IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IMAGES HAIR SOLUTIONS MEDICAL CENTER, a division of IMAGES, INC., and TOM PRENTICE	)	
Plaintiffs,	)	
v.	)	C.A. No.: N13C-05-077 WCC
FOX NEWS NETWORK, LLC, NEWS CORPORATION, FOX TELEVISON STATIONS OF PHILADELPHIA, INC. d/b/a/ FOX 29 PHILADELPHIA, a Delaware corporation, FOX TELEVISION STATIONS, INC., a Delaware corporation, and JOYCE EVANS,	)	
Defendants.	)	

Submitted: August 26, 2013
Decided: December 20, 2013

On Defendants' Motion to Dismiss – GRANTED IN PART

OPINION

Daniel A. Griffith, Esquire. Whiteford Taylor Preston, LLC. The Renaissance Centre, Suite 500, 405 King Street, Wilmington, DE 19801. Attorney for Plaintiffs.

Austen C. Endersky, Esquire. Fox Rothschild, LLP, Citizens Bank Center, 919 N. Market Street, Suite 1300, Wilmington, DE 19801. Attorney for Defendants.

CARPENTER, J.

Before this Court is Defendants Fox Television Stations, Inc. ("Fox") and Joyce Evans ("Evans") (collectively, "Defendants") joint Motion to Dismiss the Complaint brought by Plaintiffs Images Hair Solutions Medical Center ("Images") and Tom Prentice ("Prentice") (collectively, "Plaintiffs"). Defendants' Motion argues that Plaintiffs have failed to adequately plead or are otherwise barred from pursuing the Complaint's three counts: (I) defamation; (II) false light invasion of privacy; and (III) tortious interference with prospective business relations. The Court finds that the facts pleaded do not support either of Plaintiffs' defamation nor false light claims. However, in spite of the concerns set forth later in this opinion, there is a sufficient basis to allow Plaintiffs' third count, tortious interference with prospective business relations, to proceed. Accordingly, the Motion to Dismiss is **GRANTED IN PART**.

BACKGROUND

Plaintiffs' Complaint and Defendants' Motion arise from Fox's broadcast coverage and Evans's reporting on Images' treatment. Images is a hair-loss restoration business in Springfield, Pennsylvania, which provides non-invasive and safe restorative hair-loss treatment for women through the use of the MEP-90 Hair Growth Stimulation System (the "MEP-90"). The MEP-90 is an FDA-approved low-level laser treatment, which Images uses to treat women with

androgenetic alopecia. Images was opened by Prentice with the help of start-up financing from an investor and a medical advisor for the specific purpose of MEP-90 treatment.

Prentice, in his capacity as owner and operator of Images, was contacted in March of 2012 by Evans and/or other Fox employees. Defendants approached Prentice about producing and airing a segment on Images' treatment in their upcoming broadcast. Prentice was allegedly assured that the broadcast would be a positive, business enhancing opportunity. Relying on those assurances, Prentice agreed to participate in the filming. Through arrangements with Prentice, Fox was granted access to the Images facility to view demonstrations of the MEP-90 and conduct interviews with Images' staff and one patient, referred to as "Kim."

The final segment aired on May 16, 2012 and was approximately five minutes long. In addition to the scenes filmed at the Images facility, the segment included commentary by Evans, interviews with two medical doctors, and on-screen textual explanations of Images' business. The day immediately after the segment aired, five of the six appointments Images had scheduled were cancelled. The one patient that kept her appointment expressed reservations to Images staff about the treatment, explaining that she had viewed the broadcast the night before. Further, Images has noticed a decline in the acquisition of new customers and has

experienced a number of additional cancelled appointments, all of which they attribute to the broadcast. Plaintiffs allege that six specific statements from the broadcast were damaging to their business:

(1) Evans's statement that she was "following up" on the "buzz" implying that she had conducted a prior investigation on Images, which she had not.

(2) Evans's statements that Kim was "cooking under the hood" and that she became "flushed" during treatment; thus, portraying the treatment as uncomfortable.

