IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ARTHUR G. NEWMYER, individually and on behalf of his minor daughter, L.N Plaintiffs, v. THE SIDWELL FRIENDS SCHOOL and JAMES F. HUNTINGTON Defendants. and TARA MEHRBACH Intervenor.	Civil Action No. 2011 CA 003727 Next Event: Deadline for Discovery Requests - 4/2/2012 Calendar No. 7 Honorable Michael Rankin
JAMES F. HUNTINGTON Counter-Plaintiff v. ARTHUR G. NEWMYER, Counter-Defendant	

COUNTER-DEFENDANT ARTHUR G. NEWMYER'S MEMORANDUM OF LAW IN SUPPORT OF SPECIAL MOTION TO DISMISS PURSUANT TO THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT

Pursuant to the District of Columbia Anti-SLAPP Act of 2010 ("Anti-SLAPP Act"), D.C. Code § 16-5502(a), Counter-Defendant Arthur G. Newmyer, by and through his attorneys, hereby submits this memorandum of law in support of his special motion to dismiss the counter complaint, and in support thereof states as follows:

PRELIMINARY STATEMENT

On the morning of Thursday, May 12, 2011, Arthur G. ("Terry") Newmyer, on behalf of himself and his minor daughter, filed the original complaint against defendants The Sidwell Friends School ("Sidwell") and Dr. Jack Huntington. From the moment this lawsuit began, defendants have tried to prevent or limit public access to this proceeding. In fact, only hours after it was filed, Sidwell filed an emergency motion to seal the complaint and appeared before Judge Hess without notifying plaintiffs' counsel. In the next attempt to block or limit public access to this case, defendants moved to dismiss the entire case in favor of mandatory confidential arbitration, but that motion was denied by this Court on December 16, 2011.

On December 30, 2011, seven months after the original complaint was filed, Dr. Huntington filed a counter complaint, which seeks substantial damages against Mr. Newmyer for allegedly making statements that Dr. Huntington engaged in an unethical relationship with his daughter, L.N., which is a central claim in this litigation. Such strategic lawsuits have the effect of deterring individuals from voicing their concerns and are therefore contrary to the fundamental principles of freedom of speech. The D.C. Council had the foresight to remedy this and protect parties against these types of lawsuits, which require a substantial amount of money, time and legal resources to defend. In doing so, it enacted the Anti-SLAPP Act, D.C. Code § 16-5501 *et seq*., which provides a procedural mechanism that allows a defendant, such as Mr. Newmyer, to more expeditiously dispense of these types of claims.

Under this Act, Mr. Newmyer need only make a *prima facie* showing that the counterclaims arose from an "act in furtherance of the right of advocacy on issues of public interest." The burden then shifts to Dr. Huntington to prove that he is likely to succeed on the merits or the counter complaint is dismissed with prejudice.

The type of public interest issues protected by the Anti-SLAPP Act include, *inter alia*, any written or oral statement made "in connection with an issue under consideration or review by a legislative, executive or judicial body" as well as any other expressions that involve "communicating views to members of the public in connection with an issue of public interest." D.C. Code §§ 16-5501(1)(A)(i) and (1)(B). This lawsuit falls within both of these broad categories. First, the issue of whether Dr. Huntington violated the ethical codes is currently before this Court and that fact, by itself, triggers the Act's protections. D.C. Code § 16-5501(1)(A)(i).

Second, it is axiomatic that allegations of unethical conduct by a licensed school psychologist and the enabling of such conduct by one of the most well known private schools in the country, are "issue[s] of public interest." D.C. Code § 16-5501(3). Moreover, the types of dual relationships, multiple relationships, conflicts of interest and boundary violations at issue in this case are viewed by the medical community as important and recurring problems which adversely affect the public welfare, and which are the subject of ethical rules by countless professional associations worldwide.

Given that Mr. Newmyer has clearly made a *prima facie* showing under this Act, Dr. Huntington must meet the heavy burden of proving that he is likely to succeed on the merits of his counterclaims. As fully addressed in the accompanying memorandum on the other part of the 12(b)(6) motion to dismiss, and as set forth below, Dr. Huntington cannot make this showing because his counterclaims are without merit and should be dismissed.

ARGUMENT

I. THE ANTI-SLAPP ACT APPLIES TO THE COUNTER COMPLAINT

This case appears to be the D.C. Superior Court's first opportunity to rule on the merits of a special motion to dismiss under the Anti-SLAPP Act, D.C. Code § 16-5501 *et seq*., which became effective on March 31, 2011. The Act is straightforward. The procedural provisions, which are set forth in Section 16-5502, provide in relevant part:

> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.
>
> (b) If a party filing a special motion to dismiss under this section makes 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.[1] The Act further provides that the "court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be *with prejudice*." D.C. Code § 16-5502(d) (emphasis added).

