RENDERED: FEBRUARY 10, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001417-MR

MODERN HAIR SALON, INC.,
AND MELANIE FRENCH — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 14-CI-002572

CALVIN MITCHELL, INC.,
AND CALVIN MITCHELL HAYCRAFT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: Appellants[1], Modern Hair Salon, Inc., and Melanie French, contend that the trial court erred in: (1) dismissing their claims of slander *per se*

[1] For ease of reference, the two Appellants may interchangeably be referred to under the name of French alone.

and invasion of privacy claims and (2) in granting Appellees'[2] Motion for Summary Judgment prematurely on Appellants' remaining claims for breach of contract and tortious interference with contractual and prospective contractual relations. Appellees are Calvin Mitchell, Inc., and Calvin Mitchell Haycraft. After our review, we find no error. Hence, we affirm.

Appellee, Calvin Mitchell Haycraft, a hair stylist, worked at Modern Hair Salon, Inc., d/b/a Fusion Salon, owned by Melanie French. After he left Modern Hair Salon, Haycraft opened his own salon, Calvin Mitchell, Inc.

On May 12, 2014, Appellants filed a Complaint in Jefferson Circuit Court alleging that when Haycraft joined Modern Hair Salon as a stylist in May of 2009, he did so pursuant to a contractual agreement. In January 2013, Haycraft was asked to leave Modern Hair Salon because he was a disruptive influence. Subsequently, Haycraft was allowed to stay, and Appellants allege that he used his continuation of employment as an opportunity to "undermine the business, steal the stylists and other employees" in order to take them with him to his new salon. Appellants claimed that Haycraft had convinced contractors and employees to go with him because Ms. French's daughter was ill and that her resulting medical bills "would cause closure of [Modern Hair Salon] an assertion which was patently false." The Complaint asserts claims for breach of contract, tortious interference with contractual and prospective contractual relations, invasion of privacy, and slander *per se.*

[2] Similarly, for ease of reference, the two Appellees may be referred to collectively under the name of Haycraft.

On June 4, 2014, Appellees filed a Motion to Dismiss pursuant to CR[3] 12.02. The memorandum filed in support of the motion to dismiss reflects that Haycraft had worked at Modern Hair Salon as an independent contractor and that when he decided to leave and open his own salon, several other independent contractors simply decided to go with him. Appellees asserted that "[e]ven if the few facts alleged in the Complaint are accepted as true, the Complaint fails to allege the required elements of the asserted claims." On June 14, 2014, Appellants responded and resisted the motion to dismiss.

By Opinion and Order entered on July 31, 2014, the trial court granted Haycraft's motion in part and denied it in part. It denied the motion to dismiss on the two claims of breach of contract and tortious interference, explaining that although French had alleged the existence of a contract between the parties, whether she "will succeed in setting forth evidence of these allegations is another matter." The evidence to which the court referred was proof of the existence of a contract, stating that if Appellants

> wish to succeed on these two claims they will need to prove the existence of a contract. Indeed they will need to show that specific contractual provision, such as a covenant not to compete, were agreed to by the parties, and [Mr. Haycraft] breached these provisions.

The trial court dismissed Appellants' claims of invasion of privacy and slander *per se* claims **without prejudice**, concluding as follows:

[3] Kentucky Rules of Civil Procedure.

> The . . . complaint suggests that the invasion of privacy was unreasonable publicity given to the other's private life (however, in the Response, [they] allude to intrusion upon seclusion, which does not require publicity). Section 652D of the Restatement (Second) [of Torts], "Publicity Given to Private Life", defines publicity as "communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Restatement (Second) of Torts, Sec. 652D, cmt. . . . Even taking these allegations as true, the Court finds this does not constitute communication to the public at large. For the Plaintiffs to establish a case upon a theory of intrusion into seclusion, they must show an "intrusion" that would be highly offensive to a reasonable person. See Restatement (Second) of Torts, Sec. 652B. The Plaintiffs have not alleged such facts in the complaint. Dismissal without prejudice is appropriate to this claim.

The court concluded that Appellants' allegation did not constitute slander *per se* as defined under Kentucky law because "[r]eference to [Ms.] French's daughter and her inability to keep her business would not expose her to hatred, ridicule, contempt or disgrace." Additionally, it stated that in order "to proceed upon a theory of slander *per quod,* they must prove special damages or actual injury to reputation … [and] Plaintiffs have not alleged facts in the complaint, that if true show actual injury to the reputation of the Plaintiffs."

Approximately eight months passed. On March 19, 2015, the trial court entered an Opinion and Order requiring Appellants to comply with discovery within 30 days and to identify or produce any documents which might constitute the alleged contractual agreement between the parties or material which might be used as the basis for such an agreement; to identify or produce any documents

supporting the claim for and calculation of damages; to identify and produce payroll records, commission statements, and tax filings; and to produce documents relating to the sale of products by hair stylists.

In addition, the trial court ordered the Appellees to respond to Interrogatories to the extent that Haycraft had knowledge of any agreement or business relationship between himself and Modern Hair Salon or to the extent he knew of other individuals who might have information about any business or contractual relationship between the parties.

