RENDERED: August 1, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1914-MR

WILLIAM ANDERSON — APPELLANT

V.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE DAVID L. KNOX, JUDGE
ACTION NO. 95-CI-0253

RAY TIGER; CARROLL M. REDFORD, III;
and MILLER, GRIFFIN & MARKS, P.S.C. — APPELLEES

OPINION AFFIRMING

* * * * * *

BEFORE: DYCHE, GUIDUGLI, and MILLER, Judges.

DYCHE, JUDGE. William Anderson appeals from an order of the Bourbon Circuit Court dismissing his libel and defamation claims against appellees for failure to state a claim upon which relief can be granted (Ky. R. Civ. Proc. [CR] 12.02[f]). We affirm.

The case sub judice originates from a separate action filed by Ray Tiger against Joseph Anderson (Joseph), also in Bourbon Circuit Court, wherein Tiger was awarded a judgment and order of sale against Joseph. Joseph's farm is located at 1834 Clintonville Road, Paris, Kentucky, but was incorrectly identified

in the court's judgment and order of sale as "1970 Clintonville Road, Paris, Bourbon County, Kentucky," which is the address of Joseph's neighbor and brother, William Anderson (William). In an attempt to satisfy the judgment, Tiger and his counsel Carroll M. Redford III, and Miller, Griffin, and Marks, P.S.C. (MGM), placed three separate advertisements in the Bourbon County Citizen, and one in the Lexington Herald-Leader, announcing the foreclosure sale of Joseph's farm. The advertisements named Joseph A. Anderson, M.D., as the owner of the property being sold, but used the incorrect address found in the court's order to describe the location of the property.

William, who conducts a thoroughbred horse operation, filed a complaint against appellees on December 6, 1995, alleging that the publication of his address, rather than Joseph's, was libelous and defamatory. He claimed that the publication of his address in the advertisements caused him loss of business revenue, public embarrassment, and ridicule.

MGM and Redford filed a motion to dismiss on December 27, 1995, for failure to state a claim upon which relief can be granted. CR 12.02(f). The motion asserted that the complaint should be dismissed because: (a) of the privilege in Ky. Rev. Stat. (KRS) 411.060, as well as the common law judicial privilege; (b) the publication was not "of and concerning" the plaintiff, and specifically named another; (c) the complaint failed to allege specific damages; and (d) the plaintiff had knowingly waived any claim. The final defense was based on William's representation by

the same attorney involved in Joseph's proceedings for the previous three years. MGM and Redford claimed that counsel's failure to bring to the court's attention the incorrect address used in court documents waived a future claim.

On January 8, 1996, the court ordered the plaintiff to file any amendments to the complaint and supporting memorandum on or before February 10, 1996. The defendants were ordered to file any responsive memorandum on or before February 20, 1996.

William filed an amended complaint and a brief in support of the complaint on February 9, 1996. The amended complaint alleged that the advertisements were libelous per se, and that the defendants were negligent in failing to check on the truth or falsity of the statement prior to publication. The supporting brief asserted that the question of privilege was one to be determined by evidence produced at trial, and that the issue of libel per se was one to be addressed to and considered by the jury. The brief also insisted that plaintiff had shown in the complaint all elements necessary under Kentucky law to establish his claim.

On February 15, 1996, Tiger filed a renewed motion for failure to state a claim upon which relief can be granted. Defendant again asserted that the complaint failed to show that the statement was "of and concerning" the plaintiff, either directly or by colloquium, and that the complaint failed to show that the publication was unprivileged. On February 20, 1996, MGM and Redford also filed a response to plaintiff's brief, reasserting their arguments concerning privilege.

On June 5, 1996, the court entered an order granting defendants' motions to dismiss. The court held that the libel per se allegations should be dismissed because the advertisement, on its face, did not defame plaintiff. Although plaintiff's address was mentioned, plaintiff was not referred to by name in the advertisements. Therefore, the court determined that it could not reasonably be said that the advertisement referred to plaintiff, and there were no grounds for defamation. The court also held that the judicial proceedings privilege was properly raised, and the incorrect address in the advertisement was absolutely privileged. The advertisement was part of, related to, and made to achieve the objective of the proceeding. It was required to be placed in order that the sale occur, and was placed by a party to the proceeding. Finally, the KRS 411.060 privilege was held to be more applicable to media reporting, and not applicable to this case.

