UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 1:08-cv-21449-Lenard/Garber

ALVI ARMANI MEDICAL, INC. and
DR. ANTONIO ALVI ARMANI,

Plaintiffs,

vs.

PATRICK HENNESSEY and
MEDIA VISIONS, INC.,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS COMPLAINT
AND MEMORANDUM OF LAW

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants Patrick Hennessey and Media Visions, Inc. (collectively referred to as "Media Visions") file this motion to dismiss the Complaint for failure to state a claim and for lack of subject matter jurisdiction. In support thereof, Media Visions states:

1. The Complaint in this matter was filed on or about May 19, 2008. It purports to set forth five counts against Media Visions, the host of a website devoted to discussion of hair restoration. [D.E. 1] Those counts are for violation of Florida's Deceptive and Unfair Trade Practices Act (Count I), defamation (Count II), trade libel (Count III), tortious interference with prospective and advantageous business relationship (Count IV), and injunctive relief (Count V).

2. Per this Court's June 24, 2008 Order, Media Visions' response to the Complaint is due on or before July 11, 2008. [D.E. 14]

3. Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and applicable substantive law, Media Visions moves this Court to dismiss all five counts of the Complaint because each fails to state a claim upon which relief can be granted.

4. Specifically, because each of Plaintiffs' claims are premised upon the same allegedly false and defamatory statements, Florida's long-standing single action rule requires that they be brought and litigated as a single cause of action for defamation, and that the extraneous claims be dismissed. *Fridovich v. Fridovich*, 598 So. 2d 65, 70 (Fla. 1992).

5. Moreover, Plaintiffs failed to comply with Section 770.01, Florida Statutes, which requires pre-suit notice of defamation[1] actions like this one. Fla. Stat. § 770.01 (2007). Failure to provide pre-suit notice in this case prevents this Court from exercising subject matter jurisdiction over Plaintiffs' defamation claims. *Ross v. Gore*, 48 So. 2d 412, 416 (Fla. 1950); *Davies v. Bossert*, 449 So. 2d 418, 419 (Fla. 3d DCA 1984) (compliance with Section 770.01 "is a *jurisdictional condition precedent* to the right to maintain [an] action" for defamation) (emphasis added).

6. Plaintiffs' defamation claims also fail because the statements upon which Plaintiffs' claims are premised are not identified in the Complaint and therefore are not plead with requisite specificity required to state a defamation claim. *E.g., Conley v. Gibson,* 355 U.S 41, 47 (1957). Plaintiffs' failure to identify the statements at issue deprives Media Visions of the opportunity to review and analyze whether the statements are even capable of defamatory meaning or whether

[1] Trade libel and personal defamation claims receive "identical treatment" under Florida law. *E.g., Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 209 (Fla. 4th DCA 2002). Accordingly, Counts II and III of Plaintiffs' Complaint will be collectively referred to throughout this motion and memorandum as Plaintiffs' defamation claim.

First Amendment defenses, such as the constitutional protection afforded to expression of opinions, might be applicable to Plaintiffs' claims.

7. Plaintiffs' failure to properly plead the statements at issue also prevents Media Visions from fully analyzing whether the Communications Decency Act ("CDA") provides immunity from Plaintiffs' claims. Under the CDA, Media Visions is not liable for actions premised upon content provided by the users of its Internet forums. 47 U.S.C. § 230(c).

8. Plaintiffs' Florida Deceptive and Unfair Trade Practices ("FDUTPA") and tortious interference claims, which the single action rule prohibits, also lack independent merit as a matter of law as well.

9. Specifically, Plaintiffs' FDUTPA claim fails for two reasons. First, hosting a public Internet forum does not fall under the definition of "trade or commerce" because it does not advertise, solicit, provide, offer, or distribute any good or service. Fla. Stat. § 501.203(8) (2007). Second, FDUTPA is specifically inapplicable to third party content and, therefore, Media Visions would not be liable for any statement made by forum members. Fla. Stat. § 501.212(2) (2007). For these reasons, the FDUTPA claim should be dismissed.

10. Similarly, Plaintiffs' tortious interference claim fails because such a claim cannot be supported by a "mere hope" that potential customers would inquire about and possibly seek treatment by the Plaintiffs. *See Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994) (holding that "[t]he mere hope that some ... past customers may choose to buy again cannot be the basis for a tortious interference claim"). Indeed, a claim for tortious interference, even with only a *prospective* business relationship, requires the existence of an actual or identifiable understanding or agreement with an identifiable person. *E.g., Ferguson Transp., Inc. v. North American Van Lines, Inc.*, 687 So. 2d 821, 822 (Fla. 1997) (per curiam);

ISS Cleaning Servs. Group, Inc. v. Cosby, 745 So. 2d 460, 462 (Fla. 4th DCA 1999). Plaintiffs have not adequately alleged anything more than a mere hope that potential customers would consult with Plaintiffs and seek treatment. This is insufficient to state a claim. Moreover, the law also requires that the business relationship be with an "identifiable individual" not just anonymous or unnamed people or the general public, as Plaintiffs have alleged. *Ferguson*, 687 So. 2d at 822. Such allegations are insufficient to sustain a tortious interference claim, so that claim should be dismissed.

11. In addition, Plaintiffs' tortious interference claim fails because Plaintiffs have not sufficiently plead that Media Visions had knowledge of the business relationships Media Visions purportedly interfered with. *International Sales & Serv., Inc. v. Austral Insulated Prod., Inc.*, 262 F.3d 1152, 1154 (11th Cir. 2001) (*citing Ethan Allen,* 647 So. 2d at 814).

12. Finally, Count V, which seeks to enjoin future allegedly libelous publications, fails as a matter of law because the injunctive relief sought amounts to an unconstitutional prior restraint. *E.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976); *Demby v. English*, 667 So. 2d 350, 355 (Fla. 1st DCA 1995) (false and defamatory speech cannot constitutionally be enjoined).

13. In short, each count of Plaintiffs' Complaint is legally deficient and should be dismissed for failure to state a claim as a matter of law.

MEMORANDUM OF LAW

I. Florida's Single Action Rule Requires that all of Plaintiffs' Claims be Treated as a Single Cause of Action for Defamation

Each of Plaintiffs' claims is premised upon the exact same, though largely unspecified, allegedly false and defamatory statements that give rise to Plaintiffs' defamation claim. Because all of Plaintiffs' claims arise from the same allegedly operative facts as their defamation claim, the extraneous claims must be dismissed, and Plaintiffs' claims must be litigated as a single

cause of action for defamation. Thus, Plaintiffs' claims for trade libel, for violation of the Florida Deceptive and Unfair Trade Practices Act, for tortious interference, and for injunctive relief must all be considered as a defamation claim.

In Florida, the single action/single publication rule provides that the publication of allegedly false and defamatory material gives rise to but a single cause of action. That cause of action is defamation. *Fridovich v. Fridovich*, 598 So. 2d 65, 70 (Fla. 1992). If the sole basis of a claim is an allegedly defamatory statement or statements, then the cause of action is one for defamation, and no separate cause of action for any other tort will lie. *Id.*

The purpose of the single action rule is to ensure that a plaintiff does not use alternative tort claims to evade the requirements of defamation law. *Id.* at 69-70; *Gannett Co. v. Anderson*, 947 So. 2d 1, 2 (Fla. 1st DCA 2006), *review pending*, Case No. 06-2174 (Fla. 2007); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 609 (Fla. 4th DCA 1975). The rule prevents litigants from making an end run around the privileges, protections, and defenses available in defamation actions by simply renaming their defamation claims as some other tort. *Orlando Sports Stadium*, 316 So. 2d at 609. Thus, to the extent that a claim overlaps with defamation, it must be treated as a defamation claim.

