

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

BRUCE E. FREDRICS,

Petitioner,

v.

HON. BRAD RAFFENSPERGER,
GEORGIA SECRETARY OF STATE,
HON. JIM BECK, GEORGIA
COMMISSIONER OF INSURANCE AND
FIRE SAFETY, MARGO ELLIS, and
HARRY SAMLER,

Respondents.

Case No. 2019CV317438

ORDER GRANTING MOTION TO INTERVENE AND MOTION TO STRIKE

This matter is before the Court on the Motion to Intervene filed by Intervenor WGCL-TV d/b/a CBS46 (“CBS46”) and the Joint Motion to Strike and Dismiss Petitioner’s Amended Complaint Pursuant to O.C.G.A. § 9-11-11.1 (“Motion to Strike”) filed by CBS46 and Defendant/Respondent Harry Samler. The Motion to Strike was subsequently joined by Defendant/Respondent Margo Ellis. Having reviewed and considered the pleadings, the motions, the briefs and affidavits related thereto, the arguments of counsel, the testimony and evidence presented at the hearing held on May 28, 2019, and all other matters of record, the Court hereby **GRANTS** the Motion to Intervene and the Motion to Strike for the reasons set forth below.

I. FINDINGS OF FACT

In March 2018, Ms. Ellis’s home in Fairburn, Georgia was damaged by a storm. (Ellis Aff., Par. 2) Ms. Ellis filed a claim for the property damage with her insurance company but was unsatisfied with the amount it offered to resolve the claim. (Ellis Aff., Par. 2) Ms. Ellis sought

the services of a public adjuster to help with the resolution of her claim and retained Plaintiff/Petitioner Bruce E. Fredrics, a public adjuster licensed by the State of Georgia. (Ellis Aff. Par. 4-5; Tr. 21) He agreed to help Ms. Ellis pursue additional insurance funds for her property damage claim. (Ellis Aff., Par. 5; Ex. A)

As part of his engagement, Mr. Fredrics required Ms. Ellis to sign an agreement titled “5 IN 1 CONTRACTS – PUBLIC ADJUSTER; APPRAISER; CONSULTANT; EXPERT; ESTIMATOR – FOR PACS, LLC” (the “5 in 1 Contract”). The 5 in 1 Contract was drafted by Mr. Fredrics. (Tr. 30-31) It consists of one continuous, single-spaced paragraph that spans five and one-half pages in small font. (Ellis Aff., Ex. A) The 5 in 1 Contract purports to allow Mr. Fredrics and his company, Professional Adjusting & Consulting Service, LLC (“PACS”), to “act in multiple simultaneous capacities” including that of an appraiser and an adjuster. (Tr. 39) The contract also permitted Mr. Fredrics and PAC wide-ranging powers to unilaterally “switch” among those capacities – sometimes permitting the switch to occur retroactively. (Tr. 39-44)

The parties disagree about the nature of the services that Mr. Fredrics provided to Ms. Ellis in connection with her insurance claim. Ms. Ellis claims that she hired Mr. Fredrics to serve as a public adjuster acting on her behalf. (Ellis Aff., Par. 6) Mr. Fredrics claims that he acted only as an appraiser who negotiated Ms. Ellis’s insurance claim on his own behalf. (Tr. 35-36; 48-50; 123) The Court does not need to determine whether Mr. Fredrics served Ms. Ellis as a public adjuster or an appraiser in order to rule on the two motions at issue.

