IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

DISTRICT COURT
FILED
JUN - 9 2008
SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

JAMAL MIFTAH,

Plaintiff,

vs.

Case No. CJ 2007-04083
(Judge Thornbrugh)

ISLAMIC SOCIETY OF TULSA et al.

Defendants.

CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS AND BRIEF IN SUPPORT

COMES NOW Plaintiff, Jamal Miftah by and through his Attorney of Record and would respond as follows to the Second Motion to Dismiss filed by Defendants' The Islamic society of Tulsa, hereinafter "IST", Farooq Ali, Javed Jaliwala, Sheryl Siddiqui, Tariq Masood and Houssam Elsouiessi, Directors and Officers of IST, the North American Islamic Trust, hereinafter "NAIT" and Mujeeb Cheema.

INTRODUCTION

Plaintiff filed his Petition on June 22, 2007 alleging defamation, assault and the intentional infliction of emotional distress. All claims arise out of the actions of Defendants before and after Plaintiff wrote an op-ed piece in the Tulsa World wherein he raised concerns about the infiltration of Mosques in the United States by Jihadists and the use of United States Mosques to raise money for terroristic operations around the world. The case was assigned to Judge P. Thomas Thornbrugh, who recused himself in compliance with Canon 3E, having previously expressed an opinion about the conduct of the Tulsa Mosque. The case was reassigned to Judge Gordon McAlister, who granted Defendants' Motions to Dismiss but denied

as to Defendant Elsouiessi a/k/a Abu Waleed on the assault claim, by minute order, without opinion or comment. The Islamic Society of North American, Sandra Rana, Muhammed Ashwait, Amad Kabbani, Abdullah Roe and Noorudin Doe have not been served. The case has now been reassigned to this Court for consideration.

NOTICE PLEADING

This Court is very familiar with the Oklahoma Pleading Code, which tracks the Federal Rules of Civil Procedure, requiring only " (a) short and plain statement of the claim..." 12 O.S. 2008 A.1. . The obvious and common exception to this primary rule of pleading requires that fraud be plead with specificity. However, even when pleading a fraud cause of action, the Oklahoma Legislature saw fit to add that "(m)alice, intent, knowledge and other condition of mind of a person may be averred generally." 12 O.S. 2009 B. Additionally, courts have required that defamation per quod claims specify special damages, which cannot simply be an injury to the good name of the Plaintiff but must be purely economic in nature. **Defamation per se has no special damages pleading requirement.**

Plaintiff identified Defendants, Ali, Jaliwala, Siddiqui, Masood, Elsouiessi, Cheema, Rana, Ashwait and Kabbani as Officers and Directors (or members of the governing "Shura") of the Islamic Society of Tulsa. Defendants have previously complained that the Original Petition did not allege they "ordered, coordinated or endorsed the alleged assault against the Plaintiff." Plaintiff is not required to do so – the direction and leadership of the directors and officers is imputed and can be assumed for pleading purposes. However, in an attempt to meet the objections of the Defendants, Plaintiff filed an Amended Petition wherein the Background and Relationships of the Defendants is fully described. See First Amended Petition at pages 2-5. Within those additional pages, which speak for themselves, a chronology of action and inaction

is specified which gives rise to reasonable inferences and certainly puts all the Defendants on notice as to Plaintiff's legal theory. To be clear, paragraph 24 of Plaintiff's Amended Petition alleges agency and joint action, which makes the Defendants jointly and severally liable:

"In response to Plaintiff's letter, the Defendants, **acting in concert, directly and through agents, executed a policy and practice common to IST, NAIT and ISNA, designed to injure Jamal Miftah by encouraging an atmosphere where he would be physically intimidated at the Mosque, excluded from the Mosque and otherwise destroyed in his name and possibly body."**

This paragraph is, in a plain and concise way, an answer to every procedural objection every Defendant might have relating to the attribution of necessary intent and should remove any confusion whatsoever that Plaintiff is alleging that the Defendants acted as one entity with respect to every claim. Furthermore, the details of who and how the individual Defendants "ordered, coordinated and endorsed" the assault on Plaintiff is more properly the subject of discovery, which has successfully been blocked by Defendants refusal to simply admit or deny the allegations contained in the Original and Amended Petition.

RESPONDEAT SUPERIOR

Plaintiff, by his Original and Amended Petitions, has provided Notice to NAIT, ISNA, and IST, as well as the officers and directors named, that for purposes of this lawsuit , Plaintiff alleges that they have acted in concert and as one entity. See Plaintiff's Amended Petition as noted above. Additionally, Personal Jurisdiction is asserted on the basis of continuous and systematic activity in Tulsa County, which is not denied by the Defendants. Additionally, the property held by the IST is on good faith belief actually owned by NAIT. Finally, on good faith

belief, the directors and officers are themselves directed and managed by NAIT and ISNA – the umbrella entities under which IST operates. Again, the Plaintiffs Original and Amended Petitions are based on reasonable inferences, which in turn are based on the objective manifestations of the named Defendants. It is expected that discovery process, which has not been afforded, will either prove or disprove, as it was intended to do within the spirit and purpose of our Rules of Civil Procedure.

The Defendants have also argued that Plaintiff is required to allege the assault was "carried out in furtherance of a policy or practice of the governing body of the corporation." Again, for pleading purposes only, Plaintiff is not required to "spell out" every logical inference and/or make every link in a corporate or relational chain. However, the Defendants are correct in noting the dispositive issue of "policy and practice." If, during the course of discovery, evidence leads to the reasonable inference that the attack on Plaintiff did not arise from the policies and practices of IST, NAIT and the IST, the position of Plaintiff will necessarily and rightly change as to those Defendants. However, and per the status quo, the "policy and practices" of these entities are alleged in Plaintff's Amended Petition, are matters of fact, not law, and necessarily the subject of dispute.

In *Thompson v. Machinery Co., Inc.*, 1984 Ok.Civ.App. 24, 684 P 2d. 565 the Court of Appeals set out a two prong test in affirming the trial court's grant of a Motion for Summary Judgment (not a Motion to dismiss pursuant to 12 O.S. 2012 (b)(6)). The test is:

1.) Was the tortuous act committed in the course of the servant's or agent's employment?

2.) Did the principal/agent (master/servant) relationship exist at the time and in respect to the transaction of which the injury arose?

The application of this test is by nature fact bound. In the instant case, Plaintiff constructed his Petition and Amended Petition on the basis of objective manifestations of the Defendants. At this juncture, it certainly seems that the IST, ISNA, NAIT and the Officers and Directors have an affinity for the natural persons responsible for the actual attack on Plaintiff, including the Imam or Leader of the Tulsa Mosque. It is likewise rational for Plaintiff to believe in good faith that his attackers were directed to assault him by a higher authority. Additionally, certain Defendants are as yet unidentified and may have been transported out of the Jurisdiction by one or more of the corporate Defendants, a fact the Plaintiff is entitled to discover. **A dismissal for failure to state a claim upon which relief may be granted is only appropriate when there are no set of facts under which Plaintiff may recover**. *Shero v. Grand Savings* Bank, 161 P. 3d 298. If IST, ISNA and NAIT, through its officers and directors, encouraged, endorsed or authorized the assault and other wrongful acts, the Plaintiff would be entitled to recover. If IST, ISNA and NAIT did not encourage, endorse or authorize the attack and other wrongful acts, the doctrine of respondeat superior would likely be inapplicable. This is a fact question to be decided after Plaintiff has had opportunity to confirm (or not) whether his reasonable belief and inferences are correct as to the corporate relationships, common practices and policies of all the Defendants. Certainly if the Amended Petition stands the test of discovery and it is proved that the Defendants had a policy and practice or encouraging, endorsing or authorizing attacks on dissident members, that conduct would state a claim upon which relief could be granted. Therefore a Motion to Dismiss is inappropriate in this instance.

