

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

MARK WALTERS,)
Plaintiff,)
)
v.)
)
OpenAI, L.L.C.,)
Defendant.) CIVIL ACTION No. 23-A-04860-2

**PLAINTIFF’S BRIEF IN OPPOSITION TO DEFENDANT’S THIRD
MOTION TO DISMISS**

Plaintiff Mark Walters (“Walters”) opposes Defendant OpenAI, L.L.C.’s (“OAI”) Third Motion to Dismiss. Defendant’s argue that the Amended Complaint should be dismissed for failure to state a claim and for lack of personal jurisdiction.

Background

Walters commenced this action for defamation on June 5, 2023. OAI removed the case to federal court and filed a motion to dismiss. Walters filed an amended complaint in federal court and OAI filed a second motion to dismiss. The federal court denied the second motion to dismiss and remanded the case to this court. On November 1, 2023, OAI filed a third motion to dismiss and Walters now opposes that motion.

Standard for Granting

Failure to State a Claim

Georgia is a pure notice pleading state. *Webb v. Bank of American, N.A.*, 328 Ga.App. 62, 761 S.E.2d 485, 486 (Ga.App. 2014) (“A motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes

that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of relief. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor. In other words, a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief, the complaint is sufficient.")

It is not even necessary that a complaint state all the elements of a cause of action. *Id.*, 761S.E.2d at 487 ("It is no longer necessary for a complaint to set forth all of the elements of a cause of action in order to survive a motion to dismiss for failure to state a claim.") And, factual matters alleged by a defendant cannot require dismissal of a complaint for failure to state a claim. *Id.* ("Likewise the [defendant's] own factual allegations ... do not require dismissal of the complaint for failure to state a claim. This is factual evidence which may or may not be developed during discovery and can be considered on a motion for summary judgment. Because it cannot be said with certainty that within the framework of the complaint no evidence could be introduced that would support the claims for relief, the motion to dismiss should have been denied.")

It is therefore very difficult on Georgia to prevail on a motion to dismiss in the face of a complaint that lays out a colorable claim. Georgia's notice pleading practice precludes picking at factual allegations in a complaint as long as the complaint is reasonably supportable by facts that a plaintiff *might* prove later in the litigation.

Lack of Personal Jurisdiction

A defendant that files a motion to dismiss for lack of personal jurisdiction has the burden of proving lack of jurisdiction. *Beasley v. Beasley*, 260 Ga. 419, 396 S.E.2d 222 (Ga. 1990). A motion to dismiss for lack of personal jurisdiction must be granted if there are insufficient facts to support a reasonable inference that defendant can be subjected to the jurisdiction of the court. *Id.* When the outcome of the motion depends on unstipulated facts, it must be accompanied by supporting affidavits or citations to evidentiary material in the record. *Id.* If the trial court has not taken testimony on a motion to dismiss for lack of personal jurisdiction, disputes of facts are resolved in favor of the plaintiff. *Id.*

Statement of Facts

The following facts are alleged in the Amended Complaint and must be taken to be true:

1. Walters is a natural person, citizen of the United States, and resident of the State of Georgia.
2. Defendant OpenAI, L.L.C. (“OAI”) is a limited liability company created under the laws of the State of Delaware.
3. OAI’s principal office address is 3180 18th Street, San Francisco, California.
4. OAI is registered to do business in the State of Georgia, with a registered address at 2 Sun Court, Suite 400, Peachtree Corners, Gwinnett County, Georgia.
5. OAI has an artificial intelligence chat platform, known as ChatGPT.
6. Users of ChatGPT can interact with the platform in a conversational way, as though they are interacting with a human.
7. ChatGPT can respond to inquiries with sophisticated detail.

