

[Cite as *Ra v. Ohio Att’y. Gen. Office*, 2019-Ohio-3458.]

KEVIN RA, et al.

Plaintiffs

v.

OHIO ATTORNEY GENERAL'S OFFICE

Defendant

Case No. 2019-00212JD

Judge Patrick M. McGrath

DECISION

{¶1} Pursuant to Civ.R. 12(B), on the court’s own motion, the court converted a motion to dismiss filed by defendant Ohio Attorney General’s Office (AGO) to a motion for summary judgment. The AGO’s converted summary-judgment motion is before the court for determination.

I. Introduction

{¶2} Plaintiff Kevin Ra and two companies affiliated with Ra—plaintiff Vista REO Settlement Services, LLC (Vista REO) and plaintiff Parcel Revenue Corporation (PRC)—bring a lawsuit against the AGO. (Complaint.) Plaintiffs’ lawsuit arises from a news release of November 16, 2017, which the AGO posted on the AGO’s website. (Exhibit B, Complaint; Exhibit C, Ra Affidavit dated April 30, 2019.) According to the news release, in a lawsuit in the Cuyahoga County Common Pleas Court the former Ohio attorney general accused Ra of “converting nonprofit funds for personal benefit, breaching his fiduciary duties, failing to register charitable assets with the Attorney General’s Office, and failing to cooperate with an investigation, among other alleged violations.” (Exhibit B, Complaint; Exhibit C, Ra Affidavit.) And, according to the news release, the former Ohio attorney general “[sought] a reformation of the charitable trust, injunctive relief to prevent Ra from working for a charity in Ohio, civil penalties, damages, and other relief.” (Exhibit B, Complaint; Exhibit C, Ra Affidavit.) The AGO, Ra, Vista REO, and certain other entities settled the case that is the subject of the

AGO's news release. (Complaint, ¶ 19; Exhibit A., Complaint; Exhibit B and C, Ra Affidavit.)

II. Procedural History

{¶3} On February 22, 2019, after the parties in the action in the common pleas court reached a settlement, Ra (proceeding pro se), Vista REO, and PRC sued the AGO. Plaintiffs assert that (1) Ra “was formerly the founder, sole board member, and executive director of two non-profit corporations” (Complaint, ¶ 1), (2) Vista REO is a limited liability company (which was formed under Ohio law) that “has acted as an escrow agent which collects monies due Ra in connection with the use of Ra’s intellectual property” (Complaint, ¶ 3), and (3) PRC is a corporation (which was formed under Wyoming law that Ra incorporated in January 2018 and whose domain name Ra purchased on March 23, 2018) is registered in Ohio as a foreign corporation. (Complaint, ¶ 5, 35; Exhibit A, Ra Affidavit.) Plaintiffs further assert that PRC “markets and sells a proprietary software platform to municipalities which * * * identifies and tracks unproductive, tax delinquent, and vacant parcels of real estate * * * to find best-use scenarios for unproductive parcels on a parcel by parcel basis.” (Complaint, ¶ 5.)

{¶4} Plaintiffs maintain that, after the dispute in the common pleas court was settled, Ra became aware of the AGO’s news release. (Complaint, ¶ 19; Exhibit A, Ra Affidavit.) Ra emailed the AGO and he requested the removal of the news release. (Complaint, ¶ 22; Exhibit A, Ra Affidavit.) The AGO declined to remove the news release from its website. (Exhibit A, Ra Affidavit.)

{¶5} Plaintiffs allege that the AGO’s refusal to remove the news release from the AGO’s website and the AGO’s purported use of Search Engine Optimization techniques have disrupted Ra’s, Vista REO’s, and PRC’s business operations. (Complaint, ¶ 4, 24, 51, 58-60; Exhibit D, Ra Affidavit.) Plaintiffs seek monetary damages in the amount of \$1.6 Billion and declaratory relief based on claims of breach of contract, breach of implied covenant of good faith and fair dealing, declaratory judgment concerning rights

under the settlement agreement, negligence, tortious interference with business relationships, and intentional infliction of emotional distress. (Complaint.)