ASSAULT

An assault occurs when one person puts another person in imminent fear of offensive touching or contact. *See generally* 21 O.S. 641 and The Restatement (Second) of Torts 21. *See also, Brown vs. Ford*, 905 P. 2d 223. Defendants do not deny that the assault occurred. They do complain that, as to IST, ISNA, NAIT and the Officers and Directors, the assault cannot be imputed absent a specific allegation that the assault was "ordered, coordinated or endorsed." The Defendants further complain that there is "no allegation that the alleged assault was carried out in furtherance of a policy or practice of the governing body of the corporation." The Oklahoma Pleading Code does not demand this type of specificity. However, once again, the Original and Amended Petitions set out a series of events that lead to a logical conclusion and reasonable inference with respect to what amounted to a coordinated attack by individuals and entities working in concert. All of the Defendants are on Notice via a plain reading of the Original and Amended Petitions. Again, the proper response would have been a specific or general denial. Whether IST, ISNA, NAIT and the officers and directors were merely negligent or whether they were shielded from liability by a supervening criminal act is not before the Court.

DEFAMATION

As to Plaintiff's defamation claim, Defendants allege that the statements made were (A) mere opinion (B) that Plaintiff is a public figure and must allege malice (C) the statements were slander per quod, not defamation per se and (D) the First Amendment protects the statements made because they were made in the context of religious discipline and/or comment on common interests. One commentator has suggested:

"It is well to remember that standards of inquiry in allegedly defamatory material change from time to time and place to place. Thus, for a newspaper in the Soviet Union to publish the information that an individual is a Communist is obviously different from making the same statement in the United States about an American. Similarly, in certain countries, to say of a

man that he is living with two wives would be complimentary rather than actionable, however defamatory the same statement might be elsewhere."

19 AMJUR TRIALS 499 (p.4).

"The action for defamation is based on a violation of the fundamental right of an individual to enjoy a good name or reputation unimpaired by false and defamatory attacks." *Id* at p.4.

As Courts have long recognized, slanderous or defamatory statements are informed by the times in which they are published. Certainly, it is well established in the United States that to be called a "traitor" is not generally defamation per se. Certainly, it is likewise well established that to be called "anti Christian" or anti (almost anything) is not generally defamatory. It is a measure of the times and our tolerance that opinions are freely expressed on almost every subject without fear of incurring serious bodily harm or death. However, it is not universally true that words are mere words and nothing more. A citizen yelling "Fire" in a crowded theatre is not protected by the 1st Amendment to the Constitution of the United States. It is the Plaintiff's contention that the Defendants statements are the moral and real equivalent.

So far as Plaintiff's research has uncovered, there are no reported cases of Muslims bringing actions of this nature in the United States. **Thus, this is a case of first impression, which will benefit from expert opinion, and which must be informed by current events.** Plaintiff is not a cleric. However, he is originally from a region in Pakistan that is one of the original breeding grounds and currently a haven for Jihadists. He is very familiar with the effect of being labeled "anti Muslim" or "anti Islamic" or a "traitor to Islam." Per his Original and Amended Petitions, these labels are not mere hyperbole or sloganeering. **These words attach to him the status of apostate, a fact, not an "opinion" arising out of "vehement debate." An apostate Muslim is subject to the death penalty. The practice and policy is very simple and verifiable by expert opinion or perhaps subject to judicial notice.** There is no modern day

equivalent in the dominant secular or religious cultures of the United States. The closest analogy in American history might be found in the accusation of witchcraft or sorcery, which also carried the death penalty in certain communities or, in the context of European cultures, the countless numbers executed over hundreds of years as "heretics". **The statements made by Defendants are, in their cultural context, defamation per se. As such, pecuniary damages are not an element of the cause of action and not required to be plead, (though pecuniary damages may be a foreseeable consequence of Defendants' actions.)**

As to the status of Plaintiff as a public figure, Defendants have complained that the Original Petition did not allege actual malice and cannot be proved by clear and convincing evidence. The Amended Petition does allege:

"The published statements of the Defendants, alleging that Jamal Miftah is a traitor to Islam, anti Muslim, anti Islamic, had caused a disturbance in a Holy Place, were made with actual malice and with knowledge that the statements were false." *See* Plaintiff's Amended Petition at paragraph 39.

