SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JAP HOME SOLUTIONS, INC., *et al.*, ***Plaintiffs*,** **v.** **LOFFT CONSTRUCTION, INC., *et al.*,** ***Defendants.***	**Case No. 2017 CA 003390 B** **Judge Michael L. Rankin**

ORDER

Before this court are the following motions:

Motion	Filed On
defendant José Gallego Espina's ("defendant Espina") Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6) ("defendant Espina's motion to dismiss")	9/18/17
Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act of defendants Alejandro R. Sanguinetti ("defendant Sanguinetti") and Lofft Construction, Inc. ("defendant Lofft") ("defendants Sanguinetti and Lofft's first motion to dismiss")	9/19/17
Motion to Dismiss Pursuant to Rule 12(b)(6) of defendants Sanguinetti and Lofft ("defendants Sanguinetti and Lofft's second motion to dismiss")	10/11/17
defendant Espina's Objections to the Amended and Supplemental Affidavit of plaintiff Jesus Anton Perez ("plaintiff Anton")	11/14/17
defendant Espina's Objections to the Amended and Supplemental Affidavit of plaintiff Gustavo Frech Barriero ("plaintiff Frech")	11/14/17
plaintiffs' Motion to Request Targeted Discovery and an Evidentiary Hearing Pursuant to the D.C. Anti-SLAPP Act	11/15/17

I. RELEVANT PROCEDURAL HISTORY

The Complaint was filed by plaintiffs JAP Home Solutions, Inc. ("plaintiff JAP"), Frech and Anton on May 16, 2017, alleging defamation or defamation *per se* against only

defendant Espina (Count I), conspiracy to defame against defendants Espina, Sanguinetti, Lofft, and John E. Drury ("defendant Drury") (Count II), conspiracy to injure in property or in business against defendants Sanguinetti, Lofft, and Drury (Count III), and tortious interference with contract or prospective advantage against defendants Sanguinetti, Lofft, and Drury (Count IV).

On October 3, 2017, all claims against defendant Drury were voluntarily dismissed with prejudice. Accordingly, allegations in the Complaint that relate only to defendant Drury will not be considered in ruling on the motions to dismiss. Additionally, paragraph 76, exhibit 7 and exhibit 10 to the Complaint were stricken from the record in an order entered on November 20, 2017, because the paragraph an exhibits were based on Google Translate interpretations of the subject Spanish-language articles, which are less reliable than the certified translations of the articles attached as exhibits C, E, and I to the Declaration of José Gallego Espina filed on September 18, 2017 in support of defendant Espina's motion to dismiss. Decl. Def. Espina Ex. C, E, I. Accordingly, allegations in the Complaint based on the Google Translate interpretations in exhibits 7 and 10 will be construed to refer to the same portions of the certified translations.

The deadlines for responsive pleadings and oppositions thereto were extended multiple times. Defendant Espina's motion to dismiss was timely filed on September 18, 2017, per an order entered on August 18, 2017. Defendants Sanguinetti and Lofft's first motion to dismiss was filed on September 19, 2017, and the second motion to dismiss, which the court will construe as an amendment to their first motion to dismiss, was deemed timely filed in an order entered on November 16, 2017.

Plaintiffs' oppositions to defendant Espina's motion to dismiss and defendants Sanguinetti and Lofft's first motion to dismiss were also deemed timely filed in an order entered on November 16, 2017. However, plaintiffs' motion to strike defendants Sanguinetti and Lofft's

second motion to dismiss was denied in another order entered on November 16, 2017. As no other substantive opposition to defendants Sanguinetti and Lofft's second motion to dismiss has been filed, the court will defer ruling on Counts III and IV and grant the plaintiffs until December 8, 2017 to file an opposition to dismissal of those counts pursuant to Super. Ct. Civ. R. 12(b)(6).

