

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

TS MEDIA, INC., *et al*

:

v.

:

Case No. 2018 CA 001247 B

:

PUBLIC BROADCASTING SERVICE

:

ORDER

Invoking the D.C. Anti-SLAPP Act, D.C. Code §§ 16-5501 to -5505, defendant Public Broadcasting Service (“PBS”) filed a special motion to dismiss two tort claims of plaintiffs TS Media, Inc. (“TSM”), The Smiley Group, Inc., and Tavis Smiley Presents, Inc. (collectively “Plaintiffs”). The Court grants the motion. Dismissal with prejudice is required by a straightforward application of the Anti-SLAPP Act: PBS has made a prima facie, and indeed compelling, showing that Plaintiffs’ tort claims arise from its constitutionally protected statements to the public about matters of public interest involving a public figure; Plaintiffs have not provided evidence that they are likely to succeed on the merits of claims that arise from speech protected by the First Amendment; and Plaintiffs have not demonstrated that targeted discovery will enable them to defeat PBS’s motion.

I. BACKGROUND

On February 20, 2018, Plaintiffs filed their four-count complaint alleging (1) breach of PBS’s November 2016 agreement with TSM, (2) breach of PBS’s November 2017 agreement with TSM, (3) intentional interference with contract, and (4) tortious interference with business expectancy. In the contract counts, Plaintiffs claim that the breach of contract was that PBS indefinitely suspended distribution of the *Tavis Smiley* show to PBS member stations after former co-workers accused Mr. Smiley of sexual harassment. The tort counts arise out of PBS’s

statements to the media in December 2017 that “‘multiple credible’ allegations of sexual misconduct” by Mr. Smiley caused it to stop distributing the show. Compl. ¶¶ 60, 69.

On April 16, 2018, PBS filed a special motion to dismiss the tort counts (Counts Three and Four) pursuant to the Anti-SLAPP Act (“Motion”). On April 30, 2018, Plaintiffs filed an opposition (“Opp.”). On May 7, 2018, PBS filed a reply (“Reply”).

II. LEGAL STANDARD

“A ‘SLAPP’ (strategic lawsuit against public participation) is an action ‘filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.’” *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (quoting legislative history). The Anti-SLAPP Act tries “to deter SLAPPs by ‘extend[ing] substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court.’” *Id.* at 1235 (quoting legislative history). “Consistent with the Anti-SLAPP Act’s purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights, true SLAPPs can be screened out quickly by requiring the plaintiff to present her evidence for judicial evaluation of its legal sufficiency early in the litigation.” *Id.* at 1239.

“Under the District’s Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the Act by ‘mak[ing] 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.’” *Competitive Enterprise Institute*, 150 A.3d at 1227 (quoting D.C. Code § 16-5502(b)). “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.’” *Id.* (quoting § 16-5502(b)). “If the plaintiff cannot meet that burden, the motion to dismiss must

be granted, and the litigation is brought to a speedy end.” *Id.* at 1227. Section 16-5502(d) provides, “If the special motion to dismiss is granted, dismissal shall be with prejudice.” Section 16-5502(d) also requires the Court to hold an “expedited hearing” on the motion and to issue a ruling “as soon as practicable after the hearing.”

“[O]nce the burden has shifted to the claimant, the statute requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim.” *Competitive Enterprise Institute*, 150 A.3d at 1233. “[I]n considering a special motion to dismiss, the court evaluates the likely success of the claim by asking 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.” *Id.* at 1232. “This standard achieves the Anti-SLAPP Act’s goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles, while preserving the claimant’s constitutional right to a jury trial.” *Id.* at 1232-33.

Under D.C. Code § 16-5502(c)(1), the filing of a motion to dismiss generally results in an automatic stay of discovery “until the motion has been disposed of.” Section 16-5502(c)(2) provides for an exception: “When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted.”

III. DISCUSSION

The Court grants PBS’s special motion to dismiss because (a) PBS has made a prima facie showing that the tort counts arise from “an act in furtherance of the right of advocacy on issues of public interest” within the meaning of § 16-5501(1), (b) Plaintiffs have not provided

evidence establishing that they are likely to succeed on the merits of these claims, and (c) Plaintiffs have not shown that any targeted discovery will enable them to defeat the special motion to dismiss.

