

STATE OF MAINE
SAGADAHOC, SS.

BUSINESS & CONSUMER COURT
LOCATION: WEST BATH
DOCKET NO.: BCD-WB-CV-07-33

FIBER MATERIALS, INC.,

Plaintiff

v.

ORDER ON PLAINTIFF'S MOTION TO
DISMISS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

MAURICE SUBILIA, ET AL,

Defendants

This matter is before the court on the motion of Plaintiff Fiber Materials, Inc. ("FMI") to dismiss Counts I and II of Defendant Maurice Subilia's ("Defendant" or "Defendant Subilia") counterclaim pursuant to M.R. Civ. P. 12(b)(6) for failure to state a claim or, in the alternative, for summary judgment on those counts pursuant to M.R. Civ. P. 56.¹

FACTUAL BACKGROUND

Plaintiff's Complaint contains the following assertions which, for the purposes of the motion to dismiss, are deemed admitted. *Doe v. Graham*, 2009 ME 88, ¶ 3, 977 A.2d 391, 394.

Defendant Subilia was the President of FMI from February 6, 1978 until approximately April 5, 2007. At all relevant times, Walter L. Lachman, who is not a party to this action was the CEO, COB and CFO of FMI. Mr. Lachman also served as a director. In 1995, Defendant Subilia, Mr. Lachman, FMI, and Materials International, Inc. ("MI") a wholly owned subsidiary of FMI (of which Mr. Lachman was president), were named as criminal defendants and indicted on charges of violating and conspiring to violate the Export Administration Act of 1979 ("EAA")

¹ FMI's motion was filed in August 2008. Thereafter, the court granted Defendants' motion to stay this case, including pending motions, for reasons related to then-ongoing criminal investigations and charges. The stay has expired and this civil action is proceeding.

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for exporting a control panel for a large hot isostatic press without the export license required by the EAA.

According to Defendant Subilia, Article VII, Section 6 of FMI's by-laws require FMI to indemnify directors and officers against all liabilities and expenses, including fines, penalties, and counsel fees, reasonably incurred in connection with the defense of any action, suit or other proceeding, whether civil or criminal. Defendant Subilia also alleges that applicable state law required FMI to advance funds to pay for or reimburse his expenses.

FMI paid some of Defendant Subilia's legal fees in connection with the defense of the criminal matter but, over Defendant Subilia's objection and at Mr. Lachman's direction, FMI ceased paying Defendant Subilia's legal fees for a period of time prior to the criminal trial. Approximately one week before the criminal trial commenced, Mr. Lachman directed FMI to resume payment of Defendant Subilia's legal fees. After the trial, Mr. Lachman, Defendant Subilia, FMI and MI were convicted and each fined \$250,000.

FMI paid Defendant Subilia's fine. However, according to Defendant Subilia, FMI characterized that payment as "income" and, as a result, Defendant Subilia incurred tax liability of more than \$100,000. FMI also paid Mr. Lachman's fine but did so in the form of a dividend payment authorized by Mr. Lachman in a manner that avoided tax liability to Mr. Lachman and that allegedly violated FMI's by-laws. According to Defendant Subilia, in addition to the tax liability, he incurred other expenses and damages associated with the criminal prosecution for which FMI has refused to reimburse him.

Count I of Defendant Subilia's Counterclaim seeks indemnification from FMI for the tax liability, damages, attorneys' fees and other expenses he alleges he sustained as a result of the criminal prosecution. He contends he is entitled to indemnification under Article VII, Section 6 of FMI's by-laws as well as applicable state law.

Count II of Defendant Subilia's Counterclaim alleges that FMI has tortiously invaded his privacy. In support of this claim, Defendant Subilia alleges that FMI impermissibly accessed confidential attorney-client communications protected by the attorney client privilege stored on a computer issued to him by FMI. He further contends that FMI not only disclosed those communications to other FMI employees but also published them to the public at large by citing them in FMI's complaint and attaching the communication to various other court filings.²

DISCUSSION

I. Motion to Dismiss

FMI's motion is styled as a motion to dismiss or, in the alternative, a motion for summary judgment. In support of its motion, FMI has submitted a copy of its by-laws as well as a statement of material facts and supporting affidavits. FMI suggests that this court may consider its by-laws without converting FMI's motion to dismiss into a motion for summary judgment. Pl.'s Mot. at 1 n.1 (citing 5 Wright & Miller, Federal Practice and Procedure § 1327 at 762-63; and *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993) (explaining that "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim . . .")). However, if the court is inclined to treat FMI's motion as one for summary judgment, FMI asks that the court also consider its supporting affidavits and statement of material facts.

