IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW

GRAHAM B. SPANIER, Plaintiff,	:	No. 2013-2707
v.	:	
LOUIS J. FREEH and FREEH SPORKIN & SULLIVAN, LLP, Defendants	:	

ORDER OF COURT

AND NOW, to wit, this 11th day of January, 2016, in accordance with our Opinion this same date, after careful consideration of Plaintiff's Motion to Modify Stay and Plaintiff's Motion for Leave to Join Additional Parties, the Memoranda submitted by both parties, the representations of the parties articulated at Oral Argument, and the complete record of the case, we note and direct as follows:

1) Plaintiff's Motion to Modify Stay is **GRANTED**. The Stay imposed on February 25, 2014 is lifted in its entirety, with the Court to address potential 5th Amendment concerns as they arise.

2) Plaintiff's Motion for Leave to Join Additional Parties is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff's Motion as to FGIS is **GRANTED**. Plaintiff's Motion as to Penn State is **DENIED**.

BY THE COURT:

Robert J. Eby, S.J.

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CIVIL ACTION-LAW

GRAHAM B. SPANIER, Plaintiff, v. LOUIS J. FREEH and FREEH SPORKIN & SULLIVAN, LLP, Defendants	:	No. 2013-2707

APPEARANCES:

THOMAS CLARE, ESQ.
LIBBY LOCKE, ESQ. — FOR THE PLAINTIFF

ROBERT C. HEIM, ESQ.
MICHAEL KICHLINE, ESQ. — FOR THE DEFENDANT

OPINION BY EBY, S.J., JANUARY 11, 2016

Penn State University ("Penn State") retained Louis J. Freeh ("Freeh") and Freeh Sporkin & Sullivan, LLP ("FSS") to conduct an independent investigation into the circumstances surrounding and leading up to what has become known as the Gerald "Jerry" Sandusky child abuse scandal. Plaintiff Graham B. Spanier ("Spanier"), former President of Penn State, initiated the instant defamation action against Defendants Freeh and FSS in response to written and verbal comments allegedly expressed by Defendants following that independent investigation.

Currently before the Court for disposition are two motions filed by the Plaintiff in that action: a Motion to Modify Stay and a Motion for Leave to Join Additional Parties. Plaintiff's Motion to Modify Stay seeks to modify a stay in the proceedings imposed on February 25, 2014, at Plaintiff's request, in light of pending criminal charges against the Plaintiff and other potential witnesses and the ancillary Fifth Amendment concerns raised by those charges. While to date those criminal charges remain unresolved, Plaintiff now seeks to have that stay lifted and proceed with the filing of a Complaint and the commencement of discovery in the instant matter. Plaintiff's second motion petitions the Court for leave to join two additional Defendants in the instant action, Freeh Group International Solutions, LLC ("FGIS"), an entity affiliated with Freeh and FSS, on one potential count of tortious interference with business relations, and Penn State University, on seven counts of breach of contract. For the reasons that follow, we intend to grant Plaintiff's Motion to Modify Stay. With regard to Plaintiff's Motion for Leave to Join Additional Parties, we intend to grant the Motion as to FGIS, but deny the Motion as to Penn State University.

Procedural History

The Plaintiff initiated the instant action by Writ of Summons dated July 11, 2013, against Freeh, FSS, and Pepper Hamilton, LLP (a successor to FSS due to merger of the firms.) At the request of Plaintiff, an amended writ was issued on September 12, 2013, dropping Pepper Hamilton, LLP from the action, and on September 30, 2013, the Defendants filed a Praecipe to File Complaint. On October 18, 2013, the Plaintiff moved for a stay in the proceedings, arguing that during the pendency of criminal charges against

him and his two co-defendants, Gary Schultz and Timothy Curley, Fifth Amendment concerns would significantly hamstring effective litigation of the instant civil action.