{¶6} On March 25, 2019, the AGO moved to dismiss plaintiffs' case pursuant to Civ.R. 12(B)(1) and (6). The court sua sponte converted the AGO's motion to dismiss to a summary-judgment motion pursuant to Civ.R. 12(B). And the court provided the parties with an opportunity to present materials pertinent to the AGO's summary-judgment motion.

{¶7} The AGO moved the court to stay discovery pending the resolution of the AGO's converted summary-judgment motion. Ra opposed the AGO's motion to stay discovery; Vista REO and PRC did not timely respond to the AGO's motion.

{¶8} In the AGO's converted summary-judgment motion, the AGO asserts that plaintiffs' tort claims hinge on plaintiffs' contention that the AGO's news release was false and caused them reputational harm, which in the AGO's view, constitutes "disguised defamation" claims. The AGO further asserts that it is immune from liability for defamation and a one-year statute of limitations for defamation has expired. The AGO also asserts that, assuming for the sake of argument that Ra's and Vista REO's claims are not defamation claims, then those claims are barred because under the settlement agreement Ra and Vista REO waived and released any and all claims and causes of action against the AGO relating to the AGO's investigation of Ra and Vista REO or the AGO's previous lawsuit against Ra and Vista REO.

{¶9} Plaintiffs oppose the AGO's converted summary-judgment motion. Plaintiffs contend that the AGO attempts to reduce this case to a "simple, singular tort action based upon the release of one 'press release.'" (Memorandum In Opposition, 5.) According to plaintiffs, the "[settlement agreement] is the basis for the allegations of breaches and request for declaratory judgment and the tort claims are based upon the [AGO's] post-settlement conduct." (Id.)

III. Law and Analysis

A. Legal Standard

{¶10} Civ.R. 56, which governs summary judgment, “has been described as a means to facilitate the early assessment of the merits of claims, to foster pre-trial dismissal of meritless claims, and to define and narrow issues for trial. * * * As such, summary judgment is a procedural device designed to promote judicial economy and to avoid needless trials.” *Kraft v. OMCO Bldg., LLC*, 10th Dist. Franklin No. 17AP-743, 2019-Ohio-621, ¶ 19. Pursuant to Civ.R. 56(C), summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.” Construing Civ.R. 56(C), the Ohio Supreme Court has stated: “Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327, 4 Ohio Op. 3d 466, 472, 364 N.E.2d 267, 274.” *State ex rel. Grady v. State Emp. Rels. Bd.*, 78 Ohio St.3d 181, 183, 677 N.E.2d 343 (1997).

{¶11} For purposes of Civ.R. 56(C), the term “material fact” has been characterized as “one that would affect the outcome of the suit under the applicable substantive law.” *Pollard v. Elber*, 6th Dist. Erie No. E-17-050, 2018-Ohio-4538, ¶ 27. And according to one Ohio appellate court, “appellate courts have held that while a court is not required to consider improper summary judgment evidence, it *may* consider

such evidence if neither party objects.” (Emphasis sic.) *Chamberlin v. Buick Youngstown Co.*, 7th Dist. Mahoning No. 02-CA-115, 2003-Ohio-3486, ¶ 6.

B. Under the settlement agreement the Cuyahoga County Common Pleas Court retained jurisdiction to adjudicate plaintiffs’ claims of breach of contract, breach of implied covenant of good faith and fair dealing, and plaintiffs’ request for declaratory judgment.

{¶12} A settlement agreement “is a contract designed to terminate a claim by preventing or ending litigation.” *Continental W. Condominium Unit Owners Ass’n v. Howard E. Ferguson*, 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996). The interpretation of a contract presents a question of law. See *Leber v. Smith*, 70 Ohio St.3d 548, 553, 639 N.E.2d 1159 (1994) (the interpretation of an insurance contract “involves a question of law to be decided by a judge”). When a court construes a written instrument, “the primary and paramount objective is to ascertain the intent of the parties.” *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989). With respect to a written settlement agreement, the Ohio Supreme Court has stated: “Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties’ expressed intentions. * * * Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence. * * * There can be no implied covenant in a contract in relation to any matter that is specifically covered by the written terms of the contract.” *Aultman Hosp. Assn.* at 53-54.

{¶13} Plaintiffs represent that the basis for plaintiffs’ allegations of breach of contract, breach of implied covenant of good faith and fair dealing, and plaintiffs’ request for declaratory judgment is the settlement agreement that the AGO, Ra (in his personal capacity), Vista REO, and others, executed in the case before the Cuyahoga County Common Pleas Court. Notably, the settlement agreement provides that the “parties agree that the Court of Common Pleas, Cuyahoga County, Ohio, shall retain

jurisdiction to enforce this Agreement.” (Emphasis added.) (Settlement Agreement, 4, Miscellaneous Section).

{¶14} In the settlement agreement the AGO, Ra, and Vista REO unambiguously agreed that the Cuyahoga County Common Pleas Court is conferred with jurisdiction to enforce the settlement agreement. Ra’s and Vista REO’s claims relative to the AGO’s alleged breach of the settlement agreement, alleged breach of an implied covenant of good faith and fair dealing, as well as Ra’s and Vista REO’s request for a declaration of the meaning of the settlement agreement, resolve to claims pertaining to the enforcement of the settlement agreement, which, in turn, fall within the jurisdiction of the Cuyahoga County Common Pleas Court pursuant to the terms of the settlement agreement. The court holds that under the settlement agreement this court lacks jurisdiction to adjudicate Ra’s and Vista REO’s claims of breach of contract, breach of an implied covenant of good faith and fair dealing, as well as Ra’s and Vista REO’s request for declaratory relief relative to the settlement agreement. Consequently, these claims should be dismissed without prejudice pursuant to Civ.R. 41(B)(4)(a). See Civ.R. 41(B)(4)(a) (dismissal for lack of jurisdiction over the person or subject matter operates as a failure otherwise than on the merits); see also *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11 (the term jurisdiction, which encompasses jurisdiction over the subject matter and over the person, means a court’s statutory or constitutional power to adjudicate a case. Because subject-matter jurisdiction “goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time”).

{¶15} Additionally, whether PRC (which is not a party to the settlement agreement.) should be adjudicated an intended beneficiary of the settlement agreement with enforceable rights, or an incidental beneficiary of the settlement agreement with no enforceable rights, resolves to a claim concerning the enforcement of the settlement agreement, which, in turn, falls within the jurisdiction of the Cuyahoga County Common

Pleas Court pursuant to the terms of the settlement agreement. *See generally Hill v. Sonitrol of Southwestern Ohio*, 36 Ohio St.3d 36, 40, 521 N.E.2d 780 (1988) (discussing rights of intended and incidental beneficiaries under Ohio law). The court holds that under the settlement agreement this court lacks jurisdiction to adjudicate whether PRC is an intended beneficiary or, an incidental beneficiary, of the settlement agreement. Consequently, PRC's claims of breach of contract, breach of implied covenant of good faith and fair dealing, as well as PRC's request for declaratory relief relative to the settlement agreement, should be dismissed without prejudice pursuant to Civ.R. 41(B)(4)(a) for lack of jurisdiction.

C. The Ohio Attorney General's Office is entitled to partial summary judgment on plaintiffs' tort claims because those claims are "disguised defamation claims" and in the performance of official duties the Ohio attorney general has an absolute privilege to publish material that is defamatory.

{¶16} In the converted summary-judgment motion, the AGO asserts that plaintiffs' tort claims hinge on plaintiffs' contention that the AGO's news release was false and caused them reputational harm, which, according to the AGO, constitutes "disguised defamation" claims. In opposition, plaintiffs maintain that their tort claims are based on the AGO's post-settlement conduct. Construing the complaint, plaintiffs assert: "The Complaint clearly states that the basis for instant matter is the [AGO's] policy related to refusal to remove, modify, or update press releases as appropriate and the [AGO's] search optimization tactics of outdated, inaccurate, and misleading press releases. (Complaint, pp.23-24)."

