

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK KIFFIN : CIVIL ACTION
 :
 v. :
 :
 ALLISON BARSHAK, et al. : NO. 98-4363

MEMORANDUM AND ORDER

HUTTON, J.

April 12, 1999

Presently before this Court is the Plaintiff's Motion to Dismiss, or in the alternative, for Summary Judgment Regarding Counts One through Six of Defendants' Counterclaim to Plaintiff's Complaint (Docket No. 6), and the Defendants' response thereto (Docket No. 8). For the reasons stated below, the Plaintiff's Motion for Summary Judgment is **DENIED with leave to renew** following close of discovery, and Plaintiff's Motion to Dismiss is **GRANTED in part** and **DENIED in part**.

I. BACKGROUND

On September 1, 1998, Mark Kiffin ("Kiffin" or "Plaintiff") filed an Amended Complaint against Defendants Allison Barshak ("Barshak"), Michael Untermeyer, Esquire ("Untermeyer"), VC Restaurants, L.L.C. d/b/a Venus and the Cowboy ("VC") and AB Restaurants, L.L.C. ("AB") (collectively, the "Defendants"). On September 25, 1998, the Defendants filed their Answer and Counterclaim to Plaintiff's Amended Complaint, in which they raised

the following counterclaims: (1) Fraudulent Misrepresentation (Count I); Negligent Misrepresentation (Count II); (3) Fraud and Deceit (Count III); (4) Defamation (Count IV); (5) Invasion of Privacy (Count V); (6) Intentional Infliction of Emotional Distress (Count VI); (7) Breach of Contract (Count VII); (8) Promissory Estoppel (Count VIII); (9) Breach of the Implied Covenant of Good Faith and Fair Dealing; and (10) Declaratory Judgment. Plaintiff now seeks to dismiss counts I through VI of Defendants' Counterclaim under Federal Rules of Civil Procedure 12(b)(6) and 56(c).

Viewed in the light most favorable to the nonmoving party, the Defendants, the facts are as follows. Kiffin and Barshak are both chefs. On or around 1994, Kiffin and Barshak first became acquainted while participating as chefs at the Philadelphia Restaurant Tour Event known as "Book and Cook." At the time of their meeting in 1994, Barshak was separated from her former husband, Will Ternay. At or around the time of their initial meeting in 1994, Barshak was working towards the opening and/or had just started working for the "Striped Bass" restaurant located on Walnut Street in Philadelphia, Pennsylvania.

Kiffin and Barshak had a personal relationship which began in or about 1995. On or around June 1996, Barshak resigned from her position at "Striped Bass" and traveled to Sante Fe, New Mexico to spend time with Kiffin and, during that time, Kiffin willingly and

voluntarily provided partial financial support to Barshak. Barshak communicated conceptual ideas regarding "Venus and the Cowboy" to Michael Palermo ("Palermo") who eventually became employed by VC as Director of Operations. In 1997, Barshak presented a proposal to Bart Blatstein ("Blatstein") with respect to a location for a restaurant to be known as "Venus and the Cowboy" and located in Manayunk, Philadelphia, Pennsylvania. At the time of this proposal, Kiffin was working as a chef at The Coyote Cafe in Santa Fe, New Mexico.

In the summer of 1997, Barshak agreed that Kiffin would (1) assist Barshak as a chef and perform other operation duties for a proposed restaurant to be known as "Venus and the Cowboy," and (2) ultimately receive an undefined, although minority, equity interest in the proposed restaurant in exchange for Kiffin providing and obtaining financing therefor. Michael Forman, Esquire ("Forman") performed certain legal services including, preparing an Operating Agreement, Management Agreement and related Supplemental Agreements.

In or around October 1997, the personal relationship between Barshak and Kiffin ended. Nonetheless, Barshak was willing to permit Kiffin to remain involved in VC as an employee "at will." Barshak and Kiffin wrote the purported "Contract," which was simply reduced to writing by Forman.