The single action rule applies to claims of interference with business and contractual relationships, as alleged in this case. In *Orlando Sports Stadium*, for example, a plaintiff filed suit against a newspaper for defamation and tortious interference, alleging that the defendant's articles concerning the plaintiff were false, defamatory, and injurious to the plaintiff's reputation. 316 So. 2d at 608. The appellate court found that the defamation and tortious interference claims were essentially the same because they were based on the same articles and because the "thrust" of the complaint was that these articles were injurious to the plaintiff. *Id.* at 609. The extraneous

claims were "nothing more than separate elements of damage flowing from the alleged wrongful publications." *Id.* They were, in fact, nothing more than restated defamation claims. Accordingly, the court dismissed the interference claim because the plaintiff failed to comply with the pre-suit notice requirements applicable to defamation claims. *See* Section 770.01., Fla. Stat. The court explained that a "[a] contrary result might very well enable plaintiffs in libel to circumvent the notice requirements . . . by the simple expedient of redescribing the libel action to fit a different category of intentional wrong." *Orlando Sports Stadium*, 316 So. 2d at 609. (internal quotation marks omitted).

Courts in Florida have repeatedly applied the single action rule to bar tortious interference claims premised upon false and defamatory speech. *See, e.g., Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 208-09 (Fla. 4th DCA 2002) (rejecting tortious interference and abuse of process claims "because the single publication/single action rule does not permit multiple actions to be maintained when they arise from the same publication upon which a failed defamation claim is based"); *Seminole Tribe v. Times Publ'g Co.*, 780 So. 2d 310, 318 (Fla. 4th DCA 2001) (rejecting interference and negligent supervision claims because the damages were for reputational injuries and flowed from the publication of the allegedly defamatory news stories); *Ovadia v. Bloom*, 756 So. 2d 137, 138, 140-41 (Fla. 3d DCA 2000) (rejecting false light invasion of privacy, interference with advantageous business relationship, and conspiracy claims based upon same allegedly defamatory television news report); *Gilliard v. New York Times Co.*, No. GC-01-59, 2001 WL 1147256 (Fla. Cir. Ct. May 22, 2001) (interference, conspiracy, negligence, and extortion claims barred even though plaintiff did not assert a defamation claim, because the wrong complained of was the publication of allegedly defamatory statements), *aff'd*, 826 So. 2d 296 (Fla. 2d DCA 2002).

Indeed, Florida courts have consistently rejected plaintiffs' attempts to avoid the requirements for a defamation claim through the use of a variety of other torts. *See, e.g.*, *Fridovich*, 598 So. 2d at 69-70 (rejecting claim for intentional infliction of emotional distress based upon defamatory publication, because "a plaintiff is not permitted to make an end run around a successfully invoked defamation action privilege by simply renaming the cause of action and repleading the same facts"); *Gannett Co.*, 947 So. 2d at 2 (rejecting false light claim that "was not distinguishable in any material respect from a libel claim"); *Thomas v. Patton*, No. 16-2005-CA-003777-XXXX-MA, 2005 WL 3048033, at *4 (Fla. 4th Cir. Ct. Oct. 21, 2005) (rejecting invasion of privacy and conspiracy claims based upon supposedly defamatory television news broadcasts), *aff'd*, 939 So. 2d 139, 140 (Fla. 1st DCA 2006). It is the essence of the wrongful conduct alleged, and not its name, that determines whether the single action rule applies. *Orlando Sports Stadium*, 316 So. 2d at 609. If the claim is premised upon allegedly false and defamatory speech, it is treated as defamation. *Id.*

Counts I, III, and IV do not differ in any material respect from a defamation claim. The elements of defamation are: (a) a false and defamatory statement of fact; (b) of and concerning the plaintiff; (c) contained in an unprivileged publication to a third party; (d) fault on the part of the publisher; and (e) damage to the plaintiff's reputation. *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 803-04 (Fla. 1st DCA 1997). Here, in Count I, Plaintiffs claim that Media Visions engaged in false, deceptive and unfair business practices by posting disparaging and false statements about Plaintiffs on their web forum. Complaint, ¶¶ 30 – 32, 75, 81. In other words, Media Visions' allegedly defamatory statements form the basis of Plaintiffs' FDUTPA claims. Likewise, in Count IV, although Plaintiffs do not identify the tortious conduct that underlies their tortious interference claims, their incorporation of Paragraphs 1 -74 suggests

(though does not adequately allege) that these claims also are premised upon the purportedly defamatory statements described therein. The Complaint does not allege any other facts that might support a tortious interference claim.

In short, the same set of operative facts are alleged in support of all of Plaintiffs' claims; namely, the publication of allegedly false and defamatory statements by Media Visions. Plaintiffs' claims therefore all must be treated as if they were defamation claims, subject to the same conditions, elements, privileges, and defenses applicable in the law of defamation. *See Seminole Tribe*, 780 So. 2d at 318. The extraneous claims should be dismissed, and this Court should consider Plaintiffs' Complaint as a single cause of action for defamation.

II. Plaintiffs have Failed to Comply with Section 770.01, Florida Statutes

Considering the Complaint as a single cause of action for defamation, Plaintiffs' claims must be dismissed because Plaintiffs failed to comply with Section 770.01, Florida Statutes.[2] If a defamation claim is premised upon statements published in a newspaper, periodical, or other medium, the plaintiff must allege that it has complied with the jurisdictional condition precedent of Section 770.01, Florida Statutes. *See* § 770.01, Fla. Stat. (2007). Specifically, Section 770.01 states that:

> Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or *other medium*, of a libel or slander, the plaintiff *shall*, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory.

Fla. Stat. § 770.01 (2007) (emphasis added).

[2] Section 770.01 applies to defamation actions filed in federal court, such as this matter. *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1474 (S.D. Fla. 1987).

Section 770.01, Florida Statutes, applies to defamation actions against "media" defendants; that is, those who are engaged in the dissemination of news or other information through the media. *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1380 (Fla. 4th DCA 1997) (applying pre-suit notice to assistant state attorney who wrote allegedly defamatory newspaper column). Under Florida law, statements made on the Internet are considered made on an "other medium" for purposes of the statute. As a result, defamation claims premised upon the dissemination of information through Internet publications require pre-suit notice. *Holt v. Tampa Bay Television Inc.*, 34 Media L. Rep. 1540, 1542 (Fla. 13th Cir. Ct. 2006) (applying Chapter 770 to claim premised upon statements made on the Internet) (copy attached as Exhibit A), *aff'd* 976 So. 2d 1106 (Fla. 2d DCA 2007); *see also Canonico v. Callaway*, 35 Media L. Rep. 1549, 1552 (Fla. 13th Cir. Ct. 2007) (same) (copy attached as Exhibit B).[3] Here, Media Visions is the publisher of a website dedicated to providing information to the public about hair restoration and transplants, as Plaintiffs acknowledge in the Complaint. *See* Complaint at ¶ 21 (alleging that Media Visions is the "host" and "publisher" of a website "dedicated to providing information to the consumer public about the hair restoration and transplant industry"). Because Media Visions is engaged in the dissemination of news or information through the media (*i.e.*, the Internet), it is entitled to Section 770.01 notice prior to the filing of a defamation claim against it.

Section 770.01 requires five days' notice to defendants prior to initiation of a defamation action in Florida. Fla. Stat. § 770.01 (2007). Both the author and the publisher of allegedly defamatory statements are entitled to pre-suit notice under the statute. *Mancini*, 702 So. 2d at

[3] Other courts similarly apply their retraction statutes to internet publications. *E.g., Mathis v. Cannon*, 573 S.E.2d. 376, 385–386 (Ga. 2002) (applying retraction statute to internet bulletin board postings).

1377. To comply with the statute, the notice must identify with particularity each of the statements alleged to be false and defamatory so that the would-be defendant has a full opportunity to analyze the claims and make corrections if appropriate. *See, e.g., Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1474 (S.D. Fla. 1987); *Hulander v. Sunbeam Television Corp.*, 364 So. 2d 845, 847 (Fla. 3d DCA 1978); *Gannett Fla. Corp. v. Montesano*, 308 So. 2d 599, 599-600 (Fla. 1st DCA 1975); *Orlando Sports Stadium, Inc.*, 316 So. 2d at 610.

Importantly, Section 770.01 is a jurisdictional condition precedent to filing suit. *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950) (the giving of proper notice is a condition precedent to bringing suit); *Davies v. Bossert*, 449 So. 2d 418, 419 (Fla. 3d DCA 1984) (compliance with Section 770.01 "is a jurisdictional condition precedent to the right to maintain [an] action" for defamation). Accordingly, failure to comply with Section 770.01 requires immediate dismissal of a defamation claim (or any claim premised upon false and defamatory speech) for lack of subject matter jurisdiction. Failure to allege compliance with Section 770.01 is also grounds for dismissal for failure to state a claim. *Mancini.*, 702 So. 2d at 1380.

