IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAPHNE WILLIAMS,
Appellant,
vs.
CHARLES "RANDY" LAZER,
Respondent.

No. 80350-COA

NOV 25 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

Daphne Williams appeals the district court's denial of her special anti-SLAPP motion to dismiss. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Williams filed a complaint with the Nevada Real Estate Division (NRED) against respondent Charles "Randy" Lazer, a real estate agent.[1] The complaint arose out of a real estate transaction in which Rosane Krupp, represented by Lazer, conveyed a condominium to Williams. Williams was occupying the condominium as a tenant and was unrepresented in the transaction. The gist of Williams's complaint to the NRED was that Lazer behaved in an "unethical, unprofessional, racist[,] and sexist" manner "during the transaction" based on several interactions she had with Lazer.

The terms of the purchase agreement included, among other things, a ten-day diligence period starting after the buyer received the appraisal and a closing date in June 2017. After Krupp signed the agreement, Lazer emailed the signed copy to Williams for her signature. Williams was unable to print or electronically sign the contract, so Lazer

[1]We recount the facts only as necessary for our disposition.

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met Williams two days later to obtain her signature. In May 2017, Lazer sent the fully executed agreement to loan officer Bryan Jolly.

In her NRED complaint, Williams alleged that, at some point during the transaction, Lazer was taking pictures at the condominium. While there, Lazer said "Daphne, I think you are going to be successful. When you become successful and you want to buy a bigger house and if your brother is retired by then, I'd be glad to be your realtor." Williams claims that this statement was sexist and racist because it implied that Williams, as a black woman, was not already successful. She did not, however, mention this to Lazer at the time. Lazer also allegedly shared confidential information about Krupp, including that he met Krupp on an online dating website, he helped Krupp deal with emotional trauma stemming from a previous romantic relationship, he helped Krupp move to Las Vegas, and he was only charging Krupp a $1,000 fee for the condominium sale. Lazer later denied that he met Krupp online or shared confidential information.

Williams also claimed in her NRED complaint that Lazer unethically attempted to contact the appraiser for the condominium sale. According to Williams, Lazer requested the appraiser's contact information from Jolly so that he could pass along information about the condominium to ensure the appraisal value would match the sale price. Jolly replied that he could not provide the appraiser's contact information because doing so could unfairly influence the appraisal. Lazer disagreed and stated that this was an ethical requirement when representing a seller. Jolly never provided the contact information. The appraisal was later completed in June, and the appraisal value matched the sale price. Williams's due diligence period began upon completion of the appraisal, and she had ten days from the date of the appraisal to have the home inspected.

Williams further complained that Lazer falsely accused her of behaving carelessly during her diligence period. Williams did not complete the inspection within the ten-day diligence period, although it is unclear what delayed the inspection or if Williams was at fault. In an email to Jolly, Lazer expressed his frustration over the delays and implied that Williams was late in scheduling the inspection.

Williams's complaint next alleged that Lazer falsely accused her of negligently ordering a homeowners' association (HOA) questionnaire. The lender's underwriting process required Williams to purchase a condominium questionnaire for the HOA to answer. According to Lazer, these are usually completed early on during a real estate transaction. However, Williams's questionnaire was not finished until late June—less than a week away from the scheduled closing date. According to Williams and Jolly, the reason for the delay was that Williams chose to pay for normal processing time of the questionnaire because it was significantly cheaper than a "rush" option.

Williams also claimed that Lazer falsely accused her of refusing to let Krupp's movers into the condominium to remove furnishings, which caused another delay in the close of escrow. However, Krupp indicated later that she was never permitted to access the unit and some of her belongings remain in the unit to this day. This could have been due to the fact that the seller lived out of state and that Williams was not home during the week to let the movers inside the condominium.[2]

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[2]Some of the delays in escrow were apparently caused by the lender. According to Jolly, the failure to close was due to the lender's office being short staffed. It is not clear to what degree these delays affected the underlying transaction.

The delays caused the parties to execute three separate addenda, each extending the close of escrow. Relations broke down between Williams and Lazer. Williams, frustrated with these complications, sent Lazer a text message:

> Randy, if this racist sexi[ ]st and unprofessional behavior of yours continues and Rosane and I are unable to close this deal, you will leave me with no other remedy than to file a complaint with the Nevada Board of Realtors and HUD against you and your broker for your unethical and unprofessional behavior as noted in the emails and text messages you have sent during this process.

