District Court, Delta County, State of Colorado Court Address: 501 Palmer Street #338 Delta CO 81416	DATE FILED: November 27, 2018 CASE NUMBER: 2017CV30026 Filed in the Combined Court Delta County, Colorado NOV 27 2018
Plaintiffs: SG INTERESTS I, LTD, a Texas limited partnership. v. Defendant: PETER T. KOLBENSCHLAG a/k/a PETE KOLBENSCHLAG	▲**COURT USE ONLY**▲ Case: 2017 CV 030026 Division: 1 Courtroom: 1

ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY FEES AND SCHEDULIGN STATUS CONFERENCE

This matter comes before the Court on the Defendant's motion seeking attorney fees pursuant to C.R.S. §13-17-102 with respect to the dismissal of the Plaintiff SG Interests' (SGI) libel claim on summary judgment. In his motion, the Defendant argues that the Plaintiff's claim lacked substantial justification as it was frivolous, groundless and vexatious. In particular, the Defendant argues that SGI could not demonstrate either material falsity or actual malice, which are necessary elements for a libel cause of action. The Defendant further argues that the case was commenced and prosecuted for an improper and vexatious purpose. The Plaintiff, SGI, denies those allegations, maintain that it presented both a rational argument and credible evidence to support its libel claim. The Plaintiff also objects to the Defendant's motion for fees to the extent that it is predicated on SGI's alleged failure to show actual malice, which is an issue that the Court did not address as part of its summary judgment ruling.

The Defendant filed its initial motion seeking fees on July 10, 2018. SGI filed its response objecting to that request on July 31, 2018 and then subsequently submitted a corrected

brief that addressed some minor typographical errors. The Defendant's filed its reply submission in further support of its fee motion on August 7, 2018. The Court has reviewed the parties' submissions, the applicable case law, and the underlying record in this case, including the original order granting summary judgment. For the reasons set forth below, the Court GRANTS the Defendant's motion for attorney fees under C.R.S. §13-17-102 finding that the underlying claim was both frivolous and vexatious.

LEGAL ANALYSIS

A request for the imposition of legal fees as a sanction in Colorado is governed by C.R.S. §13-17-102, which provides, in relevant part, that:

> The court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5(3) that lacked substantial justification.

See C.R.S. §13-17-102(4) (emphasis added). An action is considered to lack substantial justification if it is substantially frivolous, substantially groundless, or substantially vexatious. *See* C.R.S. §13-17-102(4); *see also Remote Switch Systems, Inc. v. Delangis*, 126 P.3d 269, 275 (Colo. App. 2005). The determination of whether a claim or defense is frivolous or groundless is within the discretion of the trial court. *Schooner v. Hedlund Abstract Co., Inc.*, 727 P.2d 408, 409 (Colo. App. 1986).

Generally, a claim or defense is considered frivolous if the proponent can present no rational argument based on the evidence or law to support it. *Bd. of County Comm'rs v. Eason*, 976 P.2d 271, 273 (Colo. App. 1998). A claim is groundless if the allegations supporting the claim, although sufficient to survive a motion to dismiss, are not supported by any credible

evidence. Put another way, "a claim is 'groundless' if the proponent has a valid legal theory, but can offer little or no evidence to support the claim." *Wheeler v. T. L. Roofing, Inc.*, 74 P.3d 499, 505 (Colo. App. 2003). Finally, a vexatious claim is one that is brought or maintained in bad faith. Courts define bad faith to include conduct which is "arbitrary, vexatious, abusive, or stubbornly litigious and may also include conduct aimed at unwarranted delay or disrespectful of truth and accuracy. *Bd. of County Comm'rs v. Eason*, 976 P.2d at 273-274. In this case, the Court concludes that the Plaintiff's libel claim was legally frivolous in that it could not show that the Defendant's statement was either false or material on the undisputed facts. The Court also concludes that the filing of this action was vexatious. Attorney fees are accordingly warranted.

POINT I
Plaintiff's Libel Claim was Frivolous as the Defendant's Statement Was Not Materially False

In its order granting summary judgment, the Court found that the statement made by the Defendant that SGI Interests had been fined for bid rigging was not materially false. As part of that determination, the Court held that the Defendant's use of the term "fined" did not render his statement incorrect. The Court noted that an ordinary reader was unlikely to draw a distinction between the payment of a fine and the payment of a settlement in lieu of a fine. In fact, at the time of the settlement between the Plaintiff and the federal government, numerous newspaper articles, industry insiders, and legal commentators had referred to the settlement of the federal action as involving the payment of a fine by SGI. Despite that fact, Plaintiff argues that its libel claim against the Defendant was not frivolous because it "made a rational argument based on the law and evidence in opposition to Defendant's motions." See SGI's Corrected Opposition, dated August 8, 2018 ("SGI Opp.") at p. 5. Plaintiff, however, fails to articulate what that argument was or why it was rational.

