

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

PATIENT TRANSFER SYSTEMS, INC.	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-1568
PATIENT HANDLING SOLUTIONS, INC. and	:	
DAVID T. DAVIS	:	
Defendants	:	
	:	
v.	:	
	:	
ROBERT WEEDLING	:	
Third Party Defendant	:	

MEMORANDUM AND ORDER

YOHN, J. December , 1999

Patient Transfer Systems, Inc. [“PTS”] has sued Patient Handling Solutions, Inc. [“PHS”] and David T. Davis for, among other things, patent infringement. PTS holds several patents on air-inflatable mattress pads that are used to support and move patients in hospitals and other health care facilities. PTS also manufactures and sells these mattresses. David Davis used to be employed by PTS, where he rose to the position of Vice President of Sales. In November, 1994, Davis left PTS and set up PHS, a business that competed with PTS as a manufacturer and seller of air-inflatable mattress pads. This patent infringement suit resulted. In his answer to PTS’s complaint, Davis asserted counterclaims against PTS and its president, Robert Weedling, for tortious interference with prospective contractual relations (Count I), as well as for defamation and commercial disparagement (Count II).

Pending before the court is the motion of counterclaim defendants PTS and Weedling [“the defendants”] for partial summary judgment in the counterclaim and their brief in support (Doc. No. 114) [“Def.’s Mot.” and “Def.’s Br.”], as well as the brief of counterclaim plaintiff Davis [“the plaintiff”] in opposition to the motion for partial summary judgment (Doc. No. 115) [“Pl.’s Br.”] and his reply to the motion for partial summary judgment (Doc. No. 117) [“Pl.’s Reply”]. The court will deny the defendants’ motion for partial summary judgment because the court has not been shown that genuine issues of material fact do not exist.

I. Legal Standard

Either party to a lawsuit may file a motion for summary judgment, and it will be granted “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 moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the movant bears the burden of persuasion at trial, the movant satisfies this initial burden by “identifying [the evidence] which it believes demonstrate[s] the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323. Where the nonmovant bears the burden of persuasion at trial, the moving party may meet its initial burden “by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.” *Id.* at 325. Thus, summary judgment will be entered “against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Id.* at 322.

II. Discussion

The plaintiff’s claim of tortious interference with prospective contractual relations in Count I is based, at least in part, on a November 7, 1997, letter sent by Weedling to “present and prospective [sic] users” of PHS’s mattresses. Def.’s Br. Ex. A [“Weedling Letter”]; *see* Pl.’s Countercl. & Third Party Compl. ¶¶ 9, 11 (Doc. No. 25) [“Pl.’s Countercl.”]. The plaintiff’s claims of defamation and commercial disparagement in Count II are also based, at least in part, on the Weedling Letter. *See* Pl.’s Countercl. ¶¶ 17-18. In an effort to defeat the tortious interference claim, the defendants claim the existence of a privilege. *See* Def.’s Br. at 5. As explained hereinafter, the existence of this privilege is affected by the survival of the defamation and commercial disparagement claims in Count II, so I will examine these claims before the tortious interference claim in Count I.

A. Defamation

Under Pennsylvania law, at trial, a defendant bears the burden of proving the following affirmative defenses:

- (1) The truth of the defamatory communication.
- (2) The privileged character of the occasion on which it was published.
- (3) The character of the subject matter of defamatory comment as of public concern.

42 Pa. Cons. Stat. § 8343(b) (1998).

In Def.'s Br., the defendants assert two affirmative defenses to the plaintiff's defamation claim. They argue that plaintiff's defamation claim cannot survive because the Weedling Letter contains only true statements and is also privileged. *See* Def.'s Br. at 6. Because truth and privilege are both affirmative defenses to a defamation claim, the defendants would bear the burden of proving truth and/or privilege at trial. *See* 42 Pa. Cons. Stat. § 8343(b). Thus, as the moving party, the defendants bear the initial burden of submitting or pointing to some evidence supporting their assertions of truth and/or privilege in order to demonstrate that there are no genuine issues of material fact and succeed with their motion for partial summary judgment. *See Celotex*, 477 U.S. at 323. The defendants have, however, neither submitted nor pointed to any evidence that would support their claims of either truth or privilege. Therefore, their motion for partial summary judgment will be unsuccessful as it relates to the plaintiff's defamation claim.