Plaintiffs have not alleged and cannot allege compliance with Chapter 770, Florida Statutes, in this case.[4] In fact, at no time before instituting this defamation claim did Plaintiffs serve written notice upon Media Visions demanding retraction or identifying with specificity the allegedly false and defamatory statements, as required by Sections 770.01, Florida Statutes. *See*

[4] Plaintiffs' Complaint does contain reference to a letter sent to Defendant Hennessey through counsel but does not specify when such letter was sent or describe its substance. Complaint ¶ 38. However, the Complaint further alleges a voicemail response to that letter was received on May 6, 2004. *Id.* at ¶ 40. Accordingly, any claims premised upon the statements addressed in that demand letter necessarily are barred by Florida's two year statute of limitations on defamation actions and therefore could not provide sufficient notice of the claims Plaintiffs attempt to assert in this lawsuit. Fla. Stat. § 95.11(4)(g) (2007) (establishing two year statute of limitations for libel actions).

Fla. Stat. § 770.01 (2007). Plaintiffs' failure to comply with Section 770.01 prevents this Court from exercising subject matter jurisdiction over Plaintiffs' defamation claims and all other claims premised upon the same allegedly false and defamatory statements, and thus necessitates dismissal of the entire action. *Ross*, 48 So. 2d at 416; *see also Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607 (Fla. 4th DCA 1975) (defamation, malicious interference and conspiracy claims all barred because plaintiffs failed to provide pre-suit notice before filing defamation action). Accordingly, the Complaint should be dismissed.

III. Even if the Court had Subject Matter Jurisdiction Over Plaintiffs' Claims, Plaintiffs have Failed to Identify the Allegedly Defamatory Statements with Sufficient Specificity to State a Claim

Counts II and III (for defamation and trade libel) fail to plead defamation with the requisite level of specificity required to state a defamation claim. Under Federal Rule of Civil Procedure 8(a), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. The pleading standard exists to ensure that the allegations give the defendant "fair notice of the plaintiff's claim and the ground upon which it rests." *Conley v. Gibson,* 355 U.S 41, 47 (1957).

Federal courts have adopted a stringent approach to specificity in pleading defamation claims, requiring that the precise words sued upon be identified in the complaint. *E.g., Phantom Touring, Inc. v. Affiliated Publ'n*, 953 F.2d 724, 728 n. 6 (1st Cir. 1992) ("a defendant is entitled to knowledge of the precise language challenged as defamatory"); *McIver v. District of Columbia*, No. 90-7130, 1991 WL 84085 (D.C. Cir. May 10, 1991) (unpublished opinion) (acknowledging heightened pleading standard for defamation claims); *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 699 (8th Cir. 1979) ("the use of In haec verba pleadings on defamation charges is favored in the federal courts"). In defamation cases in this circuit, that pleading standard is met when the plaintiff reproduces the allegedly defamatory statement and provides

general details concerning its publication. *Caster v. Hennessey*, 781 F.2d 1569, 1571 (11th Cir. 1986) (complaint adequately stated defamation claim when it attached copies of allegedly defamatory statements and generally described the circumstances of their publication).

Specificity of the defamatory statements is essential to provide the defendant an opportunity to determine whether the elements of defamation have been alleged, to evaluate the possibility of a privilege, and to otherwise provide the defendant sufficient notice to allow him or her to formulate a responsive pleading. *E.g.*, *Asay*, 594 F.2d at 699 (knowledge of the precise words used in allegedly defamatory communication is necessary to form responsive pleading). Simply put, a defamation claim necessarily is founded upon false statements of fact, and those statements must be identified clearly and specifically.

Plaintiffs have not clearly and specifically identified the false statements of fact upon which they premise their defamation claims. In fact, Plaintiffs have alleged that they "purposefully do not reprint [the defamatory] posts [in the Complaint] to prevent further damage, but will make same available to the Court upon request." Complaint ¶ 37. Plaintiffs' Complaint, therefore, admits that it fails to state a cause of action for defamation by failing to specifically identify the false statements upon which Plaintiffs have sued Media Visions.

Moreover, in pleading their defamation claims, Plaintiffs simply incorporate every one of their general allegations and conclusively allege that the "information" Media Visions published was false. Complaint ¶¶ 85, 92. As a result, Media Visions has no way of determining what false statements purportedly form the basis of Plaintiffs' claims and thus no way to analyze whether a statutory bar (such as the statute of limitations) or privilege (such as protected opinion) or defense (such as truth) applies. As this Court has noted, complaints that incorporate by reference all previous allegations, "are highly frowned upon, as federal courts should not be

required to sift through a complaint to determine which allegations may support various claims." *Cannon v. Metro Ford, Inc.*, 242 F. Supp. 2d 1322, 1332 n.2 (S.D. Fla. 2002).

Media Visions cannot determine which allegations in the Complaint identify the false statements of fact upon which Plaintiffs attempt to base their defamation claims. Rule 8(a) and due process require more than an assertion that Plaintiffs prefer not to describe the defamatory statements and the wholesale incorporation of 74 paragraphs into their defamation counts without specific reference to which of the allegations contain a description of the purportedly false and defamatory statements at issue. Plaintiffs' defamation claims should be dismissed for failure to state a claim.[5]

IV. Media Visions is Immune under the CDA from all of Plaintiffs' Claims based on Third Party Statements

An additional problem created by the Plaintiffs' lack of specificity in their allegations is that it is difficult to evaluate fully whether the immunity provided for in 47 U.S.C. § 230, commonly referred to as the Communications Decency Act ("CDA"), applies.[6] However, even with the limited factual allegations made by Plaintiffs, this Court can make an initial determination regarding CDA immunity as it relates to the statements made by third parties on

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[5] At a minimum, Plaintiffs should be required to provide a more definite statement of their defamation claims so that Media Visions has a full and fair opportunity to analyze the claims for applicable privileges, defenses, and immunities and to develop a responsive pleading with respect thereto. Fed. R. Civ. P. 12(e).

[6] Consideration by the Court of the CDA immunity claim, an affirmative defense, is appropriate at the motion to dismiss stage. *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *9-10 (E.D. Tex. 2006); *see also*, *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) ("A complaint is subject to dismissal under Rule 12(b)(6) when its allegations, on their face, show that an affirmative defense bars recovery on the claim.").

the Internet forums hosted by Media Visions. In this case, the CDA prohibits imposition of liability upon Media Visions for all statements made by third parties.

The CDA was passed by Congress in 1996 to protect providers of an "interactive computer service" ("ICS") from liability predicated upon statements made by third parties on an ICS's website. 47 U.S.C. § 230(b). Specifically, 47 U.S.C. § 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server...." *Id.* § 230(f)(2). In other words, the host of an online bulletin board or forum, such as Media Visions, is considered a provider of an interactive computer service under the statute. *E.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (finding AOL immune under the CDA for messages posted on its public online bulletin boards by third parties). As such, Media Visions cannot be treated as the publisher in situations such as this where claims are based upon information supplied by another "information content provider."

An "information content provider" is "any person or entity responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3). Put another way, the information content provider is in essence the speaker or source of the statements, such as a website poster or blogger. In this case, the website poster identified as "JimmyJam" and the unnamed, unspecified posters discussed in Paragraph 59 of the Complaint are the "information content providers" for their own posts. As such, Media Visions is immune from the claims asserted by Plaintiffs predicated upon these posts. Courts throughout the country have consistently applied the CDA

in this manner. *E.g.*, *Fair Housing Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (holding that appellee had CDA immunity for content provided by third parties).

Contrary to the assertion of Plaintiffs that the law requires compliance with the alleged "industry practice" they describe, Complaint ¶¶ 50, 57, the CDA by its plain language does not condition its immunity upon such compliance. Instead, not only does the CDA protect ICSs against liability for third party content, it protects them against claims based upon the refusal to take down a statement made by a third party. *Zeran*, 129 F.3d at 328. The CDA's immunity for ICSs is only conditioned upon the ICS not being the source or developer of the information and is not conditioned on compliance with an "industry practice." Such a requirement would be an impingement upon editorial discretion and contrary to the CDA's protections. *Id.* at 330 ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.").