Barshak obtained and retained certain equity investors. VC

still required approximately \$300,000.00 in debt financing which Barshak and Kiffin agreed to jointly seek and obtain. Royal Bank denied any financing to VC because other equity investors had ownership interests therein in excess of twenty percent. VC needed approximately \$300,000.00 in funds to open "Venus and the Cowboy."

On October 30, 1998, the Plaintiff filed his motion to dismiss, or in the alternative, for summary judgment. The Defendants filed their response on December 8, 1998. Because the Plaintiff has not had an opportunity to conduct discovery, the Plaintiff's Motion for Summary Judgment is not ripe, and thus this Court declines to consider the Plaintiff's Motion for Summary Judgment. The Court considers, however, Plaintiff's Motion to Dismiss under Rule 12(b)(6).

II. DISCUSSION

A. Plaintiff's Summary Judgment Motion is Not Ripe

The purpose of summary judgment is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for

summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmoving party. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

The Court, however, may deny summary judgment if the motion is premature. Anderson, 477 U.S. at 250 n.5. Because a plaintiff should not be "'railroaded' by a premature motion for summary

judgment," the United States Supreme Court has held that a district court must apply Federal Rule of Civil Procedure Rule 56(f) if the opposing party has not made full discovery. Celotex, 477 U.S. at 326. Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f) (emphasis added). Thus, the district court is empowered with discretion to decide whether the movant's motion is ripe and thus determine whether to delay action on a motion for summary judgment. St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1313 (3d Cir. 1994); Sames v. Gable, 732 F.2d 49, 51 (3d Cir. 1984).

In order to preserve the issue for appeal, Rule 56(f) requires the opposing party to a motion for summary judgment to file an affidavit outlining the reasons for the party's opposition. See St. Surin, 21 F.3d at 1313; Galgay v. Gil-Pre Corp., 864 F.2d 1018, 1020 n.3 (3d Cir. 1988); Dowling v. City of Philadelphia, 855 F.2d 136, 139-40 (3d Cir. 1988). The United States Court of Appeals for the Third Circuit has consistently emphasized the desirability of full technical compliance with the affidavit requirement of Rule 56(f). See St. Surin, 21 F.3d at 1314; Radich v. Goode, 886 F.2d 1391, 1393-95 (3d Cir. 1989); Lunderstadt v. Colafella, 885 F.2d

66, 70 (3d Cir. 1989); Dowling, 855 F.2d at 139-40. But see Sames, 732 F.2d at 52 n.3 (finding opposing party's failure to strictly comply with Rule 56(f) not "sufficiently egregious" to warrant granting summary judgment).¹ Nevertheless, failure to support a Rule 56(f) motion by affidavit is not automatically fatal to its consideration. St. Surin, 21 F.2d 1314. The Third Circuit has stated that if a Rule 56(f) motion does not meet the affidavit requirement, the opposing party "must still 'identify with specificity what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.'" Id. (quoting Lunderstadt, 855 F.2d at 71). The opposing party, however, must be specific and provide all three types of information required. See, e.g., Radich, 886 F.2d at 1394-95 (affirming district court's grant of summary judgment when opposing party only identified several unanswered interrogatories and failed to file affidavit, identify how unanswered interrogatories would preclude summary judgment, or identify information sought).

In the present matter, the Defendants contend that summary judgment is premature because discovery has not yet begun. (Defs.' Resp. at 2.) The Defendants, however, failed to file a Rule 56(f) affidavit, and therefore have not complied with the Third Circuit's

^{1/} Some federal circuit courts of appeals have liberally applied the affidavit requirement of Rule 56(f). See, e.g., International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1267 (5th Cir. 1991) (requiring only statement of party's need for additional discovery), cert. denied, 502 U.S. 1059 (1992).

mandate of strict compliance with the affidavit rule. Nonetheless, the Defendants have adequately argued that information, if uncovered, would preclude summary judgment. Because a Court is required to give a party opposing a motion for summary judgment adequate time for discovery, Dowling, 855 F.2d at 139 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1985)), and no discovery has yet taken place in this case, the Defendant's Motion for Summary Judgment is hereby denied with leave to renew following the close of discovery.

