THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Casella Waste Systems, Inc.

v. Docket #217-2020-CV-212

Jon Swan, f/k/a Jon Alvarez, et al.

MOTION FOR PARTIAL RECONSIDERATION AND CLARIFICATION OF ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff, Casella Waste Systems, Inc. ("CWS"), moves the court for reconsideration of certain decisions in its March 13, 2023 order on the defendants' motion for summary judgment. CWS also seeks clarification as to the scope of one of the court's decisions in that order. This motion rests on the following grounds.

I. Introduction

In any defamation action it is in the defendant's strategic interest to place the most innocuous meaning possible on his statements about the plaintiff. On summary judgment, however, the court may not adopt the defendant's self-serving revisionism if the statement is reasonably capable of a defamatory meaning. By granting summary judgment on defendants' statements concerning the Zero-Sort recycling program and allegations that CWS attempted to "pack" the Bethlehem planning board, the court impermissibly adopted the defendants' interpretations of those statements, in the absence of any new facts, which were offered to explain away the conduct that has already been deemed actionable defamation by this court. CWS seeks reconsideration of the court's order regarding those categories of statements, as the court misapplied the inference to be accorded to the nonmoving party and the law concerning

defamation claims when a statement is susceptible of more than one meaning. CWS also moves the court to clarify the scope of its order granting summary judgment on the statements concerning the Zero-Sort recycling program, as the defendants only sought summary judgment as to one post concerning that category of statements. CWS seeks clarification that the remainder of this claim and other statements on that topic remain in the case.

II. Statement of Facts

CWS seeks reconsideration of the court's order concerning two defamatory statements alleged in the complaint, as the court misapprehended or misapplied the law governing summary judgment and disputed issues of fact in reaching its conclusion on those issues. The first is a category of statements concerning CWS's Zero-Sort recycling program. The amended complaint references two statements on this topic:

- Defendants published a statement that "Casella does not recycle most of the materials placed in 'zero-sort' recycling bins because they are contaminated such that they end up in a landfill (Feb. 14, 2020 social media posting)" and
- The complaint quotes the following social media post from February 2020: "Casella's 'Zero-Sort' single-stream recycling practices, and ensuring higher rate of contamination, is part of the reason why China and many 3rd world nations stopped accepting our 'recyclables' aka PLASTICS."

Third Amended Complaint at ¶¶17(b) and (d). On the defendants' motion to dismiss, the court determined that defendants' statements that CWS "did not recycle most of the materials placed in 'zero sort' bins" are actionable. Order (8/10/20) at 9. The court later denied defendants' motion for reconsideration as to that order. *See, generally,* Order (9/15/20).

The defendants filed a motion for summary judgment purportedly as to all actionable statements remaining in the case following the court's order on the motion to dismiss. *See, generally,* Mot. for Summary Judgment (4/14/22). On the issue of statements concerning "Zero-Sort" recycling practices, however, the defendants addressed only a social media post published on February 3, 2020. *Id*. at 11-14.[1] This post included the following actionable statement: "Their 'Zero-Sort' single-stream recycling program helped collapse the Asian market with its high-rate of contamination[,] ultimately leading to more recycling product being landfilled." Order (3/13/23) at 13, quoting post. This was the only social media post addressed by the defendants' motion for summary judgment concerning the Zero-Sort category of actionable statements.

The court granted summary judgment as to this statement, concluding that the word "helped" in this context could have multiple interpretations and cannot be verified in the absence of a "clear definition within the context of Mr. Swan's statement." *Id.* at 15. The court also concluded that the word "high" is subjective opinion and not objectively verifiable. *Id*. Neither the court's order nor the defendants' motion addressed the other statements referenced in the complaint, and neither of those statements – as described therein – contains the word "helped." The motion also did not address the allegation in Paragraph 17(b) of the complaint that materials in Zero-Sort bins are not recycled due to "contamination."

