

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

OMAR ALI, 1800 JONESBORO RD LLC,
AND UMMAH HOLDINGS LLC,

Plaintiffs,

v.

HEATHER M. GRAYBILL, ZACHARY
MURRAY, PAULA KUPERSMITH, AND
ANTONIO F. GLASS,

Defendants.

CIVIL ACTION NO. 24EV003341

ORDER ON MOTIONS

This matter is before the Court on Defendants' Motion to Strike Pursuant to O.C.G.A. § 9-11-11.1 and to Dismiss for Failure to State a Claim ("Defendants' Motion"), Plaintiffs' Motion to Strike Defendants' Reply in Further Support of Motion to Strike Pursuant O.C.G.A. § 9-11-11.1 ("Plaintiffs' Motion to Strike Reply"), and Plaintiffs' Motion for Discovery pursuant to O.C.G.A. § 9-11-11.1(b)(2) and/or § 9.11-11.1(d) ("Plaintiffs' Motion for Discovery"). All parties were represented by counsel. After considering all of the pleadings, briefings, affidavits, and exhibits submitted by the parties, Defendants' Motion is **GRANTED IN PART AND DENIED IN PART**, and Plaintiffs' Motion to Strike Reply is **DENIED**. The ruling on Defendants' Motion renders Plaintiffs' Motion for Discovery moot.

I. BACKGROUND

Plaintiff Omar Ali is a landlord and developer with properties in the Lakewood Heights District ("Lakewood Heights") of the City of Atlanta. Plaintiffs 1800 Jonesboro Rd LLC and Ummah Holdings LLC (collectively, with Plaintiff Omar Ali, "Ali") are business entities in which Plaintiff Omar Ali holds an interest. Defendants Heather M. Graybill, Zachary Murray, Paula

Kupersmith, and Antonio Glass are homeowners in the Lakewood Heights neighborhood within the City of Atlanta.

Plaintiffs' Verified Amended Complaint (the "Amended Complaint") alleges that Defendants made defamatory statements regarding Plaintiffs in connection with Ali's business, trade, or profession, and Ali's efforts to acquire and/or redevelop the vacant Lakewood Heights Elementary School property that is currently owned by Atlanta Public Schools ("APS"). On this basis, the Amended Complaint asserts claims for Injunctive Relief (Count I), Tortious Interference with Prospective Business Relations (Count II), Tortious Interference with Current Business Relations (Count III), Defamation: Libel and Slander (Count IV), Slander Per Se (Count V), Litigation Costs (Count VI), and Punitive Damages (Count VII). Defendants contend that Plaintiff's Amended Complaint fails to state a claim on which relief may be granted. Defendants also move to strike the Amended Complaint pursuant to Georgia's anti-SLAPP (Strategic Litigation Against Public Participation) statute. See O.C.G.A. § 9-11-11.1(b)(1).

II. **MOTION TO DISMISS STANDARD**

A motion to dismiss for failure to state a claim cannot be granted unless:

(1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

Mbigi v. Wells Fargo Home Mtg., 336 Ga. App. 316, 316 (2016). "When the sufficiency of the complaint is questioned by a motion to dismiss for failure to state a claim . . . , the rules require that it be construed in the light most favorable to the plaintiff with all doubts resolved in [its] favor" Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 361 (2011). A plaintiff's "purported

failure to allege certain elements of the various causes of action set forth in the complaint does not mandate dismissal.” Webb v. Bank of Am., N.A., 328 Ga. App. 62, 64 (2014).

II. ANTI-SLAPP MOTION TO STRIKE STANDARD

When presented with a motion to strike pursuant to O.C.G.A. § 9-11-11.1(b)(1), this Court employs a two-step process. Wilkes & McHugh, P.A. v. LTC Consulting, L.P., 306 Ga. 252, 261-62 (2019). First, this Court must determine as a threshold issue whether the challenged claim “arises from” activity protected by the Anti-SLAPP statute. Id. at 262. If not, then this Court’s analysis ends there. Id. With respect to this first step, “[i]t is not enough to show that the claim was filed ‘after protected activity took place’ or ‘arguably may have been ‘triggered’ by protected activity.’” Id. (quoting City of Cotati v. Cashman, 29 Cal. 4th 69, 78 (Cal. 2002)). The question is whether the cause of action is “*based on* the defendant[s]’ protected free speech or petitioning activity.” Id. (emphasis in original). Defendants can only meet that burden by showing that the actions underlying the challenged claim “could reasonably be construed” as fitting within one of the four categories of protected activities set forth in the statute. Id. Those four categories are:

(1) Any written or oral statement or writing or petition made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

(2) Any written or oral statement or writing or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) Any written or oral statement or writing or petition made in a place open to the public or a public forum in connection with an issue of public interest or concern;
or

(4) Any other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public concern.

O.C.G.A. § 9-11-11.1(c).

If this Court concludes that this threshold showing has been made, it then moves to the second step of the analysis which requires determining whether Plaintiffs have established that there is a probability that they will prevail on the challenged claims. Wilkes, 306 Ga. at 262. “To meet this burden, the [P]laintiff[s] must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the [P]laintiff[s] is credited.” Id. For purposes of this inquiry,

the trial court considers the pleadings and evidentiary submissions of both the [P]laintiff[s] and the [D]efendant[s]; though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the [D]efendant[s]’ evidence supporting the motion defeats the [P]laintiff[s]’ attempt to establish evidentiary support for the claim. In making this assessment[,] it is the court’s responsibility to accept as true the evidence favorable to the [P]laintiff[s].

ACLU, Inc. v. Zeh, 312 Ga. 647, 653 (2021). Only a claim that satisfies “‘*both* prongs of the anti-SLAPP statutes — i.e., that arises from protected [activity] *and* lacks even minimal merits [meaning that Plaintiffs fail to make a prima facie showing sufficient to sustain a judgment in their favor or that Defendants’ evidence defeats that showing] — is a SLAPP’ that is subject to being stricken.” Wilkes, 306 Ga. 252, 262-263 (quoting Navellier v. Sletten, 29 Cal 4th 82, 89, (2002) (emphasis in original)).

III. ANALYSIS

Having reviewed all of the pleadings, briefings, affidavits, and exhibits submitted by the parties, and applying the foregoing standards, this Court finds with respect to the first step of the anti-SLAPP analysis that Defendants’ actions underlying the claims asserted in the Amended Complaint could reasonably be construed as fitting within O.C.G.A. § 9-11-11.1(c)(2) and/or O.C.G.A. § 9-11-11.1(c)(4). This Court further finds that under the second step of the anti-SLAPP analysis, Plaintiffs have demonstrated a probability of prevailing on some of their claims in the

Amended Complaint. Evaluating the Amended Complaint under the standard for a motion to dismiss for failure to state a claim does not alter this outcome.

A. Injunctive Relief (Count I)

This Court lacks jurisdiction to grant injunctive relief. See O.C.G.A. § 23-1-1 (equity jurisdiction vested in the superior courts and state-wide Business Court). Defendants' Motion as to Count I is therefore **GRANTED**.

B. Tortious Interference with Prospective and Current Business Relations (Counts II and III)

After reviewing the pleadings and affidavits together, and taking Plaintiffs' allegations as true, Counts II and III withstand Defendants' Motion to Dismiss. These counts also survive Defendants' Motion to Strike. Whether Plaintiffs actually lost prospective or existing business is a matter for discovery and summary judgment, if not trial. Defendants' Motion as to Counts II and III is therefore **DENIED**.

C. Defamation (Count IV)

Plaintiffs fail to plead special damages, which is a required element of defamation that must be specifically alleged. McGee v. Gast, 257 Ga. App. 882, 885 (2002). Additionally, Plaintiffs have not identified with sufficient specificity any defamatory statements by Defendant Graybill. Defendants' Motion as to Count IV is **GRANTED**.

D. Slander Per Se (Count V)

Plaintiffs have not identified with sufficient specificity any slander per se statements by Defendant Graybill. Defendants' Motion as to Count V against Graybill is **GRANTED**.

Plaintiffs have identified thirty alleged statements that are variously attributed to Defendants Murray, Kupersmith, and Glass. Defendants argue that these statements are protected statements of opinion that cannot form the basis for a claim of defamation or slander. However, the Court finds

that the Plaintiffs have sufficiently alleged facts, through their Amended Complaint and supporting affidavits, to raise an issue as to whether some of the statements attributed to Defendants can be proven false and therefore are not protected opinions but are instead actionable statements. See, e.g., Bryant v. Cox Enters., 311 Ga. App. 230, 234 (2011).

Although Defendants dispute that some of the alleged statements attributed to Murray, Kupersmith, and Glass were made, at this early stage in the litigation, the Court accepts the allegations in the Amended Complaint and Plaintiffs' witness affidavits as true. After doing so, the Court finds that twelve of the thirty statements allegedly made by these three Defendants viewed in the applicable context can be considered slander per se under O.C.G.A. § 51-5-4(a)(3) ("making charges against another in reference to his trade, office, or profession, calculated to injure him therein") and are sufficient to survive Defendants' Motion: Statements 1, 4, 6-10, 12, 13, 16, 24, and 25 (the "Actionable Statements").¹

In their Motion, Defendants argue that under O.C.G.A. § 51-5-7(4) their speech is conditionally privileged and, therefore, Plaintiffs must prove actual malice. For the privilege to be applicable, Defendants must show that all of the statements attributed to them were made in "good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons." Neff v. McGee, 346 Ga. App. 522, 529 (2005) (quoting Smith v. Henry, 276 Ga. App. 832, 833 (2005)). Looking at the record as a whole, there are questions of fact as to whether the conditional privilege applies to the Actionable Statements.

Even assuming conditional privilege applies, the privilege "can be waived if the privilege is used merely as a cloak for venting private malice." Neff v. McGee, 346 Ga. App. 522, 529 (2018).

¹ The numbers assigned to each statement in this Order correspond to the numbers assigned to the thirty alleged statements identified in Plaintiffs' Consolidated Brief in Opposition to Defendants' Motion and Plaintiffs' Motion for Discovery.

For Defendants to overcome O.C.G.A. § 51-5-7(4)'s conditional privilege, they will have to show by "clear and convincing" evidence, not only that Defendants made a false defamatory statement of fact, but that they did so with knowledge of falsity or reckless disregard of the truth. Neff, 346 Ga. App. at 529. This is the "actual malice" standard. Although proving "subjective awareness of probable falsity" by "clear and convincing evidence" is an "extremely high" standard (see ACLU v. Zeh, 312 Ga. 647, 669 (2021)), looking at the context of the Actionable Statements, the Court cannot say at this early stage of the litigation that Plaintiffs cannot meet the actual malice standard at trial as a matter of law. Thus, Defendants' Motion on Count V is **DENIED** with respect to the following twelve alleged statements:

1. (with respect to Defendant Glass)	Ali is a nefarious, inferior developer working in his own self-interest.
4. (with respect to Defendants Kupersmith and Murray)	Ali is un reputable in his profession.
6. (with respect to Defendants Kupersmith and Murray)	Ali is dishonest in his profession.
7. (with respect to Defendant Kupersmith)	Ali is immoral, does not care about the Black Community, and just wants to make money.
8. (with respect to Defendants Kupersmith and Murray)	Ali is deceitful in its profession.
9. (with respect to Defendant Kupersmith)	Ali sold a home to a family, for less than market value, in the Lakewood Heights Community, in exchange for the family supporting Ali's project at the NPU and to secure the family's vote at meetings for the neighborhood planning unit which encompasses the Lakewood Heights Community ("NPU").
10. (with respect to Defendant Kupersmith)	Ali attempted to evict a tenant because the tenant would not support Ali at the NPU meeting.
12. (with respect to Defendants Kupersmith and Murray)	Ali's purpose for the Lakewood Heights School is one based in self-interest in order for Ali to make a profit.
13. (with respect to Defendant Kupersmith)	Ali requires all tenants to attend NPU meetings and to vote in favor of Ali.
16. (with respect to Defendant Murray)	Ali and its development pursuits do not follow

	the laws and rules of the city of Atlanta or the NPU.
24. (with respect to Defendants Kupersmith and Murray)	Ali and his father are in “bed” with a known racist and alleged member of the KKK.
25. (with respect to Defendant Kupersmith)	Ali is a bully.

The remaining eighteen of the thirty alleged statements that Plaintiffs attribute to the three Defendants are not cognizable as slander per se, including some that cannot factually be attributed to Defendants and/or are barred by the one-year statute of limitations. See O.C.G.A. § 9-3-33. Defendants’ Motion is therefore **GRANTED** on Count V as to those eighteen statements.

E. Litigation Costs and Punitive Damages (Counts VI & VII)

As discussed in the above section, questions of fact exist regarding actual malice. A finding of actual malice will support an award of punitive damages. See Peoples v. Guthrie, 199 Ga. App. 119, 120 (citing Macon Telegraph Pub. Co. v. Elliott, 165 Ga. App. 719, 721 (1983) (affirming jury award of punitive damages)). Likewise, such a finding will support an award of attorney’s fees under O.C.G.A. § 13-6-11 where a Defendant has acted in bad faith. See, e.g., Atlanta Journal Co. v. Doyal, 82 Ga. App. 321 336-37 (1950). Defendants’ Motion as to Counts VI & VII is therefore **DENIED**.

F. Defendants’ Attorney’s Fees

Under O.C.G.A. § 9-11-11.1(b.1), the prevailing moving party on a Motion to Strike “shall be granted the recovery of attorney’s fees and expenses of litigation related to the action in an amount to be determined by the court based on the facts and circumstances of the case.” Here, Defendants have prevailed in part and are thus entitled to recovery of at least some portion of their attorney’s fees.

The Court dismisses Counts I and IV in their entirety. The Court dismisses Count V as to Defendant Graybill. Defendants are entitled to reasonable fees and expenses for time spent in connection with obtaining dismissal of the foregoing counts, including time spent on common facts and legal argument that were integral to both their Motion to Strike and Motion to Dismiss

for failure to state a claim. See Kearney v. Foley & Lardner, 553 F. Supp. 2d 1178, 1184 (S.D. Cal. 2008) (finding defendants were entitled to attorneys' fees on their successful anti-SLAPP motion, including time and expenses spent on the common facts and legal arguments that were inextricably intertwined in both their anti-SLAPP motion and separate motion to dismiss); Mann v. Quality Old Time Serv., Inc., 139 Cal. App. 4th 328, 333 (2006) (awarding 50% attorneys' fees to defendant who succeeded on appeal in getting 1 of 4 claims dismissed on an anti-SLAPP motion to strike). Reasonable fees will be determined by the filing of a fee application with this Court. The fee application shall be filed either within 30 days after the time for appeal of this Order has run without either party noticing an appeal, or within 30 days after resolution of any ensuing appeal.

IV. PLAINTIFFS' MOTION FOR DISCOVERY

In light of the above decisions of this Court, the Plaintiffs' Motion for Discovery is moot because this case will proceed now to regular discovery under the Civil Practice Act. The Court finds and orders that the date for the 6-month discovery period under Uniform Superior Court Rule 5.1 should and shall begin to run the date this order becomes final and unappealable.

SO ORDERED, this 14th day of January, 2025.



Judge Eric A. Richardson
State Court of Fulton County

cc:
Served electronically