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

JAQUELINE ROSSI, TIM BAURER, and FIU FIU, L.L.C.	:	**CIVIL ACTION**
Plaintiffs,	:	
v.	:	**NO. 07-3792**
MARK SCHLARBAUM, JANET SCHLARBAUM, SCHLARBAUM CAPITAL MANAGEMENT, L.P., and S&S INVESTMENT PARTNER, L.P.	:	
Defendants.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 20th day of February, 2008, upon consideration of Defendants' Motion to Dismiss (Document No. 7, filed October 24, 2007); plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss (Document No. 12, filed November 23, 2007); and Defendants' Reply Memorandum in Support of Motion to Dismiss (Document No. 13, filed November 27, 2007), following a telephone conference with the parties on January 31, 2008, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Counts II, III, IV, VIII, and IX are **DISMISSED WITH PREJUDICE**, subject to plaintiffs' right to seek reconsideration if warranted by discovery.

It is **FURTHER ORDERED** as follows:

1. Defendants' Motion to Dismiss Count I is **GRANTED IN PART** and **DENIED IN PART** as follows: (a) the Motion to Dismiss Count I against defendants Schlarbaum Capital Management L.P. and S&S Investment Partners, L.P. is **GRANTED**; (b) the Motion to Dismiss Count I with respect to the claims of Tim Baurer and Fiu Fiu, L.L.C. against Mark Schlarbaum is

GRANTED; (c) the Motion to Dismiss Count I with respect to the claims of Jaqueline Rossi against Mark Schlarbaum is **DENIED.**

2. Defendants' Motion to Dismiss Count V is **DENIED.**

3. Defendants' Motion to Dismiss Count VI with respect to the claims of plaintiffs Rossi and Baurer is **DENIED.**

4. Defendants' Motion to Dismiss Count VII is **DENIED**.

5. Defendants' Motion to Dismiss Counts XI and XII is **DENIED.**

IT IS FURTHER ORDERED that, in all other respects, defendants' Motion to Dismiss is **DENIED**.[1]

MEMORANDUM

I. Background

Plaintiff Fiu Fiu, L.L.C. is a clothing line company that produces swimwear and activewear, and is owned and managed by plaintiffs Jaqueline Rossi and Tim Baurer. On September 12, 2007, plaintiffs filed a Complaint against defendants alleging the following causes of action:

Count I	Negligence (Plaintiffs v. Mark Schlarbaum, Schlarbaum Capital Management L.P., and S&S Investment Partners, L.P.)
Count II	Negligent Infliction of Emotional Distress (Plaintiffs v. Mark Schlarbaum)
Count III	Negligence (Plaintiffs v. Janet Schlarbaum)
Count IV	Negligent Infliction of Emotional Distress (Plaintiffs v. Janet Schlarbaum)
Count V	Tortious Interference with Contractual Relationship (Plaintiffs v. Janet Schlarbaum)
Count VI	Tortious Interference with Economic Advantage (Plaintiffs v. Janet

[1] Based on the Court's decision, the following counts remain: Count I, as asserted by plaintiff Rossi against defendant Mark Schlarbaum; Counts V and VI (as plead); Count VII (as plead); and Counts X through XII (as plead).

	Schlarbaum)
Count VII	Invasion of Privacy (Jaqueline Rossi v. Janet Schlarbaum)
Count VIII	Intentional Infliction of Emotional Distress (Plaintiffs v. Janet Schlarbaum)
Count IX	Intentional Infliction of Emotional Distress (Plaintiffs v. Mark Schlarbaum)
Count X	Defamation (Jaqueline Rossi v. Janet Schlarbaum)
Count XI	Slander (Jaqueline Rossi v. Janet Schlarbaum)
Count XII	Libel (Jaqueline Rossi v. Janet Schlarbaum)

The gravamen of the Complaint is that defendant Janet Schlarbaum caused plaintiffs to suffer economic and personal losses by stating to plaintiffs' business associates, and to local media, that plaintiff Jaqueline Rossi was engaged in illicit and illegal activities. According to plaintiffs, defendant Janet Schlarbaum targeted Rossi after learning of a relationship between her husband, Mark Schlarbaum, and Rossi "by illegally accessing [Mark Schlarbaum's] work email." (Compl. ¶ 30.)