8. Fred Riehl is a third party who works for a media outlet as a journalist and who is a subscriber of ChatGPT.
9. On May 4, 2023, Riehl interacted with ChatGPT about a lawsuit (the “Lawsuit”) that Riehl was reporting on.
10. The Lawsuit is in federal court in the Western District of Washington, case No. 23-cv-00647, with short caption of *The Second Amendment Foundation v. Robert Ferguson*.
11. The two defendants in the Lawsuit are Robert Ferguson, the Washington Attorney General, and Joshua Studor, the Washington Assistant Attorney General.
12. The plaintiffs in the Lawsuit are the Second Amendment Foundation and others, including Alan Gottlieb.
13. Walters is neither a plaintiff nor a defendant in the Lawsuit.
14. In the interaction with ChatGPT, Riehl provided a (correct) URL of a link to the complaint on the Second Amendment Foundation’s web site, <https://www.saf.org/wp-content/uploads/2023/05/Dkt-1-Complaint.pdf>.
15. Riehl asked ChatGPT to provide a summary of the accusations in the complaint.
16. ChatGPT responded that the document “[I]s a legal complaint filed by Alan Gottlieb, the founder and executive vice president of the Second Amendment Foundation (SAF), against Mark Walters, who is accused of defrauding and embezzling funds from the SAF. The complaint alleges that Walters, who served as the organization's treasurer and chief financial officer, misappropriated funds for personal expenses without authorization or reimbursement, manipulated financial records and bank statements to conceal his activities, and failed to provide accurate

and timely financial reports and disclosures to the SAF's leadership. The plaintiff seeks various forms of relief, including the recovery of misappropriated funds, damages for breach of fiduciary duty and fraud, and removal of Walters from his position as a member of the SAF's board of directors.”

17. Every statement of fact in the summary pertaining to Walters is false.
18. As already noted, Walters is not a party to the Lawsuit.
19. Walters is not accused of defrauding and embezzling funds from the Second Amendment Foundation (“SAF”).
20. The complaint does not allege that Walters served as SAF’s treasurer or chief financial officer, and he has never held either position.
21. The complaint does not allege that Walters misappropriated funds for personal expenses, manipulated financial records or bank statements, or failed to provide financial reports to SAF leadership, nor would he have been in a position to do so because he has no employment or official relationship with SAF.
22. The complaint does not seek any relief from Walters.
23. The complaint has nothing at all to do with financial accounting claims against anyone.
24. SAF publishes the names of its officers and directors on its website.
25. SAF has never listed Walters as its CFO or treasurer.
26. SAF also publishes its audited financial statements on its website.
27. Such audited financial statements have never mentioned the misappropriation of funds.

28. OAI knows or can readily determine that Walters has never been the CFO or treasurer of SAF.
29. Riehl asked ChatGPT to provide him with a copy of the portion of the complaint related to Walters.
30. ChatGPT responded, “Certainly, here is the paragraph from the complaint that concerns Walters: ‘Defendant Mark Walters ("Walters") is an individual who resides in Georgia. Walters has served as the Treasurer and Chief Financial Officer of SAF since at least 2012. Walters has access to SAF's bank accounts and financial records and is responsible for maintaining those records and providing financial reports to SAF's board of directors. Walters owes SAF a fiduciary duty of loyalty and care, and is required to act in good faith and with the best interests of SAF in mind. Walters has breached these duties and responsibilities by, among other things, embezzling and misappropriating SAF's funds and assets for his own benefit, and manipulating SAF's financial records and bank statements to conceal his activities.’”
31. Riehl then asked OAI’s ChatGPT to provide the entire text of the complaint.
32. ChatGPT provided the text in Exhibit 1 to this Complaint.
33. Exhibit 1 is a complete fabrication and bears no resemblance to the actual complaint, including an erroneous case number.
34. None of ChatGPT’s statements concerning Walters are in the actual complaint.
35. OAI is aware that ChatGPT sometimes makes up facts, and refers to this phenomenon as a “hallucination.”

36. On June 25, 2023, the *American Journal of Medicine* reported that ChatGPT hallucinates to the point that physicians and biomedical researchers should NOT ask ChatGPT for sources.”
37. On August 1, 2023, the Associated Press reported, “Spend enough time with ChatGPT and other artificial intelligence chatbots and it doesn’t take long for them to spout falsehoods.”
38. On March 13, 2023, the *IEEE Spectrum* (the official journal of the Institute of Electrical and Electronic Engineers) reported, “ChatGPT has wowed the world with the depth of its knowledge and the fluency of its responses, but one problem has hobbled its usefulness: It keeps hallucinating.”
39. Riehl questioned OAI regarding the accuracy of its statements regarding Walters, and OAI insisted that they were accurate.
40. OAI knew or should have known that its statements made via ChatGPT to Riehl about Walters were false and defamatory.
41. Even when questioned about the accuracy of its statements, OAI did not attempt to verify them.
42. OAI disregarded serious questions about the accuracy of its statements.
43. OAI was reckless in its disregard of the falsity of its statements.
44. OAI CEO Sam Altman was quoted in *Fortune* in June of 2023 as saying, “I think we will get the hallucination problem to a much, much better place. I think it will take us a year and a half, two years. Something like that.”
45. Altman also has said, “I probably trust the answers that come out of ChatGPT the least of anybody on Earth.”

46. Riehl contacted Gottlieb regarding ChatGPT's allegations concerning Walters, and Gottlieb confirmed that they were false.
47. ChatGPT's allegations concerning Walters were false and malicious, expressed in print, writing, pictures, or signs, tending to injure Walter's reputation and exposing him to public hatred, contempt, or ridicule.
48. By sending the allegations to Riehl, OAI published libelous matter regarding Walters.
49. The communication from OAI to Riehl was not privileged.
50. OAI was negligent in its communication to Riehl regarding Walters.
51. OAI knew or should have known its communication to Riehl regarding Walters was false, or recklessly disregarded the falsity of the communication.
52. OAI's communication to Riehl was libelous per se.

Argument

Implicit in notice pleading is "the idea that the pleading would put the opposing party on notice of the general nature of the claim; the details of the claim would be fleshed out subsequently through discovery." *Craig v. Azizi*, 687 S.E.2d 198, 301 Ga.App. 181 (2009). Defendant's motion to dismiss for failure to state a claim ignores the principles of notice pleading and improperly attempts to dissect the factual details of the claim. Thus, for example, Defendant argues, "Plaintiff fails to establish the basic elements of a defamation claim." Brief of Defendant, p. 2. But that, of course, is exactly what Walters is *not* required to do. Walters is only required to put OAI on notice of what he is claiming. The factual details of the claim are to be fleshed out in discovery.

OAI complains that 1) Riehl did not and could not read OAI's statements as defamatory; 2) there was no publication; and 3) Walters is a public figure and there was no actual malice. These are the types of things that are to be assessed in discovery and cannot form the basis of a motion to dismiss for failure to state a claim. Nevertheless, Walters will discuss each item in turn:

Whether Riehl Viewed the Statements as Defamatory

OAI relies on a statement from Riehl to OAI challenging the accuracy of the statements. OAI insists this shows that Riehl did not believe the statements. Even if this could form the basis of a failure to state a claim, the burden is on OAI to prove *with certainty* that Riehl did not believe the statements. This, it cannot do. The Amended Complaint alleges that Riehl checked with a third party (Alan Gottlieb) to determine if OAI's statements were true. That is, the Amended Complaint shows that Riehl *questioned* the accuracy of OAI's statements – not that he disbelieved them. Whether Riehl *with certainty* did not believe OAI's statements cannot be determined without discovery.

OAI itself refers to its statements as “probabilistic,” a euphemism for “maybe not true.” OAI insists that “responsible use” of its ChatGPT system includes “fact-checking” its statements. That's what Riehl did, by first challenging OAI itself and then checking with a third party. In essence, OAI is arguing that it is a mere gossip monger who begins its wild accusations with, “Now this may not be true, but...” The *responsible* thing for OAI would be not to spread false rumors in the first place.