II. FACTUAL BACKGROUND

This case primarily arises from a series of Spanish-language articles written by defendant Espina for *El Español*, an online news publication based in Spain that is not named in this action. The series reported on possible nepotism by employees of the Spanish Government and the Spanish Embassy in the District of Columbia, a topic defendant Espina began investigating in September of 2016. Decl. Def. Espina ¶ 5. The articles referring to the plaintiffs are dated March 21, 2017 ("first article"), *id.* at Ex. C, March 22, 2017 ("second article"), *id.* at Ex. E, and April 27, 2017 ("third article"), *id.* at Ex. I.

The first article and third article include information about the plaintiffs' connections to employees at the Spanish Embassy. The third article also contains information about a lawsuit filed by defendant Lofft against plaintiffs Frech and JAP in case number 2015 CA 005203 B ("the underlying lawsuit") in this court. However, none of the allegations in the Complaint relate to the second article and, as such, statements contained therein are not properly before the court and will not be considered.

The Complaint alleges that defendant "Espina knowingly, purposefully and negligently" or "recklessly" published information in the first article and the third article "in a misleading and knowingly false manner." *See* Compl. ¶¶ 60-61, 70, 77, 101, 125-128. Plaintiffs argue that the following statements of defendant Espina were false and defamatory: (1) that

plaintiff Frech "figures as a co-director along with the company's owner[,]" defendant Anton, as "confirmed by the State of Virginia's Corporate Registry, to which [*El Español*] had access," Decl. Def. Espina Ex. C 1; *See* Compl. ¶¶ 62-63, (2) that plaintiff "Anton and his company both appear in the [underlying] lawsuit," Decl. Def. Espina Ex. I 2; *See* Compl. ¶¶ 71-72, and (3) that in the underlying "lawsuit" there are "charges placed against [plaintiff Frech] ... for misappropriation and conspiracy to acquire possible business," Decl. Def. Espina Ex. I 5; *See* Compl. ¶¶ 74-75.

Defendant Espina argues that the challenged statements are covered by the District of Columbia's Anti-Strategic Lawsuits Against Public Participation Act ("Anti-SLAPP Act"), D.C. Code § 16-5501 *et seq.*, and that the defamation claim against defendant Espina must be dismissed because the plaintiffs are not likely to succeed on the merits. Def. Espina's Mot. Dismiss 1-2. In support, defendant Espina contends that (1) the plaintiffs are limited purpose public figures, (2) the statements cover matters of significant public interest, (3) the statements are protected by the fair report privilege, and that (4) the plaintiffs cannot establish that the statements were false, defamatory, or published with actual malice. *Id.* at 2.

Alternatively, defendant Espina states that the Complaint fails to state a claim on which relief can be granted against him, particularly on the claim of conspiracy to defame which is dependent on an underlying defamatory statement. *Id.* at 26; Def. Espina's Reply Supp. Mot. Dismiss 24-25. Defendant Espina states that the Complaint does not include an allegation that two or more parties agreed to defame the plaintiffs. Def. Espina's Reply Supp. Mot. Dismiss 25.

Plaintiffs' opposition claims that (1) plaintiffs Frech and Anton "are not limited purpose public figures," and therefore do not have to prove actual malice to prevail on the defamation claims, Pls.' Opp'n 2, 12-13, 26, and that (2) the challenged statements do not

involve matters of significant public interest, but were made for the "purpose of protecting [defendant Lofft's] *private, commercial interests,*" *id.* at 3, 26. In addition, plaintiffs' reiterate the claim that defendant Espina made false and defamatory statements that "assert or imply" that the plaintiffs "engaged in ... misconduct and deceit," but those claims are largely based on the stricken Google Translate interpretations of the subject articles. *See id.* at 14.[1]

Defendants Sanguinetti and Lofft's first motion to dismiss incorporates by reference and adopts defendant Espina's motion to dismiss. The only defamation claim against defendants Sanguinetti and Lofft is conspiracy to defame (Count II); as such, defendant Espina's argument for dismissal under Super. Ct. Civ. R. 12(b)(6) for failure to state a claim upon which relief can be granted under Count II will be considered as applied to the allegations against defendants Sanguinetti and Lofft.

