UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK, ESQUIRE	:	**NO. 2:09-CV-4001**
Plaintiff	:	**CIVIL ACTION**
vs.		
	:	**JURY TRIAL DEMANDED**
WALTER K. OLSON, ESQUIRE		
THEODORE H. FRANK, ESQUIRE	:	
DAVID M. NIEPORENT, ESQUIRE		
THE OVERLAWYERED GROUP	:	
And OVERLAWYERED.COM		
	:	
Defendants		

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of the Defendants' Motion for a Protective Order to Stay Discovery Pending Resolution of Defendants' Rule 12 (b) (6) Motion, and Plaintiff's Response thereto, it is hereby **ORDERED** and **DECREED** that Defendants' Motion for a Protective Order to Stay Discovery Pending Resolution of Defendants' Rule 12 (b) (6) Motion is hereby **DENIED**.

BY THE COURT:

_____
The Honorable Mary A. McLaughlin

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PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER TO STAY DISCOVERY

Plaintiff, Arthur Alan Wolk, Esquire, by and through his undersigned attorneys, respectfully opposes Defendants' Motion for a Protective Order to Stay Discovery Pending Resolution of Defendants' Rule 12 (b) (6) Motion for the reasons set forth in the attached Memorandum of Law, which is incorporated by reference herein.

Respectfully Submitted,

SPECTOR GADON & ROSEN, P.C.

By: AJD 3101

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Date: September 29, 2009

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PLAINTIFF'S BRIEF IN OPPOSITION TO THE MOTION FOR A PROTECTIVE ORDER TO STAY DISCOVERY FILED BY DEFENDANTS

Plaintiff Arthur Alan Wolk, Esquire ("Plaintiff" or "Wolk"), by and through his attorneys, respectfully submits the following Memorandum of Law in Opposition to the Motion for a Protective Order to Stay Discovery Pending Resolution of Defendants' Rule 12 (b) (6) Motion. In support thereof, Plaintiff avers as follows:

I. INTRODUCTION

A stay of discovery pending resolution of the Defendants' Motion to Dismiss cannot be granted in this case for the simple reason that the Defendants' Motion to Dismiss, in addition to being patently frivolous, cannot even be decided without substantive discovery as a matter of law, and presents issues that are the unique province of the jury and inappropriate for resolution by this Court. Thus, the Defendants' Motion for a Protective Order should not be granted.

The Defendants assert that the Plaintiff's Complaint should be dismissed because (1) the Plaintiff did not file his claim within the statute of limitations, and (2) the false

statement at issue, which accused the Plaintiff of violating his professional duty as an attorney, is actually not defamatory, is a non-actionable opinion, and is "true." However, as pled by the Plaintiff in the Complaint, the Plaintiff had no reason to awaken his inquiry into the defamatory April 2006 statement until April 2008, when the Plaintiff was advised by a panel of judges at a CLE to perform a "Google" search on himself. Further, the statement is defamatory "per se" because it impugns the Plaintiff's professional integrity, and is an actionable statement because (1) it is an accusation, (2) it is sufficiently verifiable, and (3) even if it could be characterized as "opinion," the statement implies undisclosed defamatory facts. Thus, the Defendants' Motion to Dismiss has no substantive merit whatsoever.

But regardless, none of the issues raised are appropriate for resolution at this time. The law is crystal clear that issues of the discovery rule, whether the statement is capable of defamatory meaning, and whether the statement is opinion, cannot be resolved in this case by the Court upon a Motion to Dismiss, but can only be made after full discovery by a jury. Thus, a stay of discovery in this case will only serve to delay the inevitable discovery that must take place before a resolution of this matter occurs. Accordingly, there is no possible reason for a stay of discovery in this case, and the Defendants' Motion for a Protective Order to Stay Discovery pending resolution of their motion to dismiss must be denied in its entirety.

II. FACTS

A. The Complaint

Wolk incorporates the entirety of his Complaint as though fully set forth herein. As discussed in the Complaint, Wolk is a prominent aviation attorney. [Complaint, ¶ 13]. Wolk is nationally known to be a zealous and successful advocate for his clients, and Wolk has ***never*** been accused of failing to zealously represent any client, or selling out a client to benefit himself financially. [Complaint, ¶ 16].

Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in the Taylor Case described in the Complaint. [Complaint, ¶ 29]. After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 order critical of Wolk's conduct during discovery. [Complaint, ¶ 30]. In 2003, after Wolk filed a motion to vacate the order, the order was vacated. [Complaint, ¶ 32]. Thereafter, the Taylor Case settled for a sum that far exceeded the value previously placed on the Taylor Case by a federal magistrate, and all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional, unethical or wrongful conduct in the Taylor Case. [Complaint, ¶ 32]. Neither Judge Carnes, nor any of the parties in Taylor, **ever suggested** that Wolk sold out his client for his personal gain, or that the settlement was inadequate, prior to the dissemination of the Frank Article.

On or about April 8, 2007, Defendants published an article relating to the Taylor Case (the "Frank Article"), on the Overlawyered website, which stated:

> Arthur Alan Wolk v. Teledyne Industries, Inc.
>
> by Ted Frank on April 8, 2007
>
> Judge writes scathing opinion about attorney; opponent attorney mails opinion to client; losing attorney sues other

> attorney for defamation. No dice, but even this ludicrous suit does not result in sanctions. [Beck/Herrmann]
>
> Beck and Herrmann miss, however, an especially interesting subplot. Wolk settled the underlying case, Taylor v. Teledyne, No. CIV.A.1:00-CV-1741-J (N.D. Ga.), on the condition that the order criticizing him be vacated. Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in other litigation? (The discovery violation complained about was apparently a repeat occurrence.) The district court permitted a settlement that vacated the order, but its only reported inquiry into whether Wolk did not suffer from a conflict of interest and was adequately protecting his client's rights was Wolk's representation to the court that the client was alright with the size of the settlement. That begs the question whether the client was fully aware of the conflict of interest; if, as seems to be the case, the N.D. Ga. failed to do so, one really wishes courts would do more to protect fiduciaries of plaintiffs' attorneys before signing off on settlements. 338 F.Supp.2d 1323, 1327 (N.D. Ga. 2004), aff'd in unpublished summary per curiam opinion (11th Cir., Jun. 17, 2005).
>
> We've earlier reported on Mr. Wolk for his lawsuits against commenters at an aviation website that criticized him: Sep. 16-17, 2002. As the Taylor opinion notes, Wolk also threatened to sue the federal judge in that case. He also filed what the Eleventh Circuit called a frivolous mandamus petition. (Complaint, Ex. "A").

Wolk had absolutely no knowledge that the defamatory Frank Article had been published until the Spring of 2009. [Complaint, ¶ 47]. In April 2009, Wolk attended a Continuing Legal Education seminar where the speakers, a panel of judges, advised that during trial some jurors may perform a "Google" search on the attorneys in the case. Thus, the judges recommended that each listener perform a "Google" search on themselves. [Complaint, ¶ 46]. That night, for the first time, Wolk performed a "Google" search on himself, and saw the defamatory Frank Article. [Complaint, ¶ 47]. Because Wolk had no reason to "awaken inquiry" to determine the existence of the defamatory article until

April 2009, Pennsylvania's one-year statute of limitations was tolled until Wolk's discovery. Wolk subsequently learned that certain potential clients viewed the Overlawyered.com website and the defamatory Frank Article, viewed the accusations that Wolk is unethical, that he cheats and sells-out his clients, and the other false accusations, and decided not to engage Wolk as an attorney. [Complaint, ¶ 50].

B. Procedural History

Wolk initiated this action by filing a Writ of Summons in the Philadelphia County Court of Common Pleas on or about May 13, 2009. Wolk filed his Complaint, seeking recovery under theories of defamation, false light, and intentional interference with prospective contractual relations, in the Philadelphia County Court of Common Pleas, on August 17, 2009. Defendants removed the case to this Court on or about September 1, 2009, and filed the Motion to Dismiss on or about September 9, 2009.

