IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

JAY PENSLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 09 CH 18628
	)	
ELAINA BENDER,	)	
	)	
Defendant.	)	

DEFENDANT ELAINA BENDER'S MOTION TO DISMISS COMPLAINT

FACTS

On June 10, 2009, Plaintiff filed a two-count Complaint (attached as Exhibit A) against his former patient, Elaina Bender. Ms. Bender received plastic surgery from Mr. Pensler on or about February 11, 2008. (See Affidavit, attached as Exhibit B.) Ms. Bender expressed her opinion of the surgery results on Yelp.com and Citysearch.com. The opinions are attached as Exhibits A and B to Plaintiff's complaint. (See Exhibit A, Complaint.) Ms. Bender did not use her own name on the posts.

LAW

I. 735 ILCS 5/2-615

A 2-615 motion to dismiss admits all well-pled facts in the complaint, and challenges the sufficiency of the pleading. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 490 (1996). Although admitting well-pled facts, a section 2-615 motion to dismiss does not admit conclusions of law or factual conclusions that are unsupported by factual allegations. *Carter v. New Trier East High School,* 272 Ill.App.3d at 555, 208 Ill.Dec. 963, 650 N.E.2d 657 (1st Dist. 1995). Illinois is a fact-pleading jurisdiction. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348, 798 N.E.2d 724, 278 Ill. Dec. 340 (2003). A

plaintiff therefore must plead facts sufficient to establish a cause of action. *Chandler*, 207 Ill. 2d at 348. Dismissal is proper only if it clearly appears that no set of facts can be proved under the pleadings that entitle the plaintiff to recover. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86-87, 672 N.E.2d 1207, 220 Ill.Dec. 19 (1996).

II. DEFAMATION

The rule in Illinois, which used to be limited to slander cases but has been extended to all defamation cases, *Brown & Williamson Tobacco Corp. v. Jacobson,* 713 F.2d 262, 267 (7th Cir. 1983), is that a plaintiff can maintain a suit for defamation without proof of special damages only if the defamatory statement falls into one of four "per se" categories: commission of a crime; infection with a type of communicable disease that could cause the infected person to be shunned; malfeasance or misfeasance in the performance of an office or a job; and (what is closely related, but less redolent of actual misconduct and usable by business firms as well as by workers or professionals) unfitness for one's profession or trade. *Id.* at 267-68; *Mittelman v. Witous,* 135 Ill. 2d 220, 552 N.E.2d 973, 982, 142 Ill. Dec. 232 (1989).

Yet statements that are defamatory *per se* may enjoy constitutional protection as expressions of opinion. *Rose v. Hollinger International*, 383 Ill. App. 3d 8; 889 N.E.2d 644; 321 Ill. Dec. 379 (1st Dist. 2008) (citing *Solaia Technology, LLC v. Specialty Publishing Co.,* 221 Ill. 2d 558, 581, 852 N.E.2d 825, 304 Ill. Dec. 369 (2006)); U.S. Const., amend. I. “If it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.” *Haynes v. Alfred A. Knopf,*

Inc., 8 F.3d 1222, 1227 (7th Cir. 1993). Whether an allegedly defamatory statement is an opinion is a question of law. *Moriarty v. Greene,* 247 Ill. Dec. 675, 685, 315 Ill. App. 3d 225, 234, 732 N.E.2d 730, 740 (1st Dist. 2000). "The vaguer and more generalized the opinion, the more likely the opinion is nonactionable as a matter of law." *Wynne v. Loyola Univ. of Chicago,* 318 Ill. App. 3d 443, 452; 741 N.E.2d 669; 251 Ill. Dec. 782 (1st Dist. 2000). To determine whether a statement is one of fact or opinion, Illinois courts consider the totality of the circumstances and whether the statement can be objectively verified as true or false. *Kumaran v. Brotman,* 247 Ill. App. 3d 216, 228; 617 N.E.2d 191; 186 Ill. Dec. 952 (1st Dist. 1993). The courts also view the broader social context or setting in which the statement appears signals a usage as either fact or opinion. *Quinn v. Jewel Food Stores*, 276 Ill. App. 3d 861; 658 N.E.2d 1225; 213 Ill. Dec. 204 (1st Dist. 1995).

III. ANALYSIS

A. Elaina Bender's Statement Are Not Actionable Statements and Are Protected by the First Amendment.

1) "Very bad plastic surgeon."

