SHAWN McMILLAN,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 04-00,678
	:	
	:	
	:	
ED KOHLER,	:	
	:	
Defendant	:	MOTION FOR SUMMARY JUDGMENT

Date: March 9, 2006

OPINION and ORDER

Before the court for determination is the Motion for Summary Judgment of Defendant Ed Kohler (hereafter "Kohler") filed November 7, 2005. The motion will be granted.

I. BACKGROUND

A. Procedural History

This action was commenced April 23, 2004 by a writ of summons. The original complaint was filed October 26, 2004. Preliminary objections to the first complaint were resolved by a stipulated order filed February 18, 2005. An amended complaint was filed on May 9, 2005. An answer was filed May 25, 2005. It appears that discovery in the case has been limited to the taking of each party's deposition – Plaintiff Shawn McMillan (hereafter "McMillan") on September 23, 2005, Kohler on July 20, 2004.

The case was scheduled to be tried during the court's January 2006 trial term. Kohler filed the present motion for summary judgment on November 7, 2005. In the motion, Kohler asserts that McMillan has failed to produce evidence necessary to establish his cause of action.

On December 2, 2005, McMillan filed his response to the motion for summary judgment. In the response, McMillan simply asserts that the evidence listed in discovery establishes that a jury question exists regarding his cause of action. McMillan did not supplement his response with any further evidence.

Neither party submitted any evidentiary material with their summary judgment pleading, but each did refer to the parties' depositions in their respective briefs. At argument, it was agreed that the court should consider the parties' depositions as part of the evidentiary record to be used in deciding the motion for summary judgment. McMillan's deposition was filed of record on November 29, 2005. Kohler's deposition was filed of record on August 19, 2004 as Exhibit A to his Response to Motion to Compel Discovery/Enlargement of Time. From the depositions, the court finds the following to constitute the salient factual assertions which McMillan relies upon to support his cause of action.

B. <u>Facts Asserted</u>

McMillan had worked for the Lycoming County Housing Authority (hereafter "the LCHA") since approximately 1998. Deposition of Shawn McMillan, 35 (September 23, 2005). McMillan rose to the position of Deputy Executive Director. Id. at 8. McMillan desired to advance at the LCHA, but this did not appear feasible as the Executive Director, Beth Turner, was not likely to leave her position any time soon. Id. at 15, 18. McMillan searched the trade journals and came upon the advertisement for a position with the Kankakee Housing Authority (hereafter "the KHA"). Id. at 15. The KHA is located in Kankakee, Illinois. The KHA sought to fill its vacant executive director position. McMillan responded to the advertisement by sending his resume and reference letters to Leo Dauwer (hereafter "Dauwer") of Dauwer &

Associates. Ibid. Dauwer & Associates was a firm working with the KHA to fill the executive director position.

On March 27, 2004, Dauwer contacted McMillan to set up an interview with him and the KHA Board of Commissioners. On April 8, 2004, members of the KHA Board of Commissioners and Dauwer met with McMillan for an interview in Kankakee, Illinois. McMillan Deposition, 17. While en route from Kankakee back to Williamsport, Pennsylvania, McMillan received a call on his cell phone from Dauwer telling him that the Board of Commissioners unanimously voted to hire him as the executive director of the KHA. Id. at 13. Dauwer asked McMillan what he expected his first year salary to be and McMillan responded by saying $75,000. Dauwer instructed McMillan to contact an attorney and have him prepare an employment contract. Ibid.

Before McMillan had an attorney prepare the contract, Dauwer called McMillan to inform him that the KHA was revoking the offer of the executive director position. McMillan Deposition, 23. Dauwer told McMillan the reason for the revocation was statements made by an ex-employee of the LCHA. Id. at 24-27. The statements allegedly were that McMillan:

(1) had an adversarial relationship with HUD;

(2) had an adversarial relationship with co-employees;

(3) was responsible for the decision of the LCHA to terminate the former auditor and Kohler;

(4) obtained a fraudulent receipt for a co-employee; and

(5) was responsible for an adverse civil verdict being entered against the LCHA.

Amended Complaint, ¶ 10(a)-(e). Dauwer did not name the source of the statements. McMillan Deposition, 28.

Even though Dauwer did not divulge to McMillan the identity of the ex-LCHA employee making the alleged defamatory statements, McMillan reasoned that it was Kohler. Kohler had made similar statements and accusations about McMillan in the past. McMillan Deposition, 26. Some of the issues raised in the statements were geared toward the finance department of the LCHA, of which Kohler had been the director. Id. at 28; Deposition of Ed Kohler, 4 (July 20, 2004). McMillan testified that the facts and circumstances underlying the statements would have been known only to director level employees of the LCHA. McMillan's Deposition, 27.

Kohler has acknowledged that he talked to Dauwer regarding McMillan's application for the KHA position. Kohler Deposition, 6. Kohler initially told Dauwer that McMillan could handle the job. Id. at 7. Kohler acknowledged upon Dauwer's inquiry that some people may feel that McMillan's personality would make their skin crawl. Id. at 8. Kohler told Dauwer he knew nothing about an inquiry Dauwer made as to McMillan's mother-in-law having her rent to LCHA calculated improperly. Ibid.