On April 16, 2015, Appellees filed a supplemental response to Appellants' first set of interrogatories. Haycraft contended that the parties had an arrangement which was oral and terminable at will under which he rented booth space at Modern Hair Salon at the rate of $215.00 per week. The parties also had an arrangement which was oral and terminable at will whereby Haycraft received ten-percent commission on the sale of Modern Hair Salon's products to his customers. Haycraft stated that he did not know of anyone else who would be privy to information concerning the business relationship between French and himself.

On April 24, 2015, Appellants filed a supplemental response to interrogatories and requests for production of documents, stating that Haycraft "had an oral agreement or oral contract to work at Modern Hair Salon as a booth renter" and that Haycraft was allowed to work there "in exchange for consideration of $215 a week to rent the booth." In this response, Appellants stated that in

January 2013, Haycraft had been asked to leave Modern Hair Salon "because he was being disruptive and interfering with the … business for several months." Appellants then noted that the parties subsequently "agreed that [Mr. Haycraft] could continue to work there under the condition that he no longer caused any trouble…." However, Modern Hair Salon contended that Haycraft then breached the agreement not to cause trouble and that he breached good faith by luring other booth renters to leave with him to join his new salon.

Ms. French was not aware of any other documents in her possession purporting to show a contract with Haycraft or the booth renters who had left; however, her response named several individuals "who have in their possession documents that would support the contractual arrangements" with which she alleged that Haycraft had interfered. Her response also indicated that Ms. French had oral contracts with other named individuals for booth rental – which she claimed would be ongoing to the present day – if Haycraft had not tortiously interfered with them.

On May 26, 2015, Appellees filed a motion for summary judgment seeking dismissal of Appellants' remaining claims for breach of contract and tortious interference with contractual relations. Appellants filed a motion to hold the summary judgement motion in abeyance pending completion of discovery; Appellees responded in opposition.

By Opinion and Order entered on August 27, 2015, the trial court granted Appellees' motion for summary judgment and denied Appellants' motion to hold in abeyance:

> A year has passed since the Court denied Haycraft's Motion to dismiss as to the breach of contract and tortious interference claims. The only reference to any specific contractual provision allegedly breached by Haycraft concerns an agreement that if he stays working at Modern Hair Salon, he must not "cause any trouble." Even assuming the facts in a light most favorable to Modern Hair Salon the agreement that Haycraft not cause trouble does not obligate him to any specific term of employment. Even accepting that, for the purpose of this motion, the parties entered into this agreement, this provision does not require that Haycraft stay in a contractual relationship with Modern Hair Salon. **This provision does not amount to a covenant not to compete.** The Court understands and appreciates that Modern Hair Salon has concerns … but does not find a factual dispute about the existence of a non-compete clause. Modern Hair Salon therefore cannot show Haycraft breached a contract.
>
> Furthermore, a claim of tortious interference with contractual relations requires a plaintiff to establish that the defendant breached a contract. See Snow Pallet, Inc. v. Monticello Banking Co., 367 S.W.3d 1, 6 (Ky. App.). Modern Hair Salon has not provided any evidence in the record that Haycraft breached any contractual provision between himself and Modern Hair Salon or that his actions caused a breach of a contractual provision between Modern Hair Salon and any other stylists. Accordingly, the Court concludes there is no question of material fact and summary judgment in favor of Haycraft is appropriate. (Emphasis added.)

On September 14, 2015, Appellants filed their Notice of Appeal to this Court.

Appellants first argue that the trial court improperly dismissed their claims for slander *per se* and invasion of privacy. They assert that the complaint was "more than sufficient" to give notice of the cause of action and relief sought and that they "should at least have been allowed to proceed with discovery on these claims …."

> A motion to dismiss . . . should be granted only where it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. When considering the motion, the allegations contained in the pleading are to be treated as true and must be construed in a light most favorable to the pleading party. . . . Since the trial court is not required to make factual findings, the determination is purely a matter of law. Consequently, we review the decision of the trial court *de novo*.

Mitchell v. Coldstream Labs., Inc., 337 S.W.3d 642, 644–45 (Ky. Ct. App. 2010) (Internal quotation marks and citations omitted).

In her complaint, French alleged that Haycraft had convinced the contractors and employees of the salon "to leave the business and come work for him because French's daughter's illness, and the resulting 'mounting medical bills,' would cause the closure of [Modern Hair Salon], an assertion which was patently false." Complaint, at p. 2, ¶13. French contended that Haycraft undermined her business interests while she was absent from the salon caring for her daughter and that he even told clients about his plans to open his own salon by taking business, employees, and clients away from Modern Hair Salon. As to the claim of slander *per se*, the complaint states as follows:

> Defendant Haycraft made statements to third parties, namely contractors, employees, clients and other business associates of Plaintiffs which imputed French's unfitness for the duties of her office or employment, and which prejudiced her in her trade or profession. *Id.* at p. 4, ¶21.