In opposition, Defendant Subilia moves the court to exclude the additional material submitted by FMI. However, if the court accepts those materials and treats FMI's motion as one

² Defendant Subilia's allegations with regard to the legal memorandum and FMI's assertions in response have previously been recited and considered at length by this court in connection with Defendant Subilia's Motion to Strike and Disqualify. *See* FMI v. Subilia, et al., BCD-WB-2007-317 (Me. Super. Ct., Sag. Cty., Oct. 27, 2008) (Humphrey, CJ.).

for summary judgment, Defendant Subilia preemptively moves to continue FMI's motion for summary judgment until such time that the parties have had an opportunity to conduct discovery. Defendant Subilia's motion in this regard is made pursuant to M.R. Civ. P. 56(f).

Under M.R. Civ. P. 12(b), if, on a motion asserting a failure to state a claim upon which relief may be granted, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. M.R. Civ. P. 12(b). However, as FMI correctly notes, "[n]ot all matters outside the pleadings change a 12(b)(6) motion to a Rule 56 motion." MSBA Practice Series, *The Maine Rules of Civil Procedure* § 12(b)(6) at 113. Generally, "official public documents, documents 'central to the plaintiff's claim' and documents referenced in the complaint, may be considered without converting the motion to one for summary judgment, when the authenticity of such documents is not challenged." *Id.* (quoting *Moody v. State Liquor & Lottery Comm'n.*, 2004 ME 20, ¶ 11, 843 A.2d 43, 47-48.

In this case, although Defendant Subilia has moved the court to refrain from considering FMI's by-laws, it has not challenged the authenticity of the by-laws submitted by FMI in support of its motion. Further, Defendant Subilia's claims, at least as to indemnification, expressly reference FMI's by-laws. Indeed, Count I of Defendant Subilia's Counterclaim is based upon his allegation that FMI violated its own by-laws and applicable state law. In light of the fact that documents referenced in a complaint and documents of which the court may take judicial notice may be considered without converting a 12(b)(6) motion into one for summary judgment, the court may consider FMI's by-laws and any applicable state statute in connection with FMI's motion. *See* M.R. Evid. 201(b)(2) & (c). However, the court expressly excludes all other

documents submitted in support of FMI's motion and declines FMI's invitation to treat its motion as one for summary judgment.

II. Standard of Review

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of the complaint must be taken as admitted.'" *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, this court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Id.* (quoting *Hall v. Bd. of Envtl. Prot.*, 498 A.2d 260, 266 (Me. 1985)). "The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law." *Bean v. Cummings*, 2008 ME 18, ¶7, 2008 ME 18, 939 A.2d 676, 679 (citations and internal quotation marks omitted).

III. Count I: Indemnification

As outlined above, Count I of Defendant Subilia's Counterclaim seeks indemnification from FMI for the damages and expenses he incurred in connection with his criminal prosecution. Count I is based both upon FMI's by-laws and upon applicable state law. Specifically, Defendant Subilia cites Article VII, Section 6 of the by-laws in support of his indemnification claim, which reads in relevant part:

The corporation shall, to the extent legally permissible, indemnify each of its Directors and Officers (including persons who serve at its request as Directors, Officers, or Trustees of another organization in which it has any interest as a shareholder, creditor or otherwise) against all liabilities and expenses, including amounts paid in satisfaction of judgments, in compromise or as fines and

penalties, and counsel fees, reasonably incurred by him in connection with the defense or disposition of any action, suit or other proceeding, whether civil or criminal, in which he may be involved or with which he may be threatened, while in office . . .

Exh. A to Pl.'s Mot.

In support of its motion to dismiss, FMI argues that neither Article VII nor the Massachusetts Business Corporation Act, which FMI contends governs Defendant Subilia's Counterclaim, "require or even allow[] FMI to indemnify Defendant Subilia for federal and state income taxes" incurred and paid by him. Pl.'s Mot. at 3. In making this argument, FMI invites the court to rule as a matter of law on the meaning and scope of the indemnification clause contained in its by-laws. The court declines to do this.

Contrary to FMI's suggestions, the viability of Defendant Subilia's claim is neither limited to nor dependent upon whether the corporate by-laws or Massachusetts state law permit indemnification for tax liability. By his Counterclaim, Defendant Subilia claims that he has suffered damages and incurred expenses other than the income tax liability for which he alleges he is entitled to indemnification. *See e.g.* Counterclaim at ¶¶ 14, 15 & 25. Accordingly, Defendant Subilia's claim for indemnification does not rise and fall on his ability to recover the income tax liability he incurred and paid as a result of FMI's payment of his fine.

Moreover, while FMI argues that the "undisputed facts" demonstrate that it paid all of the counsel fees to which Defendant Subilia was entitled, FMI's assertion and any evidence in support of it are not appropriate at this stage and will not be considered. Instead, all that the court will consider in the context of FMI's motion to dismiss is whether Defendant Subilia has adequately stated a claim for indemnification upon which relief may be granted. *See* M.R. Civ. P. 12(b)(6). A review of the by-laws demonstrates a prima facie entitlement to indemnification and Defendant Subilia has sufficiently alleged a failure on the part of FMI to indemnify him for

expenses and liabilities incurred in connection with a legal proceeding. See Counterclaim at ¶¶ 13-15.³ As such, he has met the requirements of Maine's notice pleading rules.

