E-FILED
7/22/2022 10:22 AM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

RAYMOND T. THROCKMORTON, III, SUSAN B. EVANS and TERRANCE E. MCNABB,	)	
Plaintiffs,	)	
	)	**Case No. 20-1264-BC**
v.	)	
STEVEN L. LEFKOVITZ and LEFKOVITZ AND LEFKOVITZ, PLLC,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter came before the Court for hearing on July 12, 2022, upon Defendants' Steven L. Lefkovitz and Lefkovitz and Lefkovitz, PLLC (collectively the "Lefkovitz Parties" or individually "Lefkovitz" and the "Lefkovitz Firm") Motion for Summary Judgment on a claim of tortious interference with a business relationship that induced procurement of breach of contract both pursuant to common law and as codified at Tenn. Code Ann. § 47-50-109. In their motion, the Lefkovitz Parties seek dismissal of the sole claim brought against them by Plaintiffs Raymond T. Throckmorton, III, Susan B. Evans and Terrance E. McNabb (the "Plaintiffs"). Plaintiffs deny that the Lefkovitz Parties have put forth a sufficient basis for summary judgment and assert they are entitled to a trial of their claim on the merits.

The parties submitted extensive materials for the Court's consideration and presented their cases orally at the motion hearing. The Court is ready to rule.

FINDINGS OF FACT

Lefkovitz is an attorney and agent of the Lefkovitz Firm. His practice has primarily been bankruptcy law since 1978.

Vickie and Wayne Woelk (the "Woelks") owned property at 300 Jefferson Street in Davidson County, Tennessee (the "Property") that became disputed in or about 2015. The Woelks retained Plaintiffs to represent them in asserting their claim as to the Property. Their fee agreement was on a contingency basis as the Woelks did not have the funds to pay Plaintiffs on an hourly basis. They entered a fee agreement, entitled Agreement Regarding Attorney Fees that provided in pertinent part as follows:

> Attorneys: Raymond T. Throckmorton III, Attorney at Law
> 2016 8th Ave S
> Nashville, TN 37204
> (615) 297-1009
> (615) 297-9007 fax
>
> Susan B. Evans, Attorney at Law
> 2016 8th Ave S
> Nashville, TN 37204
> (615) 739-6833
> (615) 297-9007 fax
>
> Client(s): Wayne and Vicki Woelk.
>
> Claim for: Conversion of property at 300 Jefferson Street Against D. Scott Parsley
>
> The client hereby employs the attorneys to perform all necessary legal and related services in connection with the above-mentioned matter.
>
> The fee arrangement described below will cover all our services in this cause, including our services for negotiating a satisfactory settlement of your claim. We shall not agree upon any settlement or comprise [sic] of your claim without your prior consent to such settlement or compromise. On your part, you agree to cooperate fully with us as your lawyers, and you agree that we shall have the exclusive right to handle your case and to negotiate with any and all parties toward a compromise and settlement. If the client(s) does not cooperate [with] the attorneys, the attorneys are authorized to withdraw from the case.
>
> If there is a recovery in this case, the attorneys' [sic] [fee] will be thirty-three and 1/3rd (33.3%) percent of the recovery plus expenses if we settle your case prior to filing suit. Fees will be forty (40%) percent of the recovery plus expenses if suit is filed. The agreement does not include fees for any appeal of this case. The calculation of the attorneys' fee is based on the total amount of the recovery. Then the attorneys' fee is subtracted from the total recovery, and then any expenses, which have been advanced by the attorneys on the client's behalf, will be recovered (subtracted) from the remaining amount. Expenses include things like filing fees,

> costs of depositions, photocopying charges, long distance telephone calls, faxes, travel expenses, medical records and expert fees, etc., which are necessarily incurred while pursuing your claim. Our firm will advance case expenses on your behalf. At the conclusion of the case, the expenses advanced, by our office, will be recovered from your share of the proceeds, in addition to the attorneys' fee as applicable. The client, therefore, receives an amount equal to the recovery less the attorneys' fee and less expenses. Again, in the event there is no recovery in this case, you will not be liable for any attorney's fees nor for any expenses, except for filing fees and the associated costs referred to above. I/We have further agree [sic] that the attorneys' fee will be divided equally between the attorneys Raymond T. Throckmorton and Susan Evans and that they assume joint responsibility for your representation. Further it is disclosed that the attorneys Raymond Throckmorton and Susan Evans [are] solo attorneys and have associated themselves in this case.
>
> The client(s) understand(s) that the attorney is authorized to involve other attorneys, at no additional expense to the client(s), as the attorneys see fit or as the legal proceedings warrant.
>
> The client(s) agree(s) that the attorneys have not made any representation to me/us about the outcome of this case.
>
> This Agreement contains all terms to which I/we have agreed. This Agreement may only be modified in writing signed by a representative of the attorneys and client(s).
>
> This Agreement is to be interpreted under Tennessee law.

