IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

I. JOEL HALPERN, O.D., HALPERN EYE ASSOCIATES, P.A., and HALPERN MEDICAL SERVICES, LLC,	:	
	:	**C.A. No: K11C-03-011 (RBY)**
Plaintiffs,	:	
v.	:	
CARL MASCHAUER, O.D., and SUSSEX EYE CENTER, P.A.,	:	
Defendants.	:	

Submitted: September 10, 2013
Decided: October 16, 2013

Upon Consideration of
Defendants Motion for Summary Judgment
GRANTED

ORDER

Benjamin A. Schwartz, Esq., Schwartz & Schwartz, Dover, Delaware for Plaintiffs.

Kevin J. Connors, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware for Defendants.

Young, J.

SUMMARY

Plaintiffs, I. Joel Halpern, O.D., Halpern Eye Associates, P.A. and Halpern Medical Services, LLC, (each and all "Halpern" or "Plaintiff") initiated the instant lawsuit against Carl Maschauer, O.D. and Sussex Eye Center, P.A., (each and all "Maschauer" or "Defendant") to recover damages on two fronts: Count I, allegedly defamatory comments attributed to Maschauer; and Count II, intentional interference with contractual relations.

This Court considers two issues: 1) whether summary judgment dismissal of Count I of Plaintiffs' Amended Complaint is appropriate based upon any statements made by Maschauer to an agent of Plaintiff's; and 2) whether Plaintiff can maintain a claim as to Count II of the Amended Complaint, given the withdrawal of that claim.

STANDARD OF REVIEW

In a motion for summary judgment, the burden is on the moving party to show, with a reasonable degree of certainty, that no genuine issue of material fact exists and judgment as a matter of law is permitted. When considering a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party. Further, if the record indicates that a material fact is disputed, or if further inquiry into the facts is necessary, summary judgment is not appropriate.[1]

"A prima facie case of defamation requires the following elements: a) the defamatory character of the communication; b) publication; c) reference to the plaintiff; d) understanding by third parties of the defamatory character of the

[1] R. Civ. P. 56 c).

communication; and e) injury."[2] The question in this context is the extent to which a principal and an agent are one.

"Actual authority is that authority which a principal expressly or implicitly grants to an agent.' When an agent commits an act with actual authority, the 'principal is bound by the legal consequences of the agent's action.'"[3]

To sustain a claim for intentional interference with prospective contractual relations, a plaintiff must establish: (1) the reasonable probability of a business opportunity, (2) the intentional interference by defendant with the opportunity, (3) proximate causation, and (4) damages, all of which must be considered in light of defendant's privilege to compete or protect his business interests in a fair and lawful manner.[4]

To survive a motion for summary judgment for failure to state a breach of contract claim, Plaintiff must demonstrate: 1) the existence of the contract, whether express or implied; 2) the breach of an obligation imposed by that contract; and 3) the resultant damage to Plaintiff."[5]

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[2] BrooksMcCollum v. Emerald Ridge Bd. Of Dir., 29 A.3d 245, 2011 Del. LEXIS 541 at *7-*8 n.13 (Del. 2011).

[3] B.A.S.S. Group, LLC v. Coastal Supply Co., Inc., 2009 Del. Ch. LEXIS 166 at *14 (June 19, 2009.

[4] *DeBonaventura v. Nationwide Mut. Ins.*, 419 A.2d 942 (1980)(citing Bowl-Mor, supra; Regal Home Distribs., Inc. v. Gordon, Del.Super., 66 A.2d 754 (1949)).

[5] *VLIW Tech., L.L.C. v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

DISCUSSION

Issues Presented:

I. Is summary judgement dismissal of Count I of the Amended Complaint relevant to any statements made by Defendant to Marshall appropriate given the lack of any publication by Maschauer to any unprivileged party?

Defendant argues that Plaintiff's Count I claims of defamation against Maschauer fail to the extent that they were made to an agent of Plaintiff.

Lack of Third-Party Publication

Defendant alleges that, when private investigator Gary Marshall ("Marshall") heard Maschauer's statements, no third party publication by Maschauer to any unprivileged party existed. Defendant refers to Paragraph 13 of Plaintiff's Amended Complaint, which alleges that Halpern employed the services of Marshall specifically to investigate Maschauer as the source of defamatory rumors, although Halpern had no existing information from anyone as to the identity of the source. Marshall and Halpern together planned for Marshall to pose as a patient of Maschauer's in order to obtain information from him.

Defendant argues that Marshall was acting as an agent of Halpern's, not as an unprivileged third party, with the legal consequence that any statements made by Maschauer to Marshall would be the same as if the communication had been made to Halpern directly.[6]

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[6] *Cornell Glasglow, LLC v. La Granger Properties, LLC*, 2012 Del. Super. LEXIS 266 at *37-*38 (June 6, 2012) (Only the defendant who is alleged to have made a

In response, Plaintiff asserts in the Answering Brief that there is no known "privileged person" doctrine absolving slanderers of liability for their torts, even when they make false statements to individuals related in some way to their victims. Plaintiff contends that the *Cornell Glasgow* case cited by Defendant does not stand for the proposition for which they are arguing. Plaintiff states that that decision contains a ruling on a Rule 12(b)(6) motion where plaintiff's defamation claims were permitted to go forward, but plaintiff's civil conspiracy to commit defamation claim could not go forward, because the alleged conspirators were a company and its offices. Plaintiff argues that the cited case, therefore, has no application here. In fact, that case is not applicable here, because the Court did not actually determine the issue of agency. The Court there held that the pled facts were sufficient to state a claim for defamation under the low pleading threshold for a motion to dismiss, but whether additional facts developed in discovery would reveal that the alleged defamatory statements were protected by an applicable privilege could not be determined on that motion.[7]

Further, Plaintiff claims that no case law exists supporting the proposition that another person, either a private investigator or some other independent contractor, does not constitute a third party for publication purposes. Plaintiff argues that Marshall went to Maschauer's office for an eye exam, doing so for personal reasons as well as for Halpern. Plaintiff alleges that Marshall was not there as an employee

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> defamatory statement as an agent of La Grange, and La Grange as the principle, can be held liable for defamation with respect to that statement.")

[7] *Id*. at *10

of Halpern, but rather as a patient as well as an independent contractor or investigator. Plaintiff references same items in the Record to show that Marshall was not acting as or in the place of Halpern.

A conflict exists in decisions as to whether the communication of defamatory matter to an agent of the person defamed constitutes a publication that will complete the foundation for an action of slander.[8] Some courts, in cases where it does not appear that the communication was induced or procured for the purpose of the action, have taken the view that, where the alleged defamatory utterance is written or spoken in response to the agent's inquiry for facts, there is no publication.[9]

Even in other courts, apparently furnishing the only authority to the contrary, the cases generally hold that, where slanderous or libelous statements are induced or procured by plaintiff's agent for the purpose of bringing a suit, the plaintiff will not be permitted to recover. The theory there is that, under such circumstances, the words are not actionable; or, in effect, that there is no publication.[10]

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[8] T.C. Williams, Annotation, *Communication to agent or representative of person defamed as publication or as privileged*, 172 A.L.R. 208 (1948).

[9] *Beck v. Oden*, 64 Ga. App. 407 (1941) (sending of letter to plaintiff's friend did not constitute a publication because plaintiff appointed him as his 'eyes and ears'), *Taylor v. McDaniels*, 139 Okla. 262 (1929)(Court stated that where the matter alleged to be libelous was written at the solicitation of the agent of the plaintiff and delivered to the agent, it is as though it had been written and delivered to the plaintiff himself, which does not amount to publication).

[10] *Richardson v. Gunby*, 88 Kan. 47 (1912)(Court stated that the reason why a person cannot recover in such a case where he instigates or invites the libel is that he does it for the purpose of basing an action for damages upon it), *White v.*

Hence, there appears to be no relevant and direct Delaware case law on whether a private investigator can be a third party for publication. Here, Marshall induced allegedly slanderous statements from Maschauer for his principal's purpose of bringing a suit. In Marshall's deposition, he stated:

> "We kind of put our heads together, came up with the idea that I would go down to Sussex Eye Center and pose as a patient, have an actual exam done by Maschauer himself, at which time I would try and solicit some of these rumors, that, you know, he was...aware of by Maschauer."

Plaintiff contends that Marshall was visiting Maschauer primarily for an eye exam, and merely fortuitously was doing an investigation for Halpern. However, Marshall's statement above clearly indicates that Marshall's motivation for visiting Maschauer was to induce the alleged defamatory statements that Halpern had allegedly heard so much about from friends and employees.

Marshall had never visited Maschauer for an eye exam before Halpern retained him for this investigation. When Marshall posed as a patient at Sussex Eye, he expressed his dissatisfaction with the Halpern's care. When asked at deposition why he chose to express his dissatisfaction with Halpern, he stated that it was part of his

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Newcomb, 25 A.D. 397 (1898) (Court held that when defendant was induced to make certain statements about plaintiff to detectives sent by plaintiff, this did not constitute publication).

"cover story," and that this story was, in fact, not accurate. That is, Marshall made negative comments about Halpern in order to induce a defamatory response about Halpern from Maschauer. Indeed, Marshall even made an audio-recording of his interaction with Maschauer, and took several pictures on his cell phone to show Halpern that he was investigating the subject on behalf of his client. He referenced the visit as a normal investigative process to obtain information for his clients. In the affidavit, Marshall states, "When he asked me to investigate Maschauer, I considered various ways of contacting Maschauer to see if he would make defamatory statements about Halpern." He goes on to say that, typically, he would contact the subject in a restaurant or various other public venues to instigate a conversation with the subject, gleaning information about the person or topic he is investigating in the process. Although Marshall does state that he needed an eye exam, thereby "killing two birds with one stone" by becoming a patient of Sussex Eye, he admits that he was there in the capacity of an investigator. Marshall was an agent. He elicited defamatory statements from Maschauer with the purpose of obtaining the statements in furtherance of litigation. Marshall is a privileged third party. Therefore, there was no third party publication when Maschauer made the alleged defamatory statements to Marshall.

CONCLUSION

Defendant's Motion for Summary Judgment on Count I as to any statements made by Defendant to Marshall is **GRANTED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Counsel
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