Notice of appeal was filed on July 2, 1996. Appellant contends that the trial court erred by assuming facts not in the record, by ruling that the statements were not defamatory, and by erroneously applying the privilege doctrine. We disagree, and affirm the lower court.

For the purpose of testing the sufficiency of a complaint, the complaint must not be construed against the pleader and all allegations in the complaint must be accepted as true. Pike v. George, Ky., 434 S.W.2d 626 (1968). Appellant contends the trial court assumed facts not in the record; however, any assumptions were drawn from appellant's complaint, and the

allegations were accepted as fact. The trial court afforded both parties the opportunity to submit any supporting documents or memoranda. At no time did appellant attempt to introduce, as support, what he now claims is crucial to the case: the advertisements. Therefore the trial court properly assumed that the descriptions of those advertisements as contained in the complaint and amended complaint were true.

McCall v. Courier-Journal and Louisville Times Company, Ky., 623 S.W.2d 882, 884 (1981), cert. denied, 456 U. S. 975 (1982), defines libel as "the publication of a written, defamatory, and unprivileged statement." The elements of defamation were enunciated in Columbia Sussex Corp., Inc. v. Hay, Ky. App., 627 S.W.2d 270, 273 (1981), as: (1) defamatory language, (2) about the plaintiff, (3) which is published, and (4) which causes injury to reputation. A defamatory writing was further defined in McCall as that which tends to (1) bring a person into public hatred, contempt, or ridicule; (2) cause him to be shunned or avoided; or (3) injure him in his business or occupation. 623 S.W.2d at 884. Since the allegations in the complaint are accepted as true, the language must be considered defamatory and as causing injury to reputation. Publication is conceded. The only question left concerning defamation is whether the advertisement was "about the plaintiff."

There has been no allegation that William Anderson was mentioned as a judgment debtor in any of the published advertisements. Appellant acknowledges as much in his brief to

this court. The only argument available to appellant is that the publication of his address in the advertisement was sufficient to identify him as the judgment debtor, even though the property was identified as the "Joseph A. Anderson, M.D. Farm." Louisville Times Co. v. Emrich, 252 Ky. 210, 66 S.W.2d 73 (1933), addressed a situation where a plaintiff was not mentioned by name in a newspaper article, yet claimed that she had been libelled by the article's publication.

> "Defamatory words to be actionable must refer to some ascertained or ascertainable person, and that person must be plaintiff. If the words used really contain no reflection upon any particular individual, no averment can make them defamatory. It is not, however, necessary that plaintiff should be mentioned by name, if the words used in describing the person meant can be shown to have referred to him and to have been so understood by others.
>
> "It is not necessary that all the world should understand that the charge referred to plaintiff, it is sufficient that those who know plaintiff can make out that he is the person meant, **but the liability of defendant depends on whether the defamation was calculated from its intrinsic quality to lead other persons to believe that it referred to plaintiff.**"

Id. at 75 (quoting 36 C.J. p. 1158, § 24)(emphasis added).

The trial court held that, under the present circumstances, it could not reasonably be said that the advertisement referred to appellant. Neither do we feel that the "intrinsic quality" of the advertisement was such that it would lead others to believe that it concerned appellant. Dismissal

under CR 12.02(f) is proper when it appears the pleading party would not be entitled to relief under any set of facts which could be proved to support his claim. Pari-Mutuel Clerks' Local 541 v. Kentucky Jockey Club, Ky., 551 S.W.2d 801 (1977). The reasonable conclusion drawn from the set of facts given to the trial court is that the farm of Joseph A. Anderson, M.D., was being sold.

Finally, it is worth noting that appellant was represented by the same attorney who represented Joseph in the preceding action. Appellant's counsel notes that he refused to sign the judgment and order of sale because it was "flagrantly and patently lacking" in a proper description of the property; however, this record is curiously lacking of any indication that a specific objection was voiced, or that any order was tendered to cure the improper description. Such an order, offered at the appropriate time, could have relieved both parties, as well as the court, of considerable time and expense.

The judgment of the Bourbon Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT

Henry C. Prewitt
Paris, Kentucky

BRIEF FOR APPELLEE
RAY TIGER

Roger A. Michael
Paris, Kentucky

BRIEF FOR APPELLEES
CARROLL M. REDFORD, III and
MILLER, GRIFFIN & MARKS, PSC

Harry B. Miller, Jr.
Robert S. Miller
Thomas W. Miller
Michael D. Meuser
Miller, Griffin & Marks, P.S.C.
Lexington, Kentucky