

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-03814

Draxxion Talandar v. Elizabeth Manchester-Murphy

ENTRY REGARDING MOTION

Title: Motion to Strike Complaint (Motion: 1)
Filer: Laura C. Bierley
Filed Date: December 27, 2022

Plaintiff Draxxion Talandar has sued Defendant Elizabeth Manchester-Murphy for defamation, arising out of allegedly false reports to law enforcement. Ms. Manchester-Murphy moves to strike the complaint pursuant to the anti-SLAPP statute, 12 V.S.A. § 1041. On its own motion, the court defers decision on the motion to afford Mr. Talandar the opportunity for limited discovery and further hearing. Because Vermont caselaw in this area is sparse, the court takes the opportunity to elucidate the standards it will apply to consideration of the motion upon conclusion of that discovery.

BACKGROUND

According to the Complaint, on Oct. 31, 2019, Ms. Manchester-Murphy falsely accused Mr. Manchester of sexually assaulting her. Compl., ¶ 9 (filed Oct. 28, 2022). Mr. Manchester alleges that this report resulted in criminal charges against him, which in turn caused his pretrial incarceration for two years. Ultimately, he was acquitted of the charges. *Id.*, ¶¶ 10–16.

Ms. Manchester-Murphy filed the instant motion on December 27, 2022. The court inadvertently overlooked the statute's prompt hearing requirement. 12 V.S.A. §1041(d). Instead, it ordered the hearing only after it had reviewed the parties' motion papers, conducted research, and drafted an opinion. The court apologized at the hearing for its oversight; it renews that apology today. The court notes, however, that neither party was prejudiced by the delay; if anything, it afforded both parties more time to develop the record.

The hearing was held on June 19, 2023. Neither party filed any additional papers prehearing. Significantly, Mr. Talandar submitted no affidavits. Instead, at the hearing, he proffered that he would testify to the falsity of Ms. Manchester-Murphy's report to law enforcement. The court declined to hear the testimony. Mr. Talandar then sought leave to file a supplemental affidavit. The court granted leave but made no commitment to consider the affidavit. The court also allowed the parties two weeks to submit and respond to supplemental authority.

Vermont's anti-SLAPP statute provides, "A defendant in an action arising from the defendant's exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution may file a special motion to strike." 12 V.S.A. § 1041(a). The motion must be filed within 60 days of the filing of the complaint. 12 V.S.A. §1041(b). The language of the statute suggests that that filing alone shifts the burden to the plaintiff. *Id.* § 1041(e) The plaintiff must then show that "the defendant's exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law," *id.* § 1041(e)(1)(A), and that "the defendant's acts caused actual injury to the plaintiff." *Id.* § 1041(e)(1)(B). The statute requires the court to consider "the pleadings and opposing affidavits stating the facts upon which the liability or defense is alleged." *Id.* § 1041(e)(2); *see also Felis v. Downs Rachlin Martin PLLC*, 2015 VT 129, ¶ 32 ("The motion is decided on the pleadings and supporting and opposing affidavits"). While the statute does allow the court, on motion and for good cause, to order "limited discovery . . . for the purpose of assisting . . . decision on the special motion to strike," *id.* § 1041(c)(2), neither party made such a motion.

ANALYSIS

Mr. Talandar challenges the basic premise of Ms. Manchester-Murphy's motion; he asserts that his suit does not "aris[e] from [her] exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances." If he is right, the motion to strike must fail. This is a threshold question, which the court must answer before determining whether Mr. Talandar has met the two-part burden set forth in 12 V.S.A. § 1041(e)(1). *Cf. Felis*, ¶¶ 33–34; *see also Chandler v. Rutland Herald Pub.*, 2015 WL 7628681, at *3 (Vt. Nov. 19, 2015) (mem.).

The statute sets forth four categories of statements that fall within the definition of “the exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances.” 12 V.S.A. § 1041(i). While our Supreme Court has not yet addressed whether a report to law enforcement of criminal activity falls within one or more of these categories, the weight of authority suggests that it does. *See O’Gara v. St. Germain*, 91 Mass. App. Ct. 490, 497 n.4 (2017) (collecting representative authorities). Mr. Talandar asserts, however, that the rights to freedom of speech or to petition the government do not extend to false reports. This assertion is not controversial; there is a near unanimity of authority supporting it. *See e.g., Stevens v. Mulay*, No. 19-CV-01675-REB-KLM, 2021 WL 1300503, at *7 (D. Colo. Feb. 16, 2021) (comparing conclusions of other courts that agree that false reports to law enforcement are not protected activity but differ on the burdens of the respective parties when a false report is alleged). What is controversial in the context of this case is whether the mere allegation that a report to law enforcement was false is sufficient to take a case outside the operation of the statute.