By Order and Opinion dated February 25, 2014, Judge Jonathon Grine granted Plaintiff's Motion for Stay over the Defendants' objection. The Defendants pursued an interlocutory appeal, arguing that the stay violated Defendants' right to remove the case to federal court, since the United States Code provides a one-year deadline for a removal action. On June 30, 2014, the Superior Court relinquished jurisdiction over the appeal, finding that the stay order was not an appealable collateral order.

The Defendants then filed a Notice of Removal to the U.S. District Court, arguing that complete diversity among the parties established federal jurisdiction, and they could not wait, in light of the imposed stay, to pursue removal until after the Plaintiff filed a complaint. Simultaneously, the Defendants also filed a Declaratory Judgment action in the Middle District Court of Pennsylvania, asking the Court to conclude there was diversity jurisdiction between the parties and the action was thus appropriate for removable to federal court. On April 9, 2014, the U.S. District Court dismissed the Declaratory Judgment action because of the parallel removal action, and the Defendants' subsequent appeal of that dismissal to the Third Circuit Court of Appeals was unsuccessful. On November 26, 2014, the District Court remanded the removal case, holding that removal was premature, because no complaint had been filed.

On March 18, 2015, Plaintiff filed the two motions currently before the Court, a Motion to Modify Stay and a Motion for Leave to Join Additional Parties, FGIS and Penn State. On April 10, 2015, the Defendants filed a Motion requesting the appointment of an out-of-county judge, and in response, on May 1, 2015, Judge Grine recused himself from

the case. The undersigned jurist was subsequently assigned to the case, and by Order dated July 1, 2015, directed the parties to file concise memoranda addressing the current procedural posture and pending issues of the action. Following a status conference held on September 15, 2015, the Court set a briefing schedule on the two outstanding motions filed by Plaintiff. As the parties have submitted their briefs and argued their positions at Oral Argument held on October 28, 2015, the matter is now ripe for our review and disposition.

Discussion

A. Plaintiff's Motion to Modify Stay

The Plaintiff originally requested a stay in the instant proceedings on October 18, 2013, after Defendants filed a Praecipe to File Complaint and a Rule was issued against Plaintiff. At that time, Plaintiff argued a stay was necessary in the instant civil action because of Fifth Amendment concerns arising out of pending, related criminal charges in Dauphin County.[1]

Although to date the criminal charges against Plaintiff and his co-defendants, Timothy Curley and Gary Schultz, remain unresolved, Plaintiff now assures the Court that he will not be asserting his 5th Amendment privilege within the context of the instant action. He urges the Court to lift the stay so that he may file a Complaint and pursue discovery. Defendants, who opposed the imposition of the stay to begin with, do not object. While Plaintiff initially asked the Court to modify the stay to allow for "staged" discovery, Plaintiff abandoned this position at Oral Argument. Both parties have now agreed to a complete

[1] At the time of his 2013 motion, Plaintiff argued the criminal cases would be resolved by the end of 2014, and thus Defendants' interest in proceeding expeditiously would not be severely impacted.

lifting of the stay, with the stipulation that the Court will manage 5th Amendment concerns of other witnesses on an *ad hoc* basis as they arise.[2]

B. Plaintiff's Motion for Leave to Join

In his second Motion, Plaintiff petitions the Court for leave to join two additional defendants: Penn State University, which hired Freeh and FSS to conduct an investigation into the culpability of Penn State in the Jerry Sandusky child sex abuse scandal and FGIS, a consulting firm founded and chaired by Freeh and retained by Freeh and FSS to aid in that investigation. Plaintiff's Motion is governed by Rule 2229(b) of the Pennsylvania Rules of Civil Procedure, which provides, in pertinent part:

> (b) A plaintiff may join as defendants persons against whom the plaintiff asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action.

