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Clerk of the Court

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

CLOSE IT! TITLE SERVICES INC., et al	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 2018 CA 5391 B
	)	Judge William M. Jackson
MICHAEL S. NADEL, et al.	)	Next Court Date: October 26, 2018
	)	Event: Initial Scheduling Conference
Defendants.	)	
	)	

OPPOSITION TO MOTION TO DISMISS AND SPECIAL MOTION TO DISMISS BY DEFENDANTS MCDERMOTT WILL & EMERY AND MICHAEL NADEL

Plaintiffs Close It! Title Services Inc. d/b/a Federal Title & Escrow Company ("Federal Title") and Todd Ewing ("Ewing"), by and through undersigned counsel, pursuant to Superior Court Rule of Civil Procedure 12-I, hereby submit this Opposition to the Motion To Dismiss And Special Motion To Dismiss ("Motion") submitted by Defendants McDermott Will & Emery ("McDermott") and Michael Nadel ("Nadel").

McDermott and Nadel's Motion largely repeats the same arguments addressed in detail in Federal Title's Opposition to Defendants Sean Smith and Erin Wrona's Special Motion to Dismiss ("Opposition to Smith and Wrona's Motion").[1] For brevity, Federal Title therefore incorporates by reference the points and authorities set forth in Opposition to Smith and Wrona's Motion, and addresses only new arguments here. As set forth below, the additional arguments raised in McDermott and Nadel's Motion are meritless as the statements at issue are plainly defamatory and not privileged. Accordingly, Plaintiffs respectfully request that the Court deny Defendants' Motion and award Plaintiffs their

[1] The Opposition was filed September 7, 2018.

reasonable attorney's fees and costs. A statement of points and authorities is submitted herewith.

STATEMENT OF POINTS AND AUTHORITIES

I. Introduction

District of Columbia law "has long sought to provide the defamed Plaintiff a maximum standard of protection" to protect the important reputational interests of its citizens. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 87 (D.C. 1980). In balancing the protection of this vital interest against important First Amendment concerns, the Supreme Court "made clear that the First Amendment gives no protection to an assertion 'sufficiently factual to be susceptible of being proved true or false.'" *Jankovic v. Int'l Crisis Grp.*, 593 F.3d 22, 27 (D.C. Cir. 2010) (*quoting Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)). Under this framework, D.C. courts have clearly outlined the distinction between statements that are actionable as defamatory, and statements that are protected as privileged or as expressions of free speech. In this case, Defendant Nadel asserted provably false facts to the media without specific attribution to any official report. As set forth below, these statements are defamatory and not privileged, and McDermott and Nadel's Motion must be denied.

II. Legal Standard

Nadel and McDermott bring their motion under both Rule 12(b)(6) and the District's Anti–SLAPP Act. Under Rule 12(b)(6), "it is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it

was not libelous." *Klayman v. Segal,* 783 A.2d 607, 613 (D.C. 2001) (internal quotations omitted).

"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 Enter. Inst. v. Mann*, 150 A.3d 1213, 1227 (D.C. 2016) (citing D.C. Code § 16–5502 (b)). As set forth in Federal Title's Opposition to Smith and Wrona's Motion, McDermott and Nadel cannot meet this burden. However, even if the Court finds that the prima facie showing is made, properly respecting the constitutional right to a jury trial, the claim may be dismissed "only if the court can conclude that the claimant could not prevail as a matter of law, that is, after allowing for the weighing of evidence and permissible inferences by the jury." *Id.* at 1236. Thus, under either standard, McDermott and Nadel's Motion must be denied.

III. Argument

A. The Fair-Report Privilege Does Not Apply

The fair-report privilege is a "media common law privilege." *Phillips*, 424 A.2d at 88. It is an exception to the common law rule that one who repeats or republishes a defamation uttered by another adopts it as his own. *See Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985). The privilege encourages "the media to disseminate official records—whether verbatim or in fair summaries—without fear of liability for any false, defamatory material that they might contain." *Id.; see also Q Int'l Courier, Inc. v. Seagraves,* No. 95-1554 (RMU), 1999 WL 1027034, at *3 (D.D.C. Feb. 26, 1999) (describing the fair-report privilege as "the privilege of newspapers and reporters

to publish reports of official proceedings that are judicial in character"). Federal Title is not aware of any District of Columbia case that has extended the fair-report privilege to insulate an attorney's defamatory statements to the media. *C.f. Newmyer v. Sidwell Friends Sch.*, 128 A.3d 1023, 1042 (D.C. 2015) (no privilege for defamatory statements made by attorney to the media); *Armenian Assembly of Am., Inc. v. Cafesjian*, 597 F. Supp. 2d 128, 140 (D.D.C. 2009) (no privilege for defamatory statements made by attorney to the media). There is no public policy basis to extend a media privilege designed to allow the media to disseminate official records without fear to Nadel's comments. His statements simply accuse Federal Title of professional and criminal misconduct rather than provide a fair report to the public about a pending lawsuit.

Even if the privilege was extended beyond the media, the Court can dispose of McDermott and Nadel's privilege defense because Nadel's statements simply do not qualify. To qualify for the fair-report privilege in the District of Columbia, "a defendant must clear two major hurdles." *Jankovic*, 593 F.3d at 26 (*quoting Phillips* 424 A.2d at 89). "It must show, first, that its publication was a 'fair and accurate report' of a qualified government source, and, second, that the publication properly attributed the statement to the official source." *Id.* Under D.C. law, Defendants do not clear either hurdle to qualify for this privilege.

In their Motion, Defendants contend that Nadel's comments to WAMU are a fair and accurate report of the then-recently filed federal complaint. As set forth below, the statements themselves directly contradict this assertion:

> '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.[2]

Nadel's assertions are not a summary of the complaint, which is never even referred to by Nadel. Rather, on their face, the statements are Nadel's own conclusions that Federal Title committed professional and criminal misconduct. As such, even if the Court were to find that an attorney's defamatory statements to the media could be shielded by the fair-report privilege, Nadel's statements fall squarely within the line of cases holding that the privilege does not apply without proper attribution.

Tellingly, McDermott and Nadel's Motion offers no analysis of the "proper attribution" prong. *See* Motion at 9-12. That prong is dispositive here.[3] Under D.C. law,

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[2] The entire WAMU article was attached as Exhibit B to Federal Title's Opposition to Smith and Wrona's Motion.

[3] Nadel's statements are not a fair and accurate summary of the federal complaint either. Nadel claims that "Federal Title either caused our money to be stolen or stole it." Caused, when used as a verb, means "to make something happen, especially something bad." *See, e.g.* https://dictionary.cambridge.org/dictionary/english/caused. *See also Guilford Transp. Indus., Inc. v. Wilner,* 760 A.2d 580, 594 *(D.C. 2000)* (statements at issue should not be interpreted by extremes, but should be construed as the average or common mind would normally understand them). As understood by the average reader, "caused our money to be stolen" means that Federal Title made the theft happen, not that Federal Title is legally responsible for the theft under the complex concept of proximate cause. Thus, it is not a fair and accurate summary of a negligence count that alleges that "Federal Title and its employees and agents breached their duty to act as escrow agent and settlement agent by not enacting adequate security protocols…. Defendants' negligence in securing their email accounts and not following up or having a policy of orally confirming large money transfers was the proximate cause of Plaintiff's loss of $1.57 million." Motion at 11.

the fair report privilege is "unavailable where the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or summary of an official document or proceeding. It must be apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings." *Dameron* 779 F.2d at 739 (further holding that the privilege "should not be interpreted to protect unattributed, defamatory statements" that leave the impression that the conclusion is the speaker's own).

In *Dameron*, the "pertinent section" was a two sentence portion of a lengthy article that defendants claimed was privileged because it summarized an NTSB report. Even though the larger article repeatedly mentioned the NTSB, the Court ruled that the privilege did not apply because "[n]either the particular sentence in which the alleged defamation appears, nor the [section of the article] as a whole mentions the NTSB, and nothing in the piece indicates that the statement is intended as a summary of the NTSB's official report." *Dameron*, 779 F.2d at 740. The logic applies with equal force here, as there is nothing in any of Nadel's quotes that indicates that he is summarizing allegations in the lawsuit.

