IN THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

The Washington Travel Clinic, PLLC *et al.*	)	
	)	
Plaintiffs	)	C.A. No. 2013 CABSLD 003233
	)	
v.	)	
	)	
John Kandrac	)	
	)	
Defendant	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

Ziad Akl, MD ("Akl") and The Washington Travel Clinic, PLLC ("WTC"), (collectively "Plaintiffs"), by counsel, hereby file this Memorandum in support of their brief in opposition to Defendant's Motion for Attorney's Fees and Costs (the "Motion") and request that the Court deny the Motion. Alternatively, the Court should at least await the resolution of this case and have the parties rebrief the Court before adjudicating the Motion as there are jury questions as to whether this is a SLAPP.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (Cont'd)

PROCEDURAL BACKGROUND

Plaintiffs filed their Amended Complaint on May 9, 2013. Defendant filed his Motion to Dismiss under the DC anti-SLAPP statute or in the alternative under DC. Sup. Ct. R. 12(b)(6) on July 15, 2013. The burden shifted on Plaintiffs to demonstrate a likelihood to prevail on the merits of their defamation and tortious interference with prospective business advantage claims. After briefing, the Court issued an order on December 16, 2013 (the "Order") dismissing the latter claim for failure to demonstrate damages and denied the Motion to Dismiss as to the claim of defamation, after dismissing some of the bases for the cause of action. Defendant then filed a motion for reconsideration of the Court's Order and a motion for award of attorneys' fees and costs.

ARGUMENTS

In his Motion, Defendant uses language suggesting that he prevailed in this suit and that "the one statement on which [Defendant] did not prevail" is a mere detail. This insinuation is false.

1. The Anti-SLAPP Act Was Not Intended To Prevent Litigation Such As This One

The anti-SLAPP Act was intended to provide "substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *See* Council of the District of Columbia, Committee on Public Safety and the Judiciary Report on Bill 18-893, "Anti-SLAPP Act of 2010", dated November 18, 2010, attached as Exhibit 1, at 1. Here, Defendant's published review was not addressing a political or public policy debate—in fact, there was no debate—nor was Defendant expressing an "opposing point of view" to anything. Plaintiffs were minding their business, and Defendant defamed them. Granting Defendant fees

and costs would be chilling to the ability of individuals and businesses to seek judicial redress for defamatory statements such as Defendant's.

2. Plaintiffs Demonstrated That This Suit Is Unlikely To Be A SLAPP

Unlike the California statute where award of attorney fees is mandatory, the D.C. anti-SLAPP Act provides that the Court *may* award a moving party who prevails, in whole or in part, on a motion brought under the Act the costs of litigation, including reasonable attorney fees. D.C. Code §16-5504(a). Thus, an award of fees is discretionary. The D.C. Court of Appeals has not yet opined on when such an award is appropriate.

The anti-SLAPP Act provides that if a party filing a special motion to dismiss makes a *prima facie* showing that the claim at issue does actually arise from an act that would fall under subsection (a) of the Act, 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(b). The fact that the Court denied the Motion to Dismiss in part signifies that Plaintiffs are likely to succeed on the merits of their claim for defamation. By the same logic, the denial of the Motion to Dismiss also means that this lawsuit is fundamentally *unlikely to be a Strategic Lawsuit Against Public Participation*. It does not matter that part of it was dismissed. What matters is the intent of the suit itself. Is it one that was intended to "muzzle speech or efforts to petition the government on issues of public interest"—Exhibit 1 at 1— or is there merit in Plaintiffs' claim that they were defamed? The answer is clear. As the Court stated, "Plaintiffs have put forward a sufficient *prima facie* showing of facts that could sustain a favorable judgment if credited by the trier of fact." Order at 9. Until this suit is 1) dismissed in its entirety; *and* 2) determined to be intended as a SLAPP, Defendant is not entitled to any award of

fees and costs. The determination whether this suit is a strategic suit against public participation is a jury question. Thus, Defendant's Motion is premature.

3. The Tortious Interference Claim May Be Reinstated On Appeal

The Court dismissed the tortious interference claim because "Plaintiffs have produced no evidence showing that they have suffered any damages as a result of Defendant's reviews, or that they will suffer harm in the future." Order at 17.

As argued by Plaintiffs in their Opposition to Defendant's Motion for Reconsideration, D.C. Law concerning libel and slander descends form Pollard v. Lyon, 91 U. S. 225 (1875), through a series of cases, namely Friedlander v. Rapley, 38 App.D.C. 208, 212 (D.C., 1912), Caldwell v. Hayden, 42 App.D.C. 166 (D.C., 1914), Harmon v. Liss, 116 A.2d 693, 695 (D.C., 1955) and Farnum v. Colbert, 293 A.2d 279, 281 (D.C., 1972). The foregoing cases all dealt with spoken words.

In Pollard, the U.S. Supreme Court stated:

> Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, *or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade*; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party. (emphasis added)

Thus, the case law descends directly from the U.S. Supreme Court through a series of decisions that sometimes omitted the part that also defines slander *per se* as the utterance of words prejudicial in a pecuniary sense to a person engaged as a livelihood in a profession or trade. Indeed, in Meyerson v. Hurlbut, 68 App.D.C. 360, 98 F.2d 232 (1938), cited with approval by Harmon, 116 A.2d at 696, the court did mention that part:

> To be so actionable, spoken words must 'import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that the party is infected with a contagious distemper,' or they must be 'prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade.' Pollard v. Lyon, 91 U.S. 225, 227, 23 L.Ed. 308.

Meyerson 98 F.2d at 233. *See also* Cleveland Hair Co. v. Kiely, 1988 WL 90199, at *1 (D.D.C. Aug. 4, 1988) (defamatory words, falsely spoken, which would prejudice a party in his business, trade, or profession, are actionable *per se*). Plaintiffs are such parties who suffered from defamatory *written* words. If words spoken, which are usually stated once and lost in the ether, can be actionable *per se* in such circumstances, then forcibly written words, which may not be erased,[1] are actionable *per se* when they prejudice someone in their trade or profession. Indeed, in Holt v. Boyle Bros., Inc., 217 F.2d 16, 17 (D.C.Cir., 1954), a case where written words were involved, the D.C. Circuit stated:

> To say, as [the defendant] did in the letter to the personnel officer, that [the plaintiff] refused to pay a just debt, was plainly defamatory, for this sort of charge 'obviously would hurt the plaintiff in the estimation of an important and respectable part of the community'. Nothing more is necessary to make written or printed defamation actionable as libel. Peck v. Tribune Co., 214 U.S. 185, 190, 29 S.Ct. 554, 53 L.Ed. 960. Thackrey v. Patterson, 81 U.S.App.D.C. 292, 157 F.2d 614. Statements in Holtz v. National Furniture Co., 61 App.D.C. 80, 57 F.2d 446, and Cohen v. Marx Jewelry Co., 67 App.D.C. 347, 92 F.2d 498, which imply that a charge of failing to pay a just debt is not actionable unless special damage or some other special circumstance is shown, are therefore erroneous.

Nothing in the foregoing involves a crime—just an allegation of refusal to pay a debt. *See also* Peck v. Tribune Co., 214 U.S. 185, 189 (1909) ("A libel is harmful on its face") ("if a doctor were represented as advertising, the fact that it would affect his standing with other of his profession might make the representation actionable, although advertising is not reputed dishonest and even seems to be regarded by many with pride.") Id. at 190; Thackrey v. Patterson,

[1] Even if Defendant later deleted his comments, they could be and may have been perpetuated through printing and forwarding by others before he deleted them. Further, Defendant can republish his comments at any time.

157 F.2d 614 (D.C.Cir., 1946) (mere assertion of marital discord is libelous, and it was unnecessary to allege special damage). Thus, the correct law of libel *per se* is the one enunciated in Holt. Written words that obviously would hurt a plaintiff in the estimation of an important and respectable part of the community are libelous *per se.* Clearly, thus, in this case, alleging that Plaintiffs repeatedly and habitually violate HIPAA and disseminate private information about their patients is certainly libelous *per se.* No damages need to be specially alleged or proven. Allegations against a physician that fall short of criminality can still be cause for license revocation and shutting down a medical practice. Common sense requires that defamatory written words are libel *per se.*

Since, in libel *per se*, damages are presumed, then there is no need to allege special damages for the purpose of stating a claim of defamation, and by the same token for stating a claim of tortious interference with prospective business advantage. Thus, the latter claim could be subject to reversal on appeal, and awarding attorney's fees for defending against that claim would be error.

