

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

LAXMAN S. SUNDAE,

Debtor.

BKY. 3-90-2945-DDO

LAXMAN S. SUNDAE,
Plaintiff,

V.

ADV. 3-94-216-DDO

JACKIE CHERRYHOMES, WILLIAM J. KORN,
CONNIE FOURNIER, MICHAEL OSMONSON,
as individuals and Employees of the City
of Minneapolis, JAMES BAILLIE, JANE DOE,
TRIBUNE, a Division of Cowles Media
Company, ALLEN SHORT, DUANE BRALEY,
JOEL KRAMER, KQRS AND CHANNEL 5,

ORDER FOR PARTIAL
JUDGEMENT AND
REMAND

Defendants.

This matter was heard on November 30, 1994, on motion of the Defendants for dismissal or judgment on the pleadings. Appearances were noted on the record. The Court, having reviewed the pleadings, motion papers and briefs of the parties, having heard arguments and being otherwise fully advised in the matter, now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

Laxman Sundae filed a petition for relief under 11 U.S.C. Chapter 11, on July 2, 1990. He remained as debtor-in-possession until April 5, 1991, when the Court ordered the appointment of a Chapter 11 trustee. A plan of reorganization, submitted by a group of creditors, was confirmed at hearing on July 30, 1992. The order confirming was entered on July 31, 1992. Under the plan, essentially all estate property, which consisted of various rental properties, vested in a corporation known as the Monday Corporation, to be administered and utilized to pay creditors one hundred percent of allowed claims.

This adversary proceeding is the continuation of a state court action commenced by Sundae against the Defendants for defamation of character and violation of civil rights. The city of Minneapolis Defendants are various city officials who had dealt with Sundae over the years. James Baillie is an attorney who represented the plan proponents in the bankruptcy case.

The violation of civil rights claim pertains to the city of Minneapolis Defendants, and is based on the allegation of continuing conspiracy of discrimination by the city against

Sundae because of his race. The alleged defamatory statements were published in a Star Tribune article on July 31, 1992, and were later broadcast over KQRS radio and Channel 5 television.

The July 31, 1992, Star Tribune article featured Sundae's prepetition ownership and management of 35 to 40 residential rental properties. It also dealt with the bankruptcy and confirmation of the Chapter 11 plan. Sundae claims that the article was defamatory, including portions that quoted various statements by city of Minneapolis Defendants and by Baillie. Sundae alleges in his complaint that his personal and business reputation has been damaged as a result of the wrongful conduct of the Defendants.

The state court action was removed here by some of the Defendants. All Defendants seek dismissal, either by separate motion or joinder, on grounds of lack of standing on the part of Sundae to bring the actions. Specifically, the Defendants argue that the causes of action asserted by Sundae are property of his bankruptcy estate. Defendants Baillie and those associated with the city of Minneapolis, also seek judgment on the pleadings for failure to state a claim for which relief can be granted.

For reasons discussed below, the Court finds and concludes that Sundae has standing to bring actions for personal defamation and violation of civil rights with respect to incidents alleged to have occurred postpetition. The Court further finds and concludes that Baillie is entitled to judgment on the pleadings, for failure to state a remedial claim, in the defamation action against him. Finally, the Court elects to remand the proceeding to state court as to the other Defendants, without determining the merits of their motions for judgment on the pleadings for failure to state a remedial claim.

II.

Standing.

The Defendants are united in their position that these causes of action belong to the bankruptcy estate, and that Sundae has no standing to assert them. However, assuming that the article is defamatory, both the estate and Sundae could theoretically have causes of action against the Defendants.

An individual Chapter 11 debtor and his estate are separate. With limited exceptions, "... all legal or equitable interests of the debtor in property as of the commencement of the case," become property of the debtor's estate. 11 U.S.C. Section 541(a)(1). The estate is enhanced during pendency of the Chapter 11 case by "[a]ny interest in property that the estate acquires after commencement of the case". 11 U.S.C. Section 541(a)(7). Property acquired during pendency of a Chapter 11 case by an individual debtor, however, is not necessarily property of his estate. The following principle generally applies to 11 U.S.C. Section 541 (a)(7) considerations:

[a] property interest acquired postpetition during the pendency of a Chapter 11 case qualifies as property of the estate, for purposes of s 541(a)(7), only if said property interest is traceable to (or arises out of) some prepetition property interest which already is included in the bankruptcy estate.

In Re Doemling, 116 B.R. 48, 50 (Bkrtcy. W. D. Pa. 1990). Both Plaintiff and Defendants cite the principle in support of their positions.

The Defendants argue that, since the Star Tribune article and the alleged postpetition defamatory statements involved Sundae's prepetition ownership and management of estate property (ie., the 35 to 40 residential rental units), any defamation action necessarily is traceable to or arises out of estate property, and, itself becomes estate property. The argument is not persuasive.

The phrase "traceable to (or arises out of) some prepetition interest" means more than mere reference to a prepetition interest. Where a postpetition cause of action is the subject of inquiry, it will be property of a debtor's estate only to the extent that it uniquely relates to the estate or to estate property. Consider, for instance, the following example in connection with postpetition defamation:

"Laxman Sundae is the biggest slumlord crook this region has ever seen. Driven by greed, he has systematically looted and wasted his rental properties beyond repair: in flagrant violation of city codes; without regard for the rights of either lenders or renters; and, without even a passing regard for the very basic principles of common decency."

Assuming that the statement is defamatory, it gives rise to a potential cause of action for defamation in favor of both Sundae and his Chapter 11 estate. To the extent that the defamation might adversely affect the estate's ability to restructure debt with the lenders or market the properties, the estate has a cause of action. But to the extent that the statement might damage Sundae's reputation and adversely affect his ability to conduct future business in the community, he also has a cause of action.