The Court's analysis in *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990) is also particularly relevant. In *White*, the plaintiff sued the Fraternal Order of Police, the Washington Post and NBC for publishing defamatory statements about a controversy surrounding plaintiff's promotion. The Court found that the Washington Post was protected by its fair and accurate report of a governmental proceeding, but that NBC was not because it did not attribute any of its reported facts to the government proceeding. *Id.*

at 514.[4] In its analysis, the Court noted that the Washington Post "consistently attributed the reported facts to [specific] documents." *White*, 909 F.2d at 528. By contrast, NBC reported the same facts without mentioning any governmental proceeding or report, instead presenting "facts" as if they were the result of NBC's own investigation. *Id.* Nadel's defamatory comments are nearly identical to NBC's in that he has asserted facts without any attribution to the complaint, leaving the reader with the impression that he reached his own conclusion that Federal Title committed professional misconduct. *Id.*; *see also Montgomery v. Risen,* 197 F. Supp. 3d 219, 266 (D.D.C. 2016), aff'd, 875 F.3d 709 (D.C. Cir. 2017) (noting that portions of a chapter that specifically attributed statements to government sources would be shielded by the fair-report privilege, while passages that discussed facts without "explicitly referencing the contents of official government reports" would not).

The cases relied on by McDermott and Nadel confirm that the defamatory statements at issue here are not privileged. *The Savage Is Loose Co. v. United Artists Theatre Circuit, Inc.*, 413 F. Supp. 555 (S.D.N.Y. 1976), turned on a specific New York statute that does not apply here and, importantly, unlike D.C. law, does not contain a proper attribution requirement. *Compare Id. at* 560 (relying on the privilege contained in N.Y. Civ. Rights Law § 74 (McKinney)) *with Dameron*, 779 F.2d at 740 (distinguishing how a reader understands a statement attributed to its source, which can be properly evaluated,

[4] Notably, the Court also found that the "privileges applicable to the FOP differ from those applicable to the media defendants" and did not consider whether the Fraternal Order of Police was protected by the fair-report privilege. *White*, 909 F.2d at 521. Likewise, the Court should not apply the privilege to attorney statements to the media.

from "the defamatory potential of an unattributed statement" of fact that presents a far different situation).

The remaining cases relied on by Defendants, and additional statements in the WAMU article itself, illustrate the sound policy behind the proper attribution requirement. In *Rosenberg v. Helinski*, 328 Md. 664 (1992), the defendant directly cited to the testimony he summarized, making it clear that he was accurately reporting a judicial proceeding. *See id*. at 671 (where the defendant preceded his summary with the phrase "[t]he child talked very directly about…). In *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 258 (D.D.C. 2013), the Court found the statements in question were protected by the fair-report privilege because the defendant specifically and consistently attributed his statements to a pending government proceeding and specifically attributed additional statements to an affidavit he had filed in a prior lawsuit. *Id.* at 258 (where the defendant preceded his summary by stating "I eventually provided a sworn affidavit in the case, in which I detailed…). After observing that the fair-report privilege will "fail…if [the statement] is not attributed to the official source," the court in *Q Int'l Courier* applied the privilege to a "direct quotation from the government's civil complaint." *Id.* at 1999 WL 1027034 at *3-4

Nadel's naked assertion that "Federal Title either caused our money to be stolen or stole it, and we need to get our money back" stands in stark contrast to the properly attributed statements that are entitled to protection under the fair-report privilege. By comparison, the WAMU article's author specifically attributed his report before summarizing any allegations in the federal complaint, using language such as "the couple filed a lawsuit against [Federal Title], alleging that…" and "[a]ccording to the lawsuit…"

This language makes it clear to the reader that the language following the attribution is a summary of the complaint instead of the author's own conclusion. Rather than somehow providing cover for McDermott and Nadel, the author's specific attribution highlights the distinction between his supported statements and the defamatory impact of Nadel's bald assertions of professional and criminal misconduct. Nadel's statements are not protected by the fair-report privilege, and the Motion must be denied.

B. Federal Title States a Claim for Defamation

The arguments raised by McDermott and Nadel have already been addressed in Federal Title's Opposition to Smith and Wrona's Motion. Put simply, Nadel's statements are defamatory because they assert and/or imply provably false facts (accusing Federal Title of professional and criminal misconduct) that tend to "injure [the] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Mann*, 150 A.3d at 1241 (*citing Guilford,* 760 A.2d at 594). As long as his statements are capable of bearing a defamatory meaning, then whether the statements are in fact "defamatory and false [is a question] of fact to be resolved by the jury." *See Guilford*, 760 A.2d at 594-5.

It is worth emphasizing that Nadel's statements are defamatory regardless of whether or not the WAMU article as whole is a balanced news story. The fact that WAMU gave Federal Title an opportunity to comment before it published the article does not change the defamatory character of Nadel's accusations. *See, e.g. Zimmerman v. Al Jazeera Am., LLC*, 246 F. Supp. 3d 257, 268 (D.D.C. 2017) (finding film that suggested that professional athletes used performance enhancing drugs was defamatory despite film

stating that "each [athlete] ... emphatically denies taking [drugs] and say whoever claims that, is lying").

Moreover, as in the privilege context, Defendants' reliance on attribution made not by Nadel, but by the WAMU author, is misplaced. The fact that the article itself references and links to the federal complaint may provide a defense for the author, who is not a party to this case. But it has no bearing here because Nadel simply asserts that Federal Title committed professional and criminal misconduct without any attribution to the pending complaint. *See Montgomery* 197 F. Supp. 3d at 266 (mere existence of the reports, themselves, do not shield Defendants from liability where they are neither referenced nor discussed); *Dameron*, 779 F.2d at 740 (holding that two sentences in an article exceeding eleven pages were defamatory even while several other passages were not).

Finally, *Klayman v. Segal*, 783 A.2d 607 (D.C. 2001) does not support Defendants' arguments. In that case, the Court found that the statements in question simply focused on the plaintiff's desire for publicity and thus did not rise to the defamatory level that would make him appear "odious, infamous, or ridiculous." *Id*. at 618. Here, the statements accuse Federal Title of criminal and professional misconduct, which constitutes defamation per se. *See Guilford*, 760 A.2d at 600; *Franklin v. Pepco Holdings, Inc.* (PHI), 875 F. Supp. 2d 66, 75 (D.D.C. 2012) (defamation as a matter of law includes false statements that impute to the subject a crime, or a matter adversely affecting the person's ability to work in a profession). McDermott and Nadel's motion should therefore be denied.

C. Ewing States a Claim for Defamation and False Light

As set forth in Federal Title's Opposition to Smith and Wrona's Motion, to satisfy the "'of and concerning' element, it suffices that the statements at issue lead the listener to

conclude that the speaker is referring to the plaintiff by description, even if the plaintiff is never named." *Jankovic*, 494 F.3d at 1088–89 (D.C. Cir. 2007). In addition, the *Dameron* case is instructive because in that case, as here, "the magazine article never mentions Dameron's name or other identifying characteristics." *Dameron,* 779 F.2d at 742. There, Dameron had attained some notoriety which made him identifiable by reference to certain people. *Id.* Here, within the real estate community, Ewing is well-known as the founder, sole owner and CEO of Federal Title. *See Ewing Decl.* ¶3. (attached as Exhibit A to the Opposition to Smith and Wrona's Motion). A publication may convey a defamatory meaning if it "tends to lower [the] plaintiff in the estimation of a substantial, respectable group, though they are a minority of the total community or plaintiff's associates." *White*, 909 F.2d at 518. Ewing has therefore stated a claim and the Motion should be denied.

D. The Complaint States a Claim for Tortious Interference

The Complaint sets forth a count for tortious interference with business relations. Nadel and McDermott contend that, at the pleading stage, Federal Title must establish that defendants have knowledge of a specific contract with which they are interfering. But that is not the case. A legally recognizable business expectancy may include "the opportunity of obtaining customers," that is "commercially reasonable to anticipate." *Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp. 2d 86, 99 (D.D.C. 2009) (*citing Carr v. Brown*, 395 A.2d 79, 84 (D.C.1978)). Thus, to prevail, "a plaintiff obviously need not demonstrate the existence of a contract, but merely a prospective advantageous business transaction." *Casco Marina Dev., L.L.C. v. D.C. Redevelopment Land Agency*, 834 A.2d 77, 84 (D.C. 2003).