(the "Contract"). The Contract is signed by Throckmorton and both Mr. and Mrs. Woelk and is dated November 23, 2015. Plaintiffs had a difficult time explaining the Contract to Mr. Woelk and knew that he tended to "renegotiate everything every single time." Plaintiffs did not believe it was important to define "recovery" in the Contract and how the fee would be attained with the Woelks. They used their standard contingency fee form.

During negotiations regarding the Woelks' property rights, Plaintiffs drafted a letter to the Woelks that described different scenarios with different attorneys' fees proposed. Plaintiffs assuaged Mr. Woelk's concern about not having money to pay by saying "well, we have to try our best to do what we can to get money." One scenario was the offer at the time, without a trial, that if the Property sold for $1.5 million, the attorneys' fees would be roughly $145,000. Another

scenario was if the Property was returned to the Woelks after trial and sold for $1.5 million, the attorneys' fees would be roughly $600,000.

After a trial in Davidson County Chancery Court, and pursuant to the Court's order in that case, the Woelks' ownership of the Property was restored. As part of the process of restoration, the Woelks had to pay Scott Parsley, the opposing party, $59,000, which they borrowed from a friend. Plaintiffs sought attorneys' fees in the Chancery Court case but were not awarded fees by the Chancellor hearing the underlying dispute. Plaintiffs had discussed with the Woelks the possibility of an appeal and what the attorneys' fees would be in such a circumstance, but the parties did not enter an agreement regarding that subject. The Chancery Court judgment became final in December of 2018. Also in December of 2018, the Woelks had a potential buyer for the property in the amount of approximately $1,275,000. The Woelks contracted to sell the Property for that amount on December 19, 2018. Plaintiffs asserted a claim for attorneys' fees of $510,000 based on that potential sale amount. The Woelks disputed that claim. It is at this point they became adverse to each other.

Lefkovitz first met with Plaintiff Throckmorton and Mrs. Woelk, whom she introduced as "our new counsel," and Lefkovitz introduced himself as "their new attorney." Plaintiff Throckmorton declined to meet with Lefkovitz and Mrs. Woelk until he could have the other Plaintiffs present. Eventually they scheduled a meeting only for the attorneys to meet. Lefkovitz discussed the possibility of filing bankruptcy for the Woelks if resolution of the fee dispute could not be reached on the theory that the term "recovery" in the Contract was vague.

The Woelks filed for Chapter 11 bankruptcy on February 4, 2019 represented by the Lefkovitz Parties. They did so despite intending to dissolve their business and vacate the Property. Their listed debt was primarily consumer in nature, and collectively was far less than Plaintiffs' claim for fees. The Court finds that the Woelks filed bankruptcy because of Plaintiffs' claim for

fees and to obtain relief from that claim in Bankruptcy Court. Mrs. Woelk admitted as much during the Rule 341 hearing upon examination by Plaintiffs' counsel Paul Jennings, a bankruptcy lawyer whom they had hired to represent them. The Woelks also acknowledged that the Property was worth at least $1,000,000.

In order to retain Lefkovitz, the Woelks paid $15,000 in cash as a flat fee. Lefkovitz has been unable to produce any records regarding this payment, had no fee agreement and is unaware of the origin of the funds, which was not listed in the Woelks' petition and schedules. There is no proof otherwise, however, and the Court finds this undisputed.

During the Woelks' bankruptcy, on March 22, 2019, they filed a Motion and Notice to Sell Property Free and Clear of Liens. On April 12, 2019, Plaintiffs filed a Limited Objection to that motion. On April 24, 2019, several pleadings were filed in the Woelk bankruptcy evidencing that Plaintiffs and they had settled their fee dispute pursuant to a judicial settlement conference. Plaintiffs' were parties to an Agreed Order resolving their Limited Objection and the Lien they had filed against the Property, allowing the sale to proceed.

The Woelks' sale of the Property closed on June 28, 2019 for $1,275,000. Pursuant to a mediation in the Bankruptcy Court, Plaintiffs agreed to accept $350,000 in attorney's fees from the Woelks to settle their claims under the Contract. The settlement agreement stated that the Contract "was a valid and enforceable agreement for legal representation" and the fee agreed to therein "reduce[d] the fees payable under the engagement agreement to $350,000, including expenses." It was important to Plaintiffs for the Woelks to stipulate that the Contract was a valid agreement of representation, in part as a condition precedent for Plaintiffs to pursue their losses against the Lefkovitz Parties. Plaintiffs did not discuss their intentions to file suit against the Lefkovitz Parties during the bankruptcy mediation with the Woelks. The Lefkovitz Parties represented the Woelks in the mediation.