Initially, Plaintiff opposed summary judgment on the grounds that nothing had been proven in the federal action and that it settled the case as a business decision. It now expands on that argument by asserting that an ordinary reader may not have believed the "mere allegations" made by the Department of Justice ("DOJ") in the federal case. At the outset, the Court would note that the Plaintiff's assertion that it settled the federal litigation as a business decision is contradicted by the pleadings and orders in that litigation. That precise argument was raised by SGI's co-defendant, Gunnison Energy Company (GEC) in support of the parties' first proposed settlement and expressly rejected by the federal judge presiding over that case. In a particularly scathing passage, Judge Matsch responded by noting that:

> GEC filed a statement responding to the public comments in a manner that demonstrates that this defendant considers this antitrust action to be meritless and the settlement to be nothing more than a payment to be rid of this nuisance. (Doc. 16-7). The unrepentant arrogance of this defendant is so self-evident that a copy of the statement is attached as Exhibit A. It is not in the public interest to approve a final judgment that permits a defendant to leave its civil action in such a smirking, self-righteous attitude.
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> There is no basis for saying that the approval of these settlements would act as a deterrence to these defendants and others in the industry, particularly as GEC considers "joint bidding" to be common in the industry. In sum, the settlement of this civil action for nothing more than the nuisance value of this litigation is not in the public interest . . .

Re-packaging and re-purposing GEC's public comments from the federal litigation as the basis for a libel action in state court against this Defendant is unconvincing. Having reviewed the underlying materials from the federal case in detail, the Court shares Judge Matsch's skepticism that the action was settled as part of an ordinary business decision by either GEC or SGI. It simply does not comport with the legal outcome of that case.

Plaintiff's assertion that its libel claim was rational is also belied by the undisputed facts in the federal case. In its summary judgment order, the Court founds that gist or sting of the

Defendant's statement was accurate and not material because the true facts from the federal litigation were far more damaging to SGI. The Plaintiff now disputes that conclusion, arguing that an ordinary reader "may not accept allegations made by the federal government as fact." SGI Opp. At 8. That argument is not only untenable, but conflates the ultimate issue of whether the anti-trust claim was successful with the undisputed facts established in the litigation. Those facts included:

- that SGI and GEC were competitors for federal gas leases;
- that in 2005, SGI and GEC secretly agreed to bid together on certain leases;
- that representatives of each company physically attended the BLM auctions despite their agreement not to compete;
- that in accordance with the agreement, GEC never submitted any bids;
- that SGI subsequently conveyed 50% of the ownership of those leases to GEC after the auctions were over without telling anyone;
- that the companies obtained the leases for less than market value as a result of their secret agreement (in one case paying $2 per acre);
- that GEC executives congratulated one another in emails on having avoided a bidding war with SGI by way of the secret agreement.

- that GEC's former vice president subsequently commenced a federal *qui tam* lawsuit alleging that SGI and GEC had illegally colluded with one another on gas leases;
- that the *qui tam* lawsuit also alleged that the SGI and GEC had submitted false certifications that stated that there had been no bid rigging;
- that the federal government concluded that the agreement was a per se restraint of trade and violated section 1 of the Sherman Act and commenced its own case;
- that the federal government also intervened as a party in the *qui tam* lawsuit against SGI;

- that the parties originally proposed jointly settling both cases for $550,000;
- that the judge overseeing the litigation rejected that settlement as not being punitive enough to serve as a proper deterrent to SGI and GEC;
- that SGI settled the qui tam action by paying $206,500;
- that SGI subsequently settled just the federal anti-trust case for $275,000;
- that the federal government took the position that the payment fully compensated it for its lost revenue and provided an appropriate deterrence to the defendants; and
- that as part of the settlement, SGI agreed to provide advanced notice of any joint bidding agreements for five years.

