IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SEAN MCMAHON,	)	
	)	
	)	
	)	
Plaintiff,	)	
	)	
	)	
	)	
v.	)	C.A. No: S22C-06-022 MHC
	)	
	)	
TIFFANY MCMAHON,	)	
	)	
	)	
	)	
Defendant.	)	

ORDER

Submitted: April 16th, 2024
Decided: April 29th, 2024

Upon Defendants' Motion to Dismiss,
GRANTED.

Anthony N. Delcollo, Esquire, Thomas H. Kramer, Esquire, Alpa V. Bhatia, Esquire, Offit Kurman, 222 Delaware Avenue, Suite 1105, Wilmington, Delaware, 19801, Attorneys for Plaintiff.

David. L. Finger, Esquire, Finger & Slanina, LLC, One Commerce Center, 1201 N. Orange St., 7th floor, Wilmington, Delaware 19801, Attorney for Defendant.

CONNER, J

Introduction

Before the Court is the motion of Tiffany McMahon ("Defendant") to dismiss her brother in-law Sean McMahon's ("Plaintiff") Amended Complaint. The Amended Complaint contains five counts: (I) malicious prosecution; (II) abuse of process; (III) slander *per se*; (IV) libel; and (V) intentional infliction of emotional distress.

Factual and Procedural History

The facts of this case stem from a family squabble. Tragically, in September of 2019, Darin McMahon ("Darin"), brother to Plaintiff and husband of Defendant, was severely injured in a firearm training accident leaving him paralyzed from the neck down. After the accident Darin was awarded a seven-figure settlement, a fact that may or may not color this litigation. Thereafter, Darin required constant life care, which (among other omnipresent factors) appears to have started the family strife. Rather than attempt to encompass the entire factual history leading up to these claims, I will set out the facts relevant to each claim in the analysis section.

Plaintiff filed his Amended Complaint on November 29, 2022. Defendant filed her original motion to dismiss on December 7, 2022. Plaintiff responded on January 13, 2023. The Court heard oral argument on January 20, 2023. The parties agreed to continue their settlement discussions but ultimately did not reach an agreement because one party (whose identity remains unknown to the Court) refused

to formally apologize to the other. A second motion to dismiss was filed by Defendant on March 20, 2023. Plaintiff responded on April 28, 2023, and Defendant replied again on May 10, 2023. Oral Argument was scheduled for October 2, 2023, but was continued in light of additional settlement discussions between the parties. Sadly, in November of 2023, Darin passed away.

Months later in February of 2024 Plaintiff notified the Court that settlement negotiations were unsuccessful. Oral argument was scheduled for April 16, 2024. At the outset of this second oral argument, defense counsel notified the Court that Plaintiff had been arrested just weeks earlier and charged with harassment and stalking. The victim of these alleged crimes is Defendant Tiffany McMahon. It appears to the Court from the posture of the parties at oral argument that Darin's death and Plaintiff's pending criminal charges wherein Defendant is the victim have exacerbated the family strife.

Standard of Review

Superior Court Rule 12(b)(6) empowers the Court to dismiss an action for "failure to state a claim upon which relief can be granted."[1] "The Court will accept all well-pleaded allegations as true and draw every reasonable factual inference in favor of the nonmoving party."[2] "[A] complaint will not be dismissed for failure to

[1] Super. Ct. Civ. R. 12(b)(6).
[2] *Gray's Landing Dev., LLC v. Blackston Cove Dev*., LLC, 2023 WL 2609633, at*2 (Del. Super. Ct. Mar. 21, 2023).

state a claim upon which relief can be granted unless it appears to a certainty that the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[3] With this in mind, "the trial court is not required to accept every strained interpretation of the allegations proposed by the plaintiff, but the plaintiff is entitled to all reasonable inferences that logically flow from the face of the complaint."[4]

Analysis

I. Malicious Prosecution

Delaware Courts disfavor malicious prosecution actions because they discourage citizens from seeking redress in the court system.[5] For Plaintiff to sustain a cause of action for malicious prosecution he must sufficiently plead: "(1) the institution of civil proceedings; (2) without probable cause; (3) with malice; (4) the termination of the proceedings in the aggrieved party's favor; and (5) damages which were inflicted upon the aggrieved party by seizure of property or other special injury."[6] "More importantly, under the well-settled law of this State, a plaintiff cannot maintain a cause of action for malicious prosecution where the termination of the