On June 17, 2019, the U.S. Trustee filed a motion to convert the Woelks' Chapter 11 case to a Chapter 7. Prior to a hearing on that motion, on July 19, 2019, the Woelks submitted a proposed order dismissing their bankruptcy. That order, and the final decree of dismissal, were entered on July 25, 2019 and August 13, 2019 respectively. The Court finds it is undisputed that once Plaintiffs' attorneys' fee claim against the Woelks was resolved, and they were able to sell the Property without the attorneys' fee lien, the Woelks no longer had a basis to remain in bankruptcy.

Lefkovitz never lied to Plaintiffs, and there is no evidence he received a fee based upon the outcome of the Woelks' negotiations with them. Plaintiffs brought this action to recover the difference in the fee the Woelks paid through the bankruptcy mediation, and the fee they originally sought, or $162,670, as well as other damages available pursuant to Tenn. Code Ann. § 47-50-109.

CONCLUSIONS OF LAW

Summary Judgment Standard

Tenn. R. Civ. P. 56.04 sets forth the summary judgment standard, requiring that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tennessee law interpreting Rule 56 provides that the moving party shall prevail if the non-moving party's evidence is insufficient to establish an essential element of her claim. Tenn. Code Ann. § 20-16-101; *Rye v. Women's Care Center of Memphis, MPLLC*, 477 S.W.3d 235, 261-62 (Tenn. 2015). In response, the non-moving party "'may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial.'" *Tolliver v. Tellico Village Property Owners Ass'n, Inc.*, 579 S.W.3d 8, 21 (Tenn. Ct. App. 2019) (citing Tenn. R. Civ. P. 56.06).

Intentional Interference with a Business Relationship and Unlawful Inducement of Breach

The elements of the tort of intentional interference with a business relationship are well-known and are set out in *Trau-Med of America, Inc. v. Allstate Ins.*, 71 S.W.3d 691 (Tenn. 2002):

> (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's *improper motive or improper means, see, e.g., Top Serv. Body Shop*, 582 P.2d at 1371; and finally, (5) damages resulting from the tortious interference.

Trau-Med of America, Inc., 71 S.W.3d at 701 (footnotes omitted).

The tort of unlawful inducement of breach of contract is related to the tort of intentional interference, with some variation in the elements. It is codified at Tenn. Code Ann. § 47-50-109, as follows:

> It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such damages.

This was summarized by the Tennessee Supreme Court as requiring a showing of "a legal contract, of which the wrongdoer was aware, that the wrongdoer maliciously intended to induce a breach, and that, as a proximate result of the wrongdoer's actions, a breach occurred that resulted in damages to the plaintiff." *Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc.*, 876 S.W.2d 818, 822 (Tenn. 1994) (citing *Polk & Sullivan, Inc. v. United Cities Gas Co.*, 783 S.W.2d 538, 543 (Tenn. 1989)). Although the statute does not include the element of malice, Tennessee courts have consistently found such to be required. *Testerman v. Tragesser*, 789 S.W.2d 553, 556-57 (Tenn.

Ct. App. 1989) (citing *Lann v. Third Nat. Bank in Nashville*, 277 S.W.2d 439, 440 (Tenn. 1955); *TSC Indus., Inc. v. Tomlin*, 743 S.W.2d 169, 173 (Tenn. Ct. App. 1987)); *see also Stone v. Faulkner, Mackie & Cochran*, No. M2000-00125-COA-R3-CV, 2001 WL 46981, at *2 (Tenn. Ct. App. Jan. 22, 2001).

The business relationship at issue in this litigation is between Plaintiffs and the Woelks, and the contract at issue is the Contract regarding attorneys' fees. It is undisputed that those relationships and that contract exists, and that the Lefkovitz Parties were aware of same. The determining issue in this summary judgment motion is whether the Lefkovitz Parties induced a breach using improper motive or means or malice. Plaintiffs rely on the filing of an "illegitimate bankruptcy" on the Woelks' behalf. The Woelks disputed that they owed Plaintiffs any fee for their work. The Court finds the Woelks' position defies belief since the return of the Property was precisely what the litigation was designed to accomplish per the Contract terms. However, the Contract was Plaintiffs' boilerplate agreement and could have been tailored for the particular case. Regardless, the Woelks were refusing to pay Plaintiffs and were relying on the language of the Contract, specifically the lack of language spelling out the fee entitlement based off the Property sale price, for their position. Valid or not, that was their position, and they sought legal counsel to advise them as to their options. Bankruptcy was a legal and viable option for them of which Lefkovitz apparently advised them, and eventually represented them in pursuing.