Pa.R.C.P. 2229(b). Thus, Rule 2229(b) gives a plaintiff the option of joining two or more persons as defendants if (1) the liabilities of the defendants arise from a common factual background, and (2) a common question of law or fact affecting the liabilities of the defendants will arise in the action. *Meyer v. Heilman*, 503 Pa. 472, 480, 469 A.2d 1037, 1041 (1983) (*citing Burke v. North Huntingdon Twp.*, 390 Pa. 588, 136 A.2d 310 (1957)). Given those two requirements, the right to join defendants in one proceeding under Rule 2229(b) is by no means absolute. *Richner v. McCance*, 2011 Pa. Super. 4, 13 A.3d 950,

[2] Given the agreement of all parties to lift the stay in its entirety, we need not conduct the six-factor balancing test *of In Re: Adelphia Communications Securities Litigation*, 2003 WL 22358819 (E.D. Pa. 2003) followed by Judge Grine in determining whether to impose the stay in 2013.

959-60 (2011). Moreover, joinder is not favored where it will complicate the action and potentially confuse the jury. *See Pittsburgh Parking Garages v. Urban Redevelopment Auth. of Pittsburgh*, 370 Pa. 578, 88 A.2d 780 (1952). With these standards in mind, in turn we will analyze the additional defendants Plaintiff now seeks to join.

1. Joinder of FGIS

With regard to FGIS, Plaintiff's Proposed Complaint alleges that, following Plaintiff's voluntary resignation from his employment with Penn State, FGIS tortuously interfered with Plaintiff's business or contractual relations by sabotaging his employment opportunities with the federal government. The Proposed Complaint further indicates that Plaintiff's proposed tortious interference cause of action will be pursued against Defendant Freeh as well as FGIS.

In order to determine whether FGIS may be properly joined under Rule 2229(b), we are first required to determine whether the liabilities of the defendants arise from a common factual background. In support of his tortious interference claim, Plaintiff's Proposed Complaint alleges that FGIS was hired by Freeh and FSS to conduct the bulk of the groundwork for the Freeh Report. The Proposed Complaint further alleges that when Plaintiff's anticipated employment with the federal government became public, Freeh and FGIS intentionally contacted federal authorities to urge them to not employ the Plaintiff. The Proposed Complaint specifically cites an April 2012 email authored by Freeh and sent from an FGIS account, in which Freeh allegedly states: "We have done our job notifying the Federal prosecutors regarding the latest information." Plaintiff's Complaint at ¶259. Plaintiff asserts that, after that date, he was no longer offered federal employment.

Based upon the above allegations in the Proposed Complaint, we have no doubt that a claim against Freeh and a claim against FGIS for tortious interference of business or contractual relations arise from a common factual background. That common factual background, as alleged in the Proposed Complaint, is much more than the subsidiary nature of FGIS to Freeh and FSS and the interrelatedness of all those entities during the course of the investigation leading to the Freeh Report. Plaintiff's claim against FGIS relies heavily on particular alleged statements of Freeh himself acting as the principal of FGIS, and thus the origin of their potential liabilities is an inexorably common one. We find, then, that the first requirement of Rule 2229(b) is met.

We are next required to consider whether a common question of law or fact affecting the liabilities of the defendants will arise in the action. We find that several common questions of law and fact will inevitably arise in Plaintiff's pursuit of tortious interference claims against both Freeh and FGIS. Aside from the factual questions of whether Freeh, acting for FGIS, made the injurious contacts to federal authorities that he and FGIS are alleged to have made, a jury will have to determine whether those actions satisfy the elements of intentional interference and, if so, make a calculation of damages. Because, as we noted above, Freeh was allegedly a principal actor for FGIS, these questions of law and fact will be common to Plaintiff's tortious actions against both Freeh and FGIS.

Finally, we do not find, based on the allegations of the Proposed Complaint, that joinder of FGIS in a suit in which the Plaintiff intends to pursue a tortious interference cause of action against Freeh, allegedly a principal in FGIS, will complicate the action or confuse the jury. While the jury will potentially need to determine whether Freeh is liable

in his individual capacity in such a suit, it would be required to do so whether FGIS is named as a Defendant or not.