In an answer to an interrogatory, the plaintiff identified a particular statement from the Weedling Letter as being objectionable. *See* Def.'s Br. Ex. C at 2. The statement that the plaintiff objected to was the following one: "the extreme seriousness of Mr. Davis' actions [which led to his being sued for patent infringement] and the grave legal consequences, to users, of purchasing and using unlawfully manufactured versions of our product." Weedling Letter; *see* Def.'t Br. Ex. C at 2. The meaning of an allegedly defamatory statement is determined in the following manner:

The test is the effect the [statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate. The words must be given by judges and juries the same signification that other people are likely to attribute them.

U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 923 (3d Cir. 1990) (quoting *Corabi v. Curtis Publ'g Co.*, 273 A.2d 899 (Pa. 1971) (abrogated on other grounds)) (alteration in original). Applying this test, the court finds that the statement in the Weedling Letter would be understood to mean that the plaintiff was manufacturing products that infringed on PTS's patent and that anyone who purchased them would be infringing on PTS's patent.

The defendants argue that this is a true statement and that they cannot be liable for making a defamatory but true statement.¹ See Def.'s Br. at 6. Although the defendants cannot be held liable for making a true defamatory statement, as movants for summary judgment, they bear the initial burden of proving the statement's truth. See *Celotex*, 477 U.S. at 323. They do not, however, submit or point to any evidence supporting the truth of the statement that the plaintiff's products are infringing. Indeed, they cannot prove the statement's truth until the underlying patent infringement case is resolved. Thus, the defendants fail to satisfy their initial burden of demonstrating the absence of any genuine issue of material fact with respect to the truth of the statement.

The defendants also argue that the statement is privileged because patentees have "an absolute right to inform infringers that they may be infringing." Def.'s Br. at 6. Although a patentee does have the right to inform potential infringers that they may be infringing, this right exists only if the patentee is acting in good faith. See *Zenith Elecs. Corp. v. Exzec*, 182 F.3d

¹The defendants also argue that this statement is one of opinion and, thus, is not actionable. See Def.'s Br. at 6. The defendants are incorrect. Statements of opinion are actionable if they imply underlying defamatory facts. See *U.S. Healthcare*, 898 F.2d at 923; *Baker v. Lafayette College*, 532 A.2d 399, 402 (Pa. 1987). This statement certainly implies that the plaintiff's products actually infringe on PTS's patent and that anyone purchasing those products would also be infringing, and those facts are defamatory. See *U.S. Healthcare*, 898 F.2d at 923. Thus, the statement is actionable as a defamatory statement.

1340, 1353 (Fed. Cir. 1999). Although the defendants could not be held liable for making this statement if they were acting in good faith, they bear as movants for summary judgment the initial burden of proving the existence of this privilege, including their good faith. *See Celotex*, 477 U.S. at 323. They do not, however, submit or point to any evidence supporting their good faith, an essential element of the privilege claimed by the defendants. Thus, the defendants fail to satisfy their initial burden of demonstrating the absence of any genuine issue of material fact with respect to the privileged nature of the statement.

Because the defendants have not satisfied their initial burden of showing an absence of genuine issues of material fact regarding the truth or privileged nature of the defamatory statement, the court will deny their motion for partial summary judgment as it relates to the plaintiff's defamation claim in Count II.

B. Commercial Disparagement

According to Pennsylvania law, in order to recover for commercial disparagement, a plaintiff must prove:

1) that the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect; 2) that no privilege attaches to the statement; and 3) that the plaintiff suffered a direct pecuniary loss as the result of the disparagement.

U.S. Healthcare, 898 F.2d at 924.

Because the truth of the statement at issue cannot be determined until the underlying patent infringement case is decided, a genuine issue of fact remains as to the truthfulness of the statement. *See supra* Part II.A. This issue is material because the patentee's privilege claimed by the defendants may not apply.

The defendants claim that the statement in the Weedling Letter was privileged because a patentee may inform potential infringers of their infringement. *See* Def.’s Br. at 6. At trial, the plaintiff bears the burden of showing the absence of any privilege in order to succeed with his commercial disparagement claim. *See U.S. Healthcare*, 898 F.2d at 924. Despite this burden being on the plaintiff at trial, the defendants, as the party moving for summary judgment, bear the initial burden of pointing out to the court an absence of evidence that a privilege did not exist. *Celotex*, 477 U.S. at 325. The defendants do not satisfy this initial burden.

