 39, 39(a), 39(b).

Substantially true statements

15. The objective of this Motion is to winnow down the Complaint clearly and unambiguously to the smallest number of actionable statements asserted by the Plaintiff. This will allow the Parties and the Court to focus on the remaining statements which the Court has deemed to be actionable: ¶¶19(a), ¶19(b), ¶20(a), ¶20(b), ¶21(a), ¶21(b), ¶22, ¶34(c), ¶35, ¶37, ¶38, ¶38(a), ¶38(b), ¶38(c).

16. Those statements, which arguably contain express or implied assertions of provable fact, should also be dismissed because they were supported by documentation that is either (a) public record, (b) incorporated by reference to Save Forest Lake’s extensive advocacy materials on social media, online and in the press, or (c) contextually supported by the statements themselves. *See Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010) (court may consider documents “sufficiently referred to in the complaint”). Thus, these are substantially truthful

statements about factual events detailed in the associated social media. *Thomas v. Telegraph Pub. Co.*, 155 N.H. 314, 335 (2007).

17. As noted in *Thomas*:

One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true. In the law of defamation, truth is defined as substantial truth, as it is not necessary that every detail be accurate. In other words, literal truth of a statement is not required so long as the imputation is substantially true so as to justify the gist or sting of the remark. Furthermore, a false and defamatory inference may be derived from a factually accurate news report.

Id.

18. The Court should deem these statements not actionable. While these assertions are vulnerable to a Motion for Summary Judgment that provides irrefutable evidence of their substantial truth, that documentary support is already implied by the Complaint. These statements were part of a sustained, aggressive, voluminous public advocacy campaign by Save Forest Lake in opposition to Casella's landfill. Such statements, even if caustic, are part of political discourse. As the Supreme Court stated in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988):

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large. Justice Frankfurter put it succinctly when he said that “[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.” Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to “vehement, caustic, and sometimes unpleasantly sharp attacks[.]”

Id. (citations and some quotations omitted).

19. Indeed, Casella notes that Mr. Swan has a history of fomenting controversy through extreme and provocative public statements. Order at 3. Assuming the truth of this statement, there is little doubt that the public, in considering his widespread advocacy campaign,

must have deemed his statements, including the statements recited in the Complaint, to be part of that campaign against the landfill—not an effort to smear or besmirch Casella’s reputation.

20. If the Court permits these claims to move forward, it is transmitting a message to well-financed corporations that intense public opposition to major projects can be subdued and eventually defeated with costly and time consuming litigation. The economics of a typical dispute of that nature inevitably favor the developer. The entire purpose of the First Amendment jurisprudence is to nip that kind of battle of attrition in the bud as an offense to free speech. *See Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) (requiring courts to give the First Amendment “breathing space.”). The command of the First Amendment requires dismissal of this case.

WHEREFORE, Save Forest Lake request that the Court:

A. Clarify that the statements in Complaint ¶¶17(a), 17(c), 17(e), 17(f), 17(g), 18, 21, 21(c), 24(a), 24(b), 24(c), 25, 25(a), 26, 27, 28(a), 28(b), 29(a), 29(b), 29(c), 30, 31, 33 are not actionable for the reasons described in the Court’s August 10, 2020 Order at 10;

B. Reconsider the August 10, 2020 Order and find, additionally, that the statements in Complaint ¶¶23, 29(a), 32, 34(a), 34(b), 36, 39, 39(a), 39(b) are not actionable because they are statements of judgment or opinion, non-defamatory, or not “of and concerning” the Plaintiff;

C. Reconsider the August 10, 2020 Order and find, additionally that the statements in Complaint ¶¶19(a), ¶19(b), ¶20(a), ¶20(b), ¶21(a), ¶21(b), ¶22, ¶34(c), ¶35, ¶37, ¶38, ¶38(a), ¶38(b), ¶38(c) are not actionable because they are substantially truthful and supported by documents in the public record or incorporated by reference by the Complaint;

D. Enter the attached Proposed Order;

E. Dismiss this case;

F. Grant such other and further relief as the Court deems just and equitable.

Respectfully Submitted,

SAVE FOREST LAKE & JON SWAN

By their Attorneys,

ORR & RENO, P.A.

Date: August 20, 2020

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CERTIFICATION OF SERVICE

I, Jeremy D. Eggleton, do hereby certify that this Motion was served on the parties of record in this matter on August 20, 2020, via the Court's electronic service system.

/s/ Jeremy D. Eggleton

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