On or about December 6, 2018, after working to resolve the dispute, Mr. Fredrics received a check in the amount of \$40,000 from Ms. Ellis’s insurance company as settlement for her property damage claim. Mr. Fredrics was listed as a co-payee on the check. (Ellis Aff., Par. 7) Mr. Fredrics refused to sign the check or deliver any of the settlement proceeds to Ms. Ellis

unless she agreed to pay him far more than what Ms. Ellis understood would be owed. (Ellis Aff., Par. 8) The parties were unable to resolve their fee dispute. Ms. Ellis has yet to receive any of the settlement proceeds from her insurance claim, and her home still has not been repaired. (Ellis Aff., Par. 8-10; 14)

On or about December 8, 2018, Ms. Ellis filed a written consumer complaint against Mr. Fredrics with the Georgia Office of Insurance and Safety Fire Commissioner (the "OCI"). (Ellis Aff., Par. 10; Ex. D) Mr. Fredrics responded to the complaint, asserting that he worked on the Ellis claim only as an appraiser and not as a public adjuster. (Ellis Aff., Par. 11; Ex. E) On February 7, 2019 the OCI issued a subpoena to Mr. Fredrics and PACS pursuant to O.C.G.A. §§ 33-1-16 and 33-2-16 (the "February 7, 2019 Subpoena"). (Commissioner's Special Appearance Motion, Ex. 1) Mr. Fredrics asserts that after he disputed the OCI's power to investigate Ms. Ellis's complaint, the Georgia Secretary of State, State Board of Residential and General Contractors, acting with retaliatory intent, commenced an investigation as to whether he was impermissibly doing "general contracting / constructing work without a license. . ." (Am. Complaint, Par. 7)

After petitioning the OCI for relief, Ms. Ellis contacted CBS46 and Mr. Samler, an investigative reporter for CBS46's "Better Call Harry" news segment, to seek their assistance in making the public aware of her experience with Mr. Fredrics. (Ellis Aff., Par. 12; Samler Aff., Par. 2-3) Mr. Samler began investigating Ms. Ellis's case and was communicating with Mr. Fredrics about it until he received an email from Mr. Fredrics's attorney demanding that he cease and desist from contacting Mr. Fredrics. Mr. Samler complied with that demand but continued working on a news story to be broadcast on CBS46 about Ms. Ellis's experience with Mr. Fredrics and his business practices. (Samler Aff., Par. 4-7)

On February 28, 2019, the day he was required to respond to the OCI's February 7, 2019 Subpoena, Mr. Fredrics filed this lawsuit naming Ellis, Samler, the Georgia Secretary of State, and the Georgia Commissioner of Insurance and Fire Safety as Respondents. He sought a "gag order" and "emergency" injunctive relief prohibiting Mr. Samler from publishing any news stories about Mr. Fredrics or his business and enjoining all of the Defendants/Respondents from communicating about Mr. Fredrics, his business practices, Ms. Ellis's complaint to the OCI, the OCI investigation, and/or this lawsuit. (Complaint, pp. 6-7) Mr. Fredrics filed an Amended Complaint on March 12, 2019, removing the express request for a "gag order," but continuing to seek the wide-ranging injunctive relief sought in his initial Complaint. (Am. Complaint, p. 6) Included in both complaints was a request that the OCI's February 7, 2019 Subpoena be quashed. (Complaint, p. 7; Am. Complaint, p. 6) Mr. Fredrics never served the Complaint or the Amended Complaint on any of the Defendants/Respondents.

On April 17, 2019, CBS46 and Mr. Samler filed their Motion to Intervene and Motion to Strike. On May 3, 2019, joined in the Motion to Strike. Mr. Fredrics filed an "objection" to the Motion to Intervene, but he never filed a response to the Motion to Strike. (Objections and Combined Motions, filed May 28, 2019) The Court issued a Rule Nisi on May 6, 2019, setting a hearing on the Motion to Intervene and Motion to Strike for May 28, 2019.¹

¹ The hearing was originally scheduled for May 7, 2019 but was rescheduled to May 28, 2019, the day following the Memorial Day holiday, after the Court granted an Emergency Motion for Medical Leave of Absence. That three-week leave was sought based upon the health condition of Mr. Fredrics's counsel. On May 23, 2019, Mr. Fredrics's counsel filed a Second Emergency Motion for Medical Leave ("Second Emergency Motion") seeking an additional one and one-half weeks of leave that would require a continuance of the May 28, 2019 hearing. Movants opposed the additional requested leave. (Opposition, filed May 24, 2019)