Further, this Court has the power to entertain an independent action to relieve a party from its Order *sua sponte*,[2] and may reverse the dismissal of this claim, thus denying Defendant's Motion regarding that part of the Complaint even before appeal.

4. The Stricken Allegations May Be Reinstated On Appeal

The D.C. Court of Appeals has not yet addressed whether particular allegations within a cause of action can be stricken. As this Court stated in its Order, where certain questions remain unresolved in this jurisdiction, California precedent is useful in interpreting certain aspects of the D.C. statute. Order at 5.

[2] *See* Sup. Ct. Civ. R. 60.

Relying on reasoning by the California Supreme Court in Oasis West Realty, LLC v. Goldman, 51 Cal.4th 811 (2011), the Court of Appeal for the Third District of California ruled that the SLAPP Act authorizes a trial court to strike a cause of action but cannot be used to strike particular allegations within a cause of action. Burrill v. Nair, 217 Cal.App.4th 357, 380 (Cal.App. 3 Dist., 2013) (citations omitted).

Plaintiffs already made this argument, albeit stated differently, in their Opposition to the Motion to Dismiss. There, Plaintiffs stated:

> The Supreme Court of California stated that "[o]nly a cause of action that satisfies both prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning and lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." Oasis West Realty, LLC v. Kenneth A. Goldman et al., 51 Cal.4th 811, 812 (2011). If the plaintiff "can show a probability of prevailing on any part of its claim, the cause of action is not meritless" and will not be stricken; "once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands." Id. at 820 (citation omitted)(italics in original). The Court's task is "solely to determine whether any portion of [the plaintiff's] causes of action have even minimal merit within the meaning of the anti-SLAPP statute." Id. at 825 (describing the standard as "low").

Opp. to Motion to Dismiss a 5-6.

> Defendant's HIPAA-related allegations are sufficient to bring a claim for defamation. Plaintiffs would have a cause of action even if Defendant's HIPAA-related allegations were the sole defamatory allegations in his review. Thus, to defeat a motion to dismiss under the D.C. Anti-SLAPP statute, Plaintiffs need only demonstrate that they are likely to prevail on the merits with respect to those allegations. "When a cause of action states multiple grounds for relief, the plaintiff may satisfy its obligation in the second prong [i.e. establishing a probability of prevailing on the merits] by simply showing a probability of prevailing on any one of those grounds." Bently [Reserve L.P. v. Papaliolios, 2013 WL 3949029 (Court of Appeal, First District, Division 1, California)(July 30, 2013)] at 4, citing Wallace v. McCubbin, 196 Cal.App.4th 1169, 1212 (2011) (internal quotations omitted)(emphasis added). If Plaintiffs demonstrate they are likely to prevail on the merits with respect to those allegations that relate to the violation of HIPAA, the Motion should be denied.

Despite this case law, the Court struck particular allegations within the defamation action. If the D.C. Court of Appeals were to adopt the reasoning of the California courts, the defamation claim would stand in its entirety. Had Plaintiffs had a channel to appeal this Court's Order immediately, the Court of Appeals may have reinstated the allegations following the same reasoning as the California courts, and Defendant would not be entitled to any fees or costs on the corresponding portions. This Court, however, still has the power to relieve Plaintiffs from that part of the Order that struck particular allegations within the defamation claim.

Further, unlike the California statute, where an award of fees and costs is mandatory, the D.C. statute makes such award discretionary. Clearly, the D.C. Council chose not to follow in the steps of the California legislature, and left it for the Court to decide whether to award fees and costs. For the Court to do so, it must find a compelling reason. Defendant has not provided any reason for the Court to award him fees. Defendant has not demonstrated, for instance, nor could he, that the suit is frivolous—the Court has already decided that Plaintiffs are likely to prevail on the merits of at least their defamation claim. That the claim relies on one statement is of no moment. Plaintiffs could have brought only a count of defamation based on that single statement. The suit would still stand. Recognizing this problem, Defendant argues that "while the language of the Anti-SLAPP Act suggests that the award of litigation fees and costs is discretionary, in providing that the Court "may" award fees, the Act is analogous to numerous fee shifting statutes, most notably federal civil rights statutes, in which prevailing parties are presumptively entitled to an award of fees and costs." Motion at 7. Defendant does not cite any authority for this statement. Defendant goes on to quote David v. District of Columbia, 489 F. Supp. 2d 45, 51 n.11 (D.D.C. 2007) that "'a presumption that successful civil rights litigants should ordinarily recover attorneys' fees unless special circumstances would render an award unjust.'" Defendant

concludes that a similar approach is warranted in the SLAPP context, where the claim is "often without merit". Defendant, however, omits that, unlike the case he quotes, he was not successful, and contrary to what he claims, the claim has been shown to likely succeed on the merits.