B. Motion to Dismiss Standard Under Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). In other words, the plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. (emphasis added).

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),²

³. Rule 12(b)(6) provides that:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of

this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

C. Defendants' Counterclaims

1. Count I: Fraudulent Misrepresentation

It is well settled that one who fraudulently makes a misrepresentation of fact or law for the purpose of inducing another to act or refrain from acting in reliance in a transaction is liable to the other for the harm caused by the justifiable reliance upon the misrepresentation. Smith v. Renaut, 387 Pa.Super. 299, 564 A.2d 188 (1989) (citing Shane v. Hoffmann, 227 Pa.Super. 176, 324 A.2d 532 (1974), overruled in part on other

the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

grounds by, 508 Pa. 553, 560, 499 A.2d 282, 286 (1985)). To state a cause of action for fraud, the plaintiff is required to establish: (1) misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damage to the recipient as the proximate cause. Woodward v. Dietrich, 378 Pa.Super. 111, 548 A.2d 301 (1988) (quoting Delahanty, supra).

In his motion, Plaintiff raises two issues regarding Defendants' counterclaim for fraudulent misrepresentation. First, Plaintiff contends that Count I of Defendants' Counterclaim "wholly fails to comply with [Federal Rule of Civil Procedure] 9(b)." (Pl.'s Mem. at 5.) Second, Plaintiff asserts that Defendants' fraudulent misrepresentation claim fails to state a claim under applicable Pennsylvania law. For both arguments, the Plaintiff concludes that Count I of Defendants' Counterclaim should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

Federal Rule of Civil Procedure 9(b) provides that:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Fed. R. Civ. P. 9(b). The Third Circuit has noted that in applying Rule 9(b), "focusing exclusively on its 'particularity' language is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules." Seville

Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir.1984). Instead, the Third Circuit explained that:

Rule 9(b) requires plaintiffs to plead with particularity the "circumstances" of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior. It is certainly true that allegations of "date, place, or time" fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.

Id.; see also In re Meridian Secs. Litig., 772 F.Supp. 223, 229 (E.D.Pa.1991) (discussing specificity requirements in fraud claim). With regard to claims of misrepresentation, the Third Circuit has further explained that the complaint need not describe the precise words used; it is sufficient if the complaint "describes the nature and subject of the alleged misrepresentation." Id.

Plaintiff submits that the allegations in Count I of Defendants' Counterclaim fail to state the time, place, or content of the alleged fraudulent misrepresentations by Kiffin. Plaintiff further contends that, without any supporting evidence, Defendants' claim for fraudulent misrepresentation is not sufficient to withstand Rule 9(b)'s particularity requirements. Plaintiff, however, relies on no authority for this contention.

Count I of Defendants' Counterclaim provides as follows:

Kiffin (i) was and is not financially credible, (ii) failed and/or otherwise refused to materially contribute a portion of the capital necessary to open and operate VC, (iii) failed and/or otherwise refused to obtain investors for additional capital required to open and

operate VC, (iv) failed and/or otherwise refused to secure financing for additional funds required to open and operate VC, and (v) failed and/or otherwise refused to use his best and diligent efforts to help open and operate VC ... Solely as a result of Kiffin's acts ... Defendants, jointly and/or severally, have sustained pecuniary losses in an amount in excess of \$100,000.00 ... Kiffin's acts and/or omissions hereinbefore described were willful and/or wanton and/or reckless and/or outrageous and/or contemptuous of Defendants' rights, and Defendants are entitled to punitive damages.

(Defendants' Answer and Counterclaim. ¶¶ 110-12.) The Court finds the allegations in Defendants' Counterclaim sufficient under Rule 9(b). The nature and subject of the alleged misrepresentation are more precise than those alleged in Seville. Defendants allege that Kiffin promised them that he (1) was financially credible, (2) could and would contribute a material portion of the capital necessary to open and operate VC, (3) could and would obtain investors for additional capital required to open and operate VC, (4) could and would secure financing for additional funds required to open and operate VC, and (5) would use his best and diligent efforts to help open and operate VC. (Defendants' Answer and Counterclaim. ¶ 107.) At the times Kiffin made the promises to the Defendants, he (1) knew and/or should have known that these promises were false, and (2) made the promises with the intent of inducing Defendants to employ and grant Kiffin a membership interest in VC. (Id.) Defendants contend that they relied on Kiffin's promises and were, as a result, damaged. (Id. ¶ 108.) Furthermore, they contend that Kiffin's acts were willful and wanton. (Id. ¶ 112.)

The Court concludes that these allegations gives the Plaintiff sufficient notice of the exact misconduct with which he is charged. Accordingly, the Plaintiff's motion is denied in this respect.

2. Count II: Negligent Misrepresentation

The elements which must be proven for a negligent misrepresentation claim are: (1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation. Gibbs v. Ernst, 538 Pa. 193, 210, 647 A.2d 882, 889 (1994); see Restatement (Second) of Torts § 552. Negligent misrepresentation differs from intentional misrepresentation in that to commit the former, the speaker need not know his or her words are untrue, but must have failed to make reasonable investigation of the truth of those words. Gibbs, 538 Pa. at 210, 647 A2d at 889.

Plaintiff asserts that "Count Two (2) of Defendants' Counterclaim simply fails to state a claim for negligent misrepresentation." (Pl.'s Mem. at 6.) Count Two of Defendants' Counterclaim provides that:

Kiffin (i) was and is not financially credible, (ii) failed and/or otherwise refused to materially contribute a portion of the capital necessary to open and operate VC, (iii) failed and/or otherwise refused to obtain investors for additional capital required to open and operate VC, (iv) failed and/or otherwise refused to secure financing for additional funds required to open and operate VC, and (v) failed and/or otherwise refused

to use his best and diligent efforts to help open and operate VC ... Solely as a result of Kiffin's acts ... Defendants, jointly and/or severally, have sustained pecuniary losses in an amount in excess of \$100,000.00 ... Kiffin's acts and/or omissions hereinbefore described were negligent.

(Defs.' Answer and Countercl. ¶¶ 114-16.) For the reasons stated above, the Defendants have given the Plaintiff fair notice of what the Defendants' negligent misrepresentation claim is and the grounds upon which it rests. See supra Part II.C.1.a. Accordingly, Plaintiff's motion to dismiss Count II of Defendants' Counterclaim is denied.

3. Count III: Fraud and Deceit

A plaintiff claiming fraud and deceit must establish the following elements: 1) a representation; 2) which is material to the transaction at hand; 3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; 4) with the intent of misleading another into relying on it; 5) justifiable reliance on the misrepresentation; and 6) injury proximately caused by the reliance. See Gibbs, 647 A.2d at 889; Wilson v. Donegal Mut. Ins. Co., 410 Pa.Super. 31, 598 A.2d 1310, 1315 (Pa. Super. 1991). In addition, a plaintiff must establish fraud through "clear, precise and convincing" evidence. Yoo Hoo Bottling Co. of Pennsylvania, Inc. v. Leibowitz, 432 Pa. 117, 247 A.2d 469, 470 (Pa.1968); see Gerfin v. Colonial Smelting and Refining Co., Inc., 374 Pa. 66, 97 A.2d 71, 74 (1953) ("clear, precise and indubitable"

evidence); New York Life Ins. Co. v. Brandwene, 316 Pa. 218, 172 A. 669, 669 (1934) ("clear and satisfactory" evidence).

In his motion, Plaintiff asserts that Count III of Defendants' Counterclaim fails to satisfy the particularity requirements of Rule 9(b). (Pl.'s Mem. at 7.) Count III of Defendants' Counterclaim provides as follows:

Kiffin's failure and/or refusal to sue his best and diligent efforts to help open and operate VC prior to termination or Kiffin's employment while, at the same time, taking compensation and other consideration from Defendants, jointly and/or severally, as well as a membership interest in VC constituted fraud, deceit and obtaining wrongfully and unjustifiably monies and personal property from Defendants, jointly and/or severally, under false pretenses ... Kiffin's acts and/or omissions hereinbefore described were willful and/or wanton and/or reckless and/or outrageous and/or contemptuous of Defendants' rights, and Defendants are entitled to punitive damages.