There were deficiencies in the bankruptcy filing, including the lack of information regarding the source of the $15,000 fee, and the Lefkovitz Parties' lack of documentation regarding the payment of same. Absent a finding by the Bankruptcy Court that the case was "illegitimate" or substantively defective so as to merit a dismissal or sanction or some other negative outcome, this Court is not prepared to make that finding. That is a finding that could have and should have been sought in the Bankruptcy Court if Plaintiffs intended to pursue relief outside of that process.

Otherwise, after having settled with the Woelks and dismissing their objection to the sale of the Property in exchange for a settlement and release, seeking relief against the lawyer who advised the Woelks of their legally sustainable option to pursue bankruptcy is too little too late. Plaintiffs can point to no evidence in the record of improper motive or malice other than allegations that Lefkovitz filed a bankruptcy that he knew was invalid and pointing to purported discrepancies in the bankruptcy proceeding. If true, these issues should have been raised in the Bankruptcy Court. This failure, coupled with the fact that Plaintiffs admit that Lefkovitz did not lie to Plaintiffs or point to any evidence that Lefkovitz was operating in his own self-interest, is insufficient to create a genuine issue of material fact regarding improper motive or malice.[1] Lefkovitz testified that he had grounds to challenge the Contract on the basis of ambiguity and vagueness, and he used bankruptcy as a means to resolve his clients' dispute. Such tactics to attempt to reach a resolution cannot be said to rise to the level of demonstrating improper motive or actual malice necessary for Plaintiffs' claim, especially without a finding by the Bankruptcy Court that the proceeding was illegitimate.

Moreover, the Court finds that the litigation privilege immunizes the Lefkovitz Parties from this action. The general rule is that statements made in the course of judicial proceedings which are relevant and pertinent to the issues, regardless of whether they are malicious, false, or known to be false, are absolutely privileged, and therefore cannot be used as a basis for a libel action for damages. *Jones v. Trice*, 360 S.W.2d 48 (Tenn. 1962). In so finding, the Court set forth the view contained in the Restatement of Torts:

> A party to a private litigation . . . is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of a judicial proceeding in which he participates, if the matter had some relation thereto.

[1] While Plaintiffs dispute that Lefkovitz was operating in his own self-interest, Plaintiffs provide no citation to the record to support that denial. (Response to Defendants' SOF ¶ 34). In fact, Throckmorton testified in his deposition that he had no evidence that Lefkovitz was operating in his own self-interest other than in receiving a fee.

Id. at 51 (quoting Restatement of Torts § 587). From these and other authorities, the Court reasoned that "a statement by a judge, witness, counsel, or party, to be absolutely privileged, must meet two conditions: (1) It must be in the course of a judicial proceeding, and (2) it must be pertinent or relevant to the issue involved in said judicial proceeding." *Id*. at 52; *see also Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 159 (Tenn. Ct. App. 1997). Tennessee courts have recognized the litigation privilege beyond the defamation context, and the privilege does apply to circumstances in which relief is sought against an attorney arising out of his professional relationship to a client. *See Unarco Material Handling, Inc. v. Liberator*, 317 S.W.3d 227 (Tenn. Ct. App. 2010); *see also Loring Just. v. Meares*, No. 3:19-CV-185, 2021 WL 3410045, at *5 (E.D. Tenn. Aug. 4, 2021). In *Unarco*, the Tennessee court defined when the litigation privilege would apply to an attorney for a party:

> [T]he communication at issue is protected by the privilege *if* (1) the communication was made by an attorney acting in the capacity of counsel, (2) the communication was related to the subject matter of the proposed litigation; (3) the proposed proceeding must be under serious consideration by the attorney acting in good faith, and (4) the attorney must have a client or identifiable prospective client at the time the communication is published. . .[T]he privilege applies *only* when there is a reasonable nexus between the publication in question and the litigation under consideration.

Unarco Material Handling, Inc., 317 S.W.3d at 237 (quoting *Simpson Strong–Tie Company, Inc. v. Stewart*, 232 S.W.3d 18, 22 (Tenn. 2007)). This is consistent with the Supreme Court's earlier ruling in *Simpson*, in which it recognized the litigation privilege to apply to pre-litigation solicitations as "consistent with our prior cases that have embraced the privilege on the basis that 'access to the judicial process, freedom to institute an action, or defend, or participate therein without fear of the burden of being sued for defamation is so vital and necessary to the integrity of our judicial system that it must be made paramount.'" *Simpson*, 232 S.W.3d at 24 (quoting *Jones*, 360 S.W.2d at 51).