In order for the Anti-SLAPP Act to apply to the counter complaint, Mr. Newmyer is only required to make a *prima facie* showing that Dr. Huntington's counterclaims arise out of the type of public interest issues protected by the Anti-SLAPP Act. *See* D.C. Code § 16-5502(b). The statute defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" to include:

---

[1] Mr. Newmyer has also moved for an automatic stay of discovery pursuant to this section which provides that "upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1).

(A) 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
(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

D.C. Code § 16-5501(1)(A)(i), (1)(B).

The statements challenged in the counter complaint clearly meet both of these definitions. First, the alleged statement by Mr. Newmyer "that Dr. Huntington was engaging in an unethical Doctor-patient relationship with his child, L.N" plainly constitutes "an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." D.C. Code § 16-5501(1)(A)(i). Second, it also constitutes "any other expression . . . that involves . . . communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). The term "issue of public interest" is defined to encompass, *inter alia*, the public discussion of "issue[s] related to health or safety . . . community well-being [or] a public figure." D.C. Code § 16-5501(3).

As set forth below, the alleged defamatory statements made by Mr. Newmyer are therefore immune from suit under the Act, unless Dr. Huntington is able to meet his heavy burden of proving that he is "likely to succeed on the merits" of his claims. D.C. Code § 16-5502(b). This he cannot do.

A. The Alleged Statement Involves an Issue Already under Consideration by This Court

It is clear from the face of Dr. Huntington's counter complaint that the alleged statement that Dr. Huntington was engaging in an unethical relationship with L.N. was made in connection with an issue that is under consideration by this Court. The Anti-SLAPP Act applies to any written or oral statement made "[i]n connection with an issue under consideration or review by a

legislative, executive, or judicial body, or any other official proceeding authorized by law." D.C. Code § 16-5501(1)(A)(i). *See Daniels v. Robbins,* 105 Cal. Rptr. 3d 683 (Cal. Ct. App. 2010) (noting that statements made in prior judicial proceedings, which later gave rise to plaintiff's lawsuit, were protected activity under California's Anti-SLAPP statute).[2] Therefore, Mr. Newmyer has met the threshold requirement for his special motion to dismiss.

This "official proceedings" requirement in Section 16-5501(1)(A)(i) is a separate and independent test for invoking the protections of the Anti-SLAPP Act. Based on the plain language of the statute, Mr. Newmyer is not required under this subsection to separately demonstrate that any allegedly defamatory statement concerned an issue of public interest. Clearly, the D.C. Council determined that the bright-line test set out in clause (1)(A)(i) was sufficient, and did not think it was necessary to add the "issue of public interest" requirement of subsection (1)(B) to that provision.[3] Because the alleged defamatory statement was made in connection with an issue under consideration by this Court, the Anti-SLAPP Act applies to the counter complaint. *See Briggs*, 969 P.2d at 569 (Cal. 1999) (holding that the Anti-SLAPP Act

[2] California's Anti-SLAPP Act, as with D.C.'s statute, provides that the protected activity includes, *inter alia*, "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." Cal. Civ. Proc. Code § 425.16(e).

[3] There is no reason to "second-guess the legislature's considered policy judgment" in enacting the Anti-SLAPP Act. *See Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 575 (Cal. 1999) (declining to impose a "public interest" requirement as a condition to protecting litigated-related communications under California's Anti-SLAPP statute). Had the D.C. Council intended to provide that an issue under consideration must be a "public interest" issue, it would not have included the "public interest" language in sections 16-5501(1)(A)(ii) and (B), but omitted it from section 16-5501(1)(A)(i) of the statute. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004) (explaining that the legislature acted "intentionally and purposely in the disparate inclusion or exclusion" of language which is included in one section of the statute but omitted in another section of the same statute).

was applicable to a defamation lawsuit which arose from statements allegedly made preliminary to, and during the course of, judicial and administrative proceedings).

B. The Alleged Statement Involves an Issue of Public Interest

Mr. Newmyer can also make a *prima facie* showing under this Act because the allegedly defamatory statement involved "communicating views to members of the public in connection with an issue of public interest," which is a separate and independent test under section (1)(B) of the Act. D.C. Code § 16-5501(1)(B). This inquiry involves a two-step analysis. First, Mr. Newmyer must demonstrate that any alleged statement was communicated to members of the public. Dr. Huntington has already conceded this point in alleging that Mr. Newmyer "engaged in a public course of conduct" and "sought to advise the public." Counter Compl. ¶ 17, 22. Therefore, Mr. Newmyer has met the first prong of this *prima facie* burden.

Second, Mr. Newmyer must show that the counter complaint arose from an "[i]ssue of public interest" which the Anti-SLAPP Act has defined to include, *inter alia*, an "issue related to health or safety; community well-being [or] a public figure." D.C. Code § 16-5501(3). Here, the underlying issue involves The Sidwell Friends School -- a private school which is well known in this community -- which, it is alleged, allowed its staff psychologist to have a sexual affair with the married mother of a then five-year-old student to whom he had provided professional services. Not only did this unethical relationship harm Mr. Newmyer's daughter, L.N., but it also had the potential of adversely impacting other Sidwell students. For example, Dr. Huntington's ex-wife, who was the mother of another student in L.N.'s class, believed that the affair between Dr. Huntington and Ms. Mehrbach was adversely affecting her own daughter. *See* Compl. ¶ 22.

Recently, it has become even more evident that some schools do not have sufficient procedures in place to protect students from being exploited by authoritative figures such as teachers, coaches, clergymen, doctors and psychologists. Clearly, the alleged statement made by Mr. Newmyer that a psychologist at a well-known private school was having an unethical relationship with his daughter qualifies as a statement made in connection with an issue of public interest. This is further evidenced by the publicity surrounding this lawsuit and the fact that two licensing boards took it upon themselves to investigate Dr. Huntington's conduct.

Moreover, the existence of this type of unethical professional relationship is a systemic problem in the medical community which has negatively impacted the public at large. In fact, according to the Federation of State Medical Boards, "[s]exual misconduct by physicians and other health care practitioners is a form of behavior that *adversely affects the public welfare* and harms patients individually and collectively [and] is *a violation of the public trust . . . .*" *See* Federation of State Medical Boards, *Addressing Sexual Boundaries: Guidelines for State Medical Boards*, http://www.fsmb.org/pdf/GRPOL_Sexual%20Boundaries.pdf (emphasis added). As a result, almost every medical and psychological association throughout the country has implemented ethical standards to regulate dual relationships, multiple relationships and professional boundaries. Just last year, the "Psychiatric Crime Database" -- which is a public service of the Citizens Commission on Human Rights -- posted an article from the Sun Sentinel newspaper about a Florida psychologist who had his license suspended for having a sexual relationship with the mother of a 16-year-old patient. *See* CCHR International, *Psychologist Michael Walczak suspended for sex with patient's mother* (Nov. 27, 2011),

http://www.psychcrime.org/news/index.php?vd=1308&t=Psychologist+Michael+Walczak+suspended+for+sex+with+patient%27s+mother.[4]

The purpose of the Anti-SLAPP Act is to prevent strategic lawsuits, such as the counter complaint here, which are aimed at punishing or preventing the expression of free speech which includes statements made in connection with a judicial proceeding or those that relate to an issue of public interest. Allowing Dr. Huntington's counter complaint to proceed would have a chilling effect on the exercise of constitutionally protected rights, because it would likely deter individuals (especially parents) from reporting allegations of sexual misconduct, out of concern that they may be retaliated against as Mr. Newmyer has been in this case. The freedom to make and discuss such allegations of misconduct is consistent with what the D.C. Council intended in enacting this law, and is something that society, as well as the judicial system, should encourage and not deter. Therefore, this Court should dismiss Dr. Huntington's counter complaint with prejudice under the Anti-SLAPP Act.

II. DR. HUNTINGTON CANNOT PROVE THAT HE IS LIKELY TO SUCCEED ON THE MERITS OF HIS COUNTERCLAIMS

Dr. Huntington cannot prove that he is "likely to succeed on the merits." D.C. Code § 16-5502(b). As addressed in the other part of Mr. Newmyer's 12(b)(6) motion to dismiss, Dr. Huntington's counter complaint fails to state a claim upon which relief can be granted.[5] Specifically, the counter complaint is devoid of any concrete factual allegations that would support his legal theory that Mr. Newmyer made false and defamatory statements. Instead, it is

[4] Prior to the Florida Board of Psychology's decision, the case was litigated in state court where a jury awarded nearly half a million dollars against an individual.