In Sundae's action against the Defendants, his claims for postpetition defamation and violation of civil rights are personal in nature, and do not constitute property of his estate. Only if he sought damages or other remedies with respect to estate interests, would the cause of action be estate property. And then, the scope of the estate's cause of action would be limited, accordingly.

The Defendants have not asserted, and it does not otherwise appear on this record, that Sundae seeks remedies pertaining to either the estate or to estate interests. The causes of action asserted for postpetition defamation and violation of civil rights are personal in nature, and Sundae has standing to bring them.
Failure To State A Remedial Claim Against Baillie.

These two statements in the article are attributed to Defendant Baillie:

"According to Baillie, about \$42,000 has been spent to date to improve the properties."; and,

"Not all of Sundae's holdings survived the bankruptcy proceedings ... some were in such disrepair that they'll be demolished ... others were foreclosed before the reorganization plan was approved."

Defendant Baillie argues that the statements are protected by absolute privilege under Minnesota law; and, in any event,

the statements were true when made. Accordingly, he seeks judgment on the pleadings, pursuant to Fed. Rule Bankr. Proc. 7012(b), for failure to state a claim upon which relief can be granted.

Baillie's first argument is based on the Restatement 2d, Torts, Section 586, which has long been recognized and applied in Minnesota. See: *Mathias v. Kennedy*, 243 Minn. 219, 67 N.W.2d 413, 419 (1954). The section provides:

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding. Restatement 2d, Torts, Section 586.

Baillie claims that he made the statements during the course of a judicial proceeding, and that he is protected under the Restatement by the absolute privilege recognized in Section 586. Sundae argues that the privilege provides Baillie no protection because the statement was published after the hearing on confirmation and after the plan had been confirmed. He claims that no judicial proceeding was pending. (FN1)

Sundae construes the term "judicial proceeding" too narrowly. The "judicial proceeding," for purposes of the Restatement 2d Section 586, is the bankruptcy case, not just confirmation of the plan. But even if restricted to confirmation, the "proceeding" would be the entire confirmation process, not merely the confirmation hearing. The statement was made contemporaneous with the entry of the order confirming the plan. The entry of the order confirming triggered an appeal period that ran for a minimum of ten days after the entry of the order. For purposes of Section 586, a "judicial proceeding" was pending at the time that Baillie made the allegedly defamatory statements. He was protected by absolute privilege in making them.

In any event, the statements were true. The truth is an absolute defense to a claim for defamation. See: *Steinbach v. Northwestern Nat. Life Ins. Co.*, 728 F.Supp. 1389 (D. Minn. 1989); *Michaelson v. Minnesota Min, & Mfg. Co.*, 474 N.W.2d 174 (Minn. Ct. App. 1991), *aff'd*, 479 N.W.2d 58 (Minn. 1992). The bankruptcy record in the case is replete with overwhelming evidence regarding the condition of the properties, their rehabilitation, and their eventual disposition. The recitations complained of, were simple descriptions of fact. Not every allegation of defamation creates a triable fact question. "Whether a statement implies objective facts that may be defamatory is a question of law for the court to decide." *Schibursky v. IBM*, 820 F.Supp. 1169, 1181 (D. Minn. 1993). Baillie's statements were too general and innocuous, as a matter of law, to support the negative inferences that would be necessary to make them actionable for defamation.

Defendant Baillie was protected by absolute privilege, through Restatement 2d, Torts, Section 586, in making the statements. And, in any event, the statements were true. They were merely descriptions of fact already in the bankruptcy record in the case. There is no material question of fact, regarding the cause of action against him. Under

these circumstances, Baillie is entitled to judgment on the pleadings. See: Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters and Butcher Workmen, 627 F.2d 853, 855 (8th Cir. 1980).

Remand.

The remaining issues in this litigation are more properly addressed in the state court in which the case was commenced. All bankruptcy related matters have been determined and there is no reason to continue the litigation in this Court. Accordingly, remand is appropriate pursuant to 28 U.S.C. Section 1452(b).

III.

Based on the foregoing, it is hereby ORDERED:

1) Plaintiff Laxman Sundae has standing to bring causes of action against the Defendants for defamation and violation of civil rights to the extent that: the actions are personal in nature; and, they arose out of alleged postpetition misconduct of the Defendants.

2) Defendant James Baillie is entitled to judgment on the pleadings that his statements, published in a July 31, 1992, article in the Star Tribune concerning Plaintiff Laxman Sundae, were, as a matter of law, not defamatory; and, that Plaintiff Laxman Sundae is entitled to recover nothing against Defendant Baillie as a result.

3) The balance of this litigation is remanded to the Minnesota State District Court, Fourth Judicial District, County of Hennepin, from which it was removed, pursuant to 28 U.S.C. Section 1452(b).

LET JUDGMENT BE ENTERED ON PARAGRAPH 2, accordingly.

February 10, 1995

By The Court:

Dennis D. O'Brien
Chief United States Bankruptcy Judge

FN1) Sundae does not allege that the statements were made by Baillie directly to the Star Tribune during an interview; and that such statements to news media by attorneys are not absolutely privileged in Minnesota. They might not be. See: Carradine v. State, 511 N.W. 2d 733 (Minn. 1994); and Asay v. Hallmark Cards, Inc., 594 F.2d 692 (8th Cir. 1979). Under the circumstances here, though, even if made directly to the media, Baillie's statements were merely reiterations of what was already in the court record, and therefore they would not be actionable in any event. See: Carradine, supra, at 737.