5. Only The Anti-SLAPP Motion Is Subject To Award Of Fees

Even if the Court were to award Defendant attorneys' fees, only the Special Motion to Dismiss should be considered. The fee "provision applies only to the motion to strike, and not to the entire action." S.B. Beach Properties v. Berti, 39 Cal.4th 374, 384 (Cal., 2006). Thus, that part of the Motion to Dismiss that was brought under Rule 12(b)(6), the Motion to Unseal the Case, and the Rule 11 Motion are not reached by the statute.

Further, those parts of the Motion to Dismiss under the anti-SLAPP Act that do not address the allegations stricken by the Court or the tortious interference claim are not reached by the statute either. In other words, the skeleton used to construct the Motion was defeated by Plaintiffs. Defendant was going to use that skeleton whether there were 10 counts or one count. Furthermore, that Defendant chose to review 13 lawsuits brought previously by Plaintiff Akl and chase the corresponding briefs and attach them to his Motion to Dismiss, making his exhibits "voluminous," motion at 2, was unnecessary and was of his own choosing. The argument that was intended by such research was that Akl brings frivolous suits to "harass, silence, and punish his perceived adversaries." Motion to Dismiss at 4. Clearly, the Court disagreed by allowing the defamation claim to proceed. All the time spent to make this argument was to Defendant's predicament.

Strangely, Defendant states:

> Plaintiffs' aggressive litigation of this case – including, for example, forcing Kandrac to litigate a contested motion to unseal, and the filing of a meritless Rule 11 motion – combined with Defendant's substantial success in defending this action, warrant an award of fees and costs to Defendant. Moreover, Mr. Kandrac

> is a private individual who did not choose to initiate litigation, and was compelled to engage counsel to defend this action with no guarantee that his counsel's fees would ultimately be reimbursed. Accordingly, an award of reasonable fees and expenses that Defendant seeks as the substantially prevailing party is appropriate here.

Defendant omits that Plaintiffs gave him the opportunity to remove his defamatory statements twice before they filed this suit, and that he rejected both attempts, countering that he would *hire his own lawyer and countersue*. *See* Affidavit by the undersigned, attached to Plaintiffs' Opposition to Motion to Dismiss. Defendant sought this litigation. He now argues that "Plaintiffs' refusals to engage in any attempt at resolution, which in turn required Defendant to expend substantial additional fees and costs to defend himself, should be factored into the Court's assessment of this motion." Motion at 4-5. Not only does Defendant not cite any authority for such proposition, the attempts at resolution that he mentions were no more than offers to settle the case by *having Plaintiffs pay Defendant's attorney's fees* (which it turns out he did not incur as this is a contingency case, Aff. of Seth Berlin at 2) and Plaintiffs would just go away. This, even *after* Plaintiffs defeated the Motion to Dismiss.

Seeking reimbursement for all work except the 10.5 hours attributable to addressing the one statement as to which the Court denied Defendant's anti-SLAPP Motion is an absurdity. *See* Aff. of Seth Berlin at 5. Plaintiffs defeated the Motion to Dismiss in its entirety except for certain statements and one claim—not the other way around. The Motion to Dismiss is much more comprehensive than those statements that were dismissed or the claim of tortious interference. The core of the matter is still intact. The reasoning that the Court should follow is thus: had Plaintiffs only brought one count—the defamation count—and only based it on the statement on which they did prevail, would Defendant have prevailed on a Motion to Dismiss? The answer is a clear no. Would Defendant be entitled to any fees? That is also a no. Defendant would not be

entitled to any fees in connection with the Motion to Dismiss, let alone in connection with the other motions. Thus, the starting point should be zero going forward, not "what was spent minus one statement."