(Def.' Answer and Countercl. ¶¶ 118-19.)

Defendants base their fraud and deceit claim on Kiffin's "claim to a 'membership interest' in VC Restaurants, LLC and illegally obtained the 'proprietary materials' which Kiffin has yet to return" (Def.' Resp. at 15.) Defendants aver that Plaintiff intended for Defendants to rely on the statements and knew or should have known the representations were false. (Def.' Answer and Countercl. ¶ 107.) Defendants also claim they reasonably relied on the statements and were injured thereby. (Def.' Answer and Countercl. ¶ 108.) As this Court has found that Defendants have sufficiently pleaded their claim of fraudulent

misrepresentation, it also finds that Defendants have sufficiently pleaded their claim of fraud and deceit. Accordingly, the Plaintiff's motion pursuant to Rule 12(b)(6) to dismiss Defendants' fraud and deceit claim is denied.

4. Count IV: Defamation

In an action for defamation, a plaintiff must prove: (1) the defamatory character of the communication, (2) publication by the defendant, (3) its application to the plaintiff, (4) understanding by the recipient of its defamatory meaning, (5) understanding by the recipient of it as intended to be applied to the plaintiff, (6) special harm to the plaintiff, and (7) abuse of a conditionally privileged occasion. Jones v. Snyder, 714 A.2d 453, 455 n.6 (Pa. Super. 1998).

Plaintiff claims that Defendants' claim for defamation should be dismissed for failure to state a claim upon which relief can be granted. Count IV of Defendants' Counterclaim states that:

On and after August 7, 1998, Kiffin made and uttered defamatory statements per se (the "Defamatory Statements") to third parties concerning Barshak and Untermeyer including, without limitation, that (i) "Barshak cheated me," (ii) "Barshak is a thief," (iii) "Barshak is a liar," (iv) "Untermeyer stole my interest," and (v) "Untermeyer is Barshak's new gigolo" ... At the times Kiffin made the Defamatory Statements, Kiffin knew and/or should have known that the Defamatory Statements were false.

(Defs.' Answer and Countercl. ¶¶ 121-22.) Defendants also allege that their reputations suffered and other damage resulted from

Kiffin's Defamatory Statements. (Id. ¶ 123.) Finally, Defendants contend that Plaintiff's statements were willful and wanton. (Id. ¶ 124.) Because the Court finds that Count IV of Defendants' Counterclaim sufficiently pleads a claim for defamation, the Plaintiff's motion is denied in this regard.

5. Count V: Invasion of Privacy

In Pennsylvania, a violation of the right of privacy is an actionable tort. See Vogel v. W.T. Grant Co., 458 Pa. 124, 327 A.2d 133 (1974); Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959). "The gist of privacy is the sense of seclusion, the wish to be obscure and alone, and it is a trespass to abuse these personal sensibilities." Bennett v. Norban, 396 Pa. at 99, 151 A.2d at 479. The right of privacy is a qualified right to be let alone; but to be actionable, the alleged invasion of that right must be unlawful or unjustifiable. Lynch v. Johnston, 76 Pa. Commw. 8, 463 A.2d 87 (1983). An action for invasion of privacy is comprised of four distinct torts: (1) intrusion upon seclusion, (2) appropriation of name or likeness, (3) publicity given to private life and (4) publicity placing the person in a false light. Marks v. Bell Tel. Co. of Pa., 460 Pa. 73, 331 A.2d 424 (1975); Vogel v. W.T. Grant Co., supra.

