IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CLOSE IT! TITLE SERVICES, INC. *et al.*, **Plaintiffs,**	)	
	)	Case No. 2018 CA 005391 B
v.	)	
	)	Judge William M. Jackson
MICHAEL S. NADER, *et al.*, **Defendants.**	)	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Defendants Sean Smith and Erin Wrona's Motion to Dismiss and Special Motion to Dismiss, filed on August 24, 2018. Plaintiffs filed an opposition to both Motions to Dismiss on September 7, 2018. Defendants Smith and Wrona then filed a reply on September 14, 2018. Defendants Michael Nadel and McDermott Will & Emery then filed their Motion to Dismiss and Special Motion to Dismiss on September 18, 2018. No opposition was filed by the Plaintiffs. Upon consideration of the motions, the opposition, the entire record herein, and for reasons stated below, the Court finds that the Defendants' Motions to Dismiss will be **GRANTED**.

I. FACTUAL BACKGROUND

In May of 2017, Mr. Sean Smith and Ms. Erin Wrona hired Federal Title to assist them in the purchase of a Cleveland Park home. *See Smith v. Federal Title & Escrow Co.*, Case No. 17-cv-1580, at Compl. ¶ 15 (D.D.C.) (filed Aug. 4, 2017) (Lamberth, J.). On the same day, Mr. Smith and Ms. Wrona received instructions from the settlement coordinator, Melina Schifflett, to wire $200,000 to Federal Title as an initial earnest-money deposit on the home. *Id.* ¶ 17. Mr. Smith and Ms. Wrona promptly followed these instructions and wired the money. *Id.* ¶ 18. Four days later, Mr. Smith and Ms. Wrona received an email sent from Ms. Schifflett's e-mail account

requesting that they wire the final closing amount to a Chase bank account in the name of Federal Title, with further credit to JMZ Equities, LLC, as the account to which funds should be transferred. *Id.* ¶ 20-22. Prior to completing the transaction, Mr. Smith inquired as to why a different account was being used for this transaction, and was allegedly reassured by Ms. Schifflett of its legitimacy. *Id.* ¶ 24-25. Mr. Smith then wired $1.57 million to the account *Id.* ¶ 26. On Jun 19, 2017, Mr. Smith and Ms. Wrona visited the Federal Title offices to sign the closing documents, however, during this visit, Mr. Todd Ewing instructed them that Federal Title never received the funds. *Id.* ¶ 31 & 35.

On August 4, 2017, Mr. Smith and Ms. Wrona filed a lawsuit against Federal Title, Mr. Ewing, and other defendants in the U.S. District Court for the District of Columbia. Shortly after the filing of the lawsuit, a reporter from WAMNU 88.5 FM contacted Mr. Michael Nadel of McDermott Will & Emery, who is Mr. Smith and Ms. Wrona's attorney in the District Court case. Ex. 2, Nader's Mot. to Dismiss. On August 8, 2017, WAMU published a story regarding the complaint online and on-air, and in that story, Mr. Nader provided the following quote:

> Federal Title either caused our money to be stolen or stole it, and we need to get our money back. We don't have any evidence that it happened because of hackers other than Federal Title's say-so.
>
> Federal Title never called Sean Smith and said, 'Bring your money to closing,' and didn't even bring it up until the middle of closing. So if they weren't responsible for helping steal the money, it certainly seems like they knew well in advance of that closing that the money was gone. Their conduct shows that.

Compl., Ex. A at 2-3. Federal Title and Mr. Ewing then filed this action on July 27, 2018, alleging that Mr. Nadel's statements to the media were false and defamatory and caused damage to their business and reputation. Compl. ¶ 2. On August 24, 2018, Defendants Mr. Smith and Ms. Wrona filed a Motion to Dismiss under Rule 12(b)(6) for failure to state a claim, and also filed a Special Motion to Dismiss on the same day under the District of Columbia's Anti-SLAPP

statute. On September 7, 2018, the Plaintiffs filed their opposition to both the Motion to Dismiss and the Special Motion to Dismiss. Defendants Smith and Wrona then filed a reply on September 14, 2018. On September 18, 2018, Defendants Michael Nader and McDermott Will & Emery filed their own Motion to Dismiss for failure to state a claim and Special Motion to Dismiss under the D.C. Anti-SLAPP statute.