(3) The medical doctor's statements that "many if not all" of the positive results were attributable to the topical solution and not the MEP-90 machine.

(4) Evans's statement that patients at Images were required to go to their family doctor for examination and blood-work prior to being treated.

(5) Evans's comparison of Images to "internet medicine."

(6) The medical doctor's statement that he did not believe the MEP-90 treatment was worth $50 a treatment.

The Complaint, setting forth the above factual pretext was filed on May 9, 2013. The Complaint alleged these six statements support three claims: (I) defamation; (II) false light invasion of privacy; and (III) tortious interference with prospective business relations. Defendants[1] filed this Motion to Dismiss on July 15, 2013 and the Court, after hearing argument on August 26, 2013, reserved judgment.

STANDARD OF REVIEW

Under Delaware Superior Court Civil Rule 12(b)(6), the Court may dismiss a plaintiff's claim for "failure to state a claim upon which relief can be granted."[2] In doing so, the Court "must assume all well-pleaded facts in the complaint to be true"[3]and draw "all reasonable inferences in favor of the non-movant."[4] A well-pleaded complaint "need only give general notice of the claim asserted."[5] Therefore, the motion will be denied "if the plaintiff may recover under any conceivable set of circumstances susceptible to proof under the complaint."[6]

[1] The Complaint named a litany of Fox-related Defendants; however, most were dismissed by stipulation. Accordingly, the only remaining Defendants are Fox and Evans.
[2] Super. Ct. Civ. R. 12(b)(6).
[3] *Read v. Carpenter*, 1995 WL 945544, at *1 (Del. Super. June 8, 1995).
[4] *Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *2 (Del. Super. Sept 3, 1999).
[5] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).
[6] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

DISCUSSION[7]

I. COUNT I - DEFAMATION

In support of the Motion to Dismiss, Defendants argue that none of the identified statements are capable of defamatory meaning or, alternatively, any defamatory content is impugning the MEP-90 treatment, not Plaintiffs. The Court finds, for the foregoing reasons, that the statements identified are not capable of defaming Plaintiffs.

A plaintiff alleging defamation must plead: "(1) a false and defamatory communication concerning the plaintiff, (2) publication of the communication to third parties, (3) understanding of the defamatory nature of the communication by the third party, (4) fault on the part of the publisher, and (5) injury to the plaintiff."[8] Defendants only challenge that the Complaint fails to plead statements capable of defamatory meaning, element (1), and, therefore, that will be the sole subject of the Court's inquiry.[9]

---

[7] Defendants' argument that Images is not a proper party is one of form over substance. Plaintiffs have explained in their response that Images, Inc. is a party to the litigation and, thus, the Court will not address the issue.

[8] *Bickling v. Kent Gen. Hosp., Inc.*, 872 F. Supp. 1299, 1307 (D. Del. 1994) (citing Restatement (Second) of Torts § 558 (1977); *Gonzalez v. Avon Prod., Inc.*, 609 F. Supp. 1555, 1558 (D. Del. 1985)).

[9] Since Defendants have not challenged whether Plaintiffs adequately plead special damages, which would require inquiry into whether the allegations are for libel or slander, the Court need not address the issue *sua sponte*. *See Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978) (explaining the difference between libel and slander in their respective pleading standards). Further, although Defendants have raised an issue of choice of laws, the motion papers and this Court's research show that there is no conflict, at least for this legal issue, between the laws of Pennsylvania and Delaware. *See* Def.'s Br. 5 n. 3.