[3] *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952), opinion adhered to on reargument, 95 A.2d 460 (Del. 1953).
[4] *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).
[5] *Nevins v. Bryan*, 2005 WL 2249520, at *1 (Del. Super. Ct. Sep. 8, 2005).
[6] *Id.*

prosecution has been brought about by the procurement of the party prosecuted, or by compromise, agreement, or settlement of the parties."[7]

The malicious prosecution charge before the Court stems from a Petition for Protection from Abuse ("PFA") filed by Defendant against Plaintiff and ultimately ordered by the Family Court in Sussex County.

On January 6, 2022, Plaintiff alleges he heard Defendant was having suicidal thoughts. Claiming to be concerned for the wellbeing of Defendant and her family prior to an impending snowstorm, Plaintiff called 911 and requested law enforcement conduct a welfare check on Defendant and her family at their home. Given the toxic state of their relationship at that time, Defendant considered this an act of intimidation and a threat against her and her family by Plaintiff. In response to the perceived threat, Defendant filed a PFA against Plaintiff. The petition was granted and the Protection from Abuse Order ("PFA Order") resulted in the temporary seizure of Plaintiff's firearm collection. Plaintiff believes that Defendant's filing of the PFA was an act of malicious prosecution.

Plaintiff sufficiently pleads that Defendant's filing of the PFA took place without probable cause, with malice, and caused him damages in the form of property seizure. However, Plaintiff cannot maintain this malicious prosecution cause of action because the PFA Order was terminated by an agreement between the parties.

[7] *Servino v. Med. Ctr. of Delaware, Inc.*, 1997 WL 527979, at*8 (Del. Super. Ct. Feb. 11, 1997).

Plaintiff admits in paragraph 38 of his Amended Complaint that "[t]he PFA was resolved between the Parties without a finding against Plaintiff McMahon."[8]

Undeterred by Delaware common law, Plaintiff cites a South Carolina case from 1934. That case held that malicious prosecution charges remain actionable when the termination of prosecution is the result of compromise if that compromise was made under coercion or duress.[9] The Court declines to adopt this unpersuasive authority. Even if the Court were to accept that authority as binding, the Amended Complaint is silent as to any indication that Plaintiff agreed to terminate the PFA Order under duress. Settling litigation to avoid its inherent inconvenience is not duress. Plaintiff has failed to allege any facts that could lead to the reasonable conclusion that he settled the PFA Order while under duress. The Court cannot allow this claim to survive the motion and therefore Count I is **DISMISSED.**

[8] Pl. Amend. Compl. ¶38.
[9] *Jennings v. Clearwater Mfg. Co.*, 172 S.E. 870, 873 (S.C. 1934).

II. Abuse of Process

"Unlike malicious prosecution claims, which focus on a party's initiation of the legal process, abuse of process concerns perversion[s] of the process after it has been issued."[10] To survive a motion to dismiss on a claim of abuse of process a plaintiff must sufficiently plead two elements.[11] The first element is that a Defendant's use of judicial process had an ulterior purpose.[12] "Merely carrying out the process to its authorized conclusions, even though with bad intentions, will not result in liability."[13] Therefore, the second element is "a willful act in the use of the process not proper in the regular conduct of the proceedings."[14] Delaware Courts have made it clear that a definite act or threat not authorized by the process is needed to sustain an abuse of process action.[15] Some overt act must be taken in addition to the initiating of the legal proceedings.[16] "The mere filing or maintenance of a lawsuit, even for an improper purpose, is not a proper basis for an abuse of process action."[17]

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[10] *Korotki v. Hiller & Arban, LLC*, 2016 WL 3637382, at *2 (Del. Super. Ct. July 1, 2016) (Internal citations omitted.).
[11] *Id.*
[12] *Id.*
[13] *Preferred Inv. Servs., Inc. v. T & H Bail Bonds, Inc.*, 2013 WL 3934992, at*23 (Del. Ch. July 24, 2013), aff'd sub nom., 108 A.3d 1225 (Del. 2015).
[14] *Korotki*, 2016 WL 3637382, at *2.
[15] *Pazuniak Law Office LLC v. Pi-Net Int'l, Inc.*, 2017 WL 4019162, at *4 (Del. Super. Ct. Aug. 25, 2017).
[16] *Korotki*, 2016 WL 3637382, at *3.
[17] *Id*.