McMillan had to look elsewhere for a job since the KHA offer had been revoked. He applied for positions with the Griffin Housing Authority in Griffin, Georgia and with the Lafollette Housing Authority in Lafollette, Tennessee. McMillan Deposition, 43. He obtained the position of executive director with the Lafollette Housing Authority in November 2004 with a starting salary of $69,354. Id. at 6, 12. McMillan still works for the Lafollette Housing Authority. Id. at 6.

C. McMillan's Claim

In the amended complaint, McMillan has asserted a defamation cause of action against Kohler. McMillan asserts that the statements Dauwer told him had been made were statements which Kohler made to Dauwer and/or the KHA Board of Commissioners. McMillan also asserts that those statements by Kohler were false and that they cost him the executive director position with the KHA. Consequently, McMillan contends that he had to take the lower paid position with the Lafollette Housing Authority.

D. Kohler's Argument in Support of Summary Judgment

Kohler contends that McMillan has failed to produce evidence to establish a prima facie case for a defamation cause of action. First, Kohler asserts that McMillan has failed to produce evidence that Kohler made any defamatory statements to Dauwer or the KHA Board of Commissioners. Kohler argues that McMillan's testimony as to what Dauwer told McMillan an ex-LCHA employee had said to him is inadmissible hearsay.

Second, Kohler asserts that the alleged statements are opinions. Consequently, Kohler argues that the statements are not defamatory as a matter of law.

Third, Kohler argues that McMillan has not produced admissible evidence of a causal link between the alleged defamatory statements and the KHA's decision not to hire McMillan. Kohler argues that McMillan's testimony that Dauwer told him that the reason for the offer's revocation was because of the defamatory statements is inadmissible hearsay.

Fourth, Kohler argues that McMillan has not produced admissible evidence that McMillan suffered a harm as a result of the alleged defamatory statements. Kohler asserts that

the only evidence produced to establish that McMillan did in fact get the position is his testimony that Dauwer called him and told him that the Board of Commissioners had voted to hire him. Kohler argues that this is inadmissible hearsay. Kohler also asserts that there is no evidence that McMillan would have been paid $75,000 as the executive director of the KHA. Kohler contends that this figure was only what McMillan expected he would be paid, but there is no evidence which confirms this amount as the salary of the executive director position of the KHA.

II. ISSUES

There is one main issue with four subparts before the court.

(1) Whether McMillan has produced admissible evidence to establish a prima facie case for a defamation cause of action against Kohler?

(a) Whether McMillan has produced admissible evidence to establish that Kohler published defamatory statements to Dauwer and/or the KHA Board of Commissioners?

(b) Whether the alleged defamatory statements are opinions, and, as a matter of law, not defamatory?

(c) Whether McMillan has produced admissible evidence to establish that the alleged defamatory statement caused him harm?

(d) Whether McMillan has produced admissible evidence to establish the amount of harm allegedly caused by the defamatory statements so that it is not speculation or conjecture?

III. DISCUSION

The court finds that McMillan has failed to produce admissible evidence to establish that defamatory statements were made and that Kohler published those statements. Therefore, McMillan has failed to produce evidence that could establish a prima facie case for a

defamation cause of action. As this determination is dispositive, the other issues are moot and will not be addressed. The discussion section of the opinion will be divided into four parts. The first part will set forth the standard of review for a motion for summary judgment. The second part will set forth the elements for a defamation cause of action. The third part will set forth general rules and principles regarding hearsay. The fourth part will state why Dauwer's statement regarding the alleged defamatory statements made by an ex-LCHA employee is inadmissible hearsay and why McMillan has failed to establish a prima facie case of defamation.

A. Standard of Review

A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. Summary judgment may be properly granted "… when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815, 821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The movant has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " '… in the light most favorable to the non-moving party, accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences ….'" ***Godlewski***, 597 A.2d at 107 (quoting ***Banker v. Valley Forge Ins. Co.***, 585 A.2d 504, 507 (Pa. Super. 1991)). Summary judgment will only be entered in cases that are free and clear from doubt and any

doubt must be resolved against the moving party. ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Summary judgment may be properly entered if the evidentiary record "… either (1) shows that the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense." ***Rauch***, 783 A.2d at 823-24; *see also*, Pa.R.C.P. 1035.2. If the defendant is the moving party under Pa.R.C.P. 1035.2(2), then "… he may make the showing necessary to support the entrance of summary judgment by pointing to material which indicates that the plaintiff is unable to satisfy an element of his cause of action." ***Rauch***, 783 A.2d at 824. "Conversely, the [plaintiff] must adduce sufficient evidence on an issue essential to [his] case and on which [he] bears the burden of proof such that a jury could return a verdict favorable to the [plaintiff]." ***Ibid***. If the plaintiff fails to establish a prima facie case, then summary judgment is proper as a matter of law. ***Ack. v. Carrol Township***, 661 A.2d 514, 516 (Pa. Cmwlth. 1995).