Plaintiff complains of constitutionally protected statements made by Ms. Bender, which are restated herein. (See page 3 of Complaint). His first complaint is that Ms. Bender opined that Plaintiff is a "very bad plastic surgeon." Yet the Illinois courts support these types of statements as a subjective view protected by the First Amendment and Illinois precedent. For example, in *Hopewell v. Vitullo,* 299 Ill. App. 3d 513, 01 N.E.2d 99; 233 Ill. Dec. 456 (1st Dist. 1998), a former employee on a United States senator's election committee brought a defamation claim against another committee member who informed the media that the plaintiff was "fired because of incompetence." The Illinois

Appellate court found the statement did not have a "precise and readily understood meaning" because of its broad scope and lack of detail. *Hopewell,* 299 Ill. App. 3d at 519. The court reasoned that "one person's idea of when one reaches the threshold of incompetence will vary from the next person's." *Hopewell,* 299 Ill. App. 3d at 519.

Similarly, Ms. Bender's statement of Plaintiff being "very bad" is impossible to verify and the threshold of quality will vary from person to person. As in *Hopewell*, there are no specific facts here that can be objectively verified as true or false. This is especially true in the context of plastic surgery, where the results are highly subjective. For example, one person may opine that Michael Jackson's nose after plastic surgery was an excellent result while another may view it as horrible and resulting from incompetence. Just as the opinion that Michael Jackson's doctor is a bad plastic surgeon cannot be objectively verified, Ms. Bender's view of Plaintiff's plastic surgery is impossible to verify as true or false. The fact that she considers him a bad plastic surgeon is a subjective view or an interpretation and under *Hopewell*, her statement is not actionable. See also *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir. 1993).

2) "Mistakes"; "horrible results"; "disfiguring"

Again, Ms. Bender has expressed a subjective view that cannot be verified as true or false and is therefore not actionable. In the context of a review concerning plastic surgery results, Ms. Bender does not render her opinion as a doctor or imply that she has any special knowledge. She is plainly "expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts," rendering the statement not actionable. *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir. 1993). Indeed, she does not pinpoint a specific type of work

he performed, but instead expresses her view generally about his work. This is a reviewer who, after seeing plastic surgery results, views this doctor's work negatively.

It is evident that during a trial, Plaintiff will never be able to prove that the results of his work were objectively pleasing. Unlike a cardiologist who has performed heart bypass surgery, it is impossible to objectively ascertain the results of rhinoplasty, face lifts, breast reduction/ enhancement, or liposuction. Plastic surgery is commonly known to be an art form, and therefore highly subjective. Recognizing that subjective opinions cannot be ascertained as true or false, Illinois and federal precedent support the conclusion that Ms. Bender's subjective views are not actionable. See, e.g., *Doherty v. Kahn,* 289 Ill. App. 3d 544, 556-57, 682 N.E.2d 163, 224 Ill. Dec. 602 (1st Dist. 1997) (finding not actionable the statements "incompetent," "lazy," "dishonest," "cannot manage a business," and/or "lacks the ability to perform landscaping services." *Doherty,* 289 Ill. App. 3d at 554).

3) "Shrugged off their concerns."

Again, Ms. Bender herein states her subjective opinion of Plaintiff's reaction to her concerns. Ms. Bender is expressing a subjective view or an interpretation rather than claiming to be in possession of objectively verifiable facts. This type of statement is impossible to verify as true or false, since one person's opinion of what is "shrugging off" concerns can vary from person to person. Similarly, in *Rose v. Hollinger*, the court found the use of the phrases "abusive behavior" and "bizarre management style" as "clearly" not actionable. *Rose v. Hollinger*, 383 Ill. App. 3d 8; 889 N.E.2d 644; 321 Ill. Dec. 379 (1st Dist. 2008). Opining as to whether someone sufficiently addresses one's concerns are not the statements of someone who claims" to be in possession of objectively verifiable

facts." *Brennan v. Kadner,* 351 Ill. App. 3d 963, 969, 814 N.E.2d 951, 286 Ill. Dec. 725 (2004).

4) "Liar"; "pretended 1 year after their surgeries that they looked great."