On October 24, 2007, defendants filed a Motion to Dismiss Counts I through V, VII through IX, and XI through XII in their entirety, and Count VI with respect to the claims of plaintiffs Baurer and Rossi. Plaintiffs agreed to the dismissal, without prejudice, of Counts II, III, IV, VIII, and IX, but opposed dismissal of the remaining counts.[2] Following a telephone conference with the parties on January 31, 2008, the Court decided to dismiss Counts II, III, IV, VIII, and IX with prejudice, subject to plaintiffs' right to seek reconsideration if warranted by discovery. The Court now addresses the remaining counts that defendants seek to dismiss.

II. Legal Standard

[2] Plaintiffs agreed to dismissal of Counts II, III, IV, VIII and IX without prejudice "due to the fact that Discovery has not even begun and there may be evidence disclosed during the process which could impact the matter at bar." (Pls.' Mem. in Opp'n 14.)

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the Court "accept[s] all factual allegations as true, construe[s] the complaint in the light most favorable to the plaintiff, and determine[s] whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Phillips v. County of Allegheny, --- F.3d ----, 2008 WL 305025, at *5 (3d Cir. Feb. 5, 2008) (quoting Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)) (internal quotations omitted). "To survive a motion to dismiss, a civil plaintiff must allege facts that 'raise a right to relief above the speculative level . . . .'" Victaulic Co. v. Tieman, 499 F.3d 227, 234 (3d Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, --- U.S. ----, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007)). In other words, a complaint must contain "enough factual matter (taken as true) to suggest" the elements of the claims asserted. Phillips, 2008 WL 305025, at *6; cf. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, 235-236 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.") (quoted in Twombly, 127 S.Ct. at 1965).

III. Discussion

A. Count I - Negligence

Count I of the Complaint asserts that defendants Mark Schlarbaum, Schlarbaum Capital Management L.P., and S&S Investment Partners, L.P. were negligent in "inadequately securing" Mark Schlarbaum's electronic mail, in violation of defendants' "duty to protect confidential information from third party access . . . ." (Compl. ¶ 57-59.) To sustain a claim for negligence

under Pennsylvania law, a plaintiff must prove four elements: "(1) the existence of a duty or obligation recognized by law; (2) a failure on the part of the Defendant to conform to that duty, or a breach thereof; (3) a causal connection between the Defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the complainant." Paliometros v. Loyola, 932 A.2d 128, 133 (Pa. Super. 2007).

Defendants argue that there was no duty owing from the named defendants to plaintiffs because the relationship between Mark Schlarbaum and plaintiff Rossi was personal, not commercial or professional. (Defs.' Mot. to Dismiss 6.) In response, plaintiffs assert that the relationship between Mr. Schlarbaum and Rossi was a "confidential relationship . . . carrying with it a fiduciary duty." (Pls.' Mem. in Opp'n to Mot. to Dismiss 5.) Additionally, defendants argue that "Defendant Mark Schlarbaum's counsel and assistance placed him in privity to the confidential working of Fiu Fiu LLC." (Pls.' Mem. in Opp'n to Mot. to Dismiss 7.)

> The Pennsylvania Supreme Court has described a "confidential relationship" as
>
> one wherein a party is bound to act for the benefit of another, and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed; in both an unfair advantage is possible.

Frowen v. Blank, 425 A.2d 412, 416-17 (Pa. 1981) (citations and quotations omitted). "A confidential relationship is not limited to any particular association of parties but exists wherever one occupies toward another such a position of advisor or counsellor as reasonably to inspire confidence that he will act in good faith for the other's interest." Id. at 417. Pennsylvania courts have recognized the existence of a "confidential relationship" between individuals where one

party to the relationship gained the confidence of the other and purported to act or advise with the other's interest in mind. Id. at 418-19 (citing Restatement of Trusts 2d). In Basile v. H &R Block, Inc., 777 A.2d 95, 102 (Pa. Super. 2001), the Superior Court of Pennsylvania observed that "those who purport to give advice in business may engender confidential relations if others, by virtue of their own weakness or inability, the advisor's pretense of expertise, or a combination of both, invest such a level of trust that they seek no other counsel."