On September 2, 2009, the Plaintiff issued Notices of Deposition and document requests to the Defendants pursuant to Rule 30 (a) (1) and Rule 30 (b) (2). The Notices sought the depositions of Defendants Olson, Frank and Nieporent, and scheduled those depositions for early October. The Plaintiff also sought four (4) categories of documents to be produced in preparation for the depositions. Each request was narrowly tailored to address only that which is necessary to prove the Plaintiff's claim. The four limited categories of requested documents are:

Document Request	**Relevance**
All documents and communications, including but not limited to searches on the internet, that You initiated to any third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 Frank Article.	Relates to Defendants' knowledge of the facts and circumstances of the subject of their writing, with respect to the Plaintiff's contention that the Frank Article was published with "actual malice," as required by, *inter alia*, Tucker v. Philadelphia Daily News, 848 A.2d 113 (Pa.2004).

All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third party, with respect to the subjects covered in the April 7, 2008 Frank Article, in drafting, editing and disseminating the April 7, 2008 Frank Article, including but not limited to notes and drafts.	Relates to Defendants' knowledge of the facts and circumstances of the subject of their writing, with respect to the Plaintiff's contention that the Frank Article was published with "actual malice," as required by, *inter alia*, Tucker v. Philadelphia Daily News, 848 A.2d 113 (Pa.2004).
All documents and communications that evidence, refer to or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article.	Relates to Defendants' knowledge of the facts and circumstances of the subject of their writing, with respect to the Plaintiff's contention that the Frank Article was published with "actual malice," as required by, *inter alia*, Tucker v. Philadelphia Daily News, 848 A.2d 113 (Pa.2004).
All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk.	Relates to damages, and specifically, the extent of the dissemination of the Frank Article.

Thus, all of the four (4) document requests seek relevant information and are narrowly tailored to require the production of only the relevant information.

III. ARGUMENT

A. Choice Of Law: Pennsylvania's State Statute Of Limitations, And Pennsylvania State Tolling Principles, Must Be Applied

As set forth in greater detail in the Plaintiff's Opposition to the Defendants' Motion to Dismiss, Pennsylvania's statute of limitations is applicable in this case. Franklin Prescriptions, Inc. v. The New York Times Co., 267 F.Supp.2d 425, 431 (E.D.Pa. 2003). As to Wolk's claims of defamation and invasion of privacy, Pennsylvania has a one-year statute of limitations. 42 Pa.C.S.A. § 5523 (1).

Pennsylvania's tolling principles are also applicable in this case. Harmelin v. MAN Financial, Inc., No. 06-1944, 2007 WL 2702638, at *9 (E.D.Pa. Sept. 12, 2007) (citing In re Mushroom Transp. Co., Inc., 382 F.3d 325, 335 (3d Cir. 2004)). Thus, both Pennsylvania's statute of limitations, and its tolling principles, including the "discovery rule," are applicable here.

B. The Defendants' Motion To Stay Cannot Be Granted Because None Of the Claims Raised In The Motion To Dismiss Can Be Decided At This Stage

The Defendants have asked this Court to stay discovery in the instant case pending resolution of their Motion to Dismiss. However, the Defendants' argument fails because, in addition to the fact that the Defendants' arguments have no legal merit whatsoever, even if there was some abstract appeal to some or all of the assertions raised in the Defendants' Motion to Dismiss, **none** of the arguments raised by the Defendants are appropriate for determination upon a Rule 12 (b) (6) Motion to Dismiss. To the contrary, all of the Plaintiffs' claims, as a matter of law, require discovery and are unique questions of fact to be answered by a jury. For this reason, the Defendants' Motion to Stay cannot be granted.

In Pennsylvania, it is well-settled that "the court should not automatically stay discovery because a motion to dismiss has been filed." 19th Street Baptist Church v. St. Peter's Episcopal Church, 190 F.R.D. 345, 349 (E.D.Pa. 2000). Thus, a stay is only proper "where the likelihood that such motion may result in a narrowing or an outright elimination of discovery." Id. In other words, a stay pending resolution of a dispositive motion should only be granted "where a pending motion to dismiss may dispose of the entire action and where discovery is not needed to rule on such motion." Weisman v. Mediq, Inc., No. 95-1831, 1995 WL 273678, at *2 (E.D.Pa. May 3, 1995).

As set forth at length in the Plaintiff's Opposition to the Defendants' Motion to Dismiss, to the extent that there is any **ultimate** merit to any of the contentions raised therein, none of the issues raised in the Motion to Dismiss, including (1) the applicability of Pennsylvania's "discovery rule" to toll the statute of limitations, (2) the defamatory character of the statement, and (3) whether the defamatory statement is one of "opinion," can be decided by the Court upon a Rule 12 (b) (6) motion.

1. **The Statute Of Limitations Issue Cannot Be Decided On A Motion To Dismiss**

For example, the statute of limitations issue cannot be decided on a motion to dismiss, but instead, the Plaintiff must be permitted to conduct discovery and submit the issue to the jury. While the Defendants contend that the Plaintiff failed to file his claim relating to the April 2007 Frank Article within the one-year statute of limitations for defamation in 42 Pa.C.S.A. § 5523 (1), it is undisputed that the Plaintiff did not discover the defamatory article, or have any reason to "awaken inquiry" into the defamatory article, until April 2009. The Plaintiff filed a Writ of Summons in State court in May 2009.

Under these circumstances, the discovery rule applies as a matter of law to toll the statute of limitations until April 2009, and the Plaintiff's filing of suit was timely. Wilson v. El-Daief, M.D., 964 A.2d 354 (Pa. 2009); Fine v. Checcio, 870 A.2d 850 (Pa. 2005); Crouse v. Cyclops Industries, 745 A.2d 606 (Pa. 2000). As noted by the Pennsylvania Supreme Court, Pennsylvania's discovery rule applies to **all** claims and causes of action subject to a Pennsylvania statute of limitation, because it is a rule of statutory construction arising out of the concept of the 'accrual' of causes of action" described in 42 Pa.C.S.A. § 5502 (a). Wilson, 964 A.2d at 363; Fine, 870 A.2d at 860

(emphasis supplied). The Pennsylvania Supreme Court has rejected the "all vigilance" approach asserted by the Defendants in their Motion to Dismiss, in favor of a "reasonable diligence" approach. Wilson, 964 A.2d at 362-63. Thus, "a party is not under an absolute duty to discover the cause of his injury," Crouse, 745 A.2d at 61, but is only under a duty to discover his injury where there is "some reason to awaken inquiry and direct diligence in the channel." Fine, 870 A.2d at 859.

Perhaps more importantly for purposes of this Motion, in cases such as the instant case, a court cannot decide the issue of the discovery rule as a matter of law. "Pursuant to the application of the discovery rule, the point at which the complaining party should reasonably be aware that he has suffered an injury is a factual issue best determined by the collective judgment, wisdom and experience of the jurors." Crouse, 745 A.2d at 611 (internal quotations omitted). "[O]nly where the facts are so clear that reasonable minds *cannot differ* may the commencement of the limitations period be determined as a matter of law." Id. See also Fine, 870 A.2d at 858-59 ("Since this question involves a factual determination as to whether a party was able, in the exercise of reasonable diligence, to know of his injury and its cause, ordinarily, a jury is to decide it."); Wilson, 964 A.2d at 362 ("Fine also reflects that the determination concerning the plaintiff's awareness of the injury and its cause is fact intensive, and therefore, ordinarily is a question of fact for a jury to decide. However, courts may resolve the matter at the summary judgment stage where reasonable minds could not differ ..."). Indeed, even if the cases relied upon by the Defendants were authoritative (which they are not, because they were distinguished and nullified by the subsequent holdings of the Pennsylvania Supreme Court in Wilson, Fine and Crouse), the two cases relied upon by the Defendants were decided upon summary

judgment, after a full record. Plainly, at the very least, in this case reasonable minds can differ as to whether Wolk exercised reasonable diligence. The issue must therefore be submitted to a jury for disposition.

Further, pursuant to Fine, the Plaintiff contends that the doctrine of fraudulent concealment also acts to toll the statute of limitations. This claim also cannot be determined upon a motion to dismiss. Fine, 870 A.2d at 860. Thus, in this case, the issue of whether the discovery rule and/or the doctrine of fraudulent concealment applies to toll the statute of limitations cannot be decided upon a motion to dismiss, and there is therefore no basis for a stay of discovery. The Defendants' Motion for a Protective Order should therefore be denied.

2. The Issue Of Defamatory Meaning Cannot Be Decided In The Defendants' Favor On A Motion To Dismiss

Likewise, the issue of defamatory meaning cannot be decided (in Defendant's favor) upon a Rule 12 (b) (6) motion. At the outset, the defamatory statement, which imputes to Wolk improper conduct in his practice as an attorney, is defamatory *per se*. Pelagatti v. Cohen, 536 A.2d 1337, 1345 (Pa.Super. 1988) ("A communication which ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his business, trade or profession, is defamatory per se ... Clearly, statements to the effect that an attorney has committed improper, illegal actions within the context of his practice would tend to impugn his integrity and thereby blacken his business reputation."). Thus, the Defendants' argument that there is no defamatory meaning is meritless as a matter of law, and the Court should reject the Defendants' Motion for a Protective Order on that basis alone.

However, even if the Court did not find the statement defamatory *per se*, the Court would still be precluded from finding a lack of defamatory meaning at this stage of the litigation. "Where there is any doubt that the communication disparages or harms the complainant in his business or profession, that doubt must be resolved in favor of the complainant, even where a plausible innocent explanation of the communication exists, if there is an alternative defamatory interpretation, it is fur the jury to determine if the defamatory meaning was understood by the recipient." Pelagatti, 536 A.2d at 1345. "If the allegedly defamatory statements are susceptible to several interpretations, some of which are benign, some of which are not, it is for the jury to decide how the statement is likely to be interpreted by the intended audience." Valjet v. Wal-Mart, No. 06-01842, 2007 WL 4323377, at *8 (E.D.Pa. Dec. 11, 2007). In this case, although the statements are defamatory *per se* as a matter of law, the Court need not even go so far for purposes of this motion. Because there is, at a minimum, a defamatory meaning that could be construed from the Frank Article, the issue of defamatory meaning is one for the jury to decide, which cannot be decided upon a motion to dismiss.

3. The Issues Of "Opinion" And "Falsity" Cannot Be Decided In The Defendants' Favor On A Motion To Dismiss

The Defendants' contention that the Frank Article is non-actionable "opinion" is wholly meritless. As set forth in the Plaintiff's Opposition, the statement is actionable (1) because it constitutes an accusation, rather than an opinion, Valjet, 2007 WL 4323377, at *8, (2) the assertions in the Frank Article are "sufficiently factual to be susceptible of being proved true or false," Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990), and (3) even if the Frank Article could be deemed "opinion," it still implies the existence of undisclosed facts upon which the information is based – such as the asserted small size

of the settlement in the Taylor case, which render the opinion actionable. Redco v. CBS, Inc., 758 F.2d 970, 972 (3d Cir. 1985), cert. den., 474 U.S. 843 (1985).

However, even if the Court found the above authority non-authoritative, the Court would still be constrained to deny the Defendants' Motion to Dismiss. In Pennsylvania, "in cases where a plausible innocent interpretation of the communication coexists with an alternative defamatory interpretation, the issue must proceed to a jury." Green v. Minzer, 692 A.2d 169, 169-70 (Pa.Super. 1997).

Further, as to the Defendants' assertion that the statements in the Frank Article are "true," the Plaintiff has claimed that the statements were false, and this assertion must be taken as true. Moreover, at a minimum, the Court cannot decide truth upon a Motion to Dismiss. At the very least, the truth or falsity of the statement is a disputed issue of fact that is a question for the jury. Merkle v. Upper Dublin School District, 211 F.3d 782, 797 (3d. Cir. 2000). Like the issue of the discovery rule, because these issues cannot be decided on a Rule 12 (b) motion without discovery, and are the unique province of the jury, a stay of discovery to delay and obstruct discovery should not be granted.

4. Conclusion

Thus, the Defendants' attempts to stonewall discovery should not be countenanced by this Court. As set forth above, none of the issues raised by the Defendants in their Motion to Dismiss are appropriately decided as a matter of law by the Court at this stage of the litigation. The issues of the statute of limitations and discovery rule are unique issues for the jury, and to the extent that the Defendants seek to oppose the Plaintiff's (as yet) undisputed contention that the Plaintiff first discovered his injury in April 2009, the Plaintiff has the right to make a record surrounding this contention, and

submit this issue to the jury. All of the other issues are also uniquely the province of the jury. Indeed, to rule on the Defendants' assertions, there must, at a minimum, be full discovery.

Accordingly, the Defendants' Motion for a Protective Order Staying Discovery will not serve any purpose other than to delay, and to permit the Defendants' to stonewall discovery until the Motion to Dismiss is decided. This will unfairly benefit the Defendants' cause, as memories will fade, witnesses could die or become incapacitated, and the delay of several months will undoubtedly prejudice Wolk, and benefit the Defendants. The Defendants, who are all attorneys, knew that none of their claims could be decided on a Rule 12 (b) (6) motion. The fact that the Defendants' filed their Rule 12 (b) (6) Motion in the first place, when the issues raised therein are inappropriate for resolution upon such a motion, and followed it up with a motion to stay, reveals their gamesmanship.

In sum, a stay should not be granted in this case to preclude discovery because the law is clear that all of the Plaintiff's claims will require discovery. Therefore, any stay will only delay the inevitable discovery that must take place, without any reason to do so. Because none of the claims raised by the Defendants are appropriate for a Rule 12 (b) (6) motion without discovery, it is well-settled that the Defendants' motion to stay discovery pending resolution of the meritless Motion to Dismiss cannot be granted.

C. <u>The Requested Discovery Is Narrowly Tailored And Non-Burdensome</u>

Even if the Defendants' claims could be determined on a motion to dismiss (which they cannot), and even if there was arguably any merit to their claims (which there is not), there is still no reason to grant a stay in this case. Quite simply, all the

Plaintiff presently seeks is the deposition of the three (3) defendants, and a full response to four (4) requests for production of documents. The document requests are minimal, and are narrowly tailored to address only relevant and discoverable information -- i.e., the Defendants' state of mind when they published the defamatory article, and Wolk's damages through the dissemination of the defamatory Frank Article. The individual Defendants are all attorneys located in New York, New Jersey and Washington, D.C. Their depositions will not cause any undue burden upon them. The Defendants are represented by competent counsel, and the claims against them are being defended by their insurer. Thus, the individual Defendants will not be subject to any great expense. By contrast, the prejudice that would inure to Wolk as a result of the Defendants' stonewalling and delay would be immeasurable. The lapse of time will cause memories to fade, and could cause some relevant documents to be lost or destroyed. Because there is no great burden upon the Defendants to provide the discovery, and there would be great prejudice to Wolk as a result of the delay sought by the Defendants, even if the Court could find **some** merit in the Motion to Dismiss, the Court should still not stay discovery pending its decision.

IV. CONCLUSION

For any and all of the foregoing reasons, as set forth more fully above, Plaintiff Arthur Alan Wolk respectfully requests that this Court deny the Defendants' Motion to Stay in its entirety, and grant such other and further relief as the Court deems appropriate.

Respectfully Submitted,

SPECTOR GADON & ROSEN, P.C.

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