A. Prima facie showing

PBS has made a prima facie showing that Plaintiffs' tort claims arise from an act in furtherance of the right of advocacy on issues of public interest. Indeed, there is no genuine dispute that Plaintiffs' tort claims are based on PBS's expressive conduct about an issue of public interest involving a public figure.

D.C. Code § 16-5501(1) defines an "act in furtherance of the right of advocacy on issues of public interest" to include "[a]ny written or oral statement made ... [i]n a place open to the public or a public forum in connection with an issue of public interest; or any other expression or expressive conduct that involves ... communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(3) defines an "issue of public interest" to include "an issue related to ... a public figure."

Plaintiffs' tort claims are based on PBS's statements to the media that "'multiple credible' allegations of sexual misconduct" caused it to stop distributing Mr. Smiley's show to its member stations. *See* Compl. ¶¶ 60, 69; *see id.* ¶ 10 (discussing reported statements by PBS to *Variety*). These statements are expression that involves communicating views to members of the public. These statements also plainly concern an "issue of public interest" within the meaning of § 16-5501(3) because they relate to a public figure: Plaintiffs' complaint includes allegations establishing that Mr. Smiley is a public figure; and Plaintiffs concede as much in their opposition. *See* Compl. ¶¶ 10 ("Mr. Smiley has never shied away from controversy.") & 21 (describing Mr. Smiley as "one of America's most well-known and respected media

personalities” who has “interviewed and worked with many of the top entertainment and political personalities in the United States and around the world”); Opp. at 11 (“Mr. Smiley is, to some extent, a public figure.”). Moreover, PBS made the statement at a time of extraordinary public interest in alleged sexual misconduct by men in positions of power, particularly in news and entertainment. Plaintiffs themselves recognize this fact in the section of their complaint entitled “Sexual Harassment and the #metoo Movement in America”: “beginning in approximately October 2017, sexual harassment in the workplace became a major topic of conversation throughout the United States. Many famous and successful men have rightfully been outed for their improper, and in many cases, criminal behavior. Hosts on network television ... voluntarily left their jobs in scandal as a result of allegations against them concerning sexual harassment.” *See* Compl. ¶ 28.

Plaintiffs’ primary contention is that the Anti-SLAPP Act does not apply to PBS’s statements to the media about this issue of public interest because PBS made the statements primarily to protect its commercial interests. *See* Opp. 7-8. Section 16-5501(3) provides, “The term ‘issue of public interest’ shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker’s commercial interests rather than toward commenting on or sharing information about a matter of public significance.” Plaintiffs’ argument is effectively foreclosed by *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014). *Burke* rejected the argument that to establish a prima facie case, the speaker must “disprove commercial motivation, even where such motivation is not apparent from the content of the speech.” *See* 91 A.3d at 1043. *Burke* pointed out that “such a presumption is inappropriate in the context of a prima facie showing, for which we have held the burden of proof is not onerous.” *Id.* (quotation and citation omitted). The statements by PBS that form the basis of Plaintiffs’ tort claims do not

on their face discuss or further any commercial interest of PBS, which is a non-profit entity. *See Simpson v. Johnson & Johnson*, Case No. 2016 CA 001931 B, Tr. at 39 (D.C. Super. Ct. Jan. 13, 2017) (Reply Ex. I). Excluding PBS's statements from the protection of the Anti-SLAPP Act would conflict with its purpose to protect "the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection." *Competitive Enterprise Institute*, 150 A.3d at 1239.

B. Likelihood of success on the merits

Plaintiffs have not offered evidence that makes their tort claims likely to succeed on the merits. PBS's speech is unquestionably protected by the First Amendment, and Plaintiffs offer no evidence PBS made its statements with knowledge that they were false or with reckless disregard for their falsity.

Because PBS's speech concerned a matter of public concern and a public figure, Plaintiffs must show that PBS acted with actual malice – that is, Plaintiffs must prove by clear and convincing evidence "that the statement was made ... with knowledge that it was false or with reckless disregard of whether it was false or not." *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016) (quoting *New York Times Co v. Sullivan*, 376 U.S. 254, 279-80 (1964)). "First Amendment restrictions apply to suits for intentional interference with contractual relations," and "a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim. *Thompson*, 134 A.3d at 310-11 (quotations and citation omitted).

Mr. Smiley admitted to PBS that he had sexual relationships with workplace colleagues during the course of his 30-year career, Compl. ¶ 40, and Plaintiffs do not provide any evidence that PBS knew that these relationships were purely consensual, or that PBS had serious doubts about the credibility of any of his accusers. PBS's alleged hostility towards Mr. Smiley (Compl.

¶¶ 4-5, 24-25) is legally irrelevant to whether it knew its statements were false or made them with reckless disregard for the truth. *See Thompson*, 134 A.3d at 311 (“And ‘actual malice’ must be shown regardless of the speaker’s motives.”). Plaintiffs also do not provide evidence establishing a likelihood of success in proving that PBS stated falsely or recklessly that it had engaged an outside law firm to conduct an investigation of the allegations against Mr. Smiley; indeed, Plaintiffs admit that members of a law firm representing PBS interviewed Mr. Smiley (Compl. ¶¶ 6-7).

Plaintiffs argue that they have “no burden to show that the interference [with its contracts and business expectancies] was, in fact, wrongful” and that PBS has the burden to prove its speech is privileged. *Opp.* 9 n.5. Here again, *Competitive Enterprise Institute* resolves the issue: “The standards against which the court must assess the legal sufficiency of the evidence are the substantive evidentiary standards that apply to the underlying claim *and related defenses and privileges;*” and a party opposing a special motion to dismiss under the Anti-SLAPP Act must provide evidence that meets “the requirement to prove actual malice by clear and convincing evidence when the claimant is a public official or ... a limited public figure with respect to the issue that is the subject of speech claimed to be defamatory.” *Competitive Enterprise Institute*, 150 A.3d at 1236 (emphasis added). If PBS has any burden, it has established, including through Plaintiffs’ admissions, that the speech from which their tort claims arise is protected by the First Amendment.

In light of this ruling, the Court need not decide whether PBS’s assessment of the credibility of Mr. Smiley’s accusers was a non-actionable opinion. *See* Def. Motion at 9-10; *compare Thompson*, 134 A.3d at 314 (“a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full

constitutional protection.”) (quotation and citation omitted) *with Competitive Enterprise Institute*, 150 A.3d at 1241 (“[S]tatements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false.”) (quotation and citation omitted). Plaintiffs’ lack of evidence of knowledge of falsity or reckless disregard for truth also makes it unnecessary to decide whether Plaintiffs offered evidence establishing a likelihood of success on other elements of their tort claims.

C. Targeted discovery

Plaintiffs contend that if the Court concludes that PBS has made a prima facie showing that its speech is constitutionally protected and that they have not provided evidence sufficient to show that their tort claims are likely to succeed, the Court should permit two types of “targeted discovery” under § 16-5502(c)(2). Plaintiffs have not shown that either type of discovery will enable them to defeat PBS’s special motion to dismiss.

Plaintiffs contend that targeted discovery will enable it to obtain evidence that PBS’s statements affect its contractual relationships with third parties. Opp. 13. However, as the Court explained in Section III.B above, Plaintiffs have not produced evidence that PBS’s speech is not constitutionally protected, so its speech cannot support a claim of tortious interference with contract even if its speech adversely affected Plaintiffs’ contractual relationships. Plaintiffs also argue that targeted discovery “concerning the veracity of the statements PBS made in its December 13, 2017 press release” will allow them to defeat the motion. Opp. 13. However, Plaintiffs do not show that any discovery (much less discovery that is targeted and not unduly burdensome) will enable them to prove by clear and convincing evidence that, for example, PBS did not have a reasonable basis to believe that any of the multiple allegations of sexual misconduct by Mr. Smiley was credible.

IV. CONCLUSION

For these reasons, the Court orders that:

1. PBS's special motion to dismiss is granted.
2. Counts Three and Four of the complaint are dismissed with prejudice.



Anthony C. Epstein
Judge

Date: May 15, 2018

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