III. ANALYSIS

Defendant Espina's motion to dismiss and defendants Sanguinetti and Lofft's first motion to dismiss, both seek dismissal pursuant to the Anti-SLAPP Act, and, in the alternative, dismissal pursuant to Super. Ct. Civ. R. 12(b)(6) for failure to state a claim on which relief can be granted.

a. Anti-SLAPP Act

A party filing a special motion to dismiss under the Anti-SLAPP Act must show entitlement to dismissal of a defamation claim by making a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1227 (D.C. 2016).

[1] While the plaintiffs' opposition also contains what is purported to be a "contextual analysis" of the articles, those sections include facts and arguments that are unrelated to the allegations in the Complaint and will be disregarded in ruling on the motions to dismiss.

"Once that prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate[] that the claim is likely to succeed on the merits'" in order to avoid dismissal of the defamation claim. *Mann*, 150 A.3d at 1227 (quoting D.C. Code § 16-5502(b)). Here, the parties dispute both (1) whether the claim of defamation, raised only against defendant Espina, involves advocacy on an issue of public interest and, if so, (2) whether the plaintiffs are likely to succeed on the merits.

i. Act in Furtherance of the Right of Advocacy on Issues of Public Interest

Under the Anti-SLAPP Act, an "act in furtherance of the right of advocacy on issues of public interest" includes: (A) written statements made (i) "[i]n connection with an issue under consideration or review by a ... judicial body," or (ii) in a "public forum in connection with an issue of public interest[,]" and (B) "[a]ny other expression or expressive conduct that involves ... communicating views to members of the public in connection with an issue of public interest." *Id.* at § 16-5501(1)(A)-(B).

Here, both of the challenged statements in the third article[2] about the underlying lawsuit, which defendant Espina based on his reading of the Second Amended Complaint in that action, are covered by the Anti-SLAPP Act as written statements made in connection with an issue under review by a judicial body. *See id.* at § 16-5501(1)(A)(i); *Forras v. Rauf*, 39 F. Supp. 3d 45, 54 (D.D.C. 2014) (interpreting the District of Columbia Anti-SLAPP Act and holding that statements made in a motion to dismiss qualify as "written...statement[s] made...[i]n connection with an issue under consideration or review by a...judicial body") (quoting D.C. Code § 16-

[2] As stated above, the challeneged statements in the third article are that plaintiff "Anton and his company both appear in the [underlying] lawsuit," Decl. Def. Espina Ex. I 2; *See* Compl. ¶¶ 71-72, and that in the underlying "lawsuit" there are "charges placed against [plaintiff Frech] ... for misappropriation and conspiracy to acquire possible business," Decl. Def. Espina Ex. I 5; *See* Compl. ¶¶ 74-75.

5501(1)(A))). The statements are not removed from the Anti-SLAPP Act's protection merely because defendant Espina summarized or repeated the facts of the judicial proceeding. *See Colt v. Freedom Communications, Inc.*, 109 Cal. App. 4th 1551, 1559-60 (Cal. Ct. App. 2003) (dismissing claims under California's Anti-SLAPP Act because "publications concerning legal proceedings [are] privileged as long as the substance of the proceedings is described accurately" under the fair report privilege).

As the statements in the third article were made in connection with a judicial proceeding, defendant Espina has made a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest. Accordingly, the defendants are entitled to dismissal of the defamation claim (Count I) under the Anti-SLAPP Act, to the extent it is based on the statements in the third article, unless the plaintiffs can demonstrate that the claim is likely to succeed on the merits.

ii. Likelihood of Plaintiffs Succeeding on the Merits

The likelihood that plaintiffs will succeed on the merits of the defamation claim is evaluated based on "whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Mann*, 150 A.3d at 1231. The Anti-SLAPP Act "requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Id.* at 1233.