B. <u>Defamation Cause of Action Elements</u>

In a defamation action, the plaintiff bears both the burden of production and persuasion. ***Curran v. Philadelphia Newspapers, Inc.***, 546 A.2d 639, 645 (Pa. Super. 1988), *app. denied*, 559 A.2d 37 (Pa. 1989). To establish a defamation cause of action, a plaintiff must establish:

(1) the defamatory character of the communication:

(2) its publication by the defendant;

(3) its application to the plaintiff;

(4) the understanding by the recipient of its defamatory meaning;

(5) the understanding by the recipient of it as intended to be applied to the plaintiff;

(6) special harm resulting to the plaintiff from its publication;

(7) abuse of a conditionally privileged occasion.

42 Pa.C.S.A. § 8343(a); ***Maier v. Maretti***, 671 A.2d 701, 704 (Pa. Super. 1995), *app. denied*, 694 A.2d 622. "Publication of defamatory matter is the intentional or negligent communication of such matter to one other than the person defamed." ***Chicarella v. Passant***, 494 A.2d 1109, 1112 (Pa. Super. 1985). The publication element is satisfied if the plaintiff proves that the defendant published or communicated the defamatory communication to a third party. ***Ellia v. Erie Ins. Exchange***, 634 A.2d 657, 660 (Pa. Super. 1993), *app. denied*, 644 A.2d 1200 (Pa. 1994).

C. <u>Hearsay General Rules and Principles</u>

Generally, hearsay is inadmissible at trial. ***Commonwealth v. Smith***, 681 A.2d 1288, 1290 (Pa. 1996); ***Alwine v. Sugar Creek Rest, Inc.***, 883 A.2d 605, 609 (Pa. Super. 2005), *see also*, Pa.R.E. 802. Hearsay is generally inadmissible because " '… such evidence lacks guarantees of trustworthiness fundamental to the Anglo-American system of jurisprudence.'" ***Commonwealth v. D.J.A.***, 800 A.2d 965, 975 (Pa. Super. 2002), *app. denied*, 857 A.2d 677 (Pa. 2004) (quoting ***Commonwealth v. Vining***, 744 A.2d 310, 317 (Pa. Super. 2000)). Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Pa.R.E. 801(c).

The hearsay rule does not bar admission of an out of court statement when the statement is not admitted to prove the truth of the matter asserted. ***Alwine***, 883 A.2d at 609.

> 'Testimony as to an out of court statement, written or oral, is not hearsay if offered to prove, not that the content of the statement was true, but that the statement was made. The hearsay rule does not apply to all statements made to or overheard by a witness, but only those statements which are offered as proof of the truth of what is said. Thus, a witness may testify to a statement made to him when one of the issues involved is whether or not the statement was in fact made.'

Id. at 609-10 (quoting ***Am. Future Sys., Inc. v. Better Bus. Bureau***, 872 A.2d 1202, 1213 (Pa. Super. 2005)).

D. <u>McMillan has Failed to Establish Kohler Published the Allegedly Defamatory Statements, and, Therefore, Failed to Establish a Prima Facie Case for Defamation</u>

McMillan has failed to produce admissible evidence that establishes a prima facie case for defamation against Kohler. McMillan has failed to produce admissible evidence to establish that Kohler published the allegedly defamatory statements to Dauwer and/or the KHA Board of Commissioners. The only evidence that the allegedly defamatory statements were made was Dauwer's out of court statement to McMillan. McMillan has not deposed Dauwer or obtained an affidavit from him establishing that the allegedly defamatory statements were made by Kohler. Kohler testified that Dauwer telephoned him and had a conversation regarding McMillan's prospective employment with the KHA. Kohler Deposition, 9. But, Kohler did not admit to making the allegedly defamatory statements. Kohler testified that there was no discussion between him and Dauwer of the subject matter underlying the allegedly defamatory statements. Id. at 9. Thus, McMillan's ability to establish that Kohler published the allegedly defamatory statements comes down to the admissibility of Dauwer's out of court statement to him.

McMillan must establish that the defamatory statements were published by Kohler. The only proof that Kohler did so is Dauwer's out of court statement to McMillan that such statements were made by an ex-LCHA employee. If Dauwer's statement is admitted to establish that the allegedly defamatory statements were made, then it is being admitted for the truth of the matter asserted, i.e. that defamatory statements were made to Dauwer . If Dauwer's statement is being admitted for the truth of the matter asserted then it is hearsay and inadmissible. Since Dauwer's statement is inadmissible, there is no evidence demonstrating that Kohler published the allegedly defamatory statements to Dauwer and/or the KHA Board of Commissioners.

Accordingly, McMillan has failed to establish a prima facie case of defamation.

IV. CONCLUSION

Kohler's motion for summary judgment is granted.

ORDER

It is hereby ORDERED that the Motion for Summary Judgment of Defendant Ed Kohler filed November 7, 2005 is GRANTED. Plaintiff Shawn McMillan's defamation cause of action against Ed Kohler is DISMISSED.

BY THE COURT:

William S. Kieser, Judge

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