Based upon the above analysis, we intend to grant Plaintiff leave to join FGIS in the instant cause of action.[3]

2. Joinder of Penn State

With regard to Penn State, Plaintiff's Proposed Complaint alleges that the University violated the separation agreement entered into with Plaintiff upon his voluntary resignation from employment in 2011. The Proposed Complaint alleges seven counts of breach of contract against Penn State, based upon the following: the initiation and the facilitation of the Freeh investigation and Report, which included "negative comments", the failure to prevent the publication of "negative comments" in the Freeh Report and its accompanying press conference and media statements, the failure to prevent "negative comments" by Penn State trustees and others against Plaintiff in the wake of the Freeh Report, the failure to provide administrative support, and the failure to pay for Plaintiff's legal fees and expenses arising from the Sandusky investigation. All proposed counts against Penn State are asserted against Penn State alone.

In considering whether Plaintiff's proposed breach of contract claims against Penn State should be joined to his existing tort action against Freeh and FSS, we have been guided by the reasoning and analysis in the Superior Court's decision in *Richner v. McCance*, 2011 Pa. Super. 4, 13 A.3d 950 (2011). In *Richner*, the Court considered

[3] The Defendants have urged the Court to deny Plaintiff's Motion for Leave to Join FGIS on a claim of tortious interference on the basis that such a claim, as pleaded in Plaintiff's Proposed Complaint, is subject to a one year Statute of Limitations, which Defendants argue has already run. Our ruling today takes no position on whether the Statute of Limitations bars Plaintiff from pursuing relief against FGIS, an entity which is not currently before the Court. FGIS, along with the other named Defendants, is entitled to assert all applicable defenses once Plaintiff files his Complaint.

whether, under Rule 2229(b), a plaintiff could join a contract action (an underinsured motor vehicle claim against his parents' insurer) with his tort claim against the driver allegedly responsible for the underlying automobile accident. The Court held that joinder of the parties and claims was improper, even though there was overlapping factual matter relevant to both. In considering the first prong of Rule 2229(b), the Court observed:

> [W]hile in an attenuated sense, [Plaintiff's] tort action against [the driver] and the coverage issue with [insurer] Erie both "arise" from the automobile accident . . . in fact [Plaintiff's} dispute with Erie arises from the formation of the insurance contract between [Plaintiff's] parents and Erie. More specifically, the dispute arises from interpretation of the [insurance contract] language . . . [Plaintiff's] tort claims . . . including all questions of duty, breach of duty, causation, and damages, will be resolved through reference to what occurred during and after the automobile accident. The respective rights and obligations of [Plaintiff} and Erie, in contrast, will derive entirely from the language of the [] provisions of the Erie insurance contract.

Id. at 960.

The Court then proceeded to the second prong of Rule 2229(b), an analysis of whether the two claims presented common questions of fact or law. After noting that the two claims presented no common questions of law, the Court disagreed with the trial court's finding that the requisite factual nexus existed between the two claims.

> The trial court found that a common nexus of fact exists between the two cases, namely Richner's use of his employer's vehicle on the day of the accident. Trial Court Opinion, 2/17/10, at 9 ("It is highly likely that if Erie were to be dismissed as a party to the Allegheny County Action, and the issue of UIM coverage was tried separately, Erie would point to this precise accident as evidence of [Richner's] regular use of his employer's vehicle, to demonstrate that [Richner] is excluded from UIM coverage."). That Richner was operating his employer's vehicle at the time of the accident with McCance, however, is far from dispositive evidence that Richner "regularly" used the vehicle. Richner's use of his employer's vehicle on a single occasion does not demonstrate frequency or regularity of his use of the car in question.

Id. at 960. Concluding that the two claims, despite some factual overlap, presented no common questions of fact affecting the liabilities of the parties, *Richner* held that joinder was improper and reversed the trial court's decision to join the two claims.