Motions filed under O.C.G.A. § 9-11-11.1 (b) (1) are time-sensitive. O.C.G.A. § 9-11-11.1 (d). Consequently, the Court was unwilling to grant the Second Emergency Motion absent additional information from Mr. Fredrics's counsel detailing his health condition. Because the requested leave was made and the objection was lodged just prior to a long, holiday weekend, the Court determined it would hear such evidence in an *ex parte* proceeding on May 28, 2019 before the formal hearing on the instant motions was set to begin. On May 27, 2019, after learning that the Court was unwilling to grant the Second Emergency Motion based solely upon his written submissions, Mr. Fredrics filed a Notice of Dismissal Without Prejudice in an effort to stop the May 28, 2019

The hearing lasted more than two hours, and no party was denied the opportunity to present evidence or argument on the Motion to Intervene or the Motion to Strike.² The Court reviewed and considered the pleadings, filings, and evidence in the record, the arguments of counsel, and the evidence presented at the hearing, which included documentary evidence and testimony from Mr. Fredrics.

II. CONCLUSIONS OF LAW

A. Motion to Intervene

CBS46 contends that this action directly and impermissibly curtails its constitutionally-protected newsgathering activities and therefore seeks to intervene in this case for the limited purpose of joining Mr. Samler's Motion to Strike. Mr. Fredrics claims that CBS46 should not be permitted to intervene in this action because he did not assert any claims directly against CBS46.³

The media's right to intervene in legal actions that seek to impede its ability to gather and report the news is well established. *See WXIA-TV v. State*, 303 Ga. 428, 432 (2018) (holding television stations had standing to intervene and challenge gag order that burdened their newsgathering rights, noting that "the federal courts have held in a number of cases that a news organization may have standing to challenge a restraint upon the speech of another when that

hearing from going forward. (Notice of Dismissal Without Prejudice, p. 1; Tr. 9-10) Movants objected to the dismissal, and all parties appeared before the Court on May 28, 2019.

At the onset, the Court conducted an *ex parte* proceeding with counsel for Mr. Fredrics. After the Court offered to make certain accommodations regarding the conduct of the May 28, 2019 hearing, counsel for Mr. Fredrics agreed that the hearing on the instant motions could go forward and effectively withdrew his Second Emergency Motion for Medical Leave. (Redacted Tr., p. 6) When the hearing in open court commenced, Mr. Fredrics asked to withdraw his dismissal. (Tr. 10) The Court granted Mr. Fredrics's request and vacated the Notice of Dismissal Without Prejudice. (Tr. 11)

² Contrary to statements found in recent pleadings by Mr. Fredrics, the Motion to Intervene and the Motion to Strike were the only motions noticed for and considered during the May 28, 2019 hearing. (Corrected Objection, filed June 17, 2019, p. 3; Redacted Tr. p. 6)

³ Mr. Fredrics also argued that he reached some type of "settlement agreement" with CBS46, but he never presented evidence of any such agreement. (Tr. 145-146)

restraint impairs its own ability to effectively engage in news gathering”). The Court finds that although CBS46 was not named as a defendant, the Amended Complaint seeks to limit CBS46’s constitutionally-protected right to gather and report the news by preventing CBS46 from broadcasting news reports about Ms. Ellis’s experience with Mr. Fredrics, the OCI’s investigation, and by preventing CBS46 from obtaining the information needed for such reporting from Ms. Ellis and others. Accordingly, the Court finds that CBS46 shall be permitted to intervene in this case.

B. Motion to Strike Pursuant to O.C.G.A. § 9-11-11.1

CBS46, Mr. Samler, and Ms. Ellis contend that the Amended Complaint should be stricken and dismissed pursuant to Georgia’s anti-SLAPP statute, O.C.G.A. § 9-11-11.1. Georgia’s anti-SLAPP statute was enacted and recently revised “to protect persons exercising their constitutional rights of petition and freedom of speech” and to prevent those rights from being “chilled through abuse of the judicial process.” *Rosser v. Clyatt*, 348 Ga. App. 40, 42 (2018); O.C.G.A. § 9-11-11.1(a). The revised anti-SLAPP statute provides:

A claim for relief against a person or entity arising from any act of such person or entity which could reasonably be construed as an act in furtherance of the person’s or entity’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern shall be subject to a motion to strike unless the court determines that the nonmoving party has established that there is a probability that the nonmoving party will prevail on the claim.

