COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1605

WALTER TUVELL

vs.

JACK MARSHALL.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case, which arises out of a series of communications between the parties on and around the defendant Jack Marshall's Internet blog,[1] "Ethics Alarms," requires us to review the dismissal of the plaintiff Walter Tuvell's defamation claims against Marshall. To the extent that we can parse them from his briefing,[2] Tuvell's legal arguments are that (1) the motion judge applied an incorrect standard, and (2) the judge incorrectly

[1] A "blog" is defined as "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer." Merriam-Webster's Collegiate Dictionary 133 (11th ed. 2005).

[2] Tuvell's arguments on appeal are difficult to understand and do not satisfy the requirements of Mass. R. A. P. 16, as appearing in 481 Mass. 1628 (2019). Nonetheless, we have carefully reviewed his submissions and address those arguments that we can discern.

applied the law to the allegations in Tuvell's complaint.[3] For the reasons discussed, we affirm.

We review de novo the allowance of Marshall's motion to dismiss Tuvell's complaint, see Santos v. U.S. Bank Nat'l Ass'n, 89 Mass. App. Ct. 687, 691-692 (2016), in order to determine whether Tuvell's complaint stated "factual 'allegations plausibly suggesting . . .' an entitle[ment] to relief." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007). Like the motion judge, in conducting our review, we consider not only Tuvell's complaint, but the uncontested copy of the communications and blog postings on which the complaint is based, and on which we conclude Tuvell relied in drafting that pleading. See Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 224 (2011) (in framing complaint plaintiff relied on extrinsic documents not excluded by motion judge). We take as true the well-pleaded factual allegations of the complaint, and any favorable inferences that may be drawn from them, see id. at 223, "[h]owever, we do not accept legal conclusions cast in the

[3] Tuvell's remaining contentions do not rise to the level of appellate argument, and we do not address them. See Zora v. State Ethics Comm'n, 415 Mass. 640, 642 n.3 (1993). In any event, "our review of the record shows that none of them has merit." Id.

form of factual allegations." Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

Background. We summarize Tuvell's allegations with these parameters in mind. In August 2017, Tuvell contacted Marshall via electronic mail message (e-mail) critiquing Marshall's blog. Marshall posted a portion of Tuvell's e-mail on his blog; the posting did not identify Tuvell by name. Tuvell publicly responded to Marshall's post, identifying himself as the author of the e-mail. Tuvell exchanged public posts with other readers on Marshall's blog, many of which concerned whether and how the readers, including Tuvell, viewed the political or "partisan" tenor of the blog. Marshall engaged with Tuvell on the blog, suggesting that Tuvell was the instigator of any partisanship on the blog; ultimately, on the day after Marshall posted the original e-mail from Tuvell, Marshall "banned" Tuvell from further posts. In the course of these communications with and about Tuvell, Marshall made various observations about Tuvell's being "special," a "jerk," "a few cherries short of a sundae," and "an asshole," and describing his posts as "whiny" and "bitching." Marshall wrote that Tuvell was "not honest," because Tuvell had "sandbagged" him by pretending interest in the subject matter of Marshall's blog while intending to draw attention to Tuvell's own interests and obtain free legal advice. He published a link to Tuvell's website, and, drawing

on the material posted there, wrote that the judge in a case brought by Tuvell "decided that [Tuvell's] case was lousy, and dismissed it," and commented on Tuvell's account of his own "PTSD."

Tuvell filed suit for defamation; Marshall responded with a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), which Tuvell opposed. After a hearing, and in a thoughtful memorandum, the judge allowed the motion. Tuvell filed a timely appeal.

Discussion. To establish a claim for defamation, a plaintiff must prove four elements: (1) the defendant made a false statement to a third party, (2) of or concerning the plaintiff, (3) that was capable of damaging the plaintiff's reputation in the community and caused the plaintiff economic loss or is actionable without proof of economic loss, and (4) that the defendant was at fault. See Ravnikar v. Bogojavlensky, 438 Mass. 627, 629-630 (2003).[4] An allegedly defamatory statement must be assessed in context, and not as isolated words

[4] Despite Tuvell's having injected himself into the public blog forum, we assume without deciding that Tuvell is a private figure, and that any "fault" is assessed using a negligence standard. See Jones v. Taibbi, 400 Mass. 786, 797-799 (1987).

or phrases.[5] See Scholz v. Delp, 473 Mass. 242, 250 (2015). The judge considers factors including "'the specific language used'; 'whether the statement is verifiable'; 'the general context of the statement'; and 'the broader context in which the statement appeared.'" Id., quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 9 (1990). The judge also takes into account "any 'cautionary terms used by the person publishing the statement.'" Scholz, supra at 251, quoting Lyons v. Globe Newspaper Co., 415 Mass. 258, 263 (1993). Ordinarily, neither an expression of opinion nor hyperbolic statements are actionable. See National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 227 (1979), cert. denied, 446 U.S. 935 (1980) ("A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is"). See also Scholz, supra at 249-250; Restatement (Second) of Torts § 566 & comment c (1981).

We begin by observing that the statements at the heart of Tuvell's complaints were made on a blog, see note 1, supra, a forum generally understood to reflect the personal views of the

[5] A point that Tuvell, whose argument on appeal includes criticism of the motion judge's failure to address individually each of the statements he considers to be defamatory, overlooks.

blog's writer, here, Marshall.[6] With some exceptions, which we address below, the majority of the statements cited as defamatory in Tuvell's complaint can only reasonably be understood as expressions of Marshall's opinion which, regardless of their tone, are not actionable. See Downey v. Chutehall Constr. Co., Ltd., 86 Mass. App. Ct. 660, 663-664 (2014) (determination whether statement is factual assertion or statement of opinion must be decided based on how statement can be reasonably understood). We include in this category Marshall's statements about his determination that Tuvell's conduct warranted his being "banned" from the blog; his communications to Marshall being treated as unwelcome "spam[]"; and his descriptions of Tuvell as "special," a "jerk," and an "asshole" and of his posts as "whiny" and "bitching."[7] There is some overlap in these categories of statements with others, like Marshall's description of Tuvell's post as "teeter[ing] on the edge of madness," that are instances of pure hyperbole, likewise inactionable.

To the extent that Tuvell complains about Marshall's publicizing Tuvell's failed lawsuit and the posttraumatic stress

[6] The "Comment Policies" Marshall established and posted for his blog give Marshall broad discretion in approving, editing, and "banning" writers and their submissions.

[7] This latter category of terms also qualifies as nondefamatory hyperbole.

disorder that Tuvell attributed to it, Marshall's recitation of those facts only repeated information that Tuvell himself gave publicly to Marshall; Tuvell could hardly complain that the facts were false. See Myers v. Boston Magazine Co., 380 Mass. 336, 339-341 (1980).

The closest question is the status of Marshall's statements that Tuvell misrepresented to him the true reason for his interest in Marshall and his blog, and his statement that Tuvell's contact was a means of seeking free legal advice about his failed lawsuit. Ultimately, we conclude that such a statement, even if false, would not be actionably defamatory because in context, it was not likely to "discredit[] the plaintiff in the minds of any considerable and respectable class of the community." Brauer v. Globe Newspaper Co., 351 Mass. 53, 55 (1966). We place particular emphasis on the fact that the statements here were made in a blog, the format and substance of which "implied commentary rather than the statement of objective facts."[8] Disend v. Meadowbrook Sch., 33 Mass. App. Ct. 674, 676-

[8] Marshall's blog provided the content and opinion that Marshall chose to include there, and while Marshall disclaimed any political partisanship, the blog could not reasonably be read as anything but Marshall's own viewpoint on his subject matter. Additionally, with respect to his comment about Tuvell's website and motivation, Marshall provided the link Tuvell had provided to him to allow the blog's readers to see Tuvell's blog for themselves, allowing them to make their own assessment of Tuvell's likely motives.

677 (1992). See, e.g., Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, 733-735 (1986); Pritsker v. Brudnoy, 389 Mass. 776, 778-783 (1983); Myers, 380 Mass. at 338-342. We do not see that Marshall's speculation about Tuvell's motives would "tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community." Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 853 (1975).

To the extent that we have not specifically addressed subsidiary arguments in Tuvell's brief, they have not been overlooked. "We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954). There was no error in the dismissal of Tuvell's complaint.

Judgment affirmed.

By the Court (Blake, Lemire & Hand, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: October 31, 2019.

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