In this case, Defendants' privacy claim is for publicity given to private life based on § 652D of the Restatement (Second) of Torts. The elements of the tort are: (1) publicity, given to (2)

private facts, (3) which would be highly offensive to a reasonable person and (4) is not of legitimate concern to the public. See e.g., Brown v. Mullarkey, 632 S.W.2d 507 (Mo. App. 1982); Forsher v. Bugliosi, 26 Cal.3d 792, 163 Cal.Rptr. 628, 608 P.2d 716 (1980). The element of "publicity" requires that the matter is made public, by 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 § 652D, comment a. Wells v. Thomas, supra. Disclosure of information to only one person is insufficient. Nagy v. Bell Tel. Co. of Pa., supra. See also Vogel v. W.T. Grant Co., supra (disclosure to four persons held insufficient).

In his motion, the Plaintiff claims that Defendants fail to allege any facts which support a claim for invasion of privacy. This Court must agree. Count V of Defendants' Counterclaim states that:

Kiffin's conduct hereinbefore described constitutes an invasion of privacy of both Barshak and Untermeyer with respect to their private affairs which is highly offensive to a reasonable person and not of legitimate concern to the public.

(Defs.' Answer and Countercl. ¶¶ 126.) Defendants also allege that Plaintiff's statements were willful and caused them extreme damage. (Id. at 127-28.) The Court finds that the Defendants have failed to specify any facts which support any unreasonable publicity given by Kiffin to Defendants' private life, or any publicity by Kiffin

that would unreasonably place Defendants in a false light before the public. The Defendants indicate that Kiffin made statements to "third parties." (Defs.' Answer and Countercl. ¶ 121.) These statements alone are insufficient to establish publicity. See Nagy, supra. See also Vogel, supra. Accordingly, Plaintiff's motion is granted with respect to Defendants' counterclaim for invasion of privacy.

6. Count VI: Intentional Infliction of Emotional Distress

Count VI purports to state a claim for intentional infliction of emotional distress. (Defs.' Answer and Countercl. ¶¶ 129-32.) As indicated in Field v. Philadelphia Electric Co., 388 Pa.Super. 400, 565 A.2d 1170 (Pa.Super.Sep. 12, 1989), a cause of action for intentional infliction of emotional distress will lie where the dictates of section 46 of the Restatement (Second) of Torts are satisfied. Id. at 427, 565 A.2d 1170. That section provides: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement (Second) of Torts § 46.

Thus, at the onset, the Plaintiff's conduct must be extreme and outrageous. Parano v. O'Connor, 433 Pa.Super. 570, 641 A.2d 607 (1994). As the Superior Court in Hunger v. Grand Cent. Sanitation, 447 Pa.Super. 575, 670 A.2d 173 (1996) stated:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Id. at 583-584, 670 A.2d 173. The conduct complained of in this case--the Defamatory Statements made to third parties concerning Barshak and Untermeyer, (see Defs.' Answer and Countercl. 121.)--cannot be deemed to be an outrageous or atrocious act so as to give rise to liability for the intentional infliction of emotional distress. Accordingly, Defendants fail to state a claim for intentional infliction of emotional distress.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK KIFFIN : CIVIL ACTION
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 v. :
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 ALLISON BARSHAK, et al. : NO. 98-4363

O R D E R

AND NOW, this 12th day of April, 1999, upon consideration of the Plaintiff's Motion to Dismiss, or in the alternative, for Summary Judgment Regarding Counts One through Six of Defendants' Counterclaim to Plaintiff's Complaint (Docket No. 6), and the Defendants' response thereto (Docket No. 8), IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is **DENIED with leave to renew** following close of discovery, and Plaintiff's Motion to Dismiss is **GRANTED in part** and **DENIED in part**.

IT IS FURTHER ORDERED that:

- (1) Count I of Defendants' Counterclaim is **NOT DISMISSED**;
- (2) Count II of Defendants' Counterclaim is **NOT DISMISSED**;
- (3) Count III of Defendants' Counterclaim is **NOT DISMISSED**;
- (4) Count IV of Defendants' Counterclaim is **NOT DISMISSED**;

- (5) Count V of Defendants' Counterclaim is **DISMISSED**; and
(6) Count VI of Defendants' Counterclaim is **DISMISSED**.

BY THE COURT:

HERBERT J. HUTTON, J.