Yet again, Ms Bender is stating her subjective opinion on Plaintiff's analysis of his own plastic surgery. In Ms. Bender's opinion, she believed that Plaintiff was not sincere when he expressed a positive opinion of his own work. Again, this is impossible to verify as true or false because different people will have various opinions upon someone's sincerity when expressing an opinion of their own work. This statement is protected as determined by the Illinois Appellate court in *Doherty v. Kahn,* 289 Ill. App. 3d 544, 556-57, 682 N.E.2d 163, 224 Ill. Dec. 602 (1st Dist. 1997), where the court held statements made by plaintiff's former employer to clients were non-actionable opinion. The *Doherty* defendants told potential customers plaintiff was "incompetent," "lazy," "dishonest," "cannot manage a business," and/or "lacks the ability to perform landscaping services." *Doherty,* 289 Ill. App. 3d at 554. The court held the statements were not actionable defamation because there were no specific facts at the root of the statements capable of being objectively verified as true or false. *Doherty,* 289 Ill. App. 3d at 557. Similarly, Ms. Bender does not state what specific factual context she is talking about when calling Plaintiff a liar or that he is pretending the results look great. She has expressed her opinion outside of a definitive factual context that is not objectively capable of proof or disproof. See also *Quinn v. Jewel Food Stores, Inc*., 276 Ill. App. 3d 861 at 867 (finding statements "A con artist! Watch out for the bullshit!" not objectively capable of proof or disproof).

5) "fixed through more surgery"; "horrible, disfiguring work"

Again, her statements not actionable because they is impossible to determine the truth or falsity of the plastic surgery results, which are highly subjective and vary from person to person. Disfiguring is a subjective terms, defined as to "mar or spoil the appearance or shape of." (See dictionary.com, citing The American Heritage Dictionary of The English Language, 4th Edition.) Ms. Bender's statement here is her opinion that Plaintiff spoiled the appearance of something with his plastic surgery. And in order to achieve her desired results, Ms. Bender opines that she will need additional surgery. Again, this is not the statement of a doctor concluding that a liver transplant patient requires additional surgery. Instead, this is the statement of an online reviewer who never claims have any specialized knowledge but who finds the results of her plastic surgery as not beautiful. She also opines that she will require additional surgery to obtain the pleasing results she is looking for. Indeed, her statements are further protected when viewing the opinion as a post in the broader context of an online review site, signaling a lay person's opinion and not a fact from a medical professional. See *Quinn v. Jewel Food Stores*, 276 Ill. App. 3d 861; 658 N.E.2d 1225; 213 Ill. Dec. 204 (viewing the broader social context or setting in which the statement appears to signal a usage as either fact or opinion).

6) Posting by a "male" and concerning a "girlfriend" and "her sister."

Plaintiff complains that Ms. Bender is "not a male" and that the male's girlfriend or her sister did not have surgery by Plaintiff. Plaintiff has no basis in law for a lawsuit in defamation per se for stating that one is male or asserting that the Plaintiff performed surgery on two sisters. Those statements do not fall within any of the "per se" categories

of defamation and are not actionable. See *Brown & Williamson Tobacco Corp. v. Jacobson,* 713 F.2d 262, 267 (7th Cir. 1983) (listing the types of statements required for defamation *per se* claim).

IV. Motion to Dismiss Under 2-619(a)(9).

A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter which avoids or defeats the claim. *Joseph v. Collins,* 272 Ill. App. 3d 200, 206, 649 N.E.2d 964, 208 Ill. Dec. 604 (1995). Subsection (a)(9) permits dismissal where the claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(9).

A. Plaintiff Admits Ms. Bender She Will Require Additional Surgery.

A defendant is not liable for a defamatory statement if the statement is true. *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 451, 741 N.E.2d 669, 251 Ill. Dec. 782 (1st Dist. 2000). Only "substantial truth" is required for the defense. *Wynne*, 318 Ill. App. 3d at 452. While determining "substantial truth" is normally a question for the jury, the question is one of law where no reasonable jury could find that substantial truth had not been established. *Wynne*, 318 Ill. App. 3d at 452. Substantial truth refers to the fact that a defendant need prove the truth of only the "gist" or "sting" of the statement. *American International Hospital v. Chicago Tribune Co.*, 136 Ill. App. 3d 1019, 1022, 483 N.E.2d 965, 91 Ill. Dec. 479 (1st Dist. 1985). Only "substantial truth" is required for this defense, which may be raised by a motion to dismiss. *Id.*, 136 Ill. App. 3d 1019 at 1022.