In response to this text, Lazer emailed Jolly and denied these claims.[3] In his email, Lazer threatened to sue Williams for her remarks if she did not apologize.

After three extensions of the closing date, the transaction was completed in late July. The day after closing, Lazer sent Williams a demand letter, claiming he had tort claims against her for her accusatory text message. In response, Williams filed a complaint with the NRED. A formal NRED complaint is titled "Statement of Fact." In a Statement of Fact, an aggrieved person recounts the factual background of his or her interactions with a real estate agent showing misconduct. Williams's NRED complaint recounted the foregoing events and allegations. Specifically, Williams noted that she was questioning Lazer's ethics and professionalism as a realtor and wondered if Lazer's "behavior, words and assumptions would have been different if," among other things, she was "a white man and not a black

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[3]At some point during the transaction, Jolly began to communicate with Lazer and Krupp on Williams's behalf.

female." The NRED appointed an investigator and ultimately, no discipline was imposed.[4]

Lazer filed an amended complaint in district court against Williams, alleging defamation, defamation per se, business disparagement, intentional infliction of emotional distress, and negligence or negligent infliction of emotional distress. Without answering the complaint and without discovery, Williams moved to dismiss under Nevada's anti-SLAPP special motion to dismiss statutory framework. The district court denied the motion without prejudice, finding that it could not determine by a preponderance of the evidence if Williams's NRED complaint was made in good faith, and finding that Lazer made a prima facie showing of a probability of prevailing on the merits as to his amended complaint. The district court orally denied Williams's assertion that the communications in the NRED complaint were absolutely privileged. Williams now appeals, arguing that Lazer's amended complaint should have been dismissed. We disagree.

We review the denial of a special anti-SLAPP motion to dismiss de novo. *Stark v. Lackey*, 136 Nev. 38, 40, 458 P.3d 342, 345 (2020) (citing *Coker v. Sassone*, 135 Nev. 8, 10-11, 432 P.3d 746, 748-49 (2019)). We are required by statute to review an interlocutory appeal stemming from the denial of an anti-SLAPP motion to dismiss. NRS 41.670(4).

Under Nevada's anti-SLAPP statute, "[a] person who engages in a good faith communication . . . is immune from any civil action for claims

[4]The NRED investigator initially recommended a fine against Lazer, believing that there were violations under Chapter 645 of the NRS. These recommendations were rescinded after NRED's legal counsel conducted a separate review of the matter.

based upon the communication." NRS 41.650. When a plaintiff sues a defendant for making a good faith communication, Nevada's anti-SLAPP statutes provide a special motion-to-dismiss mechanism enabling the defendant to seek dismissal of the case without answering the complaint or commencing discovery. NRS 41.660(3).

This special motion to dismiss has a two-prong framework. NRS 41.660(3)(a)-(b). Under the first prong, the defendant must show, "by a preponderance of the evidence, that the claim is based upon a good faith communication" that falls into one of four categories of protected communications. NRS 41.660(3)(a); NRS 41.637. If a defendant satisfies prong one, then under the second prong "the burden shifts to the plaintiff to show 'with prima facie evidence a probability of prevailing on the claim[s].'" *Shapiro v. Welt*, 133 Nev. 35, 38, 389 P.3d 262, 267 (2017) (quoting NRS 41.660(3)(b)).

Under the first prong, the only contention between the parties is whether the statements in Williams's NRED complaint were made in good faith. Williams contends that the statements in her NRED complaint were made in good faith because they were either truthful or statements of opinion. Lazer counters that the statements were not opinions and they were false.

A "[g]ood faith communication" is statutorily defined as any statement falling into at least one of four categories of protected communications. NRS 41.637. To be made in good faith, the communication must be "truthful or made without knowledge of its falsehood." *Id.* "[S]tatements of opinion are" treated as good faith communications "under Nevada's anti-SLAPP statutes." *Abrams v. Sanson*, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020) (quoting NRS 41.637). This is

because an opinion cannot legally be a defamatory statement. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002). Conversely, a communication presented as a "statement of fact" is not an opinion and is actionable. *Id.* at 714, 57 P.3d at 88. A statement is not a statement of fact "if it is an exaggeration or generalization that could be interpreted by a reasonable person as 'mere rhetorical hyperbole.'" *Id.* at 715, 57 P.3d at 88. A statement is, however, a defamatory statement of fact if it "would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt." *Id.* (citation omitted).