Here, the applicable legal and constitutional standards are the elements of a defamation claim under District of Columbia law, including "(1) that the defendant made a false and defamatory statement concerning the plaintiff[,] (2) that the defendant published the statement without privilege to a third party[,] (3) that the defendant's fault in publishing the

statement [met the requisite standard,] and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Id.* at 1240 (quoting *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)). As the Complaint does not plausibly allege *material falsity* of any of the challenged statements, the plaintiffs have failed to demonstrate a likelihood of success on the merits of their defamation claim. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (holding that written statements containing even "minor inaccuracies" are not considered false for purposes of evaluating a defamation claim "so long as the substance, the gist, the sting, of the libelous charge [can] be justified").

There is no evidence that could render the challenged statements in the third article false and defamatory. Both statements in the third article consist of objectively verifiable and true facts. Plaintiff Anton did appear in the underlying lawsuit, as his name appeared in the body of the Complaint. Decl. Def. Espina Ex. F ¶ 19 (paragraph 19 of the Second Amended Complaint in case number 2015 CA 005203 B, alleging that Frech "undertook an active, on-going business conspiracy with JAP, and its chief officer, *Jesus Anton Perez*" (emphasis added)). Similarly, in the underlying lawsuit there are charges for misappropriation and conspiracy to acquire possible business. *See id.* at Ex. F ¶ 18-27 (paragraphs 18-27 of the Second Amended Complaint in case number 2015 CA 005203 B, alleging "Misappropriation" and "Conspiracy to Misappropriate Business Assets and Interfere with Prospective Advantage").

Accordingly, there is no evidence from which a reasonable jury could find that defendant Espina's statements in the third article were false. Thus, defendant Espina is entitled to dismissal with prejudice of the defamation claim to the extent it is based on statements in the third article.

b. Failure to State A Claim

The challenged statements in the first article[3] (Count I) and the claim of conspiracy to defame (Count II) warrant dismissal under Super. Ct. Civ. R. 12(b)(6). A complaint must contain (1) a brief statement of the grounds on which jurisdiction depends; (2) a "short and plain" statement of the claim for relief; and (3) some demand for relief. Super. Ct. Civ. R. 8(a). The Court of Appeals has addressed the obligation to "state a claim" under Rule 8(a):

> To pass muster, a complaint must be specific enough to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests. It therefore must allege the elements of a legally viable claim, and its factual allegations must be enough to raise a right to relief above the speculative level. More specifically, Superior Court Civil Rule 8(a)'s short and plain statement standard requires the complaint to contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. The requirement of facial plausibility asks for more than a sheer possibility that a defendant has acted unlawfully, and a complaint falls short of showing a plausible entitlement to relief if it pleads facts that are merely consistent with a defendant's liability. To satisfy Rule 8 (a), plaintiffs must nudge their claims across the line from conceivable to plausible.

Tingling-Clemmons v. District of Columbia, 133 A.3d 241, 245-46 (D.C. 2016) (internal citations and quotations omitted). As such, a complaint need not include "detailed factual allegations" but must include "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)).

Here, accepting the allegations in the Complaint related to the statement in the first article as true, the plaintiffs have failed to plead facts that state a claim to relief that is plausible on its face. There is nothing facially false or defamatory about plaintiff Frech "figure[ing] as a co-director along with the company's owner[,]" plaintiff Anton, as "confirmed by the State of Virginia's Corporate Registry, to which [*El Español*] had access." *See* Decl. Def. Espina Ex. C 1;

[3] As stated above, the challenged statement in the first article is that plaintiff Frech "figures as a co-director along with the company's owner[.]" defendant Anton, as "confirmed by the State of Virginia's Corporate Registry, to which [*El Español*] had access." Decl. Def. Espina Ex. C 1; *See* Compl. ¶¶ 62-63.