Although the defendants claim that the statement was privileged, they make no effort to actually point out to the court an absence of evidence that they acted in bad faith. Instead, they merely make an assertion as to the existence of a privilege that protects patentees. *See* Def.’s Br. at 6 (“Additionally, a patentee has an absolute right to inform infringers that they may be infringing his patent.”). The abstract existence of such a privilege is an insufficient demonstration by the defendants that the plaintiff has no evidence that the letter was not privileged. Thus, the defendants fail to satisfy their initial burden of demonstrating the absence of any genuine issue of material fact with respect to the privileged nature of the statement.²

Consequently, the court will deny the defendants’ motion for summary judgment as it relates to the plaintiff’s commercial disparagement claim in Count II.

²Even if the defendants had satisfied their initial burden of demonstrating an absence of a genuine issue of material fact regarding the privileged nature of the statement in the Weedling Letter, the plaintiff points to deposition testimony of Weedling that could lead a jury to conclude that PTS had no basis for believing that the plaintiff’s air-inflatable mattresses were infringing and that the Weedling Letter was sent in bad faith. *See* Pl.’s Br. at 7 (citing Pl.’s Br. Ex. 2 at 255-270). This testimony would demonstrate a genuine issue of material fact because the statement is not privileged if it was made in bad faith. *See Zenith Elecs.*, 182 F.3d at 1353.

C. Tortious Interference with Prospective Contractual Relations

In order to prove tortious interference with prospective contractual relations, a plaintiff must prove “the absence of privilege or justification on the part of the defendant.” *U.S. Healthcare*, 898 F.2d at 925 (quoting *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466 (Pa. 1979)). The defendants claim that although the Weedling Letter may have interfered with prospective contractual relations between the recipients and the plaintiff, the Weedling Letter enjoyed the competitor’s privilege under Restatement (Second) of Torts § 768(1). *See* Def.’s Br. at 5.

As the plaintiff points out, one element of the competitor’s privilege is that “the actor [PTS] does not employ wrongful means.” *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 530 (3d Cir. 1998) (quoting Restatement (Second) of Torts § 768(1)(b) (1979)); *see* Pl.’s Br. at 4. Wrongful means are employed when the competitor commits conduct that is independently actionable. *See, e.g., DP-Tek, Inc. v. AT&T Global Info. Sol’ns Co.*, 100 F.3d 828, 833-35 (10th Cir. 1996); *see also Brokerage Concepts*, 140 F.3d at 531-32 (noting that the Supreme Court of Pennsylvania has not defined the term “wrongful means,” that other courts have limited the term “wrongful means” to independently actionable conduct, and making no suggestion that the Supreme Court of Pennsylvania would hold independently actionable conduct not to constitute wrongful means). Because the Weedling Letter may contain statements that are independently actionable and give rise to actions for defamation and for commercial disparagement, *see supra* Parts II.A-B, a genuine issue of material fact exists as to whether the defendants employed wrongful means by sending the Weedling Letter and, thus, sacrificed any competitor’s privilege that the letter may have enjoyed.

Because a genuine issue of material fact exists as to the privileged nature of the letter that the plaintiff alleges tortiously interfered with his prospective contractual relations, the court will deny the defendants' motion for partial summary judgment as it relates to the plaintiff's claim of tortious interference with prospective contractual relations in Count I.

III. Conclusion

Because the defendants have not satisfied their burden as the moving party of demonstrating that no genuine issues of material facts exist, the court will deny their motion for partial summary judgment. An appropriate order follows.

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ROBERT WEEDLING	:	
Third Party Defendant	:	

ORDER

YOHN, J. December , 1999

AND NOW, this day of December, 1999, upon consideration of the motion for partial summary judgment and brief in support (Doc. No. 114) filed by counterclaim defendants PTS and Weedling, as well as the brief in opposition to the motion for partial summary judgment (Doc. No. 115) and the reply to the motion for partial summary judgment (Doc. No. 117), both filed by counterclaim plaintiff Davis, IT IS HEREBY ORDERED that the motion for partial summary judgment is DENIED.

William H. Yohn, Jr.