"Whether a statement is capable of bearing a particular meaning, and whether that meaning is defamatory, is a question for the court"[10] In determining whether a statement is capable of defamatory meaning, the Supreme Court of Delaware in *Spence v. Funk*[11] looked to two similar, but slightly different, definitions of defamation:

- "That which tends to injure the 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."[12]

- "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[13]

Beginning with these fundamental definitions, this Court in *Q-Tone Broadcasting, Co. v. Musicradio of Maryland, Inc.*,[14] adopted New Jersey's three-part test on determining a statement's capability of defamatory meaning. The Supreme Court of New Jersey, in W*ard v. Zelikovsky*,[15] found that courts should consider the content, verifiability, and context of the allegedly defamatory statement(s).[16] "In its analysis of the content of an allegedly defamatory statement,

---

[10] *Bickling v. Kent Gen. Hosp., Inc.*, 872 F. Supp. at 1307; *Ward v. Blair*, 2013 WL 3816568, at *8 (Del. Super. July 16, 2013).
[11] 296 A.2d 967.
[12] W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 111 (1971), *quoted in Spence*, 396 A.2d at 969.
[13] Restatement (Second) of Torts § 559 (1977), *quoted in Spence*, 396 A.2d at 969.
[14] 1994 WL 555391 (Del. Super. Aug. 22, 1994).
[15] 643 A.2d 972 (N.J. 1994).
[16] *Q-Tone Broad., Co. v. Musicradio of Md., Inc.*, 1994 WL 555391, at *5 (Del. Super. Aug. 22, 1994).

the Court must look to the 'fair and natural meaning which will be given it by reasonable persons of ordinary intelligence.'"[17] Although falsity is one aspect of the Court's consideration,"[i]f the alleged libel was no more damaging to the plaintiff's reputation in the mind of the average reader than a truthful statement would have been, then the statement is substantially true."[18]

Next, the Court must look to the verifiability of the statements, which will generally dispose of defamation claims arising from the expression of mere opinions.

> Factual statements are uniquely capable of objective proof of truth or falsity while opinion statements generally are not since they reflect the maker's state of mind. Expressions of opinion are given broad protection under the First Amendment. By requiring that a statement be verifiable in order to be defamatory, courts can ensure that defendants are not punished for exercising their First Amendment right to free speech. Therefore, unless a statement explicitly or impliedly rests on false facts that damage a person's reputation, the statement will not be actionable as defamation.[19]

Lastly, the Court will look at the context of the statement, as contextual analysis is key to assessing how a listener would reasonably interpret such.[20] The Court will

[17] *Id.* at *5. *See also Ward v. Blair*, 2013 WL 3816568, at *8 ("A plaintiff is presumed to have stated her defamation claim in its best light and '[i]n determining whether words are defamatory, the Court must take their plain and natural meaning and understand them as would a person of average intelligence and perception.'").
[18] *Riley v. Moyed*, 529 A.2d 248, 253 (Del. 1987).
[19] *Q-Tone Broad. Co.*, 1994 WL 555391, at *5 (internal citations omitted).
[20] *Id.*

use *Ward*'s three-part test to determine whether the broadcast, taken as a whole, is capable of defaming Plaintiffs.

A. Content

Plaintiffs allege that Evans made six defamatory statements during the five-minute broadcast. Two of these statements, however, do not contain any potentially defamatory content. First, the statement that implied Evans was conducting a follow-up report, even if false, is not capable of injuring Plaintiffs' reputation, diminishing the esteem, respect, goodwill, or confidence in which Plaintiffs are held, exciting adverse, derogatory, or unpleasant feelings or opinions against Plaintiffs, or deterring third parties from associating or dealing with Plaintiffs. The implication that Fox had conducted a prior report is no more injurious than the truth, that Fox had never aired a prior broadcast on Images. In addition, this lead-in comment by Evans reflected a positive image of a new and promising procedure and is simply not actionable. Similarly, the representation that all patients must go to their doctors prior to receiving treatment, even if false, is no more injurious than informing listeners that no outside-doctor approval is necessary. In fact, the statement reflects that the treatments have a medical component that provides a basis for the viewer to view the treatment in a positive instead of a negative light. Therefore, these statements are simply not actionable as

they contain no defamatory content. The remaining statements have, at least, some indicia of impugning quality. Thus, the Court now looks at whether the statements are sufficiently verifiable or contextually non-defamatory.

B. Verifiability

Of the remaining statements, two are couched in terms of medical opinions and, thus, must be analyzed closely. First, the one doctor's statement that positive results are likely from topical solution, presented as his medical opinion, is alleged to be defamatory as the patient portrayed did not use any topical solution. As it was a medical opinion, the First Amendment's protections can only be overcome if the doctor relied on false facts.[21] This is not the case. The doctor's statements are that generally "most if not all" of the positive results from the use of MEP-90 machines is due to the topical solution. The doctor does not reference Images' business nor Kim, the patient portrayed. Plaintiffs seem to be arguing that the editing of the doctor's statements, making them juxtaposed with Kim's results, implies the false fact that Kim used topical solution (and, thus, that is the reason for her improvement). However, even if this Court were to follow that rationale, the falsity is no more injurious to Plaintiffs than the truth. Representing, by editing, that Kim's improvement was due to topical solution does little to impugn

[21] *Id.*

Plaintiffs. Instead, the statement implies that Kim's treatment at Images has been successful, albeit not because of the MEP-90. It is also fair that those who are seeking this treatment have little or no interest in how the procedure works, but simply care if it assists in reversing hair loss. Here, the doctor's statement, referencing the existence of positive results, actually reinforces this position. This opinion of another doctor did not defame Plaintiff,[22] therefore, this statement is not actionable.

The second statement that is cast as an opinion is an interviewed doctor's statement that he does not think the MEP-90 treatment is worth $50 a session. This opinion would only be actionable if it implies false facts. Plaintiffs allege that the treatment at Images is not $50 a session and, thus, the doctor's use of $50 as his measuring figure implied falsely that such was the price for Images' patients. However, the Court finds a reasonable viewer would interpret the statement as a general doctor's opinion as to the value of the treatment, rather than an attack on the amount Images actually charges their patients. As such, the opinion is not capable of objective proof of its truth or falsity and is, therefore, not actionable as a protected expression of opinion.

[22] *Id. See also Ezrailson v. Rohrlich*, 65 S.W. 3d 373, 381-82 (Tex. App. 2001).

C. Context

The remaining statements, although containing potentially-defamatory content that is sufficiently verifiable, are contextually non-defamatory. First, the statements about Kim "cooking under the hood" or becoming "flushed" during treatment are expressed together with video of Kim comfortably receiving the treatment. Therefore, any potential injury that could be done to Plaintiffs' reputation by implying an uncomfortable process is nullified by the depiction of Kim, looking comfortable during her treatment, and her statement that the process is painless. As the Court in *Q-Tone Broadcasting Co.* stated, "[t]he listener's reasonable interpretation of the statement will be based, in part, on the context in which the speaker made the statement."[23] Here, a listener's reasonable interpretation of the statement in context would be that the treatment is not uncomfortable or painful. Accordingly, these statements are also not capable of defaming Plaintiffs when viewed in context.

Lastly, Evans's statement that Images' practice was akin to "internet medicine" is contextually non-defamatory. Although the Court finds nothing inherent in the term "internet medicine" that would render the statement defamatory, the Court acknowledges that the term can carry some negative

[23] *Id.*

connotations. However, Evans's statement is not simply "Images is like internet medicine," it is qualified by her statement that the similarity between the two is the lack of face-to-face time with a doctor. This qualification given by Evans dilutes any negative connotation that the term "internet medicine" might imply. Accordingly, the statement is not capable of defamatory meaning when viewed in context.

Therefore, as the Court has found that none of the statements are capable of defamatory meaning, using *Ward*'s three-part test, the Motion to Dismiss Plaintiffs' claim for defamation is hereby granted.

FALSE LIGHT INVASION OF PRIVACY

In regard to Count II, false light invasion of privacy, Defendants argue in their Motion to Dismiss first, that false light may only be brought by an individual and second, that the facts pleaded do not rise to the level of false light. As the Court finds that the facts pleaded do not rise to the level required for false light claim, it will not address the availability of false light recovery for corporate entities.

False light invasion of privacy is when someone, knowing of or in reckless disregard for the falsity of their statements, gives "publicity to something that places plaintiff in a false light before the public where the false light is highly

offensive to a reasonable person[.]"[24] Here, although the broadcast could be interpreted as less-than favorable to Plaintiffs, a reasonable listener would view the broadcast as a routine journalistic broadcast, showing differing viewpoints and opinions on a medical treatment. The broadcast essentially leaves the final decision on whether the MEP-90 treatment is effective and/or worthy of the public's indulgence in the hands of the viewer. While it is clear that Plaintiffs were naïve in their perception in to how the media would present the broadcast, more importantly, the broadcast gave ample time and exposure to Plaintiffs' views and displayed proof of the treatment's effectiveness. While perhaps not the puff piece hoped by Plaintiffs, it did not place Plaintiffs in a false light such that their privacy was invaded.

III. TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

Lastly, in seeking dismissal of Count III, Defendants claim that Plaintiffs' final claim must also fail, arguing: (1) once defamation fails, a tortious interference claim arising from the same statements must also fail as a matter of law and (2) Plaintiffs have failed to prove that they lost actual or potential business relations due to Defendants' actions. The Court will address each argument in turn.

[24] *Q-Tone Broad., Co.*, 1994 WL 555391, at *9.

Although Defendants suggest that their first argument is settled law in Delaware, the Court is unable to find any case law supporting the proposition that in all instances a tortious interference claim cannot survive dismissal when a defamation claim, brought upon the same facts, is dismissed. All of the cases cited by Defendants to support this proposition address whether a tortious inference claim can survive when it is premised solely upon privileged or other constitutionally-protected statements.[25] In those instances, Court's have determined the answer is "no."[26] Here, although two of the aforementioned statements were opinions and, thus, constitutionally protected, the broadcast as a whole is the alleged interference. Therefore, the broadcast, taken as a whole, might still form the basis for a tortious interference claim.

Contrary to the suggestion made by Defendants, defamation and tortious interference are separate and distinct torts. As stated in the Restatement (Second) of Torts § 767:

> In some circumstances one who is liable to another for intentional interference with economic relations by inducing a third person by fraudulent misrepresentation not to do business with the other may also

[25] *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1201 (10th Cir. 2007) (concluding tortious interference claim based upon non-actionable statements of opinion could not proceed); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 973 (3d Cir. 1985) (holding that since the statements giving rise to the tortious interference claim were protected opinions the "count [wa]s not actionable because there [wa]s no basis for finding that their actions were 'improper'"); *Bove v. Goldenberg*, 2007 WL 446014, at *4 (Del. Super. Feb. 7, 2007) (dismissing the defamation and interference claims because the interference claim was "also barred by the absolute privilege to the same extent that it applied to the moving defendants in connection with the plaintiff's claim for defamation").
[26] *Supra* note 25.

> be liable under other rules of the law of torts. Thus if the representation is also defamatory of the other, the actor may be liable under the rules relating to defamation. . . . . The tort of intentional interference thus overlaps other torts. But it is not coincident with them. One may be subject to liability for intentional interference even when his fraudulent representation is not of such a character as to subject him to liability for the other torts. And, on the other hand, one may be liable for the other torts as for a defamatory statement negligently believed by him to be true, without being liable for intentional interference because of his good faith.[27]

Therefore, even though the broadcast, taken as whole, is not capable of defamatory meaning, it can still support *a prima facie* claim for tortious interference.

Under Delaware law, to establish a claim for tortious interference with prospective business relations, the claimant must show: "(1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference which induces or causes a breach or termination of the relationship or expectancy; and (4) resulting damages to the party whose relationship or expectancy has been disrupted."[28] Additionally, the Complaint must "identify the parties and the subject matter of the business opportunity as to which there was a reasonable probability of fruition which ended because of defendant's alleged statements."[29]

---

[27] Restatement (Second) of Torts § 767 cmt. c (1979) (internal citations omitted).
[28] *Lucent Information Mgmt., Inc. v. Lucent Techs., Inc.*, 5 F.Supp.2d 238, 243 (D. Del.1998) (citing *Dionisi v. DeCampli*, 1995 WL 398536 (Del. Ch. June 28, 1995)).
[29] *Wyshock v. Malekzadeh*, 1992 WL 148002, at *3 (Del. Super. June 10, 1992).

Defendants claim that Plaintiffs have failed to identify specific parties that terminated their business relations with Images. The Court disagrees. Plaintiffs have adequately pleaded a number of customers who cancelled appointments due to the broadcast. Although Plaintiffs did not plead the names or identifying information within the Complaint, such is not necessary in the pleading stage. [30] Plaintiffs have justifiable reasons for initially excluding the names of their potential clients and, as the case progresses, these identities are the proper subject of discovery and further inquiry.

While the Court has not accepted Defendants' arguments on this issue, the ruling should not be read as the Court having no concern as to the viability of this count. Although Defendants have not argued such in their Motion, the Court wishes to comment, admittedly *sua sponte*, on Plaintiffs' burden to plead facts alleging that Defendants *intended* to interfere with Plaintiffs' prospective business relations.[31] This element is not clear to the Court based on the allegations pleaded.

The Restatement (Second) of Torts § 8A defines the word intent, as used in the elements of tortious interference as when "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially

[30] *See Enzo Life Sciences, Inc. v. Digene Corp.*, 295 F. Supp. 2d 424, 429-30 (D. Del. 2003) (finding the required specificity of business expectancies is less on a motion to dismiss than on a motion for summary judgment); *Gill v. Del. Park, LLC*, 294 F. Supp. 2d 638, 646 (D. Del. 2003) (holding that "the existence of such a business expectancy is a question of fact not suitable for resolution [on a motion to dismiss]").
[31] *Lucent Information Mgmt., Inc.*, 5 F.Supp.2d at 243.

certain to result from it."[32] It is unclear to the Court what facts would support the allegation that Defendants, through the airing of their broadcast, intended to cause Plaintiffs' customers to cancel appointments or cease treatment or that Defendants knew such was certain or substantially certain to occur. Moreover, even if Plaintiffs were to point to facts supporting this contention, such interference must also be improper.

> The factors to be considered in determining whether an interference is improper are stated in § 767. One of them is the actor's motive and another is the interest sought to be advanced by him. Together these factors mean that the actor's purpose is of substantial significance. If he had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper. Other factors come into play here, however, particularly the nature of the actor's conduct. If the means used is innately wrongful, predatory in character, a purpose to produce the interference may not be necessary. On the other hand, if the sole purpose of the actor is to vent his ill will, the interference may be improper although the means are less blameworthy.[33]

Not having the benefit of the parties' briefing or argument on this issue, the Court is unable at this time to conduct a full analysis of the sufficiency of Plaintiffs' pleading for this element. However, it is difficult to envision the motive or intent of the Defendants in interfering with the Plaintiffs' business relationship. Since this allegation probably does warrant some discovery, at this juncture the tortious

[32] Restatement (Second) of Torts § 8A (1965).
[33] Restatement (Second) of Torts § 766B (1979).

interference claim may proceed as the arguments presented to the Court do not support dismissal at this time.

CONCLUSION

The Court recognizes that Plaintiffs are unhappy with Fox's broadcast and many of Evans's statements made during such. Plaintiffs understandably feel they have been wronged, however, "[t]he law does not provide a cause of action for every wrong done [ ]"[34] and every alleged wrong does not justify litigation. The statements made in the broadcast do not rise to the levels required for defamation nor false light invasion of privacy. At this stage, however, in spite of the Court's concern, it will allow the tortious interference with prospective business relations claim to remain. Therefore, for the aforementioned reasons Defendants' Motion to Dismiss is hereby **GRANTED IN PART**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[34] *Ward v. Blair*, 2013 WL 3816568, at *11.