Here, by their use of Federal Title's services, Defendants are well aware that Federal Title has the prospective business expectancy of the opportunity of obtaining customers, and also that Federal Title has established numerous existing contractual and business relationships that are damaged by the publication of defamatory statements. Furthermore, "[a]n interferer's knowledge of a plaintiff's relationship or expectancy may be shown by the interferer's conduct or spiteful or threatening words." *Nat'l R.R.,* 592 F. Supp. 2d at 98. Nadel's accusations of criminal misconduct are therefore sufficient to establish knowledge at the pleading stage.

The cases relied upon by Defendants' confirm that their motion should be denied. *Newmyer* is not applicable because it was decided under the summary judgment standard after the parties had an opportunity to conduct discovery. *Id.*, 128 A.3d at 1023. In *Sabre Int'l Sec. v. Torres Advanced Enter. Sols., Inc.*, 857 F. Supp. 2d 97, 104 (D.D.C. 2012), the Court did not dismiss on the knowledge prong, but instead found that intent to breach a contract was insufficient for purposes of stating a claim for a tort. *Id.* at 104. In fact, the Court found that to state a claim, "[c]onduct must be more egregious, for example, it must involve libel, slander [etc.]," which is precisely what is alleged here. *Id.* The motion should be denied.

E. The Anti-SLAPP Act Does Not Apply

Again, Nadel and McDermott essentially repeat the arguments already addressed in Federal Title's Opposition to Smith and Wrona's Motion. Remarkably, Nadel and McDermott also completely ignore that the Anti-SLAPP Act expressly excludes coverage for "statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public

significance." D.C. Code Ann. § 16-5501(3). Such statements on private matters are simply not an "issue of public interest" covered by the Act. *Id.* The underlying lawsuit is a private commercial dispute that does not relate to any political issue or public policy debate, and is therefore excluded from the Act. And even if the underlying lawsuit itself were an issue of public interest because it involves cybercrime, Nadel's statements are still excluded because they are, on their face, expressly directed toward protecting his and his clients' commercial interests. That Federal Title may have used the article as an opportunity to share information with the public does not transform Nadel's statement that "Federal Title either caused our money to be stolen or stole it, and we need to get our money back" into a public service announcement.

Contrary to Defendants' assertions, this lawsuit is not a "classic SLAAP countersuit," as it is not 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*." *Mann*, 150 A.3d at 1226 (defining a SLAPP lawsuit) (emphasis added). Moreover, this action is clearly not an attempt to stifle free speech because it does not name a single media defendant that has reported on Smith and Wrona's underlying lawsuit. Instead, it seeks redress for the substantial damage to Plaintiffs caused when Defendants falsely and publicly accused Federal Title of criminal conduct. The Anti-SLAPP Act simply does not apply.

F. Alternatively, the Court Should Permit Discovery

As set forth above and in Federal Title's Opposition to Smith and Wrona's Motion all of the motions to dismiss should be denied. Should the Court find otherwise, in addition to the discovery requested in the Opposition to Smith and Wrona's Motion, Plaintiffs

request that they be permitted to conduct discovery into the facts asserted in Defendant Nadel's affidavit. Plaintiffs would request additional briefing on discovery as needed.

CONCLUSION

For the foregoing reasons, Plaintiffs Close It! Title Services Inc. d/b/a Federal Title & Escrow Company ("Federal Title") and Todd Ewing ("Ewing") respectfully request that the Court deny the Motion To Dismiss And Special Motion To Dismiss submitted by Defendants McDermott Will & Emery and Michael Nadel.

Dated October 2, 2018

Respectfully submitted,

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	)	Judge William M. Jackson
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______________________________	)	

ORDER

This matter is before the Court on the Motion To Dismiss And Special Motion To Dismiss submitted by Defendants McDermott Will & Emery and Michael Nadel and Plaintiff's Opposition thereto. After careful consideration of the Motion and the Opposition, Defendants' Motion is **DENIED**; and it is further

ORDERED, that Plaintiffs shall be awarded their reasonable attorney's fees and costs incurred for opposing this frivolous motion. Plaintiffs shall submit a Bill of Costs within fourteen days of this Order.

SO ORDERED.

October ___, 2018

____
Judge William M. Jackson

Copies eserved to:

All Counsel listed on CaseFileXpress

CERTIFICATE OF SERVICE

I, Andrew J. Lawrence, hereby certify that on this 2nd day of October, 2018, I caused to be served a true and correct copy of the foregoing Opposition on the persons listed below by electronic filing:

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