The trial court did not agree that these allegations constituted slander *per se* because "[r]eference to [Ms.] French's daughter and her inability to keep her business would not expose her to hatred, ridicule, contempt or disgrace." French replied and contended that the allegations in her complaint should be interpreted to **imply** that she was unfit to perform the duties of office. However, much more clarity and precision than a mere implication are required to satisfy the elements of a claim for defamation:

> Under Kentucky law, defamation consists of four elements: (1) a defamatory statement; (2) about the plaintiff; (3) that is published; and (4) that causes injury to reputation. Slander, of course, involves the oral word. **Slander per se differs from ordinary slander in that the words themselves, absent any development of extrinsic facts or circumstances, are actionable**. Thus, to be slanderous *per se* the very words themselves must taken in their natural meaning and in the sense in which they would be understood by those to whom addressed ... tend to disgrace or degrade appellant, or to hold him up to public hatred, contempt, or ridicule, or to cause him to be shunned or avoided, or to directly prejudice or injure him in his business by imputing to him a want of fitness for engaging therein.

Gahafer v. Ford Motor Co., 328 F.3d 859, 861 (6th Cir. 2003) (emphasis added, internal quotation marks and citations omitted). The trial court did not err in dismissing French's claim for slander *per se.*

With respect to the claim for invasion of privacy, the complaint alleged that "Defendant Haycraft disclosed private facts about Plaintiff's [French's] life, the disclosure of which would be offensive to a reasonable person and not a matter of legitimate concern." Complaint, p. 3, ¶20. The trial court noted that French's complaint suggested that the invasion of privacy was unreasonable publicity given to the other's private life while her response to the motion to dismiss alluded to intrusion into seclusion.

A communication to a single person or small group of persons does not constitute publicity for purposes of unreasonable publication under § 652D of the Restatement. Intrusion of seclusion, as defined in § 652B, requires that the intrusion be a substantial one that an ordinary person would find highly offensive. *Id.* at 693. *Ghassomians v. Ashland Indep. Sch. Dist.,* 55 F. Supp.2d 675, 692-693 (E.D. Ky. 1998):

> In 1981, the Kentucky Supreme Court adopted the general invasion of privacy principals found in the Restatement (Second) of Torts (1976). *McCall v. Courier–Journal and Louisville Times,* Co., 623 S.W.2d 882, 887 (Ky.1981). . . . Kentucky law clearly holds that the right to privacy does not prohibit oral statements.

We agree with the trial court that the allegations of the complaint – if wholly taken as true – do not constitute unreasonable publicity into French's private life for purposes of a legal claim for invasion of privacy. Nor do they constitute an intrusion that "would be highly offensive to a reasonable person" as

required under a theory of intrusion into seclusion. The trial court did not err in dismissing the claims for invasion of privacy/intrusion into seclusion.

French's remaining argument is that Haycraft's motion for summary judgment was premature and that it was, therefore, improperly granted. "The trial court's determination that a sufficient amount of time has passed and that it can properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion." *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010).

In its July 31, 2014, Opinion and Order, the trial court denied Haycraft's motion to dismiss the claims for breach of contract and tortious interference, observing that it was ruling on a motion "under CR 12.02(f), not summary judgment under CR 56." The court advised that whether French could succeed on those claims was "another matter" and that French would then need to establish proof of a contract and of a covenant not to compete.

In its August 27, 2015, Opinion and Order, the court granted Haycraft's CR 56 motion for summary judgment, reasoning as follows:

> Modern Hair Salon has had ample time to complete discovery. The Court denied Haycraft's Motion to Dismiss in July 2014. A year has passed and Modern Hair Salon has not taken any depositions. Indeed, Haycraft filed a Motion to Compel in October 2014 so as to discover the terms of the agreement he had allegedly violated. As the parties note, the non-movant must only have had an opportunity to complete discovery, but does not actually need to have completed it for summary judgment to be granted. Hartford Ins. Group v. Citizens

> Fidelity Bank & Trust Co., 579 S.W.2d 628, 630 (Ky. App. 1979). In Hartford, the court concluded six months was sufficient opportunity to complete discovery.
>
> Moreover, Modern Hair Salon does not indicate what information will be uncovered if more discovery is allowed. This is a breach of contract case. The provision of the "contract" allegedly breached by Haycraft does not provide a basis for relief for Modern Hair Salon. There is no evidence in the record supporting a non-compete agreement.

We agree with the trial court that Appellants had adequate opportunity to complete discovery and conclude that the trial court did not abuse its discretion in considering and granting the motion for summary judgment. *Leeds v. City of Muldraugh*, 329 S.W.3d 341, 344 (Ky. 2010) ("A party 'cannot complain of the lack of a complete factual record when it can be shown that the respondent has had an adequate opportunity to undertake discovery.'" *quoting Cargill v. Greater Salem Baptist Church,* 215 S.W.3d 63, 69 (Ky.App.2006)).

Accordingly, we affirm the Opinion and Order dismissing Appellants' claims for invasion of privacy and slander *per se* entered on July 31, 2014, as well as the Opinion and Order granting summary judgment for Appellees entered on August 27, 2015.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gary R. Adams
Louisville, KY

BRIEF FOR APPELLEE:

David Tachau
Louisville, KY