The court also granted summary judgment on the statement in which the defendants accused CWS of "packing" the Bethlehem planning board. In ruling on the defendants' motion to dismiss, and considering the statement as set forth in the complaint, the court determined that it is an actionable statement for a defamation claim. Order (8/10/20) at 9. The court's order granting summary judgment as to this statement referred only to the language of the post, rather

[1] This post was not specifically identified in the complaint, *see* Third Amended Complaint at ¶¶17(b) and (d), but it addresses the same subject matter as those allegations.

than any evidence or information supplied in the briefing of this motion. Although the court acknowledged that "packing the board" could mean "tampering with a government institution to achieve a particular result," the court adopted the defendants' self-serving construction of the term. Order (3/13/23) at 27. Utilizing that lens, the court granted summary judgment because it determined the defendants' construction of the term is incapable of verification and thus protected opinion. *Id*. at 28. The court did not address whether CWS's construction of the term is capable of verification.

CWS respectfully seeks reconsideration and clarification of the court's March 13, 2023 order concerning these two categories of actionable statements.

III. Argument

A motion for reconsideration must identify the "points of law or fact that the court has overlooked or misapprehended." N.H. Super. Ct. 12(e). The rationale behind reconsideration is to allow trial courts to rule on issues and correct errors before they are presented to the appellate court. *Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764, 786 (2006). The decision to grant or deny a motion for reconsideration is ultimately within the trial court's discretion. *See Broom v. Continental Cas. Co.*, 152 N.H. 749, 752 (2005).

A. Zero-Sort Recycling and the Collapse of the Recycling Market

Viewed in the light most favorable to CWS, the defendants' statement alleged that Casella actually contributed to the collapse of the Asian recycling market with contaminated recyclables in its Zero-Sort recycling program, and thus more products set aside for recycling were landfilled. The court, however, deferred to the defendants' post hoc construction of this statement, concluding that the vagueness of the words "helped" and "high" in this context render the statement unverifiable opinion. Order (3/13/23) at 15. The plaintiff respectfully seeks

reconsideration of this conclusion. Regardless of which meaning of the word "helped" was actually intended in this statement, or what degree of contamination was allegedly present in the waste, it is a declarative statement that accuses CWS of playing a role in the collapse of the Asian recycling market. That statement can be verified as false, and the degree to which CWS allegedly caused this outcome – single-handedly or in combination with other market forces, and with some unknown degree of alleged contamination in its recyclables – is irrelevant to answering that question. The court therefore misapprehended this issue, as whether Zero-Sort recycling contributed in some way to the collapse of the international recyclables market is a factual matter that can be verified as false at trial through testimony and evidence. Accordingly, the court should reconsider its conclusion that the statement is unverifiable opinion and permit the fact-finder to consider evidence on that topic.

CWS also seeks clarification as to the scope of the court's order granting summary judgment for this statement. The defendants sought summary judgment solely as to a February 3, 2020 Facebook post. Mot. for Summary Judgment (4/14/22) at 11-14. While the complaint referenced other social media posts concerning this actionable statement – which do not include the word "helped" – those posts were not addressed by the defendants' motion or the court's order. *See* Third Amended Complaint at ¶¶17(b) and 17(d). CWS seeks clarification that the defendant's other statements concerning Zero-Sort recycling, impacts on the recycling market, and the fate of waste placed in Zero-Sort recycling bins referenced in the complaint still remain in the case.

B. Packing the Planning Board

The plaintiff also seeks reconsideration of the court's order granting summary judgment on the statement accusing CWS of "packing" the Bethlehem planning board. Viewed in the light

most favorable to the nonmoving party, and giving consideration to the entirety of the statement at issue, the defendants' social media post accused CWS of intentionally tampering with a government institution to achieve a particular result in a manner that subverts the will of the electorate. The court acknowledged that the statement could fairly be interpreted in this way that but observed that defendants argued it could also mean "supporting candidates for positions who would support the proponent's goals." Order (3/13/23) at 27[2]. After acknowledging these two interpretations of the statement, the court conducted no further analysis of CWS's construction of the statement and limited its discussion to the defendants' characterization, which was offered on summary judgment to explain away an actionable statement giving rise to liability. The court concluded that the defendants' interpretation of "packing the planning board" is incapable of verification and thus protected opinion, leading it to grant summary judgment on this statement. *Id.* at 28.