The CDA provides Media Visions immunity from claims premised upon content provided by third parties. Accordingly, to the extent Plaintiffs purport to premise any of their claims on statements posted by users of Media Visions' forum, those claims should be dismissed.

V. Media Vision's Forums are not "Trade or Commerce" under FDUTPA

Plaintiffs' Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") claim (Count I) is subject to dismissal pursuant to the single action rule. *See* Part I, *supra.* But even if this Court were to hold the single action rule inapplicable to Plaintiffs' FDUTPA claim, Plaintiffs have failed to state this cause of action as a matter of law.

Plaintiffs' FDUTPA claim is premised upon the speech of third parties and upon speech on a public Internet forum, neither of which is a sufficient legal basis for such a claim. Under

FDUTPA, it is unlawful to engage in "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices *in the conduct of any trade or commerce* . . . ." Fla. Stat. § 501.204(1) (2007) (emphasis added). An exception to this law exists for statements made by third parties and published by the defendant. Fla. Stat. § 501.212(2) (2007).

In this case, the forum which hosts the unlisted statements upon which Plaintiffs base their claim is not "trade or commerce" and thus cannot be the basis for a FDUTPA claim. Florida Statute Section 501.203(8) (2007) defines "[t]rade or commerce as 'the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value wherever situated.'" *Id.* A "[t]hing of value may include, without limitation, any moneys, donations, membership, credential, certificate, prize, award, benefit, license, professional opportunity, or chance of winning." Id. § 501.203(9). The public Internet forum described in Plaintiffs' Complaint is not advertising a service nor does it qualify in any other way as being part of "trade or commerce." *Cf. Trent v. Mortgage Elec. Registration Sys., Inc.*, No. 3:06-cv-374-J-32HTS, 2007 WL 2120262, at *7 n.12 (M.D. Fla. July 20, 2007) (holding that it was not "trade or commerce" under FDUTPA for a creditor to communicate pre-suit with a debtor). Instead, the forum provides an opportunity for people with a common interest in hair restoration to speak freely and openly regarding their experiences and opinions. *See* Complaint ¶ 26. This public Internet forum is akin to the public park or other public gathering space so often discussed in First Amendment cases as a traditional public forum where members of the public can congregate to discuss the issues that matter most to them. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983) (describing traditional public forums as places "devoted to assembly and debate" and places which "have been used for purposes of assembly,

communicating thoughts between citizens, and discussing public questions") (citation omitted). Although Plaintiffs allege that Media Visions accepts money from recommended doctors, Complaint ¶¶ 30, 34, the premise of their FDUTPA claims is the allegedly false and defamatory statements on the forum – in other words, the allegedly deceptive practice is the posting of statements on the forum, not any alleged fee to be on a recommended list.

In addition, even if the Court were to find that FDUTPA applies to Media Visions' Internet forum, the statements of third parties that are "published" by Media Visions cannot form the basis of liability for a FDUTPA claim. Fla. Stat. § 501.212. Section 501.212(2) specifically makes FDUTPA inapplicable to "[a] publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter, insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this part." *Id.* The statements made by third parties on the public, internet forums are the type of statements covered by this exception as Media Visions did not have actual knowledge that any such statements violated FDUTPA and the statements did not originate with Media Visions. Therefore, the FDUTPA claim as a whole should be dismissed because the public, internet forum is not "trade or commerce" or, in the alternative, dismissed in part because FDUTPA does not permit claims based upon statements made by third parties.

VI. Plaintiffs Failed to State a Claim for Tortious Interference

Like the FDUTPA claim, the tortious interference claim (Count IV) fails as a matter of law even if this Court were to hold that the single action rule does not operate to bar the claim (which it does). Plaintiffs' claim for tortious interference with prospective and advantageous business relationships fails because it is premised on mere hope, speculation, and unsupportable

legal conclusions, and therefore should be dismissed. The elements of a tortious interference claim[7] under Florida law are:

(1) the existence of a business relationship that affords the plaintiff existing or prospective legal rights;

(2) the defendant's knowledge of the business relationship;

(3) the defendant's intentional and unjustified interference with the relationship; and

(4) damage to the plaintiff.

International Sales & Serv., Inc. v. Austral Insulated Prod., Inc., 262 F.3d 1152, 1154 (11th Cir. 2001) (*citing Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994)). Plaintiffs have failed sufficiently to plead the first and second elements, and the claim should be dismissed.

The first element of a tortious interference claim, which has not been sufficiently pled, is in fact multifaceted. In addition to the requirement that the plaintiff must have existing or prospective legal rights, the Florida Supreme Court has stated that "[a]s a general rule, an action for tortious interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *Ethan Allen*, 647 So. 2d at 815. In addition, the "mere hope" of a relationship is not sufficient to support a tortious interference claim. *E.g.*, *id.*

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[7] Florida Courts have not drawn a distinction between the elements for prospective and advantageous business relationships; therefore, no distinction is made here. *See Ferguson Transportation, Inc. v. North American Van Lines, Inc.*, 687 So. 2d 821, 821 (Fla. 1997) (reciting general rule on type of relationship required in an advantageous business relationship case in a prospective business relationship case); *ISS Cleaning Servs. Group, Inc. v. Cosby*, 745 So. 2d 460, 462 (Fla. 4th DCA 1999) (*citing Ferguson*).

In *Ethan Allen*, a tortious interference claim was brought by Georgetown, a furniture dealer, against Ethan Allen, Georgetown's former supplier, based upon a one-day newspaper advertisement in which Ethan Allen explained the split with Georgetown over unpaid debts and that Ethan Allen would fill all outstanding orders. *Id.* at 814. Georgetown claimed that the advertisement tortiously interfered with its "customers, past, present, and future." *Id.* Specifically, Georgetown asserted that the interference had affected 89,000 former customers who "might shop there again in the future." *Id.* In rejecting this claim, the Court stated that "[t]he mere hope that some of its past customers may choose to buy again cannot be the basis for a tortious interference claim." *Id.* Other courts have reached similar conclusions that the speculative hope that past customers will patronize the plaintiff again or that future customers may patronize plaintiff are insufficient to constitute a tortious interference. *MQ Associates, Inc. v. North Bay Imaging*, LLC, No. 07-14828, 2008 WL 713688, at *4 (11th Cir. March 18, 2008) (unpublished) (rejecting a tortious interference claim by a former employer against a former employee who started his own, competing company because the plaintiff "did not identify any legal rights at stake, and it did not allege any instances of customers not performing pursuant to those legal rights"); *Medical Sav. Ins. Co. v. HCA, Inc.*, No. 2:04CV156FTM-29DNF, 2005 WL 1528666, at *9 (M.D. Fla. 2005) ("The mere hope that some of plaintiff's past insureds may choose to renew their policy cannot be the basis for a tortious interference claim under Florida law) *aff'd* 186 Fed. Appx. 919 (11th Cir. 2006); *St. Johns River Water Mgmt. Dist. v. Ferberg Geological Servs., Inc.*, 784 So. 2d 500, 505 (Fla. 5th DCA 2001) ("The speculative hope of future business is not sufficient to sustain the tort of interference with a business relationship.") (citation omitted); *Lake Gateway Motor Inn, Inc. v. Matt's Sunshine Gift Shops, Inc.*, 361 So. 2d 769 (Fla. 4th DCA 1978) ("A mere offer to sell, however, does not, by itself, give rise to

sufficient legal rights to support a claim of intentional interference with a business relationship.").

In addition to alleging more than a "mere hope," Plaintiffs must show evidence of "an actual and identifiable understanding or agreement" regarding the business relationship, that the agreement "in all probability would have been completed," and that they have existing or prospective legal rights. *Ethan Allen*, 647 So. 2d at 814-15. Plaintiffs have not pled existing or prospective legal rights. For the other elements, Plaintiffs have only recited these elements as legal conclusions, but have not supported these legal conclusions with sufficient facts to withstand a motion to dismiss. *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (stating that "the Court is, 'not bound to accept as true a legal conclusion couched as a factual allegation'"); *Hyde v. Storelink Retail Group, Inc.*, No. 8:07-cv-240-T-30MAP, 2007 WL 1831683, at *3 (M.D. Fla. June 25, 2007) (rejecting "[w]holly conclusory allegations" as being insufficient to survive a motion to dismiss in a disparate treatment case under Title VII). Furthermore, the business relationship required for the tort must be with "an identifiable person" and not with unknown or anonymous individuals or the general public. *Ferguson Transp., Inc.*, 687 So. 2d at 822.