II. STANDARD OF REVIEW

a. Rule 12(b)(6)

Dismissal under Rule 12(b)(6) is warranted "where the complaint fails to allege the elements of a legally viable claim." *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) (quoting *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007); citing *Potomac Dev. Co. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011)). In deciding a Rule 12(b)(6) motion this court must accept "all of the allegations in the complaint as true" and "construe all facts and inferences in favor of the plaintiff." *Id.* (quoting *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 316 (D.C. 2008)). Nevertheless, to survive a motion to dismiss a claim must have facial plausibility, that is, "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Potomac,* 28 A.3d at 544 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)). Conclusory pleadings are not entitled to an assumption of truth and will not sustain a complaint. *Grimes v. District of Columbia*, 89 A.3d 107, 112 (D.C. 2014) (internal citations omitted). Neither will "formulaic recitation[s] of the elements of a cause of action." *Logan v. Lasalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1019 (D.C. 2013) (*quoting (Michael Patrick) Murray v. Motorola, Inc.*, 982 A.2d 764, 783 n.32 (D.C. 2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

b. D.C. Anti-SLAPP Statute

The District of Columbia's anti-SLAPP statute requires that the moving party establish 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, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." D.C. Code § 16-5502. The statutes defines an "act in the furtherance of the right of advocacy on issues of public interest" as "any written or oral statement made: (i) in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or (ii) In a place open to the public or a public forum in connection with an issue of public interest. D.C. Code § 16-5501(1)(A).

III. ANALYSIS

a. Count I (Defamation)

"In order to state a claim of defamation, "plaintiff must allege and prove four elements: (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 amounted to at least negligence; 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." *Solers, Inc. v. Doe*, 977 A.2d 941, 948 (D.C. 2009) (quoting *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)).

First and foremost, as to Plaintiff Ewing, the complaint fails to allege any statements made by any of the defendants concerning him in an individual capacity. Any statements that were made never mentioned Mr. Ewing in any capacity and only referred to Federal Title. While Mr. Ewing may be the CEO of Federal Title, he and Federal Title are not one and the same in a

way that the statements made in relation to Federal Title can be deemed as made to Mr. Ewing as well. Therefore, Plaintiff Ewing is dismissed for failure to state a claim.

Next, reading the statements in context, it is clear to the Court that the alleged defamatory statements cannot be deemed defamatory. A defamation claim survives a motion to dismiss only if "the communications of which the plaintiff complains were reasonably susceptible of a defamatory meaning." *Klayman v. Segal*, 783 A.2d 607, 612 (D.C. 2001). The defamation claim must be interpreted and evaluated "in the sense in which it would be understood by the readers to whom it was addressed." *Id.* at 613. "Context serves as a constant reminder that a statement in an article may not be isolated and then pronounced defamatory, or deemed capable of a defamatory meaning. Rather any single statement or statements must be examined within the context of the entire article." *Id.* at 614. In the Complaint, the Plaintiffs focused on the following three statements that were included in the article:

> "Federal Title either caused our money to be stolen or stole it, and we need to get our money back," said Michael Nadel, the couple's attorney. "We don't have any evidence that it happened because of hackers other than Federal Title's say-so."
>
> Nadel also says Federal Title, which has offices in Friendship Heights and Logan Circle, failed to effectively communicate with Smith and Wrona ahead of the closing — a situation he attributes to the company being involved in the scheme.
>
> "Federal Title never called Sean Smith and said, 'Bring your money to closing,' and didn't even bring it up until the middle of closing. So if they weren't responsible for helping steal the money, it certainly seems like they knew well in advance of that closing that the money was gone. Their conduct shows that," he said.

Compl., ¶ 17. However, viewing the statements in context of the article, specifically the sentence immediately preceding these statements, it is clear that Mr. Smith, Ms. Wrona, and their attorney were simply pursuing alternative theories of liability. Specifically, the sentencing immediately preceding stated "Federal Title either conspired to defraud them of the $1.57 million or was so

negligent in its online security protocols that it all but allowed the money to be stolen by someone else." Compl., Ex. A at 1. Mr. Nadel's statements essentially restated the alternative theories of liability by stating "Federal Title *either* caused our money to be stolen *or* stole it." Compl., ¶ 17 (emphasis added). The statement was the speaker expressing his theory and subjective view of the case rather than claiming them to be objective facts. *See Guilford Trans. Indus., Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000) ("[I]f it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.") (quoting *Haynes v. Alfred A. Knopf, Inc.* 8 F.3d 1222, 1227 (7th Cir. 1993)). Similarly, stating "[s]o if they weren't responsible for helping steal the money, it certainly seems like they knew," Compl., ¶ 17, is yet another example of speculative language that cannot form the basis for a defamation claim. Overall, Mr. Nadel's statements, when read in context, were not reasonably capable of conveying a false and defamatory message.