In this case, Ms. Bender does require more surgery to fix Plaintiff's work, as expressed in the doctor's own notes. (See Affidavit and Plaintiff's notes, redacted, as

attached as Exhibit B.) Plaintiff himself opined that Ms. Bender would require additional surgery. Similarly, in *Maag v. Coalition for Jobs, Growth & Prosperity,* 368 Ill. App. 3d 844, 851-52, 858 N.E.2d 967, 306 Ill. Dec. 909 (2006), a flyer aimed at judicial candidate stating: "What was he thinking?," "Letting a Murderer Back on the Streets," "A Mistake with Consequences," "Questionable Judgment," " 'Technicality' Justice?," and "Overturning the Conviction of a Sexual Predator" was not considered actionable by the Illinois appellate court. The court reasoned that although the flyer's language was "simplistic and misleading, it [was] also true." *Id*. 368 Ill. App. 3d 844 at 852. Although the statements were "shallow and truncated summaries of judicial decisions designed to generate fear and anger, " they were "not actionable as defamatory because they are substantially true even though not accurate in every detail." *Id*. 368 Ill. App. 3d 844 at 852. Similarly, while Ms. Bender does not explain every detail as to why she needed surgery, it is substantially true that additional surgery is necessary. Therefore her statement is not actionable.

B. Plaintiff's Attempt to Shut Down Public Criticism of His Work is A Violation of The First Amendment and Against Public Policy

Plaintiff also wishes the Court to curtail free expression made on public forums. Yet just as this honorable Court may not bar those who yell in the street that "Dr. Pensler is a horrible doctor," online reviewers cannot be chained. The "Internet is a place for spontaneous, anonymous expression with very little significance." See Journal of International Media and Entertainment Law, Defamation on the Internet – A New Approach to Libel in Cyberspace by Yural Karniel, Volume 2, Number 2, Winter 2009, page 232. This is especially true in the context of review sites such as Yelp.com or Citysearch.com, which are not relied upon by readers as statements of specific facts or by

persons with specialized knowledge. Instead, they are simply opinions that are often impossible to verify in any context.

To wit, this Court cannot ascertain through a trial that food at a particular restaurant is "very bad", or whether the salesperson is a "liar" when pretending that certain clothing looks great, or whether the contractor "shrugged off" a client's concerns, or whose work was full or "mistakes" and "horrible" and required additional labor. These opinions are exactly those conveyed by Ms. Bender.

Furthermore, public forum websites such as Yelp.com and Citysearch.com are forums where expression should be encouraged by the courts as a matter of public policy. Reviewers on these sites post their opinions of many varieties of establishments, including restaurants, boutiques, hotels and doctors. (See Yelp.com and Citysearch.com). Plaintiff's lawsuit is an attempt to shut down people's ability to express their views of businesses is akin to a "SLAPP" suit (strategic lawsuit against public participation) that was discussed in *Levin v. King*, 184 Ill. App. 3d 557 (1st Dist. 1989). In *King*, the court discussed a sham lawsuit as that which "lacked any reasonable basis in fact or law and was brought, not to genuinely influence government action, but primarily to harass or to improperly deter another's legitimate activities." Similarly, Plaintiff is taking the context of a public forum to improperly harass a reviewer to deter her from posting her opinions about his work. Indeed, Plaintiff's strategy is effective -- after Plaintiff's suit against Yelp.com and Citysearch.com (08 L 013658), Ms. Bender's review was removed from Yelp.com and Citysearch.com. (See Exhibits C-F, attached).

Plaintiff is clear in his attempt to shut down any public criticism of him in his complaint for injunctive relief, where he asks this court to "permanently" bar Ms. Bender

from ever "posting any additional defamatory statements concerning Dr. Pensler." (See Complaint, Count II, paragraph 32A). In other words, he does not wish for her to say that he is "very bad" or that he "shrugged off" her concerns or that his work is "horrible," regardless of the fact that this is her subjective opinion. He further demands a retraction, i.e., wanting Ms. Bender to deny Plaintiff's own assessment that she requires additional surgery! Clearly, his request is not simply a violation of the 1st Amendment but also an attempt to shield Plaintiff from criticism. This honorable Court should not permit the infringement of public discussion, but instead encourage people to express their opinions freely and without any hindrance by those wealthy enough to hire attorneys to harass online reviewers, who are often forced to expend their limited resources to defend against harassment.

CONCLUSION

FOR ALL THE FOREGOING REASONS, Plaintiff's Complaint should be dismissed entirely and with prejudice, and that the Plaintiff pay costs to Defendant Elaina Bender.

ELAINA BENDER,

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