Once again, it is premature to announce what can or cannot be proved in an Original or Amended Petition. The proper response would be an admission or denial since the facts as plead surely state a claim upon which relief must be granted if proven. As to actual malice, the Oklahoma Pleading Code imposes no magic formulas for defamation actions. The facts as seen through the Plaintiff's eyes are clearly expressed and give rise to manifest inference of actual malice – the knowledge that the facts stated are false and made with the intent to injure. Whether the Plaintiff is a public figure, is relevant only as to burden of proof . Certainly Plaintiff's "op-ed" piece might be analogous to Dr. Schwartz's article in *Schwartz v. American College of Emergency Physicians,* 215 F. 3d 1140 (10th Cir. 2000). If so, and the higher burden

of proof is applied, the Oklahoma Supreme Court has directed that "the state of mind of the publisher and a showing that the publisher knew or had reason to suspect that his publication was false" must be determined. *Herbert v. Oklahoma Christian Coalition*, 992 P. 2d 322, 329 (Okla. 2000). Again, the Defendants would short circuit the process of discovery and examination by reversion to common law Code or Writ Pleading.

Likewise, as a case of first impression, Plaintiff's position is that the label of apostate is, for a Muslim, the sum of every statutory element of slander or defamation per se inasmuch as an apostate occupies the status and cultural equivalent of a common criminal, the carrier of a loathsome disease, an incompetent and an impotent.

The most important and delicate of Defendants' objections arise from the Free Exercise Clause of the First Amendment. In short, the Courts have generally required the State to justify any infringement via a compelling interest. That compelling interest and necessary infringement is examined with the strictest scrutiny. **The privilege and right afforded religious bodies is not absolute. The simple issue in this case is whether the Defendants can issue a declaration or fatwah, directly or through agents, which has the effect of justifying the homicide of one of its members. This, again, is an issue of first impression in American civil law.**

Most reported cases revolve around "church discipline" in Christian denominations wherein a member who is deemed to have "strayed" is confronted publicly. As Defendants point out, most declarations, whether written or verbal, made in this context, so long as there is an absence of malice, are protected. The Oklahoma Supreme Court has followed this reasoning with a slight twist. In *Guinn v. The Church of Christ of Collinsville,* 775 P.2d 766 (Okla. 1989) the Court was confronted with a church discipline case. The Court in that matter held that the

Church was not shielded from judicial scrutiny after the member had voluntarily left the church, nor was the Church protected from civil liability for "post withdrawal disciplinary measures."

In the case at bar, Plaintiff alleges that his "op-ed" attack on Mosques that raise money for Jihadists, along with his earlier requests for financial accountability from the Defendants (to account for cash contributions following visits from Hamas and Hezbollah sympathizers), triggered his expulsion from the Mosque. When the decision to expel him from the Mosque was made, is a fact question that will be the subject of discovery. If the decision to expel, defame and assault Plaintiff was made behind closed doors prior to his actual physical expulsion, the Defendants are not entitled to First Amendment privileges or immunities. These acts would be characterized as "post withdrawal disciplinary measures." This again, is a fact question. **If the wrongful acts were committed while Plaintiff was a member, the analysis shifts back to acceptable forms of discipline and compelling State interests, and once more to whether the Defendants can issue lethal fatwahs in the United States.** In *Guinn* the Oklahoma Supreme Court offered the issue this way:

"In testing the constitutionality of the court's action against the Elders and the jury's verdict in Parishioner's favor, the proper inquiry is whether on the record, the Elder's decision to discipline Parishioner **constituted such a threat to the public safety, peace or order that it justified the state trial court's decision to pursue the compelling interest of providing its citizens with a means of vindicating their rights conferred by tort law.**" *Guinn* at 773.