[5] While the principal claim is defamation, the counter complaint also includes claims of false light invasion of privacy, tortious interference with a contractual relationship, and intentional infliction of emotional distress.

filled with vague and conclusory allegations, without any concrete facts, which does not meet the necessary degree of specificity to survive a motion to dismiss. Such a conclusion is even more readily apparent in the instant motion because Dr. Huntington cannot meet the heightened burden of proof, in light of the application of the Anti-SLAPP Act, that he must be "likely" to prevail on the merits of his counterclaims.

Even if the Court were to accept the allegation that the alleged statement by Mr. Newmyer "that Dr. Huntington was engaging in an unethical Doctor-patient relationship with his child, L.N." as being sufficiently pled, this statement cannot support a defamation claim. First, it is clear from the face of Dr. Huntington's counter complaint filed on December 30, 2011 -- which alleges that Mr. Newmyer made false and defamatory statements "[o]n and after the fall of 2010, and over the next several months" (Counter Compl. ¶ 20) -- that his defamation claim is time-barred by the one-year statute of limitations. D.C. Code § 12-301(4) (2012). Because his other three claims are closely intertwined with the defamation claim, they are also barred by the limitations period. *See, e.g., Jankovic v. Int'l Crisis Group*, 494 F.3d 1080, 1086 (D.C. Cir. 2007).

Second, Dr. Huntington cannot, as a matter of law, satisfy the *prima facie* elements of a defamation claim. He cannot establish that the statement was made in an unprivileged communication to a third party because the persons to whom it was allegedly made -- individual members of the Board of Trustees of Sidwell and licensing boards -- render it protected by the "judicial proceedings" privilege. *See, e.g., Arneja v. Gildar*, 541 A.2d 621, 624 (D.C. 1988). Moreover, the alleged statement that Dr. Huntington committed an ethical violation is fundamentally a conclusion of law (based on the application of law to facts) which cannot form the basis of a claim for defamation because it is not a discrete fact that can be proved false. *See*

Whiting v. Allstate Ins. Co., No. 08-12991, 2010 U.S. Dist. LEXIS 23552, at *24 (E.D. Mich. Mar. 15, 2010), aff'd 2011 U.S. App. LEXIS 16399 (6th Cir. 2011).

Finally, Dr. Huntington has also failed to plead the requisite elements of his other counterclaims, as further shown in Mr. Newmyer's 12(b)(6) motion to dismiss. For the same reasons that warrant dismissal of Dr. Huntington's defamation claim, his other three claims, which rely on the same underlying allegations, must fail. Because the counter complaint does not even survive dismissal under Super. Ct. Civ. R. 12(b)(6), Dr. Huntington cannot prove that he is likely to succeed on the merits, and therefore the counter complaint should be dismissed with prejudice under the Anti-SLAPP Act.

CONCLUSION

For the foregoing reasons, Dr. Huntington is not able to carry his heavy burden in demonstrating that he is likely to succeed on the merits of his counterclaims. As a result, the Anti-SLAPP Act requires this Court to dismiss his lawsuit with prejudice.

Dated: February 29, 2012

Respectfully submitted,

/s/ Kerry Alan Scanlon
Kerry Alan Scanlon (D.C. Bar #942276)
Jeremy M. White (D.C. Bar #483287)
KAYE SCHOLER LLP
901 15th Street, NW
Washington, DC 20005
Telephone: (202) 682-3660
Email: kscanlon@kayescholer.com

/s/ Bernard S. Grimm
Bernard S. Grimm (D.C. Bar # 378171)
COZEN O'CONNOR
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006-4007
Telephone: (202) 912-4835
Email: bgrimm@cozen.com

Counsel for Counter-Defendant

CERTIFICATE OF SERVICE

I certify that on February 29, 2012, a true and correct copy of the foregoing was served on the following by e-mail via the Court's electronic filing system:

Barton D. Moorstein
Blank, Moorstein & Lipshutz, LLP
111 Rockville Pike, Suite 400
Rockville, MD 20850

Counsel for Counter-Plaintiff Dr. Huntington

William D. Nussbaum
Douglas S. Crosno
Hogan Lovells US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

Counsel for Defendant The Sidwell Friends School

Barry D. Trebach
Katherine Berman Yoder
Bonner Kiernan Trebach & Crociata, LLP
1233 20th Street NW, Suite 800
Washington, DC 20036

Counsel for Defendant Dr. Huntington

I further certify that on February 29, 2012, a copy of the foregoing was served by first class mail, postage pre-paid, on the following:

Tara Mehrbach
4701 Willard Avenue, Apt. #1210
Chevy Chase, MD 20815

Pro Se, Intervenor

/s/ Jeremy M. White
Jeremy M. White