Accordingly, Count I of Defendant Subilia's Counterclaim is sufficient to withstand FMI's motion.

VI. Count II: Invasion of Privacy

Maine law recognizes four types of actionable invasion of privacy. They are:

- (1) intrusion upon the plaintiff's physical and mental solitude or seclusion;
- (2) public disclosure of private facts;
- (3) publicity which places the plaintiff in a false light in the public eye;
- (4) appropriation for the defendant's benefit or advantage of the plaintiff's name or likeness.

Stokes v. Barnhart, 257 F.Supp.2d 288, 295 (D. Me. 2003) (citing *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 795 (Me. 1976)).

In this case, Defendant Subilia has clarified that his claim falls within the third category of invasion of privacy. See Counterclaim; and Def.'s Opp. at 5. According to Defendant Subilia's Counterclaim, when FMI accessed the attorney-client communication stored on the FMI laptop issued to Defendant Subilia and both cited that communication in FMI's complaint and attached a copy of it to FMI's court filings, FMI tortiously invaded Defendant Subilia's privacy.

In order to maintain an invasion of privacy claim based on an allegation that FMI has publicized private matters, Defendant Subilia is required to plead that "the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate

³ Notwithstanding FMI's argument at fn. 3 that "[a] fair reading of the allegations in ¶¶ 13-17 . . . suggests that Mr. Subilia's legal fees were advanced for a time, suspended for a time, and then resumed," but does not allege that FMI has failed to pay any part of Mr. Subilia's legal fees, the court concludes that paragraphs 13-17 give rise to a permissible inference that some of Mr. Subilia's fees were not paid. As noted above, all permissible inferences shall be drawn in favor of the Counterclaim Plaintiff at the 12(b)(6) stage.

concern to the public.” RESTATEMENT (SECOND) OF TORTS § 652D (2002) (cited with approval in *Nelson v. Maine Times*, 373 A.2d 1221, 1225 (Me. 1977)).

In support of its motion to dismiss Count II, FMI argues that Defendant Subilia has failed to state a claim for invasion of privacy because he has not sufficiently alleged that the attorney-client communication contained “highly offensive” personal matter. That is, according to FMI, because Defendant Subilia has not alleged that the information contained in the communication was offensive, he may not recover under an invasion of privacy theory. FMI has offered no other applicable argument⁴ in support of its motion to dismiss Count II. In light of the limited scope of FMI’s arguments in support of dismissal and drawing all inferences in favor of Defendant Subilia, the court concludes that Defendant Subilia has sufficiently stated a claim for invasion of privacy.

Contrary to FMI’s suggestion, a claim for invasion of privacy is not necessarily dependent upon an allegation that the allegedly private information itself be “highly offensive.” Instead, under the RESTATEMENT, such a claim may in fact lie if the alleged intrusion itself, or the *manner* in which private information is obtained and publicized, is “highly offensive.” See RESTATEMENT § 652D cmt. b (an action for publicity occurs “[w]hen the] intimate details of a person's life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man”) & c.

In this case, Defendant Subilia has effectively alleged that the alleged intrusion itself – that is, the discovery and publication of attorney-client communications - was “highly

⁴ FMI presents arguments as to why Defendant Subilia fails to state a claim for any of the four categories of invasion of privacy. However, because Defendant Subilia has clarified that his claim is based solely on alleged publication of private information, the court need not consider FMI’s alternative arguments.

offensive.”⁵ Although the court is not aware of a Maine case expressly adopting the Restatement’s commentary on the scope of the “highly offensive” element, at this stage in the proceedings the court concludes that Mr. Subilia’s allegation, when combined with the other allegations in his Counterclaim, is sufficient to state a claim for invasion of privacy upon which relief may be granted.

DECISION

Based on the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

Plaintiff/Counterclaim Defendant FMI’s Motion to dismiss or, in the alternative, for summary judgment on Counts I and II of Defendant/Counterclaim Plaintiff Subilia’s Counterclaim is DENIED.

Dated: November 23, 2009



Thomas E. Humphrey
Chief Justice, Superior Court

⁵ In addition to the general factual allegations relating to the discovery and publication of the attorney-client communication, Count II of Defendant Subilia’s Counterclaim contains the following allegations:

50. At all relevant times, Mr. Subilia had a reasonable expectation of privacy in confidential communications he had with his spouse and his lawyers via his computer.
51. FMI intentionally intruded on the privacy Mr. Subilia [had] in his personal affairs or concerns without reasonable business justification by reading and then publishing, *inter alia*, Mr. Subilia’s private communications with his personal attorneys.
52. The matters disclosed were not of legitimate concern to the public.
53. FMI’s intrusion into Mr. Subilia’s private affairs, and subsequent publication of that information, is highly offensive.
54. Mr. Subilia is entitled to compensatory damages and punitive damages as a result of . . . FMI’s actions.