6. Defendant Is Not Entitled To Any Award Under Sup. Ct. R. 11(c)(1)(a)

Similarly, Defendant is not entitled to any award under Sup. Ct. R. 11(c)(1)(a) for defending the Rule 11 Motion. Defendant's argument is that "[s]uch an award is particularly appropriate here, where Plaintiffs' response to Defendant's anti-SLAPP Motion was to continue exactly the kind of conduct the Anti-SLAPP Act was designed to address." Motion at 8. There is no such conduct that existed for it to be "continued." Defendant tried to demonstrate such conduct and failed. The Court ruled that that Plaintiffs are likely to succeed on the merits of the main statement they take issue with; i.e. this is not a SLAPP until proven otherwise at trial.

Defendant further argues that Plaintiffs' arguments "consisted of exactly the same arguments that Plaintiffs could have addressed – and in fact did address – in their opposition to Defendant's anti-SLAPP motion." Motion at 8. It is not clear how this logic helps Defendant. Apparently he relied on Becker v. The Weinberg Grp., Inc., 554 F. Supp. 2d 9, 14 (D.D.C. 2008), where the court stated:

> Defendants raised the same substantive arguments in filing their Rule 11 Motion as they raised in their Motion to Dismiss. Consequently, Plaintiff is entitled to be compensated for her fees involved in opposing the Rule 11 Motion, as well as the Motion to Dismiss.

Becker involved a prevailing party clause, and the plaintiff prevailed, defeating a motion to dismiss and a Rule 11 motion raising the same substantive arguments as were raised in the motion to dismiss. The court awarded the plaintiff fees *under the prevailing party clause*, since both motions were filed by the Defendant, who lost. Here, Plaintiffs did not initiate the motion to dismiss, there is no prevailing party clause, and Plaintiffs prevailed, albeit in part, in opposing

the Motion to Dismiss. Nowhere does Becker suggest that a Rule 11 motion is frivolous because it repeats the same arguments made in another brief. According to Defendant's logic, many Rule 11 Motions would be frivolous. Defendant's argument is strained and makes no sense.

Based on the foregoing, Defendant's fee request is unreasonable. Defendant acts as if he did not want this suit, as if this case was dismissed, as if he succeeded in demonstrating that the case is a SLAPP, and as if he made reasonable offers of settlement.

7. **Determination Of Attorney Fees Requires Submission Of Details Of Retainer Agreement**

In analyzing what amount Defendant would be entitled to, if any, the Court must look at the details of the retainer agreement between Defendant and his counsel. Defendant's Counsel states that he agreed to handle the matter on a contingent basis. Berlin Aff. at 2. It is not clear what this means.

In Dowling v. Zimmerman, 85 Cal.App.4th 1400, 1425 -1426 (Cal.App.4.Dist.2001), the court stated:

> The record in the instant case shows that the modified contingent fee agreement into which Zimmerman and Moneer entered provided that Zimmerman would pay him a "nominal" retainer in the amount of $1,300, he would collect his attorney fees from her under the anti-SLAPP statute if she prevailed on her special motion to strike Dowling's SLAPP complaint, but he would "absorb the loss of his billable time" if the court denied the motion.

If Defendant and his Counsel had such an agreement, whereby Counsel would "absorb" certain amounts if they could not deliver, Defendant would not be entitled to that portion since he is not being billed for it. Plaintiffs and the Court would be entitled to know the details of any contingency agreement.

8. **Calculation Of Attorney Fees Is Subject To the Court's Discretion**

In Maughan v. Google Technology, Inc., 143 Cal.App.4th 1242, 1249 (Cal.App. 2 Dist., 2006), the court determined for itself what a reasonable time spent on an anti-SLAPP motion

should be, stating that it routinely deals with attorneys' fee requests in complex cases and other contexts such as in class actions and discovery motions, and that it has experience with how much time attorneys should be spending and typically do spend on difficult and complex matters.

***

CONCLUSION

In sum, Defendant's Motion is premature and intended to place pressure on Plaintiffs to just "go away". The Court should deny the Motion in its entirety for the reasons argued above. Alternatively, the Court should at least await the resolution of this case and have the parties rebrief the Court before adjudicating the Motion as there are jury questions as to whether this is a SLAPP.

Michael A. Troy, Esq.
Bar No. 476606
5185 MacArthur Blvd., Suite 702
Washington, D.C. 20016
Tel: (202) 306-2422
michael@troylegalonline.com