IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

CROELL REDI-MIX, INC.,

ORDER

Plaintiff,

05-C-0294-C

v.

JACK A. ELDER,

Defendant.

- -

Plaintiff Croell Redi-Mix, Inc. brought this civil action for defamation in state court; defendant removed it to this court on May 19, 2005. Since then, it has been plagued with problems. First, the removal notice did not specify the amount in controversy, necessitating an order directing defendant Jack A. Elder to advise the court whether more than $75,000 was in dispute. After plaintiff advised the court that it agreed that this much was at issue, I concluded that this court could exercise jurisdiction over the case. Although I have doubts that plaintiff could prove itself entitled to more than $75,000 in actual or punitive damages for the alleged defamation, I cannot say to a certainty that it could not.

Second, the parties neglected to advise the court of the citizenship of the parties. However, I was able to determine from the internet that plaintiff is incorporated in Iowa,

the state in which it has its principal place of business. Plaintiff is a citizen of Minnesota so the diversity requirements are met.

Now yet another problem has arisen that neither party has addressed. Wis. Stat. § 895.05(2) requires that "[b]efore any civil action shall be commenced on account of any libelous publication in any newspaper . . . the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter." Plaintiff did not allege in its complaint that it sought such a retraction from defendant.

Section 895.05(2) has been held to apply in situations in which the alleged defamer "published" his statement through a newspaper reporter. Such persons are directly liable for their defamatory statements. Hucko v. Jos. Schlitz Brewing Co., 100 Wis. 2d 372, 377, 302 N.W.2d 68, 72 (Ct. App. 1981) (author of libelous statement is liable for any secondary publication that is natural consequence of his or her act). See also Zawistowski v. Kissinger, 160 Wis. 2d 292, 303, 466 N.W.2d 664, 669 (1990) (same); SuperValu Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis. 2d 568, 579, 431 N.W.2d 721, 726 (Ct. App. 1988) (same).

According to Schultz v. Sykes, 2001 WI App 255 ¶ 57, 248 Wis. 2d 746, 789-90, 638 N.W.2d 604, 624, the notice requirement in Wis. Stat. § 895.05(2) "is a condition precedent to the existence of a cause of action for libel where the statute applies, and a

circuit court is not competent to hear the claim until the condition is met." Citing Elm Park Iowa, Inc. v. Denniston, 92 Wis. 2d 723, 728-29, 286 N.W.2d 5, 9 (Ct. App. 1979), the Wisconsin Court of Appeals compared the notice requirement in § 895.05(2) to the notice of claim provision in Wis. Stat. § 895.45, which is designed to afford governmental entities an opportunity to adjust claims and avoid needless litigation. It noted also that it had held in Hucko, 100 Wis. 2d 372, 302 N.W.2d 68, that "no civil action for damages can be brought or maintained unless the condition precedent of required notice is given." Id. at 380-81, 302 N.W.2d 68, 73-74. It appears from these cases that if plaintiff did not give defendant an opportunity for retraction, this court would lack jurisdiction to hear its case against defendant.

I will give plaintiff an opportunity to show cause why this case should not be dismissed for plaintiff's apparent failure to seek a retraction from defendant in accordance with § 895.05(2).

ORDER

IT IS ORDERED that plaintiff Croell Redi-Mix , Inc. may have until March 31, 2006 in which to show cause why this case should not be dismissed for plaintiff's failure to comply with the requirements of Wis. Stat. § 895.05(2). The trial set for the week of April 10, 2006

is continued indefinitely, pending resolution of the question of jurisdiction.

Entered this 15th day of March, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge