IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

CLOSE IT! TITLE SERVICES, INC., et al., Plaintiffs v. MICHAEL S. NADEL, et al., Defendants.	Case No. 2018 CA 005391 B Judge William M. Jackson NEXT EVENT: Initial Conference, Friday October 26, 2018 at 9:30 a.m.

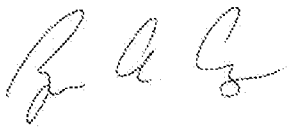
MOTION TO DISMISS (OPPOSED)

Defendants Sean Smith and Erin Wrona move for an Order by the Court dismissing the complaint with prejudice under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. For the reasons elaborated below in the points and authorities, the plaintiffs' complaint fails to state a claim upon which relief can be granted. This motion is filed in the alternative to the concurrently-filed special motion to dismiss under the District of Columbia's anti-SLAPP statute. A proposed form of Order accompanies this motion.

August 24, 2018

ORAL HEARING REQUESTED

Respectfully submitted,



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POINTS AND AUTHORITIES

I. BACKGROUND

1. Plaintiffs Close It! Title Services, Inc. d/b/a Federal Title & Escrow Company ("Federal Title") and Todd Ewing ("Ewing") have filed this defamation countersuit in answer to an underlying lawsuit that Defendants Sean Smith and Erin Wrona ("Smith and Wrona") first filed against Federal Title and Ewing (among others) seeking to recover about $1.6 million that was intended to be used to purchase a home, but that was stolen from them before the closing of the purchase. The lawsuit underlying this one was first filed in federal court, but now is pending before Judge Rigsby in this Court. *See Smith, et al. v. Federal Title and Escrow Co., et al.*, Case No. 17-cv-1580 (D.D.C. 2017) (Lamberth, J.) and *Smith, et al. v. Federal Title & Escrow Co., et al.*, Case No. 2018 CA 004613 B (D.C. Super. Ct. 2018).

2. Federal Title's and Ewing's tort claims turn on statements made by the attorney representing Smith and Wrona in the underlying lawsuit published in a WAMU radio station news story about a recently-filed (then) complaint in federal court. The reporter's story quotes the attorney about the legal theories asserted in the federal lawsuit, which included eight counts: : (1) a civil RICO violation, (2) conversion, (3) civil conspiracy, (4) negligence, (5) breach of contract, (6) breach of the implied covenant of good faith and fair dealing, (7) breach of fiduciary duty, and (8) legal malpractice, for recovery of their stolen purchase money.

II. LEGAL STANDARD

3. To survive a motion to dismiss under Rule 12(b)(6), a complaint "must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist." *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007) (internal quotation omitted). Yet the "'[f]actual allegations must be enough to raise a right to relief above the speculative level . . . .'"

Clampitt v. Am. Univ., 957 A.2d 23, 29 (D.C. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). A complaint must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *See Murray v. Motorola, Inc.*, 982 A.2d 764, 783 n.32 (D.C. 2009) (quoting *Twombly*, 550 U.S. 544, 555 (2007)).

III. PLAINTIFFS HAVE FAILED TO STATE DEFAMATION CLAIMS

4. Federal Title and Ewing base their complaint solely on a small excerpt of the news story about the lawsuit that Smith and Wrona filed in federal court last year. *See* Compl. at ¶¶ 16-17 and Exh. A. That excerpt contains quoted statements attributed to Smith's and Wrona's attorney. The quoted statements are:

- "Federal Title *either caused* our money to be stolen *or* stole it, and we need to get our money back;"
- "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 at ¶ 17 (emphasis added).[1] These two statements are the foundation of the complaint and they cannot support this tort action.

5. The alleged defamatory statements are in the context of a news story that relates how Smith and Wrona filed a lawsuit in federal court to recover their stolen purchase money. *See* Compl. Exh A at 1. In the article, Federal Title's spokesperson states that the incident occurred from "what appears to be a cybercrime attack on our information systems," a statement by Federal Title linking itself to the hacking incident. *Id.* at 2. The reporter of the story also describes that Smith and Wrona "filed a lawsuit against the company, alleging that Federal Title

[1] Plaintiffs' allegation of another statement attributed to the attorney "that Federal Title is '*involved in the scheme*' to steal its customers (sic) money" is not a separate statement by the attorney but is commentary by the reporter. *See* Compl. ¶ 19 and Exh. A at 2-3.

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." This statement makes it clear that the suit alleged alternative theories of liability and not asserting one theory or the other as a statement of fact. *Id.* (emphasis added). And the published news story also includes a hyperlink to a copy of the federal court complaint so that readers of the story have ready access to the legal claims as they are stated in the federal court filing. *See id.* at 1 and https://wamu.org/story/17/08/08/hackers-allegedly-steal-1-5-million-d-c-couple-home-buying-phishing-scheme/ (online version with hyperlink to complaint).

6. To succeed on their defamation claims, Federal Title and Ewing must show: (1) that the defendants made a false and defamatory statement concerning the plaintiffs; (2) that the defendants published the statements without privilege to a third party; (3) that the defendants' fault in publishing the statements amounted to at least negligence; and (4) either that the statements were actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm. *See Klayman v. Segal*, 783 A.2d 607, 612 n.4 (D.C. 2001). Plaintiffs also have the burden of proving the defamatory nature of a challenged publication, and "*the publication must be considered as a whole, in the sense in which it would be understood by the readers* to whom it was addressed." *Id.* at 613 (emphasis added).

7. As to Ewing, the complaint fails to allege any statements by Smith or Wrona or their attorney — defamatory or otherwise — concerning him. Ewing's complaint against Smith or Wrona therefore fails as a matter of law. Without this necessary element and devoid of any allegations concerning him, Ewing's defamation claim (and remaining tort claims) should be dismissed.

8. Setting aside the failure of Ewing's claim, the Court must evaluate Federal Title's defamation claim "in the sense in which it would be understood by the readers to whom it was addressed." *Klayman*, 783 A.2d at 613. That is, the attorney's statements must be reviewed as they fall within a news story in which Federal Title also is named as one of the actors in the hacking incident by the story's reporter. Indeed, Federal Title, through its own spokesperson, told the reporter that the incident appeared to stem from a hacking attack on its own information systems. *See* Compl. Exh. A at 2. And the story also relates that Smith and Wrona had filed a federal lawsuit and that the complaint alleged several theories of liability and recovery. *Id.* And any reader of the story, even today, has ready access to the complaint filed in the federal court by the hyperlink placed at the first mention of the lawsuit in the news story. *See id.* at 1.

9. Given the context of the statements and the ready access to the text of the court complaint, the statements made by the attorney are not defamatory. Instead, they merely relate the alternative legal theories of the federal complaint, which is separately privileged and immune from a defamation claim. And by relating *alternative* theories of recovery, they necessarily are not statements of fact, but propose an either/or narrative: "Federal Title *either caused* our money to be stolen *or stole it*." And the second statement even relieves Federal Title of responsibility in part, while alternatively asserting the possibility of awareness knowledge of missing funds: "[s]o if *they weren't responsible* for helping steal the money, it *certainly seems like they knew* well in advance of the closing that the money was gone." Compl. at 17 (emphasis added). Such statements, standing alone, are not defamatory. *See Rosen v. Am. Isr. Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1256 (D.C. 2012) ("[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.") (internal citation and quotation

omitted). But read in the context of the entire story, as they must be, the statements echo the claims in the complaint, which is available to the reader. No reader would conclude that the attorney's statements assert definitive facts, but would understand from the context of the story that they were legal claims asserted in a recently-filed lawsuit. And Federal Title, through its spokesperson, rejects Smith and Wrona's claims in a statement found only one sentence later in the body of the story. *See* Compl. Exh. A at 3.

10. Any statements in the underlying complaint are, of course, absolutely privileged from claims of defamation, and that privilege confers immunity from suit. *See McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1139 (D.C. 2010) ("[T]he origins of advocacy immunity trace back to English common law, which provided private attorneys with absolute immunity from liability for damages"); *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C. 2001) ("The privilege is intended to 'afford[] an attorney absolute immunity from actions in defamation for communications related to judicial proceedings."); *see also* RESTAT 2D OF TORTS, § 586 (2nd 1979) ("An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relationship to the proceeding."). Because the allegations of the complaint enjoy immunity from a defamation claim and the attorney's statements in the news story echo the allegations and theories in the complaint, this immunity serves as a separate ground for a finding that the attorney's statements are not defamatory.

11. In sum, Federal Title and Ewing fail to allege anything more than conclusory allegations that the attorney's statements defamed them. Without more substantive allegations, their defamation claims fail as a matter of law.

IV. FEDERAL TITLE LACKS STANDING TO STATE A FALSE LIGHT CLAIM

12. Federal Title's false light claim is fatally flawed because it is a corporation, which cannot be offended. *See S. Air Transp., Inc. v. Am. Broad. Cos.*, 670 F. Supp. 38, 42 (D.D.C. 1987) ("[T]he District of Columbia follows the Restatement's formulation of the right of privacy and that source prohibits corporations from bringing suit for false light claims.").

13. 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*. *See Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999) (citing RESTATEMENT (SECOND) OF TORTS § 652E (1977)) (emphasis added).

14. Even if the attorney's statements were false (which they are not), Federal Title's complaint identifies it as a District of Columbia corporation, which cannot be offended, which defeats its false light claim. *See* Compl. ¶ 2.

V. EWING HAS NOT STATED A FALSE LIGHT CLAIM

15. As with his defamation claim, the complaint lacks any allegation of statements about Ewing, so he has also failed to allege any elements of a false light claim. His false light claim also should be dismissed.

VI. FEDERAL TITLE AND EWING HAVE FAILED TO STATE CLAIMS FOR TORTIOUS INTERFERENCE WITH THEIR BUSINESS RELATIONS

16. The complaint makes only a formulaic recitation of the elements for a cause of action for their tortious interference with business relations claims. *See* Compl. ¶¶ 38-43. This alone is enough to dismiss these claims. *See Murray*, 982 A.2d at 783 n. 32.

17. "To establish a prima facie case of tortious interference with contractual or other business relationships in the District of Columbia, a plaintiff must prove four elements: (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." *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.*, 957 A.2d 890, 900 (D.C. 2008).

18. Federal Title's and Ewing's complaint makes only the most sweeping allegations to support their tortious interference claims. They state that "over the past twenty years" that they have "established valid contractual and business relationships" with an array of unnamed parties and without specifying any particular contracts. Compl. ¶ 39. They assert that Smith and Wrona know these deep and yet vague contractual and business relationships just because they availed themselves of Federal Title's and Ewing's real estate closing services and by reference to "their allegations and false and defamatory statements" without specifying anything more. *Id.* at ¶ 40. These sweeping statements lack the detail required to support the claims, especially the element of knowledge for Smith and Wrona for any particular business relationship of Federal Title or Ewing. The alleged defamatory statements make no reference to Federal Title's other business relationships. And if "allegations" refers to statements in the complaint filed in the federal court, those statements enjoy absolute immunity from a defamation claim. *See infra*, ¶ 10. Smith and Wrona are lawfully prosecuting their own claims against Federal Title and Ewing and the exercise of those rights, does not translate into intent to interfere with Federal Title's or Ewing's other business affairs, whatever they may be.

VII. IN ANY EVENT, SMITH AND WRONA CANNOT BE MADE VICARIOUSLY LIABLE FOR THEIR ATTORNEY'S CONDUCT EVEN IF IT AMOUNTED TO AN INTENTIONAL TORT (WHICH IT DOES NOT)

19. The complaint does not allege that Smith or Wrona uttered or published anything defamatory but relies on a theory of vicarious liability to assign fault to them. *See* Compl. ¶¶ 17, 21. The complaint states only a naked assertion that they directed or ratified their attorney's

statements and makes that allegation "upon information and belief." *Id.* ¶ 21. The absence of any supporting facts makes the allegation insufficient to impose a claim of vicarious liability for intentional conduct of an attorney.

20. While District of Columbia Court of Appeals has not addressed the issue of whether a client can be held vicariously liable for its attorney's intentional misconduct, other courts of final appeal and the Federal District Court for the District of Columbia have. When a plaintiff seeks to hold a client vicariously liable for his or her attorney's allegedly intentional tortious conduct, a plaintiff must prove facts showing either that the client specifically directed, controlled, or authorized the attorney's *precise method* of performing the work or that the client *subsequently ratified* acts performed in the exercise of the attorney's independent judgment. If there is no evidence that the client directed, controlled, authorized, or ratified the attorney's allegedly tortious conduct, then no vicarious liability can attach. *See Horwitz v. Holabird & Root*, 816 N.E.2d 272, 279 (Ill. 2004) ("[W]hen, as here, an attorney acts pursuant to the exercise of independent professional judgment, he or she acts presumptively as an independent contractor whose intentional misconduct may generally not be imputed to the client, subject to factual exceptions."); *Givens v. Mullikin*, 75 S.W.3d 383, 397 (Tenn. 2002) ("Despite the wide range of authority and right of control possessed by the client, however, the client does not have a general authority to control 'the time, place, methods and means' of the representation."); *Bradt v. West*, 892 S.W.2d 56, 76 (Tex. App. 1994) ("Unless a client is implicated in some way other than merely being represented by the attorney alleged to have committed the intentional wrongful conduct, the client cannot be liable for the attorney's conduct."); *McDevitt v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 160, 171-72 (D.D.C. 2013) ("[T]he weight of authority provides that a

client generally is not vicariously liable for its attorney's torts, absent evidence that the client directed, controlled, authorized, or ratified the attorney's allegedly tortious conduct.").

21. Federal Title's and Ewing's theory of vicarious liability for Smith and Wrona is just a shot in the dark. A plaintiff is entitled to make allegations on information and belief, "where the belief is based on factual information that makes the inference of culpability plausible." *Hedgeye Risk Mgmt., LLC v. Heldman*, 271 F. Supp. 3d 181, 189 (D.D.C. 2017). Federal Title and Ewing only base their complaint on the mere presence of the attorney-client relationship and not on any facts that would make it plausible that Smith and Wrona directed their attorney's interview comments with the reporter or later took steps to ratify his statements. So even if their attorney's statements could be found to be tortious conduct (which they cannot), Federal Title and Ewing cannot look to Smith and Wrona for any recovery.

RULE 12-I CERTIFICATION

On August 23, 2018, I contacted Andrew J. Lawrence, counsel for Federal Title and Ewing, to inquire whether plaintiffs would oppose this motion. Mr. Lawrence conveyed that the plaintiffs would oppose.

Bryan A. Carey

CERTIFICATE OF SERVICE

I certify that I will file the foregoing motion and proposed order on August 24, 2018, by the Court's electronic filing system that will serve copies upon counsel for plaintiffs by electronic transmission. Defendant McDermott Will & Emery LLP will be served with a copy by email to Joshua David Ragaczewski (jrogaczewski@mwe.com) and Defendant Michael S. Nadel will be served with a copy by email (mnadel@mwe.com).

Bryan A. Carey