This is also consistent with the recent Court of Appeals finding in *The Law Offices of T Robert Hill PC v. Cobb*, No. W2020-01380-COA-R3-CV, 2021 WL 2172981 (Tenn. Ct. App. May 27, 2021). There, the contention was that the defendants pursued an underlying case to "'maliciously, improperly and unethically gain an advantage in a personal dispute to effect a hostile takeover of … Hill Boren, PC and loot the corporation of its assets, including its valuable brand, [property,] and approximately 1,400 Hill Boren clients.'" *The Law Offices of T Robert Hill PC*, 2021 WL 2172981, at *6. The mechanisms supposedly employed to do so included making false and irrelevant allegations to assault the character of one of the parties, participating in an *ex parte* communication with a court to gain an unfair advantage, and suborning perjury. *Id.* The trial court found some of the actions complained of to fall within the litigation privilege and some outside. Specifically, those actions related to the underlying litigation were protected, but those directed at the firm's employees and encouragement to violate duties of loyalty and provide false testimony were not. *Id.* at *7. The Court of Appeals did a detailed analysis of the litigation privilege through review of *Unarco* and *Simpson*. Reiterating that the privilege is only applicable when the attorney's conduct "come[s] within strict parameters," the Court stated that "the litigation privilege in Tennessee applies not only to *statements* made in the course of litigation, but also to *actions* taken prior to the commencement of litigation. . . ." *Id.* (citing *Unarco*, 317 S.W.3d at 238; *Simpson*, 232 S.W.3d at 22).

Plaintiffs assert that the Lefkovitz Parties did not have a "legitimate purpose" for advising the Woelks of bankruptcy as an option and then filing bankruptcy for them. Again, however, they were hired to advise the Woelks how to deal with their debts, including Plaintiffs' claim. Bankruptcy is a tool that is available to debtors and, if a debtor files and the chosen type of bankruptcy, or no type of bankruptcy, is available to him given his circumstances, it is for the Bankruptcy Court to make that determination. Plaintiffs participated in the bankruptcy as a

creditor, and although initially objecting to the transfer of the Property, withdrew their objection and entered a settlement agreement with the Woelks. The Court fails to see how the Lefkovitz Parties' representation of the Woelks was illegitimate absent a finding by the Bankruptcy Court otherwise.[2]

The Court cannot find that the Lefkovitz Parties engaged in conduct that is actionable and/or outside of the litigation privilege. The Lefkovitz Parties were retained to advise their clients regarding options, including bankruptcy. The clients had an obligation from which they were seeking relief through bankruptcy. The Lefkovitz Parties filed the bankruptcy on their behalf and successfully resolved their dispute with Plaintiffs. For Plaintiffs to use that process to settle with the Woelks, and then come to this Court and assert the bankruptcy was illegitimate and not protected by a litigation privilege, is not well taken. The Court dismisses Plaintiffs' claim and grants the Lefkovitz Parties' summary judgment motion.

CONCLUSION

It is therefore ORDERED, ADJUDGED and DECREED that the Lefkovitz Parties' summary judgment motion is GRANTED. The Court DISMISSES Plaintiffs' claim, and the case is hereby DISMISSED. Costs are to be taxed to Plaintiffs.

It is so ORDERED.

s/Anne C. Martin

ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

[2] Plaintiffs' reliance on dicta from a Delaware case that there is an equitable "good faith" requirement that the Bankruptcy Code "should not encourage the 'filing of a bankruptcy petition that lacks a valid reorganizational purpose'" is misplaced. *See Esopus Creek Value LP v. Hauf*, 913 A.2d 593, 604 (Del. Ch. 2006). That case involved a stockholder lawsuit against the officers and directors of a corporation that used a bankruptcy process to enfranchise preferred stockholders over others in a restructuring of an asset sale when the certificate of incorporation required otherwise. *Id.* at 596. In that case, the bankruptcy process amounted to "inequitable conduct" when the company was otherwise financially healthy. *Id.* at 604-05.

cc by U.S. Mail, email, or efiling as applicable to:

Michael F. Braun, Esq.
Jonathan Cole, Esq.

RULE 58 CERTIFICATION

A copy of this Order has been served by U.S. Mail upon all parties or their counsel named above.

s/Megan Broadnax
Deputy Clerk & Master

7-22-22
Date