If a preponderance of the evidence shows that the gist of the statement, not every word or detail, is true, then the moving party has met her burden under the first prong. *Rosen v. Tarkanian*, 135 Nev. 436, 440-41, 453 P.3d 1220, 1224 (2019). The moving party may satisfy her burden through "a sworn declaration . . . that the statements were truthful or made without knowledge of their falsehood" unless there is evidence to the contrary. *Stark*, 136 Nev. at 43, 458 P.3d at 347. "A determination of good faith requires consideration of all of the evidence submitted by the defendant in support of his or her anti-SLAPP motion[,]" in light of the record as a whole. *Rosen*, 135 Nev. at 439, 453 P.3d at 1223; *see, e.g.*, *Stark*, 136 Nev. at 40, 458 P.3d at 345.

Here, the gist of Williams's NRED complaint was that Lazer behaved in a racist, sexist, and unethical manner toward Williams throughout the transaction. However, the claims of unethical behavior rest on different factual allegations—that is, different communications—than the claims of racism and sexism. The NRED complaint is a collection of several communications. Williams made both communications claiming

unethical conduct and communications claiming racist and sexist behavior, so we analyze the gist of each communication separately.

First, Williams's claim that Lazer behaved unethically by contacting the appraiser is not supported by the record. There was nothing illegal or unethical about Lazer contacting the appraiser. *See* NRS 645C.557(3) (providing that a person with an interest in a real estate transaction may provide information to an appraiser). In her complaint to the NRED, Williams alleged that she spoke with someone at the NRED, prior to filing, who claimed that an agent is not permitted to contact an appraiser, but she fails to provide proof, or any details, of this conversation.[5] The fact that the NRED conducted an investigation and closed the case without imposing discipline lends credence to Lazer's argument that Williams falsely accused him of unethical conduct as a realtor. *See Stark*, 136 Nev. at 43, 458 P.3d at 347. Therefore, Williams has not shown that her contentions of unethical conduct by Lazer were true, or made without knowledge of their falsehood, and thus in good faith. Accordingly, the denial of her motion to dismiss must be affirmed as to this point.

Second, Williams's claims of racism and sexism cannot, at this juncture, be found by a preponderance of evidence to be made in good faith. Williams claimed in her NRED complaint that Lazer was racist and sexist "as noted in the emails and text messages [he] sent during this process," but

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[5]Williams also accused Lazer of failing to provide a receipt for her earnest money deposit. However, Lazer alleged in his amended complaint that he never received a deposit because it was sent directly to the escrow company, so he was not required to provide a receipt. *See* NRS 645.310 (requiring a realtor to provide a receipt for an earnest money deposit only when deposited into the broker's trust account). On appeal, Williams does not address her claim that Lazer was ethically obligated to provide a receipt.

does not include a copy of any text or email that identifies such statements in either her motion below or her record on appeal. There is no evidence in this limited record to indicate that Lazer made any remarks about Williams's race or gender.[6] In fact, the totality of the emails presented by Williams on appeal show that Lazer was extremely frustrated with the delays in closing and may have been too vociferous in expressing himself. Because Williams does not provide adequate evidence of these racist and sexist emails or texts, and there is evidence to the contrary, the district court correctly concluded also as to this point, that it could not determine that she made her complaint to the NRED in good faith.

Lastly, Williams's claim that the statements in her NRED complaint were mere opinions is unpersuasive. Although Williams could possibly have perceived Lazer's alleged comment at the condominium as racist and sexist, her accusation as it is presented on appeal appears to be made as a statement of fact, not opinion. Indeed, the NRED complaint is titled as a "Statement of Fact," so there is no basis for opinion when filing such a complaint with the NRED. Filing a Statement of Fact with the NRED unsurprisingly necessitates making a communication as a statement of fact.[7] *Pegasus*, 118 Nev. at 714, 57 P.3d at 88. Although it is not

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[6]The one alleged oral statement made at the condominium from Lazer that Williams provides states: "Daphne, I think you are going to be successful. When you become successful and you want to buy a bigger house and if your brother is retired by then, I'd be glad to be your realtor." Standing alone, this statement does not demonstrate racism or sexism.

