COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

23-P-414

ANTHONY MICHAEL BRANCH

vs.

AIDAN T. KEARNEY & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following the publication of a "blog" post, the plaintiff, Anthony Michael Branch, filed an amended defamation complaint in the Superior Court against the defendants, Aidan T. Kearney and related entities. A judge allowed the defendants' motion for summary judgment and dismissed the amended complaint. We affirm.

Background. On August 23, 2016, when former Secretary of State Hillary Clinton was running for President, a social media blog published a photograph of the plaintiff and Clinton under the title: "Fake Bishop Tony Branch Forces Brockton High School

[1] Turtleboy Digital Marketing, LLC; Turtleboy Enterprises, LLC, doing business as Turleboysports.com; and Worcester Digital Marketing, LLC.

to Change Name From 'Housemasters' To 'Deans' Because . . . . . Slavery." After quoting extensively from an article attributed to the Brockton Enterprise newspaper, which identified the plaintiff as chairman of the Brockton diversity commission, the blog criticized the name change, noted the plaintiff's support for Brockton creating the position of "Community Relations Director," and argued that the plaintiff "is interested in the same thing Hillary is -- money and power." Under a photograph of people marching and led by a person in a clerical collar, the blog continued, "See, Worcester isn't the only place with fake pastors who exist for the sole purpose of bilking the taxpayers and stirring up racial tensions." The blog concluded, "Anyway, this is how people like 'Bishop' Tony Branch make a living. They get fake theology degrees from online schools, and then they expect special treatment from the local governments because they call themselves 'religious leaders.'"

Three years later, the plaintiff filed his amended complaint and alleged that he is a "Pentecostal Bishop and well-respected civil rights leader." He claimed that the defendants published the blog and "knew or should have known" the statements in the blog were "false and made without reasonable grounds for belief in their truth." The plaintiff further alleged that the defendants "published the statements maliciously with knowledge of their falsity or with reckless

disregard for the truth." A judge allowed the defendants' motion for summary judgment. The plaintiff appealed from the judgment dismissing his complaint.

Discussion. 1. Summary judgment. "We review a grant of summary judgment de novo," Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 252-253 (2015), to determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the nonmoving party is entitled to judgment as a matter of law" (citation omitted). Molina v. State Garden, Inc., 88 Mass. App. Ct. 173, 177 (2015). In a defamation case, a public official must demonstrate by "clear and convincing" proof, Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), that "the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964). "Statements of pure opinion are constitutionally protected." King v. Globe Newspaper Co., 400 Mass. 705, 708 (1987), cert. denied, 485 U.S. 940, 962 (1988).

On the record before us, the plaintiff has not met his burden. Without identifying the many hats worn by the plaintiff in his community, we conclude that the New York Times standard applies at least because of the plaintiff's undisputed status as an elected member of the southeast regional vocational school

committee; chairman of the Brockton diversity commission; and candidate for elective offices of mayor, Brockton city council, and Governor's Council. Applying that rigorous standard, the summary judgment record is bereft of any facts showing that the defendants knew they published a false statement or had reckless disregard for the truth. New York Times Co., 376 U.S. at 279-280. For this reason alone, summary judgment was appropriate.

We disagree with the plaintiff's contention that calling someone a "fake bishop" or a "fake pastor" is an actionable false statement of fact in the context presented here. The blog reference to fake religious offices was nothing more than a constitutionally protected opinion, King, 400 Mass. at 708, especially in the context of the blog criticizing the plaintiff for leveraging his religious status to achieve political gains including being photographed with a presidential candidate, holding public office, and being responsible for changing the nomenclature of school administrators. See Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 311 (1982), cert. denied, 459 Mass. 1037 (1982) (nonactionable opinion that reporter was "sloppy and irresponsible" and had "history of bad reporting techniques"); Myers v. Boston Magazine Co., 380 Mass. 336, 338 (1980) (nonactionable opinion that sports announcer was "worst" in Boston and was "enrolled in a course for remedial speaking"). The statement about "bilking taxpayers" also constitutes a

protected opinion clearly linked to the plaintiff publicly supporting the creation of a $90,000-per-year position called "Community Relations Director." "When the statements are viewed within their context, they do not imply the allegation of undisclosed defamatory facts as their basis." Cole, 386 Mass. at 313. A harsh critic may resort to hyperbole as well as "caricature or rhetorical license" without losing constitutional protection for freedom of speech. Myers, 380 Mass. at 344.

We also reject the plaintiff's claim that the blog reference to a degree from an "online school" was false. That reference was not directed at the plaintiff. To the extent the statement could have been perceived as suggesting the plaintiff had an "online" degree, the plaintiff's deposition testimony resolves this claim in favor of the defendants. The plaintiff acknowledged in his testimony that he never obtained a bachelor's degree, and he also acknowledged that he falsely claimed to be a college graduate with a bachelor's degree. Thus, the reference to the "online" degree was even more generous than the truth of no degree at all. See Reilly v. Associated Press, 59 Mass. App. Ct. 764, 770 (2003) ("a factual statement need not state the precise truth").

In reviewing this matter, we are reminded of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it

may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co., 376 U.S. at 270. Even if the defendants' motivations were less than noble as the plaintiff suggests in his brief, "[d]ebate on public issues will not be uninhibited" if the challenged speech must be free of "hatred" or other "ill-will." Garrison v. Louisiana, 379 U.S. 64, 73-74 (1964). Also, "[t]he New York Times rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed." Id. at 77.

2. Other claims. While the civil action was pending, the defendants published a variety of blogs, with content appearing on Facebook and Twitter and broadcast on YouTube. Postings included extremely detailed findings of fact by a judge in the plaintiff's divorce proceedings, documents pertaining to civil judgments against the plaintiff, and documents from the plaintiff's filings in the United States bankruptcy court. In response to this barrage, the plaintiff filed a motion "to enjoin the defendants from harassing and causing emotional distress by intentionally engaging in a smear campaign to harm the plaintiff through the publishing and video posting of false statements." The plaintiff argued that Kearney's "intimidation under the cloak of being a reporter must not go unchallenged."

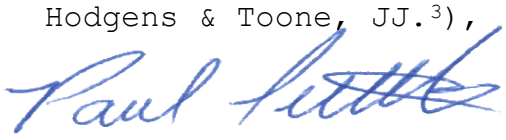
Another judge denied the motion for a preliminary injunction on April 25, 2022.

The appeal from the denial of this motion is not properly before us. Although the plaintiff referenced the unsuccessful motion for a preliminary injunction in the summary judgment notice of appeal (filed on March 7, 2023), the plaintiff failed to file a timely notice of appeal one year earlier following the denial of the motion for a preliminary injunction. See G. L. c. 231, § 118, second par. (appeal from denial of preliminary injunction "shall be taken within thirty days"); Mass. R. App. P. 4 (a) (1), as appearing in 481 Mass. 1606 (2019) (notice of appeal must be filed "within 30 days"). "A timely notice of appeal is a jurisdictional prerequisite to our authority to consider any matter on appeal." Wells Fargo Bank, N.A. v. Sutton, 103 Mass. App. Ct. 148, 152 (2023), quoting DeLucia v. Kfoury, 93 Mass. App. Ct. 166, 170 (2018). Accordingly, we lack jurisdiction to consider this additional claim, and we also note that the entry of a final judgment renders the denial of preliminary relief moot. See Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 2), 424 Mass. 471, 472 (1997), S.C., 492 Mass. 772 (2023).[2]

[2] In response to the alleged smear campaign, the plaintiff also unsuccessfully requested the appointment of counsel based on his belief that the information published by the defendants suggested that the plaintiff engaged "in serious criminal

Judgment affirmed.

By the Court (Milkey, Hodgens & Toone, JJ.[3]),



Clerk

Entered: July 24, 2024.

conduct." On appeal, he contends that the judge erred by denying his request, but he has not identified the origin of such a right to counsel in the circumstances presented. In any event, we discern no error. The right to counsel was not triggered by the mere suggestion of criminal conduct or even anticipation of a possible criminal prosecution. See, e.g., Kirby v. Illinois, 406 U.S. 682, 689 (1972) (Sixth Amendment right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings"); Miranda v. Arizona, 384 U.S. 436, 479 (1966) (Fifth Amendment right to counsel arises during custodial interrogation).

[3] The panelists are listed in order of seniority.