As a threshold matter, the court's order relies on the defendant's interpretation of the statement, even though inferences may be drawn from the same text in favor of CWS that lead to a different result. This contravenes the standard by which the court must determine whether to grant summary judgment, and thus the court misapprehended the standard by which it must evaluate this motion regarding this statement. *See Purdie v. Attorney General,* 143 N.H. 661, 663 (1999) (when reviewing a motion for summary judgment, the court will "consider the pleadings and any accompanying affidavits, and all proper inferences drawn from them, in the light most favorable to the nonmoving party"). The court's order also fails to consider the statement in its

[2] It is worth noting here that the most familiar widespread use of the term "packing" in American history is Franklin Roosevelt's plan to increase the number of justices on the United States Supreme Court so that the justices who were, in his view, obstructing his New Deal programs, would be outvoted by a new majority including the judges Roosevelt would appoint pursuant to the plan. By contrast, defendants and the court did not identify any common use of the term to refer only to supporting the appointment of people who agree with the supporter.

entirety, focusing on "packing the board" when the latter part of the statement includes the phrase "against the will of the voters." Order (3/13/23) at 27 (quoting the statement). The latter phrase contradicts the defendants' construction of the text, but the court did not consider that phrase when it reached its conclusion. Testimony could be elicited to establish that CWS never intended to tamper with the planning board to achieve a result "against the will of the voters." Because the court adopted the defendants' after-the-fact, anodyne construction of what it means to "pack" a governmental body, it drew an inference in favor of the defendants by resolving a dispute as to the meaning of a term in their favor.

The court also misapplied the law concerning defamation claims when words are capable of more than one meaning as prescribed in *Thomson v. Cash*, 119 N.H. 371 (1979). In that case, the court considered an allegedly defamatory statement in the context of a motion to dismiss and delineated the steps for analyzing a claim susceptible of multiple meanings. The "threshold question" is "whether the published words are reasonably capable of conveying the defamatory meaning or innuendo ascribed to them by the plaintiff." *Id*. at 374. That question was already resolved in this case when the court denied the defendants' motion to dismiss and concluded that this category of statements is actionable. Order (8/10/20) at 9. The supreme court then stated that the words "alleged to be defamatory must be read in the context of the publication taken as a whole." *Thomson*, 119 N.H. at 374. Where the words complained of, "taken in context, are not such that their meaning is unequivocally defamatory," however, the question is whether some number of "readers of ordinary intelligence and common understanding could reasonably have understood the words as implying fraud or wrongdoing." *Id*. at 373-74. Whether the word was used in a defamatory sense, then, "is a question of fact for the jury." *Id*.

The court's analysis in this case does not comport with *Thomson.* Although the court previously determined that the statement is capable of defamatory meaning, the order on summary judgment adopts only one of the possible – and least plausible – interpretations of "packing the board" and concludes that it is too vague for objective verification. In this regard, then, the court has deprived the fact-finder of its opportunity to determine whether the words imply wrongdoing or are otherwise defamatory. Because there is a dispute as to the meaning of the word "packing" in this context, and because the meaning of that word is determinative as to whether the statement is defamatory, the court also impermissibly resolved a question of material fact on summary judgment. *Porter v. City of Manchester*, 155 N.H. 149, 153 (2007); RSA 491:8-a, III.

IV. Conclusion

For the reasons set forth in this motion, CWS respectfully moves the court to reconsider its order on the defendants' motion for summary judgment as to the two statements described herein, and to clarify its order as to the category of statements concerning Zero-Sort recycling.

Respectfully submitted,

CASELLA WASTE SYSTEMS, INC.
By Its Attorneys,

Date: 3/23/23

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CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically through the court's ECF system upon counsel of record and all other parties who have entered electronic service contacts in this case.

Date: 3/23/23

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