The Oklahoma Supreme Court also noted that the United States Supreme Court had "acknowledged that some religiously motivated acts are undeserving of First Amendment protection." Specifically, the Oklahoma Supreme Court cited *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879) wherein the United States Supreme Court reasoned:

"Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to

prevent such sacrifice? Of if a wife religiously believed it was her duty to burn herself upon the funeral pire of her dead husband, **would it be beyond the power of the civil government to prevent her carrying her belief into practice?** So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. **Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could only exist in name under such circumstances."** *Reynolds* 98 U.S. at 166-167.

The Plaintiff asks only that the State set similar boundaries for the Defendants.

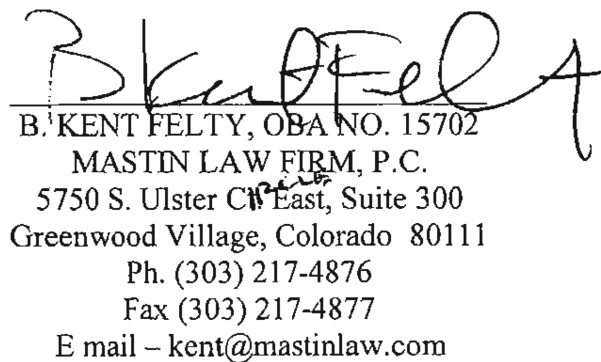
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort we call intentional infliction of emotional distress arises out of the tort of outrage. The earliest cases involved the mishandling or mutilation of dead bodies. From that time to this, behaviors that amount to outrage have shifted. The test remains the same. Is the behavior outrageous? Plaintiff would submit that Defendants actions pass that test. The Muslim community is divided in the United States and around the world by Jihadists who have no tolerance for those who will not take up arms. The Jihadists are fighting to impose theocracy on Muslims and non Muslims alike. The Jihadists' theology leaves no room for peace with societies or people they consider decadent and/or lukewarm in their love for God. The Jihadists raise huge amounts of money from other Muslims in mosques around the world, including Mosques in the United States. **The Jihadists intimidate fellow Muslims in the same way gangsters have always intimidated others – by their willingness to kill, and issue standing orders to kill.** For many young Muslims the Jihadists are romantics and a boost to battered self esteem. The Jihadists offer meaning and purpose they do not find elsewhere. The consequence of this state of affairs is the current World War, and the also the war within the Muslim community. The Plaintiff expressed the belief that the Jihadists were preying on young Muslims and bringing shame on Islam. The Plaintiff also mentioned that fundraising for Jihadists is conducted in

some Mosques in the United States. In response, at some unknown temporal point, the Defendants had a choice to make. The Defendants chose, either in concert or individually, either via silence or via acts and words, to cast Jamal Miftah out and to authorize and endorse a policy and practice which could logically result in his assassination. The Plaintiff was not merely cast out of the local congregation; he was cast out of the worldwide faith with the label of unbeliever attached. For those Muslims who do not temper judgment with mercy, this amounted to a death sentence. This is, in the United States of America, outrageous conduct.

WHEREFORE, premises considered, the Plaintiff prays that the combined Motions to Dismiss per 12 O.S. 2012 (b)(6) be denied and the Defendants be required to file Answers to the allegations contained in the Original Petition. Alternatively, should the Court find that Defendants have not been given fair notice of the claims against them, that the Court issue a written opinion specifying the deficiencies in Plaintiff's Amended Petition, and grant the Plaintiff an opportunity to Amend his Petition to fully conform to the findings of this Court.

Respectfully submitted,



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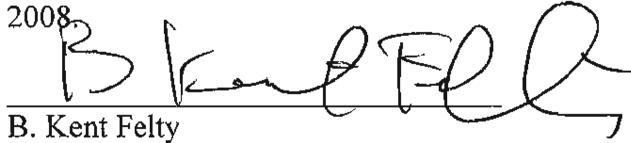
CERTIFICATE OF TRANSMISSION/MAILING

I, B. Kent Felty do hereby certify that I e mailed and mailed a copy of the foregoing Response to Defendants' Motions to Dismiss to all counsel of record listed below on the 9th day of June, 2008.



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