The only facts Plaintiffs have pled to support its claim are that one of the anonymous posters from the Media Visions Forums claimed he cancelled a consultation with Dr. Armani, Complaint ¶ 72, and that "[u]pon information and belief, as a direct result of Defendants' fraudulent and tortious behavior, many such individuals have decided not to use Plaintiffs' services." Complaint ¶ 71. Both of these claims fail because neither the anonymous poster nor the claim that unnamed individuals "upon information and belief" decided not to use Plaintiffs' services are sufficient under Florida law. *Ferguson Transp., Inc.*, 687 So. 2d at 822 (holding that

the plaintiff in a tortious interference case was required to allege a business relationship with "an identifiable person").

Indeed, a consultation by its very nature does not "afford the plaintiff existing or prospective legal rights." *International Sales*, 262 F.3d at 1154. There obviously is no obligation on the part of either party following a medical consultation related to an elective procedure the patient is considering. Instead, it is an opportunity for both parties to familiarize themselves with each other so that a course of action can be recommended and a more informed decision can be made. The cancellation of such an appointment hardly rises to the type of relationship or prospective relationship that justifies tort liability. Instead, a consultation leads to the "mere hope" that an agreement will be reached, the very type of speculative relationship which the Florida Supreme Court has rejected as being insufficient to sustain a tortious interference claim. *Ethan Allen*, 647 So. 2d at 815. Likewise, neither the scheduling of a consultation nor any other portion of Plaintiffs' Complaint supports the claim that there existed evidence of "an actual and identifiable understanding or agreement." *Id.* Similarly, other than the conclusory proclamation of the Plaintiffs, there is no reason to expect that an understanding or agreement "in all probability would have been completed if the defendant had not [allegedly] interfered." *Id.*

Furthermore, the unsupported allegation in Paragraph 104 of the Complaint that "[d]efendants knew or reasonably should have known of Plaintiffs'" business relationships with anonymous and unidentifiable individuals is unsubstantiated by facts sufficient to support such a claim. *Papasan*, 478 U.S. at 286 (legal conclusions need not be accepted as true). To state a tortious interference claim, Plaintiffs must allege facts sufficient to demonstrate that Media Visions knew of the business relationships it purportedly interfered with. *International Sales &*

Serv., 62 F.3d at 1154. Plaintiffs have alleged nothing more than the legal conclusion that Media Visions knew *or should have known* about the relationships underlying its tortious interference claims. Plaintiffs have thus failed to adequately allege knowledge as an element of their tortious interference claim, thereby warranting dismissal of Plaintiffs' tortious interference claim for failure to state a claim.

Plaintiffs' claims fall fatally short of sufficiently alleging the existence of a business relationship necessary to state a tortious interference claim or the requisite knowledge on the part of Media Visions. Therefore, that claim should be dismissed.

VII. Count V Seeks an Impermissible Prior Restraint on Speech and Should be Dismissed as Inconsistent with the First Amendment to the United States Constitution.

In Count V, Plaintiffs seek a prior restraint on speech. Specifically, Plaintiffs seek to enjoin Media Visions from publishing "disparaging and false statements about Plaintiffs." [D.E. 1 at "wherefore" clause following Paragraph 112]. The First Amendment to the United States Constitution prohibits Plaintiffs from obtaining the relief requested by Count V of the Complaint.

Plaintiffs' request for an injunction prohibiting Media Visions' from publishing "disparaging and false" statements about the Plaintiffs is a request for a prior restraint on speech – a remedy that bears a heavy presumption of unconstitutionality. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976); *Clear Channel Commc'ns, Inc. v. Murray*, 636 So. 2d 818, 820-21 (Fla. 1st DCA 1994); *Miami Herald Publ'g Co. v. McIntosh*, 340 So. 2d 904, 908 (Fla. 1976). The United States Supreme Court emphatically has stated that prior restraints "on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" and are therefore "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n*, 427 U.S. at 559, 562. Indeed, even in situations where competing constitutional interests are at stake or where there are questions of allegedly urgent national

security concern, a prior restraint is permissible only where the evil sought to be avoided is great and certain and cannot be mitigated by less intrusive measure. *Id.* at 562. As this Court has noted, society "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Connor v. Palm Beach County*, Case No. 95-cv-8628, 1996 WL 438779 (S.D. Fla. May 29, 1996) (*quoting Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 526, 559-60 (1975)) (emphasis in original). This is so because a prior restraint "has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n*, 427 U.S. at 562.

Plaintiffs have not alleged any facts that come close to satisfying this heavy burden. In fact, it is well established that under Florida law "equity will not enjoin either an actual or a threatened defamation." *See Demby v. English*, 667 So. 2d 350, 355 (Fla. 1st DCA 1995) (defendant could not be enjoined from making defamatory statements); *Rodriguez v. Ram Sys., Inc.*, 466 So. 2d 412 (Fla. 3d DCA 1985) (injunctive relief is unavailable to restrain an actual or threatened defamation); *United Sanitation Servs. of Hillsborough, Inc. v. City of Tampa*, 302 So. 2d 435, 439 (Fla. 2d DCA 1974) (same). As Plaintiffs' complaint is premised entirely upon allegedly false and defamatory statements, equity cannot provide a remedy, and this Court should dismiss Count V for failure to state a claim.

CONCLUSION

Plaintiffs' Complaint should be treated as a single cause of action for defamation. As such, the Complaint fails as a matter of law. For the foregoing reasons, Plaintiffs' Complaint should be dismissed.

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via CM/ECF on this 11th day of July, 2008, to:

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Media Law Reporter

Source: Media Law Reporter Cases > Florida > Holt v. Tampa Bay Television Inc., 34 Med.L.Rptr. 1540 (Fla. Cir. Ct. 2006)

34 Med.L.Rptr. 1540
Holt v. Tampa Bay Television Inc.
Florida Circuit Court
Hillsborough County

No. 03-11189

March 17, 2006

ALICE A. HOLT v. TAMPA BAY TELEVISION INC., MIKE MASON, individually, and LOIS WIMSETT, individually

Headnotes

REGULATION OF MEDIA CONTENT

[1] Defamation — Pre-trial procedures — In general (▶11.1201)

Defamation — Pre-trial procedures — Jurisdiction (▶11.1203)

Defamation — Publication — Statute of limitations (▶11.0305)

Defamation claim stemming from allegedly false and defamatory television stories about plaintiff is dismissed, since letter plaintiff sent to defendant television station did not specify broadcasts and statements alleged to be false and defamatory, and thus plaintiff failed to satisfy jurisdictional prerequisites set forth in Fla. Stat. Ann. § 770.01 regarding presuit notice, and dismissal is with prejudice, since two-year statute of limitations has expired.

[2] Defamation — Pre-trial procedures — In general (▶11.1201)

Defamation — Pre-trial procedures — Jurisdiction (▶11.1203)

Jurisdictional prerequisites set forth in Fla. Stat. Ann. § 770.01, requiring that media defendant in defamation action be served with presuit notice of articles or broadcasts alleged to be defamatory, apply to Internet publications, since Section 770.01 applies to "any civil action ... for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander," and there is no legitimate justification to interpret broad term "other medium" to exclude Internet, and thus plaintiff's failure to give required presuit notice is fatal to her defamation claim against television station stemming from allegedly defamatory stories published on defendant's Web site.

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[3] Defamation — Publication — Single publication rule(▶11.0303)

Defamation — Publication — Statute of limitations(▶11.0305)

Single publication rule applies to allegedly defamatory stories published on defendant television station's Web site, and thus plaintiff's defamation claim is time-barred, since latest publication challenged was published in Feb. 6, 2002, and since, therefore, statute of limitations expired on Feb. 6, 2004.

Case History and Disposition

Defamation action against television station. On defendant's motion for summary judgment.

Granted.

Attorneys

Jeffrey A. Blau, Tampa, Fla., for plaintiff.

Gregg D. Thomas and Susan T. Bunch, of Thomas & LoCicero, Tampa, for defendants.

Opinion Text

Opinion By:

Exhibit A

Little, J.:

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This cause came on for hearing on February 24, 2006, on the Motion for Summary Judgment filed on behalf of the Defendant Tampa Bay Television, Inc. ("WFTS"). Having heard the argument of counsel, reviewed the record, and considered the affidavits submitted by the parties, the Court hereby makes the following findings:

1. Pursuant to Florida Rule of Civil Procedure 1.510, WFTS is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, affidavits, exhibits and other documents filed with the Court show that there is no genuine issue as to any material fact and that WFTS is entitled to judgment as a matter of law. *See* Fla.R.Civ.P. 1.510.

2. In Florida, defamation claims are subject to a two-year statute of limitations. *See* Fla. Stat. §95.11(g) (2005).

3. In addition, with regard to actions against media defendants, "[*b*]*efore* any civil action is brought for publication ... of libel or slander, the plaintiff shall, at least 5 days *before instituting* such action, serve notice in writing on the defendant." Fla. Stat. §770.01 (2004) (emphasis added).

4. Section 770.01 requires that the presuit notice "*specify* the article or broadcast *and* the statements therein which [plaintiff] alleges to be false and defamatory." Fla. Stat. §770.01 (2005) (emphasis added).

5. Because Plaintiff, Alice Holt ("Holt"), sued two media defendants, WFTS and Mike Mason, she was required to comply with the presuit notice requirements set forth in Section 770.01 prior to filing a suit for defamation. *See Gifford v. Bruckner*, 565 So.2d 887, 888 n.1 (Fla. 2d DCA 1990). Failure to do so requires dismissal of the defamation claim. *Id. See also Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So.2d 1376, 1377 (Fla. 4th DCA 1997). A plaintiff's failure to satisfy a statutory condition precedent to suit prior to the expiration of the statute of limitations requires dismissal of the complaint with prejudice. *See, e.g., City of Coconut Creek v. City of Deerfield Beach*, 840 So.2d 389, 390 (Fla. 4th DCA 2003).

Count I—Defamation (Television Broadcasts)

[1] 6. Count I of the Second Amended Complaint alleges that, from February 5, 2002 until February 19, 2002, WFTS broadcast false and defamatory television stories about Holt.

7. On February 22, 2006, Holt served an Affidavit in opposition to WFTS's Motion for Summary Judgment. Attached to her affidavit was a letter dated October 15, 2003, addressed to WFTS from Roland Maxwell Griffin of the Victims of Animal Abuse Laws (hereinafter the "October 2003 Griffin Letter"). Holt contends that the October 2003 Griffin Letter satisfies the requirements of Section 770.01 with respect to the television stories that form the basis for Count I of her Second Amended Complaint.

8. The October 2003 Griffin Letter does not satisfy the requirements of Section 770.01 for two reasons: First, the October 2003 Griffin Letter fails to specify the broadcast(s) alleged to be false and defamatory. Second, the October 2003 Griffin Letter fails to specify the allegedly false and defamatory statement(s) therein.

9. Because the October 2003 Griffin Letter fails to satisfy the jurisdictional prerequisites set forth in Section 770.01, Count I must be dismissed. Because the two-year statute of limitations has expired with respect to the

February 2002 television broadcasts, the dismissal is with prejudice.

Count II—Defamation (Internet Stories)

[2] 10. Count II of the Second Amended Complaint alleges that, from February 5, 2002 until late March 2005, WFTS published stories about Holt on WFTS's web site that were false and defamatory (hereinafter the "Web Site Stories").

11. WFTS has submitted the affidavit of Chris Boex, the Webmaster for the WFTS web site. Mr. Boex swears that the only stories published about Holt on WFTS's web site were posted on February 5 and 6, 2002. Holt has provided this Court with no evidence to rebut this affidavit. The undisputed facts establish that the last story posted by WFTS on its web site that was of and concerning Holt was posted on February 6, 2002.

12. The October 2003 Griffin Letter does not mention the Web Site Stories that allegedly serve as the basis for Count II. Instead, Holt asserts that Section 770.01 does not apply to stories published on the Internet and therefore, that no presuit notice pursuant to Section 770.01 is necessary before filing suit against a media defendant who has posted allegedly defamatory stories on the Internet. By contrast, WFTS contends that the Internet falls within phrase "other medium" in Section 770.01 and that Holt's failure to satisfy the presuit notice requirements operate as a bar to her claims in Count II. Therefore, resolution of the Motion for Summary Judgment as to Count II turns on the applicability of Section 770.01 to stories published on the Internet.

13. Section 770.01 applies to "any civil action ... for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander ..." Fla. Stat. §770.01 (2005).

14. This Court is persuaded that the phrase "other medium" in Section 770.01 includes the Internet. Although no Florida state court has yet addressed the applicability of Section 770.01 to the Internet, the United States District

Court for the Southern District of Florida has concluded that Section 770.01 applies to electronic news services such as the Associated Press. *See Nelson v. Associated Press, Inc.*, 667 F.Supp. 1468, 1474-78 [14 Med.L.Rptr. 1577] (S.D. Fla. 1987). In addition, at least one other state has applied its presuit notice statute to stories published on the Internet. *See Mathis v. Cannon*, 573 S.E.2d 376, 385 [31 Med.L.Rptr. 1613] (Ga. 2002) (interpreting "newspaper and other publication" to include an Internet defendant because more restrictive definition failed "to accommodate changes in communications and the publishing industry due to the computer and the Internet").

15. This Court finds no legitimate justification for interpreting the broad term "other medium" to exclude the Internet, which has become a recognized medium for communication to the masses. Both the plain meaning and purpose of Section 770.01 support this Court's conclusion that the presuit notice statute applies to stories published on the Internet.

16. The purpose of the presuit notice statute is to protect the public's interest in the free dissemination of news. *Ross v. Gore*, 48 So.2d 412, 415 (Fla. 1950). This interest is not diminished merely because the stories are published by media entities on their web sites as well as in their television broadcasts or newspapers.

17. Therefore, the Court holds that the Internet falls within the phrase "other medium" in Section 770.01 and that defamation actions against media defendants based on stories published on the Internet must satisfy the presuit notice requirements established in Section 770.01. Consequently, Holt's failure to give the required notice is fatal to Count II.

18. Holt asserts that the continued availability of the offending web site pages after the initial date of publication in February 2002 creates a "continuing tort" and thereby tolls the two-year statute of limitations.

19. WFTS asserts that, under the "single publication rule," the posting of the two offending stories on the station's web site on February 5 and 6, 2002 gave rise to only a single cause of action for each web page. Therefore, the statute of limitations expired on the last story on February 6, 2004.

20. Florida has adopted the single publication rule in defamation cases. *See, e.g., Callaway Land & Cattle Co. v. Banyon Lakes C. Corp.*, 831 So.2d 204, 208 (Fla. 4th DCA 2002); *Daytona Beach News Journal Corp. v. FirstAmerica Dev. Corp.*, 181 So.2d 565, 568 n.1 (Fla. 3rd DCA 1966).

21. Under the single publication rule, "any one edition of a book or newspaper, or any one radio or television broadcast, exhibition or a motion picture or similar aggregate communication

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is a single publication." Restatement (Second) of Torts §557A (1977).

22. No Florida cases have addressed the applicability of the single publication rule to defamation cases arising out of Internet publications. However, numerous cases outside of Florida have held that the single publication rule applies to Internet publications. *See, e.g., Traditional Cat Ass'n v. Gilbreath*, 118 Cal.App.4th 392, 404, 13 Cal.Rptr.3d 353, 362 [32 Med.L.Rptr. 1998] (2004); *McCandliss v. Cox Enters.*, 265 Ga.App. 377, 593 S.E.2d 856, 858 [33 Med.L.Rptr. 1219] (2004); *Lane v. Strang Communications Co.*, 297 F.Supp.2d 897, 900 [32 Med.L.Rptr. 2042] (N.D. Miss. 2003); *Mitan v. Davis*, 243 F.Supp.2d 719, 722 (W.D. Ky. 2003); *Firth v. New York*, 98 N.Y.2d 365, 747 N.Y.S.2d 69, 775 N.E.2d 463 [30 Med.L.Rptr. 2085] (2002); *Simon v. Arizona Bd. of Regents*, 28 Med. L. Rep. 1240 (Ariz.Super.Ct. 1999); *Abate v. Maine Antique Digest*, 2004 W.L. 293903, at *1 (Mass. Super. Jan. 26, 2003).

[3] 23. This Court is persuaded that the single publication rule should apply to the allegedly defamatory Internet publications under consideration in this case.

24. The undisputed facts establish that the latest publication challenged in Count II was published on February 6, 2002. Consequently, the statute of limitations for expired on February 6, 2004. Holt having failed to satisfy the statutory conditions precedent established by Section 770.01 within the statutory time frame for so doing, Count II is time barred.

NOW THEREORE, IT IS ORDERED:

1. Defendant, Tampa Bay Television, Inc.'s Motion for Summary Judgment is granted.

2. Counts I and II of the Second Amended Complaint are dismissed with prejudice.

- End of Case -

Media Law Reporter

Source: Media Law Reporter Cases > Florida > Canonico v. Callaway, 35 Med.L.Rptr. 1549 (Fla. Cir. Ct. 2007)

35 Med.L.Rptr. 1549
Canonico v. Callaway
Florida Circuit Court
Hillsborough County

No. 05-09049

February 22, 2007

ERIC CANONICO, et al. v. JACKIE CALLAWAY, et al.

Headnotes

REGULATION OF MEDIA CONTENT

[1] Defamation — Pre-trial procedures — Jurisdiction (▶11.1203)

Florida trial court lacks subject matter jurisdiction over defamation claim against television defendants, since Fla. R. Civ. P. 1.090(a), which provides that, in computing time period of less than seven days, weekends and holidays should be excluded from computation, must be used to compute time period for written notice to potential defendant of defamation lawsuit in action against television defendants, since Fla. Stat. §770.01, which requires five-day notice period for defamation suits against media defendants, does not provide contrary method of computing time, and since plaintiffs filed their complaint one day before they were permitted to do so under five-day notice period.

[2] Defamation — Publication — Single publication rule (▶11.0303)

Privacy — Common law right — False light publicity (▶13.0104)

False light invasion of privacy claim against television defendants is dismissed, since single publication/single cause of action rule prohibits plaintiff from recasting failed defamation claim as claim for different tort, and plaintiffs in present action are attempting to assert claim based on same publication that gave rise to their defamation claim, which was dismissed for lack of subject matter jurisdiction, and since plaintiff corporation lacks standing to pursue false light claim, as it conceded at oral argument; individual plaintiff will be given leave to amend his complaint to state cause of action under applicable case law, which allows false light claim where publication of truthful, nondefamatory facts is done in manner as to cast plaintiff in false light in eye of public.

[3] Defamation — Publication — Single publication rule (▶11.0303)

Defamation — Related causes of action — In general (▶11.5801)

Negligence claim against television defendants is dismissed under single publication/single cause of action rule, which prohibits plaintiff from recasting failed defamation claim as claim for different tort, since plaintiffs are attempting to assert claim based on same publication that gave rise to their defamation claim, which was dismissed for lack of subject matter jurisdiction; plaintiffs will be given leave to amend their complaint to state cause of action under applicable case law.

[4] Defamation — Pre-trial procedures — Jurisdiction (▶11.1203)

Plaintiffs failed to adequately plead basis for personal jurisdiction over nonresident television defendants in defamation, false light invasion of privacy, and negligence action, since they failed to allege sufficient facts relating to each defendant to establish personal jurisdiction as required by Fla. Stat. §48.193.

[5] Defamation — Defamatory content — "Of and concerning" (▶ 11.0502)

Plaintiff corporation failed to state defamation claim in action against television defendants, since it failed to demonstrate that any false and defamatory statements were "of and concerning" it.

Case History and Disposition

Action for defamation, negligence, and false light invasion of privacy against television defendants. On defendants' motion to dismiss.

Exhibit B

Granted.

Attorneys

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Gregg D. Thomas and James J. McGuire, of Thomas & LoCicero, Tampa, for defendants Jackie Callaway, www/abcactionnews.com d/b/a and/or a/k/a ABC Action News, Tampa Bay Television Inc., Scripps Howard Broadcasting Co. d/b/a and/or a/k/a WFTS-TV Channel 28, E.W. Scripps Co. d/b/a and/or a/k/a WFTS-TV Channel 28, ABC Broadcasting Inc., ABC Inc. a/k/a American Broadcasting Co. a/k/a American Broadcasting Companies Inc.

Opinion Text

Opinion By:

Nielsen, J.:

ORDER GRANTING THE WFTS DEFENDANTS' MOTION TO DISMISS AND THE ABC DEFENDANTS' MOTION TO DISMISS

This cause came on for hearing on October 11 and 19, 2006, upon the Motions to Dismiss the Amended Complaint filed by both WWW.ABCACTIONNEWS.COM d/b/a and/or a/k/a ABC Action News, Tampa Bay Television, Inc., Scripps Howard Broadcasting Company d/b/a/ and/or a/k/a WFTS-TV Channel 28 News, the E.W. Scripps Co. d/b/a/ and/or a/k/a/WFTS-Channel 28, and its reporter Jackie Calloway (collectively "the WFTS Defendants") and ABC News, Inc., American Broadcasting Companies, Inc. (incorrectly named in this action as "ABC Broadcasting Inc." and/or "ABC, INC. a/k/a American Broadcasting Company, a/k/a American Broadcasting Companies, Inc.") and ABC, Inc. (named in this action as "ABC Broadcasting Inc." and/or "ABC, Inc. a/k/a American Broadcasting Company a/k/a American Broadcasting Companies, Inc. (collectively "the ABC Defendants").

This action was initiated on October 10, 2005, when plaintiffs, Eric Canonico and Morre Entertainment, LLC ("Plaintiffs"), filed a two-count Complaint for defamation and negligence. After the defendants moved to dismiss the Complaint, Plaintiffs filed a three-count Amended Complaint against both the WFTS Defendants and the ABC Defendants, asserting claims for defamation (Count I), false light invasion of privacy (Count II), and negligence (Count III).

The defendants have moved to dismiss all Counts of the Amended Complaint, asserting, among other things, that the defamation claim must be dismissed because this court lacks subject matter jurisdiction over it, that the defamation fails to allege a false statement of and concerning plaintiff Morre Entertainment, that Morre Entertainment cannot assert a claim for false light invasion of privacy, and that the false light and negligence claims are barred under the single publication/single cause of action rule. The ABC Defendants have also moved to dismiss for lack of personal jurisdiction. The court has reviewed the motions, memoranda of law and supplemental memoranda of law filed by the parties in support of their respective positions, considered several post hearing letters from counsel and is otherwise fully advised in the matter.

ANALYSIS

I. Defamation (Count I)

In Count I, Plaintiffs claim that they were defamed by statements made by the WFTS Defendants and the ABC Defendants on television and/or on the Internet. On October 4, 2005, Plaintiffs served upon the WFTS Defendants and the ABC Defendants, by U.S. Certified Mail, Return Receipt Requested, a notice specifying allegedly false and defamatory statements made by the defendants. The notice was intended to comply with §770.01, Fla. Stat. On October 10, 2005, Plaintiffs filed their Complaint in this court.

Section 770.01 provides that before suit is filed against a periodical or news or broadcast media for libel or slander, the plaintiff shall serve notice in writing, at least 5 days before instituting such action, on the proposed defendant identifying the material which he or she alleges to be false and defamatory. Section 770.01 does not prescribe how the five days are to be calculated and there are no reported Florida cases addressing the method of computing the five-day notice period under the section. The parties have argued opposing approaches

to calculating the five days. The defendants maintain that the court must look to Florida Rule of Civil Procedure 1.090 (a) to compute the five days. Plaintiff contends that the court should look to other, unrelated statutes for guidance in calculating the five days.

Fla. R. Civ. P. 1.090(a) provides that in computing a period of time of less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. Plaintiffs argue, however, that Rule 1.090(a) should not be invoked because under the "plain language" of the statute, five days means five days, including weekends and holidays. Plaintiffs further argue that because media defendants conduct business on weekends, there is no need to exclude weekends from the five-day notice period.

[1] Florida courts repeatedly have held that the time computation rules contained in Rule 1.090 govern the computation of time unless the specific statute at issue provides to the contrary. *See, e.g., Lehmann Development Corp. v. Nirenblatt,* 629 So.2d 1098, 1099 (Fla. 2d DCA 1994): *Public Health Trust of Dade County v. Gabrilove,* 349 So.2d 1228, 1229 (Fla. 3d DCA 1977); *Berry v. Clement,* 346 So.2d 105 (Fla. 2d DCA 1977); *Moffett v. MacArthur,* 291 So.2d 134 (Fla. 4th DCA 1974). Here, §770.01 does not provide a contrary method of computing time. Therefore, Rule 1.090(a) must be used to compute the five-day period pursuant to §770.01, Fla. Stat.

In applying Rule 1.090(a) to the five-day notice period in §770.01, one must exclude the day that notice is sent, as well as intervening Saturdays, Sundays, and legal holidays. Applying this standard to the notice served by Plaintiffs on October 4, 2005, the fifth day, and the day on which Plaintiffs could first have filed their defamation claim, was October 11, 2005. As noted above, Plaintiffs filed their complaint on October 10, 2005, one day before they were permitted to do so.

As a result, this court lacks subject matter jurisdiction over Count I of the Amended Complaint, Plaintiffs' defamation claim. *See, e.g., Davies v. Bossert,* 449 So.2d 418, 419 [10 Med.L.Rptr. 1838] (Fla. 3d DCA 1984) (compliance with §770.01 "is a jurisdictional condition precedent to the right to maintain [an] action" for defamation against a media defendant). Therefore, Count I is DISMISSED.

Furthermore, this dismissal must be with prejudice. Plaintiffs' Amended Complaint alleges the defendants broadcast a story on October 3, 2003, and posted a story on their Internet website on October 8, 2003. This means the statute of limitations on the Chapter 770 cause of action expired, at the latest, on October 8, 2005, and this action is time barred. Section 95.11, Fla. Stat.; *Williams v. Campagnulo,* 588 So.2d 982, 983 (Fla. 1991); *City of Coconut Creek v. City of Deerfield Beach,* 840 So.2d 389, 393 (Fla. 4th DCA 2003); *Veal v. Escambia County,* 773 So.2d 625, 625-626 (Fla. 1st DCA 2000).

II. False Light Invasion of Privacy (Count II)

In Count II, Plaintiffs allege a false light invasion of privacy claim based on the assertion that the news report on WFTS and the article published on WFTS's Internet website—the exact same news report and Internet article that form the basis of Plaintiffs' defamation claim—cast him in a false light. Defendants seek dismissal of Count II arguing that this count is nothing more than Plaintiffs' defamation claim re-labeled as an invasion of privacy claim.

The defendants' motions to dismiss argue that under Florida law a plaintiff who asserts a failed defamation claim cannot avoid a motion to dismiss merely by re-labeling that claim as one for false light invasion of privacy. Under the single publication/single cause of action rule, a plaintiff may bring only one cause of action for injuries arising out of an allegedly defamatory statement, and that one cause of action is for defamation alone. *See Fridovich v. Fridovich,* 598 So.2d 65, 69-70 (Fla. 1992) ("[A] plaintiff cannot transform a defamation action" into a claim for a different tort "simply by characterizing the alleged defamatory statements" in a different way). *See also, Ovadia v. Bloom,* 756 So.2d 137, 140-41 [28 Med.L.Rptr. 2054] (Fla. 3d DCA 2000) (plaintiff may bring only a single cause of action for injuries arising out of an allegedly defamatory publication).

The single publication/single cause of action rule prohibits a plaintiff from avoiding the two-year statute of limitations for defamation actions by re-labeling his unsuccessful defamation claim as a false light invasion of privacy claim. *See, e.g., Heekin v. CBS Broadcasting, Inc.,* 789 So.2d 355, 358 [29 Med.L.Rptr. 1795] (Fla. 2d DCA 2001) (where a plaintiff has a cause for action for libel or slander and alleges a claim for false light invasion of privacy based on the publication of the same false facts, the false light invasion of privacy claim is barred by the two-year statute of limitations).

[2] Here, Plaintiffs are attempting to assert a false light claim based on the same publication that gave rise to their defamation claim. Under the single publication/single action rule, the false light invasion of privacy claim fails. In addition, plaintiff Morre Entertainment, as a corporation, lacks standing to pursue a claim for false light invasion of privacy, as was conceded by Morre Entertainment at oral argument. A corporation has no right of privacy. *See, e.g., United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950).) Therefore, Count II is DISMISSED.

A plaintiff may bring a false light claim where the publication of truthful, non-defamatory facts is done in a manner as to cast the plaintiff in a false light in the eye of the public. *See, e.g., Heekin v. CBS Broadcasting, Inc.,* 789 So.2d 355, 358 [29 Med.L.Rptr. 1795] (Fla. 2d DCA 2001). Under such facts, the four-year statute of limitations provided for in §95.11(3)(p) of the Florida Statutes applies. Therefore, plaintiff Eric Canonico will be given leave to amend his complaint to state a cause of action under the applicable case law.

III. Negligence (Count III)

In Count III, Plaintiffs assert that the defendants were negligent in gathering and reporting the news on television and on the Internet. Plaintiffs' negligence claim is in all relevant respects the same as Plaintiffs' defamation claim. Defendants seek dismissal of Count III arguing that this count is simply Plaintiffs' defamation claim re-labeled as a negligence claim.

[3] As was discussed concerning Count II, above, under the single publication/single action rule, Florida law prohibits a plaintiff from re-labeling a defamation claim as a different tort. *See Fridovich v. Fridovich,* 598 So.2d 65, 69-70 (Fla. 1992). Accordingly, Count III is DISMISSED. Plaintiffs will be given leave to amend their complaint to state a cause of action under the applicable case law.

IV. Lack of Jurisdiction Over ABC Defendants

[4] As a final basis for dismissal of the Amended Complaint as to the ABC Defendants, the Amended Complaint fails to adequately plead the basis for personal jurisdiction over these nonresident defendants by failing to allege sufficient facts relating to each of these defendants to establish personal jurisdiction as required by §48.193, Fla. Stat. *See Venetian Salami Co. v. Parthenais,* 554 So.2d 499, 502 (Fla. 1989). Therefore, the Amended Complaint fails for lack of personal jurisdiction as to the ABC Defendants.

IV. Dismissal As To Morre Entertainment

[5] Neither the Amended Complaint nor the attached articles reveal any allegedly defamatory statements of and concerning Morre Entertainment. Under these circumstances, the Amended Complaint fails to state that any false and defamatory statements were made "of and concerning" Morre Entertainment and, therefore, the Amended Complaint fails to state a claim upon which relief may be granted. *See, e.g., Thomas v. Jacksonville Television, Inc.,* 699 So.2d 800, 803-04 [26 Med.L.Rptr. 1335] (Fla. 1st DCA 1997); *McIver v. Tallahassee Democrat, Inc.,* 489 So.2d 793 [13 Med.L.Rptr. 1111] (Fla. 1st DCA 1986) (article that only mentioned corporation in identifying its president, in connection with president's testimony before grand jury was not "of and concerning" the corporation).

CONCLUSION

As discussed above, each of the counts of the Amended Complaint in this case must be dismissed. Although the Plaintiffs may not be able to state all of their claims based upon these publications, the Plaintiffs should have another opportunity to state causes of action seeking relief for the conduct alleged. Therefore, the dismissal of the Amended Complaint is without prejudice, except as otherwise provided herein.

Based upon the foregoing, it is thereupon

ADJUDGED as follows:

1. The Motion to Dismiss Count I of the Amended Complaint filed by the WFTS Defendants and the ABC Defendants is GRANTED, with prejudice.

2. The ABC Defendants' Motion to Dismiss Count II of the Amended Complaint brought by plaintiff, MORRE ENTERTAINMENT, LLC, is GRANTED, with prejudice.

3. The Motion to Dismiss Counts II and III of the Amended Complaint filed by the WFTS Defendants and the ABC Defendants is GRANTED, without prejudice.

4. The Plaintiffs shall have 20 days from the date of this order within which to serve a Second Amended Complaint.

- End of Case -