In this regard, Mr. Talandar relies principally on *Lefebvre v. Lefebvre*, 199 Cal. App. 4th 696 (Cal. Ct. App., 2d Dist., Div. 4 2011), and its progeny. That case, however, has been distinguished in its own state and rejected in others—at least to the extent that it can be read as standing for the assertion that making an allegedly false police report is not a protected activity within the scope of an anti-SLAPP statute. *See, e.g., Kenne v. Stennis*, 230 Cal.App.4th 953, 966-67 (Cal. Ct. App. 2d Dist., Div. 5 2014) (discussing and distinguishing *Lefebvre* and concluding, “the making of allegedly false police reports also can be protected petitioning activity under the first prong of the anti-SLAPP statute if the falsity of the report is controverted”). Thus, even in *Lefebvre*’s home state, “[o]nly if the record conclusively demonstrates that a police report is false does it constitute illegal activity that falls outside the scope of protected activity under the anti-SLAPP statute.” *Caraway v. Haller*, 2023 WL 3088264 (Cal. Ct. App., 1st Dist., Div. 2 2023); *see also L.S.S. v. S.A.P.*, 523 P.3d 1280, 1287 (Colo. Ct. App. 2022) (distinguishing *Lefebvre* and following *Kenne*: “if a defendant were precluded from [invoking protection of the anti-SLAPP statute] anytime a plaintiff alleged that the defendant’s otherwise-protected statements were false, it would undercut the purposes of the anti-SLAPP statute and would allow a plaintiff to evade the statute merely by alleging falsity”).

This court need not determine whether the bald assertion in the complaint that the Ms. Manchester-Murphy made a false report to law enforcement shifted the burden to her to controvert that assertion; whether it was her burden or not, she has done so. In her motion, she notes that her statements were “made under oath and investigated by trained law enforcement”; that they “were evaluated by the Windsor County State’s Attorney’s office and submitted to the Court, which found probable cause and that the weight of the evidence was sufficient to hold [Mr. Talandar] without bail pending trial”; and that they were “considered by the prosecution to be credible enough that the state maintained the case all the way to a trial by jury.” Def.’s Special Mot. to Strike, 6. Ms. Manchester-Murphy supported these assertions with citations to the record of the criminal case. *Id.* This was sufficient to controvert Mr. Talandar’s allegation, and so place on his shoulders the burden of demonstrating that her report “was devoid of any reasonable factual support” and that it “caused actual injury” to him.

This he has failed to do. In response to Ms. Manchester-Murphy’s motion, he asserts boldly, “[t]he Complaint is sufficient to carry Talandar’s burden under 12 V.S.A. § 1041(c)(1) [sic].” Opp. to Mot. to Strike, 5. He states further: “[t]he facts alleged in the Complaint . . . clearly establish that Manchester-Murphy’s statements to police in October 2019 were false, defamatory, and malicious, and caused harm to Talandar. Nothing more is required under 12 V.S.A. 1041.” *Id.* As a three-justice panel of our Supreme Court has made clear, however, in this regard he is wrong. In *Chandler v. Rutland Herald Publishing, Inc.*, the plaintiff, in response to a motion to strike, “simply assert[ed]” that the news article on which his complaint rested “was false and vexatious.” 2015 WL 7628687, at *3 (Vt. Nov. 19, 2015) (mem.). The Court held that such “generalized contentions are insufficient to meet his burden on the statute.” *Id.* So too here. While Mr. Talandar’s allegations may meet the requirements of notice pleading, they fall well short of the factual showing required by the statute.

This conclusion ought to end the inquiry. The court notes, however, that in his opposition, Mr. Talandar suggested a belief that the hearing required by 12 V.S.A. § 1041(d) should be an evidentiary hearing. *See* Opp. to Mot. to Strike, 6. The court is not persuaded; in both *Felis* and *Chandler* the Supreme Court suggested that the court must decide the motion to strike exclusively on “the pleadings and supporting and opposing affidavits.” Each of these suggestions, however, was clearly dicta.

The court need not decide this issue at this time. Instead, the court interprets Mr. Talandar's request for a hearing as seeking the opportunity to develop the factual record further. In its discretion, the court will consider Mr. Talandar's affidavit and will afford Ms. Manchester-Murphy the opportunity to respond to the same. It further determines that there is good cause to allow limited discovery to determine whether there was any reasonable factual support for Ms. Manchester-Murphy's statements to law enforcement. This discovery may not include deposition of Ms. Manchester-Murphy; Mr. Talandar had ample opportunity for such a deposition during his criminal case. *See* V.R.Cr.P. 15(a). Similarly, it shall not include deposition of any other witness disclosed by the prosecution in that case. It may, however, include written discovery, as allowed by the Rules of Civil Procedure, directed to Ms. Manchester-Murphy or any other witness.

The parties shall conclude all such discovery within 45 days of the date of this order. Within 60 days of the date of this order, Mr. Talandar shall submit any supplemental affidavits or other materials properly shown to be admissible in evidence, along with a supplemental memorandum of law. If he seeks a further hearing, evidentiary or otherwise, he should submit a motion requesting the same and demonstrating his entitlement to it under the law. Ms. Manchester-Murphy may file any affidavits or other materials properly shown to be admissible in evidence, along with a supplemental memorandum of law, 15 days after Mr. Talandar's submission; she may also then reply to any motion for further hearing. The court will then determine how to proceed.

Electronically signed pursuant to V.R.E.F. 9(d): 7/12/2023 11:31 AM



Samuel Hoar, Jr.
Superior Court Judge

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