Last but not least, the alleged defamatory statements are protected by the fair-report privilege, which is recognized by the D.C. Courts. *See Oparaugo v. Watts*, 884 A.2d 63, 81 (D.C. 2005). This privilege extends to "defamatory matter concerning another in a report of any official proceeding or any meeting open to the public which deals with matters of public concern… if the report is (a) accurate and complete, or a fair abridgment of what has occurred, and (b) published for the purpose of informing the public as to a matter of public concern." *Id.* (quoting *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88 (D.C. 1980)). Mr. Nadel's statements provided a fair and accurate accounting of the issues in a pending judicial proceeding, which is a matter of public record and concern. Further, Mr. Nadel was simply echoing the allegations made in the federal case's complaint made by Mr. Smith and Ms. Wrona, which is

also protected by a recognized privilege. *See Oparaugo*, 884 A.2d at 79 ("[District] has long recognized an absolute privilege for statements made preliminary to, or in the course of, a judicial proceeding, so long as the statements bear some relationships to the proceeding."). Therefore, Count I of defamation will be dismissed for failure to state a claim.

b. Count II (False Light)

An invasion of privacy-false light claim requires a showing of: (1) publicity; (2) about a false statement, representation, or imputation; (3) understood to be of and concerning the plaintiff; and (4) which places the plaintiff in a false light that would be highly offensive to a reasonable person. *Klayman v. Segal*, 783 A.2d 607, 613-14 (D.C. 2001). "Thus, before finding that a statement is not actionable, because it is not reasonably capable of a defamatory meaning, the trial court must also satisfy itself that the statement does not arguably place the plaintiff in a highly offensive false light." *Id.* As stated above, Mr. Ewing does not have a claim for defamation, therefore the false light claim fails. As to Federal Title, a corporation does not have a claim for false right for it does not have a right of privacy that can be invaded. *See* RESTATEMENT (SECOND) OF TORTS § 652I, cmt. c ("A corporation, partnership or unincorporated association has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion of privacy…."). Therefore, the False Light claim is dismissed for failure to state a claim.

c. Count III (Tortious Interference)

"To make out a prima facie case of tortious interference with contract and/or prospective advantage, the plaintiff must demonstrate: (1) existence of a valid contractual or other business relationship; (2) the defendant's knowledge of the relationship; (3) intentional interference with that relationship by the defendant; and (4) resulting damages." *Havilah Real Prop. Servs. v. VLK,*

LLC, 108 A.3d 334, 345-46 (D.C. 2015). In the Complaint, the Plaintiff fails to allege the exact business or contractual relationships that were supposedly damaged by the statements. It simply states that "Defendants have knowledge of these contractual and business relationships" and that they "intentionally and improperly interfered" with these relationships. Compl., ¶ 40-41. No specific factual allegations were provided in the complaint aside from these legal conclusions. Therefore, the Tortious Interference claim is dismissed for failure to state a claim.

d. D.C. Anti-SLAPP Act

As stated by the Court of Appeals, the D.C. Anti-SLAPP Act was enacted "to protect a 'particular value of high order' – the right to free speech guaranteed by the First Amendment – by shielding defendants from meritless litigation that might chill advocacy on issues of public interest." *Competitive Enter. Inst. V. Mann*, 150 A.3d 1213, 1231 (D.C. 2016). First, the moving party must demonstrate that the "underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest." *Doe No. 1 v. Buirke*, 91 A.3d 1031, 1040 (D.C. 2014). The statutes defines an "act in the furtherance of the right of advocacy on issues of public interest" as "any written or oral statement made: (i) in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or (ii) In a place open to the public or a public forum in connection with an issue of public interest. D.C. Code § 16-5501(1)(A). An "issue of public interest" is defnied broadly as "an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure, or a good, product or service in the market place." D.C. Code § 16-5501(3). Once this prima facie showing is made, the burden then shifts onto the nonmoving party to demonstrate that the claim is likely to succeed on the merits, otherwise the special motion to dismiss shall be granted. D.C. Code § 16-5502(b).

Here, the application of the Anti-SLAPP statute is clear. The action is clearly based on protected speech under the statute as it arises from the privileged statements made by Mr. Nadel to a WAMU reporter after the filing of the underlying federal lawsuit. The issue is included as one of public interest under the broad reading permitted by the statute, which relates to potential concerns regarding cybercrime. According to the article, even Federal Title themselves admit that this "incident should serve as a reminder to the public about the importance of cybercrime awareness and education." Compl., Ex. A at 3. As a result, the burden shifts onto the Plaintiffs to demonstrate that their claims are likely to succeed on the merits. As discussed above, it is evidence that the claims are unable to succeed on the merits, therefore, the Anti-SLAPP statute dictates the dismissal of the Plaintiff's Complaint.

Accordingly, it is this **22nd Day of October, 2018**, hereby:

ORDERED that Defendant Sean Smith and Erin Wrona's Motion to Dismiss is **GRANTED**; it is further

ORDERED that Defendant Sean Smith and Erin Wrona's Special Motion to Dismiss is **GRANTED**; it is further

ORDERED that Defendant Michael Nadel and McDermott Will & Emery's Motion to Dismiss and Special Motion to Dismiss the Complaint is **GRANTED**; it is further

ORDERED that the Initial Scheduling Conference scheduled for October 26, 2018 at 9:30 AM and all other future events in this case will be **VACATED**; and it is further

ORDERED that this case is **DISMISSED**.

SO ORDERED.

William M. Jackson
Associate Judge
(Signed in Chambers)

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