In his Amended Complaint, Plaintiff alleges that Defendant's filing the PFA was done to retaliate and with the pretextual intent of depriving him of his firearms. Additionally, at both oral arguments and in his briefs, Plaintiff argues that Defendant sent the PFA Order to Rehoboth Elementary School to embarrass him and his wife.[18]

The facts pleaded in the Amended Complaint, even when viewed in a light most favorable to the Plaintiff, do not support an abuse of process claim. Although the Plaintiff claims the Defendant filed the PFA to deprive him of his firearms, to harass him, and to restrict his access to Darin, absent an additional overt act not proper in the regular proceedings of a PFA filing, Plaintiff's claim must fail.

The Defendant's act of providing a copy of the PFA Order to Rehoboth Elementary School, her place of employment and her children's school, is not improper in the regular course of a PFA. This decision by Defendant is a logical next step by a PFA petitioner to ensure the safety of herself and children, not an improper act in the ordinary course of a PFA filing. The fact that Plaintiff's wife also worked at Rehoboth Elementary School does not make this act improper. Therefore, these actions do not rise to the level of a cognizable claim for Abuse of Process. Count II is **DISMISSED.**

[18] Plaintiff's wife, Kathy McMahon, and Defendant both worked at Rehoboth Elementary School.

III. Defamation – Slander *Per Se*

The general rule regarding oral defamation is that it is not actionable without special damages.[19] However, there are four categories of oral defamation, also referred to as slander *per se*, that do not require proof of special damages.[20] In order for Plaintiff to plead slander *per se* he must show Defendant's statements were those which: "(1) malign one in a trade, business or profession, (2) impute a crime, (3) imply that one has a loathsome disease, or (4) impute unchastity to a woman."[21]

Plaintiff asserts that Defendant made false statements to her colleagues at Rehoboth Elementary School. Plaintiff pleads these false statements include things like Plaintiff is the "type of person to threaten violence against [Defendant] and [Defendant's] family", Plaintiff was "abusive toward [Defendant]", "[Plaintiff] did not properly help with or provide care for [Darin]," and more generally that Plaintiff filed a false police report.

[19] *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978).
[20] *Id.*
[21] *Id.*

a. Plaintiff has failed to sufficiently plead that Defendant's alleged statements maligned him in trade, business, or profession.

Plaintiff argues the alleged statements of Defendant caused harm to Plaintiff's reputation and the reputation of his small business. Besides general allegations of harm to Plaintiff's small business reputation, he has provided no actual evidence that his business has suffered.

To malign means to speak about someone in a spitefully critical manner. So, to malign one in a trade, business, or profession would mean to speak critically about someone's job and/or work. None of the comments Defendant allegedly made have anything to do with Plaintiff's pest control business nor any trade, business, or profession. Plaintiff alleges the Defendant's statements caused harm to his reputation and the reputation of his small business, yet he pleads nothing to support this contention.

Plaintiff's strained interpretation of slander *per se* blurs the lines between maligning one personally and professionally, conflating the two separate causes of action as one in the same. While the Court must acknowledge that the reputation of any business is inextricably linked to its proprietor, this reality does not change well settled Delaware Law. Under Plaintiff's theory, a personally slanderous statement published about a business owner so too maligns them professionally and is therefore slander *per se* without need of special damages. This is not the law in Delaware.

To succeed on a claim for oral defamation Plaintiff must prove special damages.[22] To succeed on a claim for slander *per se* Plaintiff must sufficiently plead that Defendant maligned him in his professional, not personal, capacity.[23] Plaintiff has failed to meet either of those requirements and has further failed to proffer any tangible evidence that his business has suffered from such statements. Absent such pleadings, this claim cannot survive a motion to dismiss.

b. Plaintiff has failed to sufficiently plead that Defendant's alleged statements imputed a crime upon him.