Compl. ¶¶ 62-63. Defendant Espina's verified declaration states under penalty of perjury that both the copy of plaintiff JAP's annual report, dated September 14, 2016, and the website of the Virginia State Corporation Commission, as of March 7, 2017, listed plaintiff Frech as a co-director. Decl. Def. Espina ¶ 11. Moreover, after defendant Espina learned that a request was filed on March 27, 2017, to remove plaintiff Frech as co-director, defendant Espina included that fact in his third article. *Id.* at ¶ 23, Ex. I 4.

Additionally, the Complaint does not allege that Frech was not listed as a co-director of JAP when the first article was published. Instead, the Complaint alleges that defendant Espina published the statement with actual malice because the plaintiffs informed defendant Espina that the listing of plaintiff Frech as co-director was an administrative error. Compl. ¶ 57 (stating that the plaintiffs sent defendant Espina a letter "indicating that any reference to Frech as a director of JAP is a mistake"). However, the mental state of the declarant of an allegedly defamatory statement is irrelevant to dismissal if the Complaint does not sufficiently allege that the statement was untrue. Therefore, defendant Espina is entitled to dismissal of the defamation claim (Count I) pursuant to Super. Ct. Civ. R. 12(b)(6) to the extent the claim is based on the statement in the first article.

Finally, defendants Espina, Sanguinetti, and Lofft are all entitled to dismissal for failure to state a claim of conspiracy to defame (Count II). Civil conspiracy is not an independent tort action, and conspiracy to defame necessarily requires an underlying defamatory act. *See Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 738 (D.C. 2000). This order dismisses the defamation claim (Count I). As such, there is no underlying defamatory act that has been sufficiently alleged for a facially plausible claim of conspiracy to defame. *Sieber v. Brownstone Publ. Co.*, 2009 D.C. Super. LEXIS 10, *64-65 (Dec. 23, 2009) ("since an

underlying tort claim is the foundation for the civil conspiracy allegation, it is clear that the inability to prove the tort dooms the conspiracy allegation automatically").

Even if an underlying defamatory act was sufficiently alleged, the complaint fails to set forth allegations that are specific enough to put the defendants on notice of what the conspiracy to defame claim consists of or the grounds upon which the claim rests. Instead, the Complaint fails to state with any specificity who agreed to defame the plaintiffs, let alone facts that facially show a common scheme.[4] *Sieber*, 2009 D.C. Super. LEXIS at *64-65 ("Where there is no direct evidence of an agreement between the alleged co-conspirators, there must be circumstantial evidence from which a common intent can be inferred."). Therefore, the complaint fails to state a claim on which relief can be granted as to Count II for conspiracy to defame.

Accordingly, upon consideration of the motions, the opposition thereto, and the entire record in this matter, it is this 29th day of November, 2017, hereby:

ORDERED, that defendant Espina's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6) is **GRANTED**; it is further

ORDERED, that the Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act of defendants Sanguinetti and Lofft is **GRANTED**; it is further

ORDERED, that the plaintiffs shall have until December 8, 2017, to respond to the Motion to Dismiss Pursuant to Rule 12(b)(6) of defendants Sanguinetti and Lofft; it is further

ORDERED, that defendant Espina's Objections to the Amended and Supplemental Affidavit of plaintiff Jesus Anton Perez is **DENIED AS MOOT**; it is further

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[4] *See Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 738 (D.C. 2000) ("The elements of civil conspiracy are: '(1) an agreement between two or more persons; (2) to participate in an unlawful act, or in a lawful act in an unlawful manner; and (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement (4) pursuant to, and in furtherance of, the common scheme.'" (quoting *Griva v. Davison*, 637 A.2d 830, 848 (D.C. 1994)))

ORDERED, that defendant Espina's Objections to the Amended and Supplemental Affidavit of plaintiff Gustavo Frech Barriero is **DENIED AS MOOT**; it is further

ORDERED, that plaintiffs' Motion to Request Targeted Discovery and an Evidentiary Hearing Pursuant to the D.C. Anti-SLAPP Act is **DENIED AS MOOT**.

SO ORDERED.

Michael L. Rankin, Associate Judge

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