{¶17} Upon consideration of the parties' filings and arguments, the court is persuaded that plaintiffs' tort claims—negligence, tortious interference with business relationships, and intentional infliction of emotional distress—which, although they are couched as separate torts, stem from the AGO's refusal to withdraw the news release from the AGO's website and those claims therefore constitute "disguised defamation

claims.” See *Breno v. City of Mentor*, 8th Dist. Cuyahoga No. 81861, 2003-Ohio-4051 (affirming a trial court’s summary-judgment determination that claims of negligent infliction of emotional distress, intentional infliction of emotional distress, and loss of consortium arising out of a police investigation involving an erroneous report of child pornography were disguised defamation claims subject to a one-year statute of limitations); *Worpenberg v. Kroger Co.*, 1st Dist. Hamilton No. C-010381, 2002-Ohio-1030 (affirming a trial court’s grant of summary judgment) (holding that a trial court did not err when it characterized a claim as a “disguised defamation” claim since the claim was expressly premised upon a “communication” as defined by 1 Restatement of the Law 2d, Torts (1977), Section 559, Comment a); see also *Schaumleffel v. Muskingum Univ.*, S.D. Ohio No. 2:17-cv-463, 2018 U.S. Dist. LEXIS 36350, at *22 (Mar. 6, 2018) (stating that when a plaintiff “alleges he suffered emotional distress as a result of false allegations against him, such a claim ‘is properly characterized as a “disguised defamation” claim’ and is subject to the same statute of limitations as the defamation claim. See *Breno v. City of Mentor*, 8th Dist. Cuyahoga No. 81861, 2003-Ohio-4051, ¶ 12”); *Doe v. College of Wooster*, N.D. Ohio No. 5:16-cv-979, 2018 U.S. Dist. LEXIS 23411, at *21-22 (Feb. 13, 2018) (claim that alleged defamatory statements intended to cause serious emotional distress is properly characterized as a “disguised defamation claim”).

{¶18} Notably, this court has previously recognized that in the performance of official duties the Ohio attorney general has an absolute privilege to publish material that is defamatory. *Autumn Health Care of Zanesville, Inc. v. Ohio Attorney General*, Ct. of Cl. No. 2013-00644 (Mar. 26, 2014), 2014 WL 1349257. In *Autumn Health Care*, this court stated:

“An absolute privilege to publish defamatory matter concerning another in communications made in the performance of his official duties exists for (a) any executive or administrative officer of the United States;

or (b) a governor or other superior executive officer of a state.”
3 Restatement of the Law 2d, Torts, Section 591 (1976). * * *.

“All of the state courts that have considered the question have agreed that the absolute privilege stated in Clause (b) protects the superior officers of the state governments, including at least the governor [and] the attorney-general * * *.” *Id.* at comment c.

Autumn Health Care at 2014 WL 1349257 at * 2. *Accord Bensman v. Ohio Secretary of State*, Ct. of Cl. No. 2015-00599 (Mar. 15, 2016), 2016 WL 1122196 (2016) * 3, (stating: “This Court has held that an officer of the state enjoys an absolute privilege to publish defamatory material even ‘when the publications are incidental to the performance of the duties of the office.’ *Autumn Health Care of Zanesville, Inc. v. Ohio Attorney General*, Ct. of Cl. No. 2013-00644, 2014 WL 1349257, citing Restatement of the Law 2d, Torts, Section 591 cmt. a”).

{¶19} Moreover, in *Marcum v. Rice*, 10th Dist. Franklin No. 98AP-717, No. 98AP-718, No. 98AP-719, No. 98AP-721, 1998 Ohio App. LEXIS 5385, at *12-13 (Nov. 3, 1998), the Tenth District Court of Appeals stated:

The doctrine of absolute privilege recognizes that some of the functions public officials are required to perform are of such importance to the public that the public interest in having the official communicate freely overrides an individual’s interest in pursuing a cause of action for defamation. * * *.

* * *

The doctrine of absolute privilege is not just a defense to liability; it “clothes the official acts of the executive officer with *immunity* from civil defamation suits.” *Barr v. Matteo* (1959), 360 U.S. 564, 574, 3 L. Ed. 2d 1434, 79 S. Ct. 1335. In [*Bigelow v. Brumley*, 138 Ohio St. 574, 37 N.E.2d 584 (1941)], the Ohio Supreme Court clearly recognized that the doctrine

of absolute privilege is a form of immunity. The *Bigelow* court refers to absolute privilege as an “immunity” at least ten times. In addition, at page 584, the *Bigelow* court adopts the view in Restatement of the Law 2d, Torts (1977) 224, Section 584, that the privilege protects the official “not only from liability but from the danger of even an unsuccessful action”).

* * *

{¶20} Based on the evidence before the court, reasonable minds can only conclude that the Ohio Attorney General is a member of the executive department of Ohio government. Ohio Constitution, Article III, Section 1. And reasonable minds can only conclude that the former Ohio Attorney General posted and the current Ohio Attorney General has continued to post the news release in performance of the AGO’s official duties. See *generally* R.C. 109.02 (providing that the attorney general is the chief law enforcement officer for the state); R.C. 1716.15 (permitting the attorney general to conduct an investigation based upon reasonable cause to believe that any person has violated or is violating any provision of R.C. Chapter 1716 (charitable organizations) or any rule adopted under it, or has filed any document as required under R.C. Chapter 1716 that contains false or misleading information). Furthermore, reasonable minds can only conclude that the news release, all of which the AGO asserts is true, even if it is shown to be defamatory is the product of the AGO acting fully within the duties of the office and, as consequence, is privileged.

{¶21} Viewing the parties’ evidence most strongly in favor of plaintiffs and given that, as a matter of law, the Ohio attorney general has an absolute privilege to publish material that is defamatory in the performance of official duties, reasonable minds can come to but one conclusion—namely, that no genuine issue of material fact remains to be litigated relative to plaintiffs’ “disguised defamation claims” and that the AGO is entitled to judgment as a matter of law on plaintiffs’ “disguised defamation claims.” See *Autumn Health Care of Zanesville, supra* and *Bensman, supra*. The court holds that

partial summary judgment in favor of the AGO is proper on plaintiff's "disguised defamation claims."

IV. Conclusion

{¶22} In accordance with a settlement agreement executed by the AGO, Ra, Vista REO (and others), the court lacks jurisdiction to adjudicate plaintiffs' claims of breach of contract, breach of an implied covenant of good faith and fair dealing, and plaintiffs' request for a declaration of the meaning of the settlement agreement. Consequently, those claims should be dismissed without prejudice for lack of jurisdiction.

{¶23} The AGO is entitled to partial summary judgment on plaintiffs' claims of negligence, tortious interference with business relationships, and intentional infliction of emotional distress because these claims constitute "disguised defamation claims," and, as a matter of law, the AGO has an absolute privilege to publish defamatory material in the performance of official duties. The AGO's motion to stay discovery pending the resolution of the AGO's converted summary-judgment motion is moot.

PATRICK M. MCGRATH
Judge

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KEVIN RA, et al.

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v.

OHIO ATTORNEY GENERAL'S OFFICE

Defendant

Case No. 2019-00212JD

Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶24} For reasons set forth in the decision filed concurrently herewith, pursuant to Civ.R. 41(B)(4)(a) the court DISMISSES without prejudice plaintiffs' claims of breach of contract, breach of an implied covenant of good faith and fair dealing, and declaratory judgment. The court GRANTS partial summary judgment in favor of defendant on plaintiffs' claims of negligence, tortious interference with business relationships, and intentional infliction of emotional distress. The court DENIES all pending motions as moot.

{¶25} Judgment is rendered in favor of defendant. Court costs are assessed equally against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge