STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-11-269
TDW-CUM- 11/4/2011

CHARLES D. CLEMETSON,

Plaintiff

v.

ORDER

SWEETSER, INC.,

Defendant.

STATE OF MAINE
Cumberland, ss, Clerk's Office

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RECEIVED

In this action plaintiff Charles Clemetson is suing defendant Sweetser Inc. alleging defamation, placement in a false public light, breach of fiduciary duty, and intentional and negligent infliction of emotional distress. The complaint seeks compensatory and punitive damages.

Before the court is a motion by Sweetser to dismiss the complaint on two grounds: (1) that Sweetser's alleged actions constituted protected activity under Maine's anti-SLAPP statute, 14 M.R.S. § 556; and (2) that in any event Dr. Clemetson's complaint fails to state a claim upon which relief may be granted.

The gist of Dr. Clemetson's complaint is that Dr. Clemetson, who is a licensed psychiatrist, was unfairly terminated from employment at Sweetser after approximately three weeks of work and that Sweetser subsequently filed a complaint with the Board of Licensure in Medicine falsely stating that Dr. Clemetson had failed to attend certain training and had repeatedly missed scheduled appointments with patients. Complaint ¶¶ 3-15. Dr. Clemetson also alleges that in seeking future employment, he was compelled to tell potential employers the unfounded and misleading reasons given by Sweetser for his termination. Complaint ¶ 23. Finally, he alleges in passing that

Sweetser employees made false and unprivileged statements to unspecified third parties. Complaint ¶¶ 16. 19.

1. Sweetser's anti-SLAPP and Immunity Defenses

Sweetser argues that its report to the Board of Licensure in Medicine was mandated under the Health Security Act, see 24 M.R.S. § 2506,[1] and falls within the anti-SLAPP statute's definition of a "written or oral statement . . . submitted to a legislative, executive or judicial body." 14 M.R.S. § 556. Sweetser notes that the Law Court has held that "the Legislature intended to define in very broad terms those statements that are covered by the statute." Schelling v. Lindell, 2008 ME 59 ¶ 12, 942 A.2d 1226, 1230. As a result, Sweetser argues, the anti-SLAPP statute requires Dr. Clemetson to show that Sweetser's report to the Board of Licensure was devoid of any reasonable factual support or any arguable basis in law and caused "actual injury" within the meaning of the anti-SLAPP statute to Dr. Clemetson. See 14 M.R.S. § 556; Morse Bros. Inc. v. Webster, 2001 ME 70 ¶ 20, 772 A.2d 842, 849 (discussing plaintiff's burden under anti-SLAPP statute); Schelling v. Lindell, 2008 ME 59 ¶¶ 17-19, 27, 942 A.2d at 1231-34 (discussing actual injury requirement)

Sweetser also argues that the Health Security Act provides that any health care provider or health care entity shall be "immune from civil liability . . . for making any report or other information available to any board, appropriate authority, professional competence committee or professional review committee pursuant to law." 24 M.R.S. §

[1] Section 2506 provides that a health care provider or entity "shall, within 60 days, report in writing to the disciplined practitioner's board or authority" the name of any licensed employee whose employment has been terminated for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action.

2511(1).[2] As a result, Sweetser argues that even if the anti-SLAPP statute were inapplicable, it cannot be held liable for its report to the Board of Licensure in Medicine.

2. Dr. Clemetson's Response

In response to Sweetser's motion, Dr. Clemetson has not contested Sweetser's arguments that the anti-SLAPP statute is applicable. Nor has he attempted to demonstrate through pleadings and affidavits that Sweetser's report to the Board of Licensure was devoid of any factual support or any arguable basis in law and that he suffered actual injury within the meaning of § 556. See Morse Bros. v. Webster, 2001 ME 70 ¶ 20, 772 A.2d at 849. Similarly, Dr. Clemetson does not argue that the immunity contained in § 2511 is inapplicable in his case or that his claims relating to Sweetser's report to the Board of Licensure are not subject to that immunity. See Plaintiff's Opposition to Defendant's Motion to Dismiss dated August 12, 2011 at 1-2.

Instead, Dr. Clemetson focuses on his allegation that in seeking employment after his termination from Sweetser, he was "compelled to explain to potential future employers and third parties the unfounded and misleading reasons given by Sweetser for his termination." Complaint ¶ 23. Because he is proceeding under a theory of "compelled self-publication," Dr. Clemetson argues, the Maine anti-SLAPP statute and the Health Security Act "do not apply." Plaintiff's Opposition to Defendant's Motion to

[2] The immunity set forth in § 2511 applies to "any person acting without malice, any physician, podiatrist, health care provider, health care entity or professional society, any member of a professional competence committee or professional review committee, any board or appropriate authority and any entity required to report under this chapter." The Law Court has reserved decision on whether the immunity conferred by § 2511 is absolute or conditioned on the absence of malice. McCullough v. Visiting Nurse Service, 1997 ME 55 ¶ 14, 691 A.2d 1201, 1205. However, because the words "acting without malice" appear only in connection with "any person," Magistrate Judge Kravchuk has opined that § 2511 is intended to provide absolute immunity to physicians, health care providers, and the other specifically identified professionals or entities. Landsberg v. Maine Coast Regional Health Facilities, 2009 U.S. Dist. LEXIS 37390, *27-28 (Recommended Decision), adopted in part, rejected in part on other grounds, 640 F. Supp. 2d 108 (D.Me. 2009).

Dismiss dated August 12, 2011 at 1. See id. at 2 (court should evaluate his allegation of compelled self-publication under the normal standard applicable to motions to dismiss, "not under the burden-shifting procedure set forth in the anti-SLAPP statute").

The court agrees that to the extent that Dr. Clemetson's allegations do not depend on reports that Sweetser has challenged under the anti-SLAPP statute and under the immunity contained in 24 M.R.S. § 2511, his claims must be evaluated under the usual standard applicable to a motion to dismiss. Under that standard, the material allegations of the complaint must be taken as admitted and must be read in the light most favorable to the plaintiff to determine if they sets forth elements of a cause of action or facts that would entitle plaintiff to relief. In re Wage Payment Litigation, 2000 ME 162 ¶ 3, 759 A.2d 217, 220.

Because Dr. Clemetson has waived any argument that his claims based on reports to the Board of Licensure in Medicine are barred by the anti-SLAPP statute and the immunity contained in § 2511, the court will grant Sweetser's motion as to those claims.

3. Compelled Self-Publication

The Law Court has expressly reserved the question of whether Maine law permits a defamation claim to be based on compelled self-publication. Cole v. Chandler, 2000 ME 104 ¶5, 752 A.2d 1189, 1193. Previously in 1995 the federal district court had predicted that Maine would recognize defamation claims based on compelled self-publication, but only where it was reasonably foreseeable that the plaintiff would be placed under strong compulsion to repeat the defamatory statement. See Carey v. Mt. Desert Island Hospital, 910 F.Supp. 7, 11-13 (D.Me. 1995) (Brody, J.).

Since Judge Brody's decision, various other courts have weighed in on the validity of compelled-self publication, and the court is aware that the theory of compelled self-publication now appears to be a minority view, that it has been described by the Seventh Circuit as a "largely discredited" doctrine, that Massachusetts and Connecticut have declined to adopt that doctrine, and that the federal court in New Hampshire has predicted that New Hampshire would not adopt such a theory. See Olivieri v. Rodriguez, 122 F.3d 406, 408 (7th Cir. 1997) (Posner, C.J.); White v. Blue Cross and Blue Shield of Massachusetts, 809 N.E.2d 1034, 1037-39 (Mass. 2004); Cweklinsky v. Mobil Chemical Co., 837 A.2d 759 (Conn. 2004); Slater v. Verizon Communications, 2005 U.S. Dist. LEXIS 3270, *26-28 (D.N.H. 2005)(McAuliffe, J.).

Whether this court or the Law Court will ultimately recognize compelled self-publication is, therefore, far from a foregone conclusion. Under the circumstances, however, the court will not make a final determination at the pleading stage. Additional factual development, either as part of a summary judgment record or at trial, will help to illuminate whether and to what extent compelled self-publication should provide a basis for liability. This is particularly true because Dr. Clemetson has also alleged, as noted above, that employees of Sweetser made unprivileged and defamatory statements to unspecified third parties. If true, this might provide a basis for liability apart from Dr. Clemetson's compelled self-publication theory and apart from any report made to the Board of Licensure in Medicine or any other appropriate authority.

The Law Court has held, however, that a defendant in a defamation case is entitled to sufficient notice of the content and circumstances of an allegedly defamatory statement to be able to determine whether defenses such as truth and privilege should be raised. See Picard v. Brennan, 307 A.2d 833, 834-35 (Me. 1973). In the court's view allegations that Sweetser employees made unspecified defamatory and unprivileged

statements to unspecified third parties are insufficient under this standard. Dr. Clemetson shall have 20 days from the date of this order to amend count I of his complaint in order to remedy these defects.

4. Dr. Clemetson's Other Causes of Action

Count II of Dr. Clemetson's complaint alleges that Sweetser's allegedly unfounded reasons for termination placed him in a false light. The essential elements of a false light claim are set forth in Restatement Second Torts § 652E (1977):

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability ...

(emphasis added). See Cole v. Chandler, 2000 ME 104 ¶17, 752 A.2d at 1197. Publicity requires communication to the public at large or to a sufficient number of persons so that it must be regarded as substantially certain to become a matter of public knowledge. Id.; Restatement (Second) of Torts § 652D, comment a.

Dr. Clemetson's complaint alleges that Sweetser's statements to third parties and to the Board of Licensure have given publicity to assertions that have placed Dr. Clemetson in a false light, Complaint ¶ 27, but the complaint does not allege that Sweetser made any communications to the public at large or to a sufficient number of persons that those communications are substantially certain to become a matter of public knowledge.[3] As a result, Sweetser's motion to dismiss Dr. Clemetson's false light claim will be granted.

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[3] For the reasons noted above, Dr. Clemetson has not contested Sweetser's arguments that its report to the Board of Licensure were protected by the anti-SLAPP statute and were privileged under 24 M.R.S. § 2511, so his false light claims cannot be based on that report. In any event, a communication to the Board of Licensure is not a communication to the general public or a communication that is substantially certain to become a matter of public knowledge.

Count III of the complaint alleges that Sweetser breached a fiduciary duty to Dr. Clemetson but does not allege any of the essential elements of a fiduciary relationship – the actual placing of trust and confidence by the party claiming a fiduciary relationship and a great disparity of position and influence between the parties. See Bryan R. v. Watchtower Bible and Tract Society, 1999 ME 144 ¶ 19, 738 A.2d 839, 846. Moreover, even if Dr. Clemetson had recited those elements, the Law Court has ruled that in order to survive a motion to dismiss, "a plaintiff must set forth specific facts constituting the alleged relationship with sufficient particularity to enable the court to determine whether, if true, such facts could give rise to a fiduciary relationship." Id. ¶ 21, 738 A.2d at 846-47. Count III of Dr. Clemetson's complaint falls far short on this score, and Sweetser's motion to dismiss that count will be granted.

Count IV of Dr. Clemetson's complaint alleges intentional infliction of emotional distress. In part, this count of Dr. Clemetson's complaint consists of conclusory allegations that simply track the elements of intentional infliction of emotional distress as set forth in such cases as Curtis v. Porter, 2001 ME 158 ¶ 10, 784 A.2d 18, 22-23. See Complaint ¶¶ 38-40. The only facts supporting such a claim are those previously set forth – that Sweetser unfairly terminated Dr. Clemetson and made a false report to the Board of Licensure as to the reasons for Dr. Clemetson's termination, that Sweetser employees made unprivileged and defamatory statements about Dr. Clemetson to third parties, and that Sweetser's termination compelled Dr. Clemetson to repeat Sweetser's defamatory statements in seeking new employment and cast him in a false light.

Dr. Clemetson's claims based on Sweetser's report to the Board of Licensure are barred for the reasons stated above, and the court has some doubt that Dr. Clemetson's remaining allegations would, if proven, demonstrate that Sweetser's conduct was so extreme and outrageous as to exceed all possible bounds of decency and be regarded as

atrocious and intolerable in a civilized community. See Staples v. Bangor Hydro-Electric Co., 561 A.2d 499, 501 (Me. 1989). Nevertheless, that cannot be determined at the pleading stage.

Count V of the complaint consists of a claim for negligent infliction of emotional distress. In order to recover on a free-standing claim for negligent infliction of emotional distress, a plaintiff must demonstrate that a special relationship existed between plaintiff and defendant that created a duty to avoid the negligent infliction of emotional harm. Curtis v. Porter, 2001 ME 158 ¶¶ 18-19, 784 A.2d 18, 25-26. The only relationship between Dr. Clemetson and Sweetser that can be discerned from the complaint is an employer-employee relationship. However, there is no authority for the proposition that an employer-employee relationship constitutes the kind of special relationship that could give to a negligent infliction claim. Accordingly, count V of the complaint will be dismissed.

Count VI of the complaint seeks punitive damages. This is not a separate cause of action but a form of relief that may be available if Sweetser is held liable on one or more of Dr. Clemetson's other claims and if Dr. Clemetson also proves entitlement to punitive damages by clear and convincing evidence. In light of the rulings on Dr. Clemetson's other causes of action, his claim for punitive damages cannot be resolved on the pleadings.

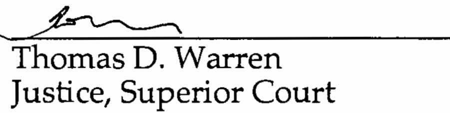
The entry shall be:

With respect to Count I of the complaint, defendant's motion to dismiss is granted as to any defamation claims based on reports by defendant to the Board of Licensure in Medicine but is denied as to plaintiff's allegations of compelled self-publication. With respect to allegations in the complaint of unprivileged statements to third parties, plaintiff shall have 20 days from the date of this order to amend count I of the complaint as set forth in this order. If not such amendment is filed, plaintiff's claims relating to unspecified statements to third parties shall be dismissed. Defendant's

motion to dismiss is granted as to counts II, III and V of the complaint and is denied as to counts IV and VI of the complaint.

The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: November 4, 2011



Thomas D. Warren
Justice, Superior Court

CHARLES CLEMETSON VS SWEETSER

UTN:AOCSsr -2011-0056023 CASE #:PORSC-CV-2011-00269

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