Contrary to the Plaintiff's characterization, none of these statements are allegations by the federal government. They are all operative facts established during that case. Moreover, none of them are dependent upon the successful prosecution of the anti-trust claim. They remain facts regardless of whether SGI successfully defended itself in the litigation or not. [1]

Ultimately, to suggest that an ordinary reader may disregard established facts because the underlying legal claim was not proven at a final trial does a disservice both to the ordinary reader and to undisputed facts in general. It is sophistry dressed up as a legal principle. It may well be that there are individuals out there who will disbelieve anything they hear, especially where the federal government is involved. The Court does not make its decisions based on such outliers. The Court concludes again that any ordinary reader looking at the operative facts set forth in the federal litigation would have a far worse view of SGI then he or she would have after reading the Defendant's statement that SGI had been "fined" for collusion with GEC. The gist or sting of the Defendant's statement was therefore not materially false. Moreover, that reality was readily apparent long before SGI brought this litigation. The Court therefore finds that the Plaintiff's libel claim lacked substantial justification and it was legally and factually frivolous.

POINT II
The Court Declines to Address Any Claim Based On Actual Malice Since the Issue Was Not Addressed

In his moving papers, the Defendant also suggests that the Court can find the Plaintiff's claim to be frivolous or groundless because there was no way SGI could have shown, by the requisite clear and convincing evidence, that it was the published with actual

[1] The Court finds it disingenuous for the Plaintiff to now argue that the settlement was merely a business decision after it expressly did not take that position before Judge Matsch or challenge the Government's description of the settlement as constituting a sufficient deterrent against continued illegal conduct by SGI and GEC in the form of joint bidding.

malice on the Defendant's part. The Court notes that this particular issue was voluntarily withdrawn by the Defendant as a basis for summary judgment, and that the Court accordingly made no ruling on that ground as part of its order dismissing the libel claim. The Court agrees with the Plaintiff's attorney that the withdrawal of the actual malice defense prevents the Court from considering it at this stage of the proceeding, especially based upon an incomplete record. The Court accordingly denies the Defendant's motion for fees to the extent that it is premised on the grounds that the libel claim was frivolous or groundless based upon a lack of showing of actual malice.

POINT III
The Court Finds that the Libel Action Was Vexatious

Because the Court has found that the libel claim itself was legally and factually frivolous, an award of fees does not require a separate finding under the vexatious standard of C.R.S. §13-17-102 as well. Nonetheless, the Court concludes that the Defendant has adequately demonstrated that the Plaintiff commenced and prosecuted the libel action for an improper purpose. In part, that conclusion follows from the Court's finding that the claim was baseless and that SGI was or should have been aware of that fact before it commenced the lawsuit. The Court also believes that SGI continued to prosecute the claim even after its lack of merit became apparent. The Court is not finding that the Plaintiff engaged in abusive discovery practices as the Defendant asserts in its moving papers, but it does conclude that the lawsuit was baseless and commenced in retaliation against the Defendant.

The Court is particularly troubled by the Plaintiff's explanation for its different treatment in suing the Defendant for libel while taking no such action against the news organizations, industry professionals and legal commentators who described the settlement of the federal case as including the payment of fines by SGI. The Plaintiff has no further

evidence of actual malice on the part of the Defendant here than it would have had against any other party who described the settlement payments the same way. As for the suggestion that the Defendant should be held to a higher standard based on his knowledge of the industry, that same consideration would apply to the numerous industry insiders and legal commentators who allegedly mischaracterized the nature of the underlying payments. Ultimately, the only difference the Court sees between the Defendant and all of the other parties who used similar terms to describe the settlement is that the Defendant is a frequent industry critic, who has lobbied against SGI's operations. Commencing and maintaining a lawsuit as a form of retaliation or to silence a critic is a clear example of vexatious litigation. The Court accordingly finds that the Defendant's motion for attorney fees should be granted on that ground as well.

CONCLUSION

For the foregoing reasons, the Defendant's motion for attorney fees under C.R.S. §13-7-102 is GRANTED. The Court is aware that there is no agreement as to the amount of reasonable fees and that the resolution of that issue will likely require either further briefing or an evidentiary hearing. Finally, the Court is aware that the Plaintiff has appealed the summary judgment decision, which may obviate the need for further proceedings altogether. This case is accordingly set for a status conference on December 27, 2018 at 1:00 p.m. with the judge to discuss the next step, including whether it makes sense to stay the final resolution of the fee dispute until the appeal is resolved. Counsel can appear for the status conference in person or by telephone by contacting the clerk's office at (970) 874-6280.

Date: November 27, 2018

BY THE COURT:

Steven L. Schultz
District Court Judge

xc: Parties of Record