[7]The record reveals that Williams made her complaint to the NRED immediately after Lazer insisted she retract her statements of racism, sexism, and unethical conduct, and apologize to him. Consequently, her complaint could have been motivated by several factors including retaliation or to intimidate Lazer so he would not sue her as he threatened.

implausible that a person could file an invalid complaint based only on speculative exaggerations, this is not the case here. In her sworn declaration attached to her anti-SLAPP motion to dismiss, Williams states "Never at any time have I doubted the truth of the statements I made . . . . At this time, even upon review, I have no doubt as to the veracity of the statements I made[,]" which implies that she believed her statements to be objectively true. Also, her NRED complaint appears to have been meant to have Lazer viewed in contempt by the NRED, which is a statement of fact per *Pegasus*. *See* 118 Nev. at 714, 57 P.3d at 87. Therefore, the district court correctly determined that Williams failed to prove by a preponderance of the evidence that her statements were mere opinion, so it cannot be said, at this juncture, that it is more likely than not her statements were made in good faith.[8]

In light of our resolution under the first prong of Williams's anti-SLAPP special motion to dismiss, we need not reach her remaining contentions.[9] Accordingly, we

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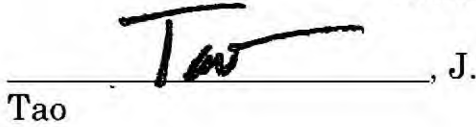
Conversely, Lazer's claims may be unfounded or legally proscribed. These questions cannot be answered without discovery and inquiry.

[8]We note that the anti-SLAPP motion to dismiss was denied without prejudice and more objective details, obtained through discovery, may potentially develop that support the conclusion that Williams's perception of racism and sexism was expressed in good faith or as an opinion. Williams is not foreclosed from bringing these legal defenses later in a dispositive motion.

[9]We note that Williams's absolute litigation privilege claims cannot be addressed under the anti-SLAPP framework unless she satisfies her burden under the first prong and we address the second prong. The litigation privilege "acts as a complete bar to defamation claims." *Jacobs v. Adelson*, 130 Nev. 408, 413, 325 P.3d 1282, 1285 (2014). For the privilege

ORDER the judgment of the district court AFFIRMED.

____________________, C.J.
Gibbons



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cc: Hon. Joseph Hardy, Jr., District Judge
Randazza Legal Group, PLLC
Law Offices of Michael F. Bohn, Ltd.
Eighth District Court Clerk

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to apply, the communication must be stated during or in contemplation of a judicial or quasi-judicial proceeding, and the communication must in some way relate to the litigation. *Shapiro*, 133 Nev. at 40, 389 P.3d at 268. The litigation privilege would apply only to Lazer's defamation and business disparagement claims where "unprivileged publication" is an element of each cause of action. But analyzing this privilege would requires us to review the second prong of the anti-SLAPP framework, which we are not conducting at this time.

We further note that Williams is not precluded from asserting the litigation privilege as an affirmative defense in her answer or moving for summary judgment. This is because the absolute litigation privilege is a separate doctrine from the anti-SLAPP statute. While there is no conclusive authority on the matter, the Nevada Supreme Court has traditionally treated the absolute litigation privilege separately from a special motion to dismiss under Nevada's anti-SLAPP statutes. *See, e.g., Patin v. Ton Vinh Lee*, 134 Nev. 722, 726-27, 429 P.3d 1248, 1251 (2018) (recognizing that the litigation privilege and anti-SLAPP statutes are separate areas of law, even though they "serve similar policy interests"); *Shapiro*, 133 Nev. at 40-41, 389 P.3d at 268-69 (treating claims under the absolute litigation privilege separate from a denial of an anti-SLAPP motion to dismiss). However, because Williams appeals only the denial of her anti-SLAPP motion, we may not address her litigation privilege claims outside of the anti-SLAPP framework.