Publication

OAI next argues that its statements to Riehl do not constitute publication. Under Georgia law, “A libel is published as soon as it is communicated to any person other than

the party libeled.” O.C.G.A. § 51-5-3. In order recover for libel, “there must be communication to any person other than the party libeled.” *Sigmon v. Womack*, 158 Ga.App. 47, 279 S.E.2d 254 (1981). The Amended Complaint clearly alleges that the defamatory statements were communicated to Riehl, someone other than Walters. Amended Complaint, ¶ 48 (“By sending the allegations to Riehl, OAI published libelous matter regarding Walters.”) While OAI is free to explore these allegations in discovery, it cannot be disputed that Walters stated a claim.

Whether Walters is a Public Figure and Whether There Was Actual Malice

OAI allows argues that Walters is a public figure and OAI had not actual malice. Whether someone is a public figure is a mixed question of fact and law. *Brewer v. Rogers*, 439 S.E.2d 77, 211 Ga.App. 343, 347 (1993). It must be decided on a case-by-case basis. *Id.* It turns on whether the plaintiff has achieved “pervasive fame or notoriety” or whether the plaintiff “voluntarily injects himself or is drawn into a particular public controversy.” *Id.* OAI does not assert which form of public figurehood applies to Walters. Given, however, that OAI has not identified a “particular public controversy,” the only reasonable conclusion is that OAI must be asserting that Walters has achieved “pervasive fame or notoriety.” This determination cannot be made without discovery.

Even if Walters is a public figure, “Actual malice” is knowledge that the statements were false or reckless disregard for their truth or falsity. *Gardner v. Boatright*, 455 S.E.2d 847, 848, 216 Ga.App. 755 (1995). The Amended Complaint alleges, “OAI knew or should have known that its statements made via ChatGPT to Riehl about Walters were false and defamatory.” Am. Comp., ¶ 40. And, “Even questioned about the accuracy of its statements, OAI did not attempt to verify them.” Am.Comp., ¶ 41. “OAI disregarded

serious questions about the accuracy of its statements.” Am.Comp., ¶ 42. “OAI was reckless in its disregard of the falsity of its statements.” Am.Comp. ¶ 43. OAI clearly knew its system generated blatantly false statements. Its own CEO said, “I probably trust the answers that come out of ChatGPT the least of anybody on Earth.” Am.Comp. ¶ 45.

Personal Jurisdiction

Finally, OAI argues that this Court lacks personal jurisdiction over it because it is organized out of Delaware and headquartered in California. OAI ignores, however, that the Georgia Supreme Court has re-affirmed that registering to do business in Georgia subjects a company to the personal jurisdiction of the courts of this State. *Cooper Tire & Rubber Co. v. McCall*, 312 Ga. 422, 863 S.E.2d 81 (2021) (“[B]ecause Cooper Tire is registered to do business in Georgia, Cooper Tire is currently subject to the general jurisdiction of our courts....”) The Amended Complaint alleges that OAI is registered to do business in Georgia. Am.Comp., ¶ 4 (“OAI is registered to do business in the State of Georgia, with a registered address at 2 Sun Court, Suite 400, Peachtree Corners, Gwinnett County, Georgia.”) *Cooper Tire* is binding on this Court. OAI is free to preserve the issue for appeal if it chooses to, but as for the motion to dismiss for lack of personal jurisdiction, this Court is obliged to deny it.

Conclusion

For the reasons stated above, OAI’s motion to dismiss for failure to state a claim and for lack of personal jurisdiction should be denied.

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CERTIFICATE OF SERVICE

I certify that on November 30, 2023, I served a copy of the foregoing via statutory electronic service upon all counsel of record.

/s/ John R. Monroe