O.C.G.A. § 9-11-11.1(b)(1). Both the General Assembly and the Court of Appeals have recognized that the statute must “be construed broadly” to accomplish its goals. O.C.G.A. § 9-11-11.1(a); *Rosser*, 348 Ga. App. at 42.

Under the revised anti-SLAPP statute, there is “a two-step process for determining whether a claim is subject to being stricken.” *Neff v. McGee*, 346 Ga. App. 522, 524 (2018). First, “the defendant bringing an anti-SLAPP motion to dismiss must make a prima facie showing that the plaintiff’s suit is subject to OCGA § 9-11-11.1.” *Id.* at 524-525. Second, if the defendant makes such a showing, “[t]he burden then shifts to the plaintiff to demonstrate that there is a ‘probability’ that she will prevail on her claims at trial.” *Id.* at 525 (citation omitted). If the plaintiff fails to satisfy that burden, the complaint must be stricken. O.C.G.A. § 9-11-11.1(b)(1).⁴

1. Movants Made a Prima Facie Showing that the Amended Complaint is Subject to O.C.G.A. § 9-11-11.1

It is clear from the face of the Amended Complaint and Mr. Fredrics’s own testimony that this lawsuit is based on Ms. Ellis’s filing of a complaint with the OCI related to his business activities and Mr. Samler’s and CBS46’s efforts to investigate and report those matters to the public. CBS46, Mr. Samler, and Ms. Ellis contend that those actions are the type of conduct protected by the anti-SLAPP statute. The Court agrees.

A defendant makes a prima facie showing that the plaintiff’s suit is subject to the anti-SLAPP statute by demonstrating that the defendant’s conduct “could reasonably be construed as acts taken in furtherance of his or her constitutional rights of petition or free speech in connection with an issue of public concern as defined by the statute.” *Rosser*, 348 Ga. App. at 43. The anti-SLAPP statute broadly defines this protected conduct to include statements made before or “in connection with an issue under consideration or review” by either an executive body or “any other official proceeding authorized by law.” O.C.G.A. § 9-11-11.1(c)(1)-(2). Ms.

⁴ Mr. Fredrics objects to the Court’s consideration of affidavit evidence from Ms. Ellis and Mr. Samler. (Corrected Objection, filed June 17, 2019, pp. 3-4) However, O.C.G.A. § 9-11-11.1 (b) (2) specifically provides that the Court may consider affidavit evidence offered by either side in making the determination required by O.C.G.A. § 9-11-11.1 (b) (1). Further, these affidavits were attached to the Motion to Strike so nothing about their contents would have surprised Mr. Fredrics. Finally, both Ms. Ellis and Mr. Samler were in attendance at the May 28, 2019 hearing, and Mr. Fredrics could have sought their testimony had he so desired. (Tr. 8-9; 147-148)

Ellis's complaint to the OCI – the governmental agency charged with licensing, regulating, and investigating consumer complaints about public adjusters – is quintessential petitioning activity protected by the anti-SLAPP statute, O.C.G.A. § 9-11-11.1(c)(1)-(2). See O.C.G.A. § 33-1-16 (Georgia's Insurance Code permits investigation into "fraudulent insurance acts"); O.C.G.A. § 33-23-36 (Georgia's Insurance Code permits investigation into the alleged misconduct of those granted licenses under its authority).

The anti-SLAPP statute further defines protected conduct to include any act made "in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public concern." O.C.G.A. § 9-11-11.1(c)(4). The Court finds that issues related to Ms. Ellis's OCI complaint and Mr. Fredrics's business practices -- including whether and when Mr. Fredrics provides services as a public adjuster or an appraiser, whether and when he is subject to licensure and regulatory oversight, and whether he engaged in any unfair, unlawful, or deceptive practices -- are matters of public interest and concern. O.C.G.A. § 9-11-11.1(c)(4).

Accordingly, the Court concludes that the CBS46, Mr. Samler, and Ms. Ellis have made a prima facie showing that the Amended Complaint is subject to O.C.G.A. § 9-11-11.1.

2. Mr. Fredrics Failed to Establish a Probability of Prevailing on his Claims

Because the Amended Complaint is subject to § 9-11-11.1, the Motion to Strike must be granted unless Mr. Fredrics establishes a probability that he will prevail on his claims. The Court finds that Mr. Fredrics failed to meet that burden.

The only claim Mr. Fredrics has asserted against Ms. Ellis and Mr. Samler is a claim for injunctive relief to prevent Ms. Ellis and Mr. Samler, CBS46's reporter, from communicating any "false" information to any of Mr. Fredrics's customers or communicating with anyone about Ms. Ellis' OCI complaint, the OCI's investigation, and the nature of this action. It is well settled

that such an injunction would be a prior restraint on Ms. Ellis, Mr. Samler, and CBS46. *See Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (stating a “prior restraint” includes all “administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur”). The Georgia Supreme Court has recognized that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights” and are “presumptively unconstitutional.” *WXIA-TV v. State*, 303 Ga. 428, 434 citing *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558-559 (1976). Accordingly, the party seeking a prior restraint “bears a heavy burden of showing a justification for the imposition of such a restraint.” *Id.* Moreover, while Mr. Fredrics claims that Ms. Ellis and Mr. Samler have made or may in the future make “false” statements about him, Georgia courts follow “Georgia’s firm policy to protect the right of free speech [and] apply the general rule that equity will not enjoin libel and slander.” *Hartman v. PIP-Grp., LLC*, 349 Ga. App. 233, 238 (2019) (reversing injunction and holding that “[t]o the extent that the order forbids [plaintiff] from making future statements about [defendant], it is an impermissible prior restraint”).

The Court finds that Mr. Fredrics failed to meet the “heavy burden” required to overcome the presumptive constitutional invalidity of the prior restraint he seeks. Mr. Fredrics failed to introduce any evidence showing that he would suffer irreparable harm in the absence of a prior restraint. *See Cohen v. Advanced Med. Group*, 269 Ga. 184, 185 (1998) (stating party seeking prior restraint must show he would be “irreparably harmed” by the defendant’s communications). The Court therefore finds that Mr. Fredrics’s requested injunction preventing Ms. Ellis, Mr. Samler, and by extension, Mr. Samler’s media outlet, CBS46, from communicating about him or his business practices would constitute an impermissible and unconstitutional prior restraint.

Accordingly, the Court concludes that Mr. Fredrics failed to establish a probability that he will prevail on his injunctive relief claims against Ms. Ellis, Mr. Samler or, by extension, CBS46.

III. CONCLUSION

For the reasons set forth above, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Motion to Intervene filed by CBS46 and the Motion to Strike filed by CBS46 and Harry Samler, and joined by Ms. Ellis, are **GRANTED**, and the Amended Complaint filed against them by Mr. Fredrics is hereby **STRICKEN** and **DISMISSED WITH PREJUDICE**.

There being no reason for delay, the Court deems this a final order pursuant to O.C.G.A. § 9-11-54(b).

The Court notes that the Motion to Strike sought an award of attorney's fees and expenses of litigation pursuant to O.C.G.A. § 9-11-11.1(b.1). The Court expressly reserves judgment on the award of such fees and expenses, and directs any party who wishes to seek the recovery of attorney's fees and expenses of litigation under O.C.G.A. § 9-11-11.1(b.1) to submit a motion for such fees and expenses, along with supporting evidence, within forty-five (45) days of the date of this Order.

IT IS SO ORDERED this 24th day of August, 2019.



REBECCA CRUMRINE RIEDER, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

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