A statement is actionable absent special damages as slander *per se* if it imputes a crime upon the plaintiff. Plaintiff alleges Defendant told multiple people, including colleagues at Rehoboth Elementary School, that Plaintiff filed a false police report. Pursuant to 11 *Del. C.* § 1245, it is a crime in Delaware to initiate a false police report, therefore if sufficiently alleged with specificity such a claim may survive a motion to dismiss. Plaintiff has failed to plead with specificity.

In his Amended Complaint Plaintiff does not provide the Defendant's allegedly defamatory statement nor does he claim with specificity who the statements were published to. Rather, Plaintiff makes the general allegation that Defendant told her colleagues at work Plaintiff filed a false police report. When

[22] *Spence,* 396 A.2d 967, 970.
[23] *Id.*

directly asked at oral argument in April of 2024, Plaintiff could not provide with specificity the statement made nor could he provide the person or persons it was made to.

Plaintiff relies on *Gilliland v. St. Joseph's at Providence Creek*[24] to support the contention that the slander *per se* claim cannot be dismissed if the communication imputes a crime to plaintiff. *Gilliand* is factually distinguishable from the case at bar and survived a motion to dismiss because, "Plaintiff … provided the date, place, the false allegation, who the communication was published to, and how the statements damaged the Plaintiff."[25] In the matter presently before the Court, Plaintiff has not provided the date, the statement imputing a crime, who the communication was published to or how the alleged statements damaged him with any degree of specificity. Absent such specificity, a mere conclusory allegation that Defendant imputed a crime to plaintiff is insufficient to survive a motion to dismiss. For the foregoing reasons, Count III is **DISMISSED.**

IV. Defamation – Libel

For a libel claim to survive a motion to dismiss it must sufficiently plead five elements: (1) the defamatory character of the communication; (2) publication; (3)

[24] 2006 WL 258259 (Del. Super. Ct. Jan. 27, 2006).
[25] *Id.* at 21.

that the communication refers to the plaintiff; (4) the third party's understanding of the communication's defamatory character; and, (5) injury.[26]

In the fall of 2020 Defendant's co-worker sent her a photo of black truck parked outside of Rehoboth Elementary School, their place of work. Accompanying the photograph of the truck were the texts "it's likely they are waiting for someone" and "want to make sure they aren't here to talk to you/ambush." Because Plaintiff drives a similar looking truck, he argues those messages imply that Defendant has made previously untrue and defamatory statements about him to her co-worker.

Plaintiff is unable to point to any facts that would lead to the reasonable inference that Defendant previously said anything defamatory to her co-worker that would prompt her to text Defendant a picture of the black truck and the attached statements. There is nothing in those text messages that refers to Plaintiff. In fact, Plaintiff's truck is blue, not black. Plaintiff has not sufficiently plead that the communication refers to him and therefore cannot sustain a claim of libel with regards to the texts from her co-worker.

After receiving those text messages from her co-worker, Defendant forwarded the image of the truck to Darin with the text "reason for it? Or should we just deny this[.]" Plaintiff contends these messages to Darin are also defamatory because they imply that Plaintiff was stalking Defendant, an implication that has not aged well.

[26] *Gilliland*, 2006 WL 258259, at *8.

Again, there is nothing in those text messages that refers to Plaintiff. Plaintiff has failed to sufficiently plead the texts were about him and cannot satisfy the third element of a defamation claim. Therefore, Plaintiff cannot sustain a claim of libel with regards to those messages between Defendant and Darin.

It should be noted that although Plaintiff is entitled to all logical inferences that flow from the face of a well-pleaded complaint, the Court cannot accept every strained interpretation of the posed allegations.[27] Allegations are considered well-plead if they give the opposing party notice of the claim.[28] Defendant is not on notice of this claim because Plaintiff is unable to state what the allegedly defamatory statements were.

Although Plaintiff claims Defendant must have said something defamatory to her co-worker that prompted the text message, he provides no actual evidence and/or proof of Defendant's alleged defamatory statements. At oral argument Plaintiff argued that perhaps discovery would lead to sufficient evidence to support their claims. This is an improper use of the judicial process. There is no set of facts from which it could be inferred from the pleadings that Plaintiff could prevail. Likewise, Plaintiff is unable to satisfy all elements of a defamation claim, therefore Count IV is **DISMISSED.**

[27] *Malpiede*, 780 A.2d 1075, 1082.
[28] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002).

V. Intentional Infliction of Emotional Distress

To survive a motion to dismiss on a claim of intentional infliction of emotional distress (IIED) Plaintiff must sufficiently plead that Defendant engaged in extreme or outrageous conduct that caused severe emotional distress.[29] Extreme or outrageous conduct is "conduct that exceeds the bounds of decency and is regarded as intolerable in a civilized community."[30]

Plaintiff alleges the Defendant's act of filing the PFA was extreme and outrageous because: (1) the PFA contained untrue statements about Plaintiff; (2) Defendant knew any allegations of violence would extremely disturb Plaintiff due to his prior profession as a Pennsylvania State Trooper; (3) Defendant knew filing a PFA would require Plaintiff to surrender his firearms; and (4) a clerical error regarding a misstated serial number on one of Plaintiff's firearms caused him to have to endure police interrogation about a stolen weapon. Plaintiff argues each of these instances have caused him extreme emotional distress. I will address each in turn.

The filing of a PFA is a common occurrence in the Family Court system. There is nothing extreme or outrageous about this action, it does not exceed the bounds of decency, nor is it intolerable in a civilized community. Defendant is

[29] *Hunt ex rel. DeSombre v. State, Dep't of Safety & Homeland Sec., Div. of Delaware State Police*, 69 A.3d 360, 367 (Del. 2013).
[30] *Id*. (citing *Goode v. Bayhealth Med. Ctr., Inc*., 931 A.2d 437 (Del. 2007)).

entitled to utilize the court systems in good faith to protect her and her family by filing a PFA.

The Plaintiff's former occupation and his sensitivity to allegations of misconduct do not preclude the Defendant from filing a PFA. Further, petitioning for protection from abuse does not exceed the bounds of decency nor is it intolerable in a civilized community. As a former police officer Plaintiff should have a greater understanding and appreciation for the necessity of these types of court proceedings.

The Family Court, not Defendant, forced Plaintiff to surrender his weapons. The fact that the law required Plaintiff to surrender his firearms does not raise an otherwise legal act to the level of extreme or outrageous.

Finally, Plaintiff cannot maintain a cause of action for IIED against Defendant based on the clerical error of a third party. Even if the clerical error resulted in an unpleasant experience for Plaintiff, it was not an action caused by the Defendant and therefore is not actionable against the Defendant.

If the Court allowed every protection from abuse respondent to sue its petitioner for IIED, the waste of judicial resources would be extreme and outrageous. Plaintiff is unable to prove that any of Defendant's alleged conduct meets the requisite level of extreme and outrageous, therefore Count V is **DISMISSED.**

Conclusion

"Courts are available for many purposes, and providing an outlet clothed with some sense of civility for minor emotional controversies is one service courts perform."[31] In acknowledging this reality, Judge Quillen reminds us that "…we all suffer some inconvenience as the price of living. But, de minimus non curat lex."[32] To put the Court's eloquent wordplay more bluntly, the law does not govern trifles.[33] One may not drain scarce judicial resources in the furtherance of petty domestic disagreements absent a cognizable claim. There are no reasonably conceivable set of circumstances in which Plaintiff could recover under any of the claims levied against Defendant, therefore the motion to dismiss is **GRANTED**.

IT IS SO ORDERED.

/s/ Mark H. Conner
Mark H. Conner, Judge

cc: Prothonotary

[31] *Read v. Carpenter*, 1995 WL 945544, at *6 n.3 (Del. Super. Ct. June 8, 1995), aff'd, 670 A.2d 1340 (Del. 1995).
[32] *Id.*
[33] *de minimus non curat lex*, Merriam Webster Online Dictionary, (https://www.merriam-webster.com/dictionary/de%20minimis%20non%20curat%20lex last visited April 29, 2024).