Accepting as true all of the facts alleged in the Complaint, and drawing all reasonable inferences in favor of plaintiffs, the Court concludes that plaintiffs have failed to allege any facts reflecting the existence of a "confidential relationship" between any of the plaintiffs and Schlarbaum Capital Management L.P. or S&S Investment Partners, L.P. The Complaint reflects that plaintiff Rossi maintained a relationship with Mark Schlarbaum individually, not with either of the two business entities. Except to state that Mark Schlarbaum "presented himself as an experienced business person who runs a hedge fund . . . and his own investment company," (Compl. ¶ 16), plaintiffs allege no facts demonstrating any relationship between the two business entities and plaintiffs. Thus, as against Schlarbaum Capital Management L.P. and S&S Investment Partners, L.P., and under the facts as alleged, plaintiffs state no valid claim for relief. Therefore, the Court will grant defendants' Motion to Dismiss Count I against Schlarbaum Capital Management L.P. and S&S Investment Partners, L.P.

As to defendant Mark Schlarbaum, the Court will grant in part and deny in part defendants' Motion to Dismiss Count I. The Complaint avers the following:

> ¶ 16: Defendant, Mark Schlarbaum, presented himself as an experienced business person who runs a hedge fund . . . and has his own . . . investment company . . . .

> Defendant, Mark Schlarbaum, advised the parties that all information would remain confidential.
>
> ¶17: During this time, Defendant offered business advice to Plaintiff, Jaqueline Rossi, and he gave her his work email . . . to communicate business matters as well as personal matters.
>
> ¶18: During this time, relying on Defendant, Mark Schlarbaum's expertise, Plaintiff, Jaqueline Rossi, confided in Defendant about her goals and hopes to expand their business with the help of investors. Defendant Mark Schlarbaum advised on these issues and inquired about the details. Once again, Plaintiffs were under the belief that all information would remain confidential as promised by Defendant, Mark Schlarbaum.
>
> ¶19: Relying on Defendant's business background and his expertise, and believing that the exchange of emails would be confidential, Plaintiff communicated her confidential goals and investment plants to him via email for his expert advice with the belief that his offer to help her with her business was true and honest.
>
> ¶26: Plaintiff, Jaqueline Rossi, communicated to Defendant, Mark Schlarbaum, about their tremendous work and money spent in preparation to launch their new product line and he agreed to review their plan and commitment with her with regard to the investment stipulations. Once again, Defendant, Mark Schlarbaum assured Plaintiff that same would remain confidential.

Accepting as true these and other averments, the Court concludes that plaintiffs have alleged a "confidential relationship" - that is, one in which one party justifiably trusted in and depended on another - between Rossi and Mark Schlarbaum. Thus, plaintiff Rossi's right to relief [for negligence] rises above the "speculative level," and defendants' Motion to Dismiss Rossi's claims as asserted in Count I against Mark Schlarbaum is denied.

As for the negligence claims asserted against Mark Schlarbaum by plaintiffs Baurer and Fiu Fiu, the Court agrees with defendants that the claims must be dismissed. Nothing in the Complaint suggests that there was a "confidential relationship" between Baurer or Fiu Fiu and Mark Schlarbaum. As stated above, a confidential relationship "appears when the circumstances

make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed." Frowen, 425 A.2d at 416-17. Nowhere do plaintiffs allege the existence of any relationship between Baurer and Mark Schlarbaum. Similarly, the Complaint is silent on the existence of a relationship between Fiu Fiu, as a distinct and separate entity from Rossi, and Mark Schlarbaum. Therefore, Mark Schlarbaum owed no duty to either Baurer or Fiu Fiu. As a result, the claims of plaintiffs Baurer and Fiu Fiu asserted against defendant Mark Schlarbaum in Count I are dismissed.

B. Count V - Tortious Interference with Contractual Relationship/Count VI - Tortious Interference with Economic Advantage

Defendants argue that Count V should be dismissed for failure to satisfy one of the essential elements of the tort of interference with contractual relations - the existence of a contract. In Pennsylvania, a plaintiff must prove four elements to sustain a cause of action for interference with contractual relations or prospective economic advantage:

> (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.

See CGB Occupational Therapy, Inc. v. RHA Health Services Inc., 357 F.3d 375, 384 (3d Cir. 2004); Marshall v. Fenstermacher, 388 F. Supp. 2d 536, 556-57 (E.D. Pa. 2005).

Count V alleges that Janet Schlarbaum "wrongfully and intentionally affected the contract between Plaintiffs and Jennifer Nicole Lee, a third party, for a celebrity clothing line to be offered by Fiu Fiu, L.L.C." (Compl. ¶ 72.) Defendants assert that although the Complaint avers

the existence of a contract with Lee, it does not allege the existence of a contract for a "celebrity clothing line" specifically. (Defs.' Mot. to Dismiss 11.) Rather, defendants argue that the Complaint reveals "only . . . [an] agