IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SUNSTAR VENTURES, LLC, a Delaware limited liability company, and JOHN HYNANSKY, Plaintiffs, v. CHRISTOPHER J. TIGANI and N.K.S. DISTRIBUTORS, INC., a Delaware corporation, Defendants.	
CJT AIR, LLC, a Delaware limited liability company, Plaintiff, v. WINNER 614H, LLC, a Delaware limited liability company and JOHN HYNANSKY, Defendants.	Consol. C.A. No. 08C-04-042 JAP
CHRISTOPHER J. TIGANI, Plaintiff, v. JOHN HYNANSKY, Defendant.	

Submitted: January 5, 2009
Decided: April 30, 2009

On Christopher J. Tigani and N.K.S. Distributers, Inc.'s Motion to Dismiss Sunstar Ventures, LLC and John Hynansky's Amended Complaint.
DENIED.

On John Hynansky's Motion to Dismiss Defamation Claims Asserted by Christopher J. Tigani
DENIED.

MEMORANDUM OPINION

David J. Margules, Esquire, Evan O. Williford, Esquire, Sean M. Brennecke, Esquire, Bouchard Margules & Friedlander, P.A., Wilmington, Delaware, Attorneys for Plaintiffs.

John G. Harris, Esquire, Riley Riper Hollin & Colagreco, Wilmington, Delaware, Attorney for Defendants.

PARKINS, J.

I. INTRODUCTION

Mr. Hynansky and Mr. Tigani allegedly made an oral agreement that included, among other things, the lease and sale of Mr. Hynansky's home to Mr. Tigani. This agreement is the focus of three lawsuits filed in this Court involving Mr. Hynansky and Mr. Tigani: (1) a breach of contract action, (2) a debt action, and (3) a defamation action.[1] Before the Court is a motion to dismiss the contract action and a motion to dismiss the defamation action. For the reasons stated below, both motions are **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Residential Transaction

In the spring of 2007, Mr. Hynansky and Mr. Tigani reached a "handshake agreement," pursuant to which (i) Mr. Tigani would purchase Mr. Hynansky's family home on Kennett Pike for $5 million, (ii) N.K.S. Distributers, Inc. ("NKS"), a corporation owned by Mr. Tigani, would lease warehouse space in Dover owned by Mr. Hynansky's company, Sunstar Ventures, L.L.C. ("Sunstar"), and (iii) Mr. Hynansky would give Mr. Tigani a Porshe automobile worth over $100,000.

Mr. Tigani was to take immediate possession of the home, although closing on the home would not take place before July 2009. The alleged

[1] The Court has consolidated the three cases for all purposes.

agreement contemplated that until the transfer of title, Mr. Tigani would lease the home and assume related expenses, such as taxes, utilities, and maintenance. Mr. Tigani had the right to make modifications to the home, with Mr. Hynansky retaining a limited right to approve material work. The aggregate monthly rent for the home and warehouse was $25,000 (two-thirds allocated to the warehouse). In addition, Mr. Tigani was to make three principal payments of $500,000 prior to the transfer of the house title. Mr. Hynansky owed Mr. Tigani $440,000 from an unrelated transaction which would be offset against the first $500,000 payment.[2] At closing, Mr. Tigani was to pay the remaining $3.5 million.

Mr. Tigani took possession of the home and began renovations. The terms of this deal were to be confirmed in a written contract drafted by the parties' attorneys, however, by March 2008 there was still no formal contract. Consequently, Mr. Hynansky sent Mr. Tigani the following email:

> Dear Chris:
>
> I've been trying to communicate with you and finalize our agreement for the last 8 months to a year. I have again tried to communicate with you to finalize our agreement over the past week or so, specifically the last 2 days. Your recent email to me is unacceptable. You seem to believe that you paid me a lot for the house. I believe you did not because as you remember I never really wanted to sell it, but nevertheless, we struck a deal for $5MM. Additionally, I gave you a new Porsche and we agreed on

[2] The $440,000 is a debt allegedly incurred by Mr. Hynansky and owed to CJT Air, LLC, whose managing-member is Mr. Tigani. This debt is the focus of a complaint filed by CJT Air against Mr. Hynansky and Winner 614JH (the "CJT Air Action").

terms, including deposit schedules. You clearly understood, and I clearly stated to you at that time, that I had two objectives for the sale.

(1) To lease it to you for a period of two years so I would not have a major tax impact because I have owned the house for over 25 years.

(2) In my recent divorce settlement, I have cash flow commitments to Mrs. Hynansky, which I clearly defined for you.

I trusted you, therefore, I let you work on MY HOUSE and tear it apart without a final signed contract, something I've never done before, and since you have possession of the house and are working on the house you no longer feel the necessity or the obligation to keep our original terms. Additionally, you know that we have had numerous issues:

(1) Disposal of my personal possessions before I reviewed them.

(2) The eviction of my maid.

(3) The removal of the balance of my furniture without my permission.

This is to inform you that I leave for Ukraine Monday, March 24th. THIS IS YOUR NOTIFICATION THAT IF OUR AGREEMENT IS NOT FINALIZED PRIOR TO MY TRIP, ON SUBSTANTIALLY THE TERMS THAT WE SHOOK HANDS ON, I AM CANCELLING THE AGREEMENT.

Sincerely,

John Hynansky
Winner Automotive Group

P.S. Chris I have a degree of respect for you and am substantially older than you. I have done 100's of transactions, i.e., real estate, corporate purchases, etc., and have never had this kind of difficulty. You and I have negotiated two transactions, i.e., the warehouse and now this house, and the negotiation process is tedious and cumbersome. For some reason we seem to be on different wave lengths and address issues differently.

On March 24, 2008, Mr. Tigani sent Mr. Hynansky an email stating that the contract terms "do not work for me" and expressing "regret that we are unable to come to terms." Thereafter, on April 6

2008, Sunstar and Mr. Hynansky filed a complaint against Mr. Tigani and N.K.S. alleging breach of contract (the "Contract Action").[3]

B. ***The News Journal*** **Article**

On April 2, 2008, following an interview with Mr. Hynansky, *The News Journal* ran an article titled "Millionaires battle in court over mansion" on the front-page of its Saturday edition and on its website, *delawareonline.com* (the "Article"). On July 9, 2008, Mr. Tigani filed a complaint against Mr. Hynansky alleging that Mr. Hynansky's statements published in *The News Journal* article were defamatory (the "Defamation Action"). Specifically the complaint claims that the following twelve statements contained in the Article and attributed to the interview with Mr. Hynansky and are defamatory:

1. "[Mr. Tigani] approached [Mr. Hynansky] about selling his nearly 8-acre estate.

2. "[Mr. Tigani] asked me to sell my house . . . "

3. As part of the Residential Transaction, [Mr. Tigani] asked [Mr. Hynansky] to give him [Mr. Hynansky's] gold watch coin.

4. Once the Parties reached a handshake agreement, [Mr. Hynansky] gave [Mr. Tigani] "the keys [to the Home] and his blessing to begin renovating the house to [Mr. Tigani's] taste."

5. "It was [Mr. Tigani's] home, so it didn't make any difference to me . . . [Mr. Tigani] bought the house, so he was fixing it up for himself.

[3] Plaintiffs filed an amended complaint on April 18, 2008.

6. While the Improvements were being made, [Mr. Tigani] discarded and mistreated [Mr. Hynansky's] personal items stored at the Home.

7. After the Parties shook hands on the final terms of the Residential Transaction, " . . . [Mr. Tigani] became elusive, not returning phone calls, showing up for meetings late or not al all . . . [Mr. Tigani] kept stalling . . ."

8. [Mr. Hynansky] was forced to cancel the Residential Transaction only after [Mr. Tigani] had failed to honor the terms of the original deal on which the parties shook hands.

9. [Mr. Tigani] reneged on his obligation to follow through with the Residential Transaction: "I was shocked that [Mr. Tigani] *walked away from the transaction*."

10. In walking away from the Residential Transaction, [Mr. Tigani] left the Home in "a partial state of demolition, including a torn-up swimming pool, a demolished conservatory, a ripped-up bathroom, and devastated landscaping."

11. Before [Mr. Tigani] made the Improvements, "I had a beautiful place" which was marketable in its condition.

12. "I trusted him – or else I wouldn't be in this position."

The complaint also alleges that two captions contained in the Article are defamatory. One of the captions, placed underneath a photo of the partly renovated swimming pool, reads: "Owner John Hynansky says Christopher J. Tigani had the swimming pool torn up and much of the interior gutted for renovations, leaving the property in no condition to sell to someone else." The other caption to a picture of partially renovated bathroom states: "A bathroom was ripped apart and left unfinished."

The Court consolidated the Defamation Action, the Contract Action and the CJT Air Action on September 12, 2008.

III. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) requires the Court to determine "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[4] When deciding a motion to dismiss, the Court accepts as true all well-pleaded allegations in the complaint, and draws all reasonable inferences in favor of the plaintiff.[5] "Where allegations are merely conclusory, however, (*i.e.*, without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss."[6] Therefore, dismissal will only be warranted where the Court finds that the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.[7]

[4] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[5] *Ramunno v. Crawley*, 705 A.2d 1029 (Del. 1998).
[6] *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).
[7] *Luscavage v. Dominion Dental USA, Inc.*, 2007 WL 901641, at *2 (Del. Super.).

IV. DISCUSSION

The Contract Action

The Complaint filed by Sunstar and Mr. Hynansky ("Plaintiffs") against Mr. Tigani and NKS ("Defendants") contains three counts: (1) Breach of Contract; Tortious Interference, (2) Quantum Meruit, and (3) Declaratory Judgment.[8]

Count I: Breach of Contract/ Tortious Interference

Count I alleges that the parties entered into a contract involving the sale of Mr. Hynansky's home and a lease of warehouse space. Plaintiffs further claim that Mr. Tigani and NKS breached the contract by failing to make payments due for rent. They contend that the sale of the home and the lease of the warehouse were both part of a unified transaction. In the event that the Court views the two as separate transactions, however, Plaintiffs alternatively plead that Mr. Tigani tortiously interfered with NKS's contractual obligations to Sunstar.

Defendants assert that Count I should be dismissed because (1) there was no meeting of the minds on all material terms and therefore there was

[8] Plaintiffs seek declaratory judgment regarding the $440,000, which was allegedly incurred by Mr. Hynansky and owed to CJT Air, LLC. Defendants originally sought dismissal of this count on the ground that CJT Air, LLC was not a party to the Contract Action. However, the CJT Air Action was consolidated with the Contract Action and the Defamation Action. Therefore, CJT Air is now a party and Defendants' argument that Count III should be dismissed is moot.

no contract, (2) the contract violates the Statute of Frauds, and (3) Mr. Tigani could not have tortiously interfered with NKS's obligations because he was a party to the contract.

A. The material terms of the contract are sufficiently pled

"A contract is formed when the parties agree to all the essential terms and intend the contract to be binding."[9] This is true even when the agreement contemplates a later more formal agreement.[10] The essential terms of a real estate agreement are price, date of settlement, and the property to be sold.[11] The Complaint alleges the following essential terms of the contract were agreed to:

- "Mr. Tigani agreed to purchase the Home for $5 million and to close on that sale in 2009."
- "Mr. Tigani would take immediate possession of the home."
- "Mr. Tigani would lease the home for two-years commencing July 1, 2007, with the obligation to assume all expenses related to the Home, including taxes, utilities and maintenance as of that date."
- "Mr. Tigani was to pay $1.5 million in equal $500,000 pre-payments over the two year lease period. Mr. Hynansky owed $440,000 to Mr. Tigani in connection with a prior, unrelated transaction and it was understood that the sum would be credited against the first pre-payment, resulting in a net payment due by Mr. Tigani of $60,000."

[9] *ID Biomedical Corp. v. TM Tech., Inc.*, 1995 WL 130743, at *11 (Del. Super).
[10] *Id*. (stating that "[a]lthough the Letter Agreement contemplated a later formal agreement, the Letter Agreement is a formal binding contract.").
[11] *Walton v. Beale*, 2006 WL 265489, at *5 (Del. Ch.).

- "Mr. Tigani's company, NKS, would lease part of Sunstar's Dover warehouse for the exact same period that Mr. Tigani would lease the Home."

- "Rent for the two properties was set to approximate the interest that Mr. Hynansky would have earned on the $5 million purchase price for the Home . . . the amount of the payments was smoothed out to provide for a constant payment of about $25,000 per month."

- "At the expiration of the two leases, Mr. Tigani would receive legal title to the Hynansky home in exchange for payment of the $3.5 million balance remaining on the $5 million purchase price."[12]

"Even if aspects of the agreement are obscure, the agreement will be enforceable if the Court is able to ascertain the terms and conditions on which the parties intend to bind themselves. Indeed, an agreement may be enforceable even where some of its terms are left to future determination."[13] While the complaint does not state all details of the contract with complete certainty, at this stage of the proceedings, drawing all reasonable inferences in favor of the Plaintiffs, the complaint has sufficiently pled that the parties agreed to the material terms.[14]

B. The contract, as pled, does not violate the Statute of Frauds

The Delaware Statute of Frauds provides, in relevant part, that

[12] Compl. at ¶ 15.
[13] *Id.*
[14] *See Citibank, N.A. v. National Bancshares, Inc.*, 1994 WL 810035, at *4-5 (Del. Ch.) (holding that "[w]hether the evidence will support [the allegation that the parties intended to be bound by oral agreement] is an issue of fact that cannot be resolved on a motion under Rule 12(b)(6)").

> No action shall be brought to charge any person ... upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them ... unless the contract is reduced to writing, or some memorandum, or notes thereof, are properly signed by the person to be charged therewith....[15]

"However, a well settled general exception to the restrictions of the statute of frauds exists when there is evidence of actual part performance of an oral agreement."[16]

Plaintiffs allege in the complaint that there has been "substantial partial performance" of Mr. Tigani and Mr. Hynansky's oral agreement.[17] For example, the complaint states that Mr. Tigani took possession of Mr. Hynansky's home and began making modifications to it.[18] Defendants contend that the partial performance doctrine does not apply here because the agreement cannot be performed within a year. While it is true that partial performance will not validate a service contract not to be performed in one year, that rule does not apply to real estate contracts.[19] Unlike contracts for personal services, "evidence of part performance [in a real

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[15] 6 *Del. C.* § 2714(a).
[16] *Quillen v. Sayers*, 482 A.2d 744, 747 (Del. 1984).
[17] Compl. at ¶ 37.
[18] *Walton*, 2006 WL 265489, at *4 (stating that "[c]ourts generally have found that taking possession of the land, making partial or full payment for the land, rendering services that were agreed to be exchanged for the land, or making valuable improvements on the land in reliance on an oral contract demonstrates part performance").
[19] 10 Williston on Contracts § 28:9 (4th ed. 2008) ("Except in contracts for the sale of land, an agreement not performable within a year is generally not validated by part performance.").

estate contract] is relatively clear, definite, and substantial."[20] Therefore, because the contract at issue in this case is a real estate contract, the partial performance doctrine is applicable.

Defendants also assert that the partial performance exception is an equitable doctrine and that it should not be applied to action at law for breach of contract where the plaintiff is seeking only a legal remedy such as money damages. Delaware courts, however, have applied the part performance doctrine in cases where the plaintiff was seeking money damages for a breach of contract claim.[21] Therefore, the fact that Plaintiffs complaint states a legal claim and seeks a legal remedy does not prevent them from asserting the partial performance exception to the statute of frauds.

Defendants further allege that partial performance of contract for the sale of the home cannot save the contract regarding the lease of the warehouse. The underlying assumption of Defendants' argument is that the warehouse transaction was wholly independent of the home transaction. The

[20] *Aurigemma v. New Castle Care LLC*, 2006 WL 2441978 (Del. Super.) (quoting *Coca-Cola, Co. v. Babyback Int'l Inc.*, 841 N.E.2d 557, 567 (Ind. 2006)).
[21] *See, e.g.*, *Chrysler Corp. v. Chaplake Holdings Ltd.*, 822 A.2d 1024, 1031 (Del. 2002) (noting that the trial court had held in an action for money damages that "statute of frauds defense was precluded as a matter of law by the doctrine of part performance"); *Nemeth v. Schweitzer*, 1987 WL 3283 (Del. Supr.) (upholding a decision awarding damages on a partially performed oral real estate contract). *See also* 10 Williston on Contracts § 28:4 (noting that "several courts have found that the doctrine [of part performance] is applicable to actions for legal remedies, such as damages . . . . ").

complaint, however, states that the parties considered the lease/sale of the home and the lease of the warehouse to be part of a "unified transaction." The leases were allegedly for the same time period, they were both allegedly negotiated at the same time, and the rental payments for the home and the warehouse were allegedly related. Taking all well-pleaded allegations as true, the Court must assume at this point in the litigation that the warehouse lease and the sale of the home were both part of a unified transaction.[22] Therefore, the partial performance of the contract to sell the home can be considered partial performance of the entire contract. Consequently, the Court will not dismiss Plaintiffs' breach of contract claim.

C. Plaintiffs have sufficiently pled tortious interference

In an abundance of caution, in the event that the Court finds that the warehouse lease was a separate transaction from the sale of the home, Plaintiffs allege in the complaint that Mr. Tigani tortiously interfered with NKS's contract to rent the warehouse. It is well settled that a party cannot interfere with its own contract.[23] Defendants allege that Mr. Tigani is legally indistinguishable from NKS and therefore Plaintiffs' tortious interference claim must fail. On a motion to dismiss, however, the Court is

[22] *Orenstein v. Kahn*, 199 A. 444, 446 (Del. Ch. 1922).
[23] *Tenneco Automotive Inc. v. El Paso Corp.*, 2007 WL 92621, at *5 (Del. Ch.) (stating that "[a] defendant cannot interfere with its own contract").

constrained to the well-pleaded allegations in the complaint. The only facts regarding Mr. Tigani's relationship with NKS contained in the complaint is that Mr. Tigani was the person "in sole control of NKS."[24] While it very well may turn out that Mr. Tigani is indistinguishable from NKS, the Court cannot reach that conclusion on a motion to dismiss from the sole fact that he was in control of NKS.[25] Therefore, the Court will not dismiss Plaintiffs' tortious interference claim.

Count II: Quantum meruit

Count II of the complaint seeks recovery pursuant to the theory of quantum meruit should the Court find that no contract existed between Mr. Hynansky and Mr. Tigani. Defendants contend that this claim should be dismissed because it is "so vague and incomprehensible in form and substance that Defendants cannot reasonably be expected to frame an informed response to its allegations."[26] While the Court agrees that Count II could be clearer, it sufficiently puts Defendants on notice to satisfy

[24] Compl. at ¶ 39.
[25] *See Encite LLC v. Loni*, 2008 WL 2973015, at * 6 (Del. Ch.) (citing *Harrison v. NetCentric Corp.*, 744 N.E.2d 622 (Mass. 2001) (holding that "whether the CEO--who was also the founder of the company, the chairman of the board, and a large shareholder of the closely held corporation--and the close corporation itself were indistinguishable presented a question of material fact").
[26] Def. Mot. to Dismiss, at 18.

Superior Court Rule 8 and survive a motion to dismiss.[27] Furthermore, the Court notes that even counsel for Defendants stated at oral argument that while Count II could have been more artfully pled, he did not know if it was subject to dismissal. Therefore, the Court will not dismiss Count II. Consequently, Defendants motion to dismiss the Contract Action is denied.

The Defamation Action

Mr. Tigani claims that the statements Mr. Hynansky made to *The News Journal*, as a whole, are defamatory.[28] Mr. Hynansky alleges that the defamation claims should be dismissed because the statements he made are (1) absolutely privileged, (2) non-actionable opinions, (3) substantially true, and (4) not capable of a defamatory meaning.

A. The statements are not absolutely privileged

Mr. Hynansky claims that the statements are absolutely privileged because they were made in the context of litigation. The Delaware Supreme Court explained the scope of the absolute privilege in *Barker v. Huang*:

> The absolute privilege is a common law rule, long recognized in Delaware, that protects from actions for defamation statements of judges,

[27] *Spanish Tiles, Ltd. v. Hensey*, 2005 WL 3981740 (Del. Super.) (noting that the "intent and effect of [Rule 8] is to permit a claim to be stated in general terms and to discourage battles over the mere form of statement").

[28] Statements 3 and 6, as alleged in the complaint, do not appear in *The News Journal Article*. Therefore, those statements clearly cannot support Mr. Tigani's defamation claims and will not otherwise be considered in this opinion.

> parties, witnesses and attorneys offered in the course of judicial proceedings so long as the party claiming the privilege shows that the statements issued as a part of a judicial proceeding and were relevant to a matter at issue in the case.[29]

For example, the absolute privilege extends to "intra-courtroom events . . . conversations between witnesses and counsel, the drafting of pleadings, and the taking of depositions or affidavits."[30] "However, statements made outside of the course of judicial proceedings, such as those made during a newspaper interview concerning judicial proceedings, are not accorded the protection of the absolute privilege."[31]

Mr. Hynansky's statements, which were made during a newspaper interview concerning the soon to be filed Contract Action, were clearly made "outside the course of judicial proceedings."[32] Accordingly, Mr. Hynansky's alleged defamatory statements and are not protected by the absolute privilege.

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[29] 610 A.2d 1341, 1345 (Del. 1992)
[30] *Nix v. Sawyer*, 466 A.2d 407 (Del. 1983).
[31] *Barker*, 610 A.2d at 1345. *See also Hoover v. Van Stone*, 540 F. Supp. 1118, 1123 (D. Del. 1982) ("Thus, distribution of the complaint to the news media . . . will not constitute a privileged occasion.").
[32] *See* Rodney A. Smolla, *Law of Defamation* §8:9 (2d ed. 2005) ("The privilege is usually understood as not applying, however, to out-of-court statements made to persons not related to the litigation."); Robert D. Sack, *Sack on Defamation* § 8.2.1 (3d ed. 1999) ("More generally, statements made by parties in litigation to the public, during the course of press conferences, for example, like similar statements by lawyers and judges, are not privileged.").

B. The statements are not non-actionable opinions

Mr. Hynansky also contends that Mr. Tigani's defamation claims must be dismissed because the alleged defamatory statements are non-actionable expressions of opinion. Mr. Hynansky alleges that the "thrust of Mr. Tigani's claim . . . is that he was defamed by the accusation he breached a binding contract to buy the Home" and that the "belief that Mr. Tigani breached a contract in an opinion that cannot be verified as a factual matter."

Although pure statements of opinion are not actionable, an opinion "may often imply an assertion of objective fact and, if the implied fact may be found to be false, the trier of fact may find the plaintiff to have been libeled."[33] Therefore, the issue is whether "the entire context of the published statements, considered from the viewpoint of the average reader, may imply a false assertion of fact."[34]

The Article may suggest Mr. Hynansky's opinion that Mr. Tigani breached a contract, but it also contains many stated and implied defamatory facts as the basis of that opinion. For example, an average reader may infer that Mr. Tigani pursued Mr. Hynansky in order to purchase the house, shook hands on a gentlemen's agreement, began demolition of the home, which was previously in marketable condition, and then eluded Mr. Hynansky

[33] *Kanaga v. Gannett Co.*, 687 A.2d 173, 177 (Del. 1996).
[34] *Id*. at 179.

before ultimately walking away from the transaction, leaving Mr. Hynansky with a wrecked home.

Furthermore, Mr. Tigani claims that Mr. Hynansky's statements omitted important facts. The Delaware Supreme Court has stated that "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact."[35] That court has further stated that "the better rule does not distinguish between indirect and direct, or incomplete and complete libels, so long as the defamation is susceptible to proof."[36] After drawing all inferences in favor of Mr. Tigani, the Court cannot dismiss the defamation claims on the ground that the statements are non-actionable opinions because the ordinary reader could infer the existence of facts which are capable of being proved true or false.

C. At this stage, the Court cannot determine whether the statements are substantially true as a matter of law

In addition, Mr. Hynansky claims that the statements are not defamatory because they are substantially true. Mr. Tigani, however, contests the veracity of several of the statements made to *The News Journal*.

[35] *Id*. at 177 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S 1, 18-19 (1990)).
[36] *Spence v. Funk*, 396 A2d 967, 972 (Del. 1978).

For example, he claims that although the Article states that Mr. Tigani approached Mr. Hynansky about buying the home, Mr. Hynansky was the one who pursued Mr. Tigani about purchasing the home. Further, Mr. Tigani disputes the statements in the Article that Mr. Hynansky gave Mr. Tigani his blessing to begin renovating and that "it didn't make any difference to me . . . [Mr. Tigani] bought the house, so he was fixing it up for himself." Mr. Tigani contends that Mr. Hynansky's own construction company managed all of the construction to the home and that Mr. Hynansky retained final and sole discretion to approve any renovation proposed by Mr. Tigani. Mr. Tigani also contends that the statements, among others, that he attempted to elude Mr. Hynansky and that he "walked away" from the transaction are false.

A statement of fact is not defamatory if it is "substantially true."[37] The Delaware Supreme Court has explained that:

> The defense of substantial truth may necessarily entail some inferential judgment concerning the importance of a falsity to the average reader. The notion of substantial truth necessarily implies a thread of untruth. The conclusion that a statement is substantially true will therefore involve the uncertain determination that whatever errors abound in the statement are irrelevant in the minds of the audience.[38]

[37] *Rammuno v. Cawley*, 705 A.2d 1029, 1035 (Del. 1998) (holding that the trial court erred by dismissing the plaintiffs defamation claims on the rationale that the alleged defamatory statements were substantially true).
[38] *Id*. at 1036.

Given the "unavoidably inferential nature of this inquiry, it is a rare case that may be dismissed under Rule 12(b)(6) on the rationale that the statements complained of are substantially true."[39] While the trier of fact may ultimately determine that Mr. Hynansky's statements are substantially true, at this stage of the proceedings, drawing all inferences in favor of Mr. Tigani, the non-moving party, the Court cannot conclude as a matter of law that the statements are substantially true.

D. The statements are capable of a defamatory meaning

Mr. Hynansky claims that the statements do not "grievously fracture" Mr. Tigani's reputation and therefore are not capable of a defamatory meaning. Mr. Tigani concedes that the statements, taken separately, do are not defamatory. He asserts, however, that taken as a whole, the statements are capable of a defamatory meaning. Delaware courts have defined defamation as "that which tends to injure 'reputation' in the popular sense: to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[40] Stated somewhat differently, "A communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or

[39] *Id*.
[40] *Spence*, 396 A.2d at 969 (quoting Prosser Law of Torts §111 (1971)).

dealing with him."[41] Furthermore, the "scope of liability for libel [written defamation] is generally broader than for slander [oral defamation]."[42]

Mr. Hynansky's statements could imply that Mr. Tigani pursued a deal with Mr. Hynansky for the purchase of his home, began demolition of the home without Mr. Hynansky's consent, then eluded Mr. Hynansky before eventually cancelling the deal. In other words, the statements could imply that Mr. Tigani's word is not to be trusted. Drawing all reasonable inferences in favor of Mr. Tigani, the alleged defamatory statements are capable of diminishing the esteem in which Mr. Tigani is held, or deterring third persons from dealing with him, and therefore are capable of a defamatory meaning.

Mr. Hynansky also claims that Mr. Tigani has not sufficiently demonstrated that he was injured as a result of the statements. Generally, defamation is not actionable without special damages. There are four categories of defamation, however, commonly called libel *per se*, which are actionable without proof of special damages. Those categories are statements which: "(1) malign one in a trade, business or profession, (2)

[41] *Id*. (quoting Restatement of Torts § 559).
[42] *Id*. at 970

impute a crime, (3) imply that one has a loathsome disease, or (4) impute unchastity to a woman."[43]

The first count of Mr. Tigani's complaint alleges libel *per se* and specifically alleges harm to Mr. Tigani's business reputation. It is well settled that when the alleged defamatory matter "imputes to plaintiff a characteristic or view 'incompatible with the exercise of'" his profession, the plaintiff does not need to plead or prove special damages.[44] Mr. Hynansky's alleged defamatory statements could indeed impute a characteristic incompatible with his position as chief executive officer of NKS, such as untrustworthiness or disloyalty, among others. The complaint alleges that the statements "have impaired [Mr. Tigani's] ability to effectively run his existing business and to create future opportunities for NKS or himself." Therefore, Mr. Tigani has properly stated a claim for libel *per se* and need not plead or prove special damages.

The second count of the complaint alleges defamation in general, which does require the plaintiff to plead damages. Mr. Tigani, accordingly, states in his complaint that Mr. Hynansky's statements "have left a permanent blot on [Mr. Tigani's] hard-earned reputation as a reputable business person" and that "[Mr. Tigani's] reputation has been lowered in the

[43] *Id*.
[44] *Id*. at 973.

eyes of his employees, customers, venders and lenders" in addition to causing him "personal humiliation." The Court must accept these assertions as true for purposes of this motion.[45]

Mr. Hynansky, relying upon *Barker v. Huang*,[46] contends that under the "incremental harm" doctrine, Mr. Tigani cannot demonstrate injury. The incremental harm doctrine provides that "if any claimed injury resulting from a defamatory statement is minimal in light of the alleged harm caused by publication of other non-actionable statements, the challenged statement is also nonactionable."[47] For example, in *Barker*, the Delaware Supreme Court held that the plaintiff could not demonstrate harm "where the listener (and the entire population of *News Journal* readers) was already aware that [the defendant] had made that statement previously [due to a prior published article in *The News Journal*]."[48]

Mr. Hynansky claims that the statements he made to *The News Journal* are non-actionable because they only repeat or rephrase allegations contained in the complaint in the Contract Action. Unlike *Barker*, however, the reporter and the entire population of *News Journal* readers were not

[45] *Id*. (holding that the trial court improperly granted he defendants' motion to dismiss the plaintiff's claim where an alleged defamatory statement "allegedly caused [the plaintiff] to be ridiculed and scorned by his community, an assertion which for purposes of this appeal we must accept as true").
[46] 1994 WL 682566 (Del. Supr.).
[47] *Id*. at *3.
[48] *Id*. at *5.

already aware of Mr. Hynansky's statements. There was no previous article in *The News Journal*, nor was there even a court file yet, as the complaint had not been filed as of the date of the interview. Therefore, at this stage, the Court will not dismiss Mr. Tigani's defamation claims for failure to sufficiently plead injury.

V. CONCLUSION

For the reasons stated above, Mr. Tigani and NKS's motion to dismiss Sunstar and Mr. Hynansky's amended complaint is denied. Mr. Hynansky's motion to dismiss Mr. Tigani's defamation claims is also denied.

oc: Prothonotary