In light of *Richner*, we are not persuaded that the liability Plaintiff ascribes to Freeh and FSS in his tort claims and that which he ascribes to Penn State in the proposed breach of contract counts arise from a common factual background, even though, in the broadest sense, both involve fallout from the Sandusky investigation, just as in *Richner* both claims involved fallout from an automobile accident. According to his Proposed Complaint, Plaintiff's breach of contract claims center upon the scope of the obligations imposed by the Separation Agreement entered into by Spanier and Penn State in mid-November of 2011, a week before Freeh and FSS were retained by Penn State. Plaintiff's tort claims against the existing Defendants, in contrast, focus on Defendants' independent investigation during the end of 2011 and the first half of 2012. As in *Richner*, while the tort claims "including all questions of duty, breach of duty, causation, and damages, will be resolved through reference to what occurred during and after" the investigation and the publication of the Freeh Report, the contract claims against Penn State will be resolved through the interpretation of the language of the Agreement.

With respect to the second prong of Rule 2229(b) analysis, we do not find the tort claims against Freeh and FSS and the breach of contract claims against Penn State involve common questions of law or fact that give rise to the liabilities of both parties. Indeed, the critical issues, particularly in light of *Richner*, seem to be quite distinct. With regard to questions of law, to prove his defamation claims, Plaintiff will be required to

prove, against Freeh and FSS: (1) the defamatory character of the communication, (2) its publication by the defendant, (3) its application to plaintiff, (4) the understanding by the recipient of its defamatory meaning, (5) the understanding by the recipient of it as intended to be applied to the plaintiff, (6) special harm resulting to the plaintiff from its publication, and (7) abuse of any conditional privilege. 42 Pa.C.S. § 8343(a). Because Spanier is arguably a public figure, his Proposed Complaint also alleges, as it must under Pennsylvania law for that class of persons, actual malice on the part of Freeh and FSS. *See Lewis v. Philadelphia Newspapers, Inc.*, 2003 Pa. Super. 350, 833 A.2d 185, 191 (2003); Plaintiff's Proposed Complaint at ¶¶288, 305, 323, 341. Truth of alleged defamatory statements is an absolute defense to such a claim, and thus Defendants will carry the burden of proving that element. *Bobb v. Kraybill*, 354 Pa.Super. 361, 511 A.2d 1379, 1380 (1986); 42 Pa.C.S.A. § 8343(b)(1). Critically, *none* of the above-cited elements overlap with the elements of a breach of contract action against Penn State for "negative comments" made by Penn State during and after the release of the Freeh Report. Certainly, they have no overlap with Plaintiff's other claims based upon the Separation Agreement, including the alleged breaches for failing to provide administrative support and pay legal fees.

As to common questions of fact, both claims will no doubt reference the Freeh investigation and report, just as in *Richner* both cases tried separately would have referenced the automobile accident. However, no fact proven in Plaintiff's tort action against Freeh and FSS would be dispositive of a factual issue in his contract action against Penn State. Following the reasoning of *Richner*, then, we find the two claims have no common questions of fact or law that determine the liability of the parties.

Finally, even if we were persuaded that Plaintiff's proposed joinder satisfied the two prongs of Rule 2229(b), we would not favor joining the breach of contract claims against Penn State to Plaintiff's existing tort action, since we believe such joinder would have the significant potential to confuse the jury and complicate the action. In particular, we note the breach of contract claims and the tort claims have radically different legal standards and burdens of proof. The standard applicable to the claims for breach of the non-disparagement clause in the separation agreement requires Plaintiff to show by a preponderance of the evidence that PSU breached a duty to prevent "negative comments" about Plaintiff. Plaintiff's defamation claims require proof by clear and convincing evidence that Freeh and FSS made defamatory statements about Plaintiff, and that the statements were made with actual malice. We agree with Defendants that "[r]equiring a jury to simultaneously consider both claims poses a grave risk that the jury would improperly conflate the two standards." Plaintiff's Brief in Opposition at 3-4.

Therefore, we intend to deny Plaintiff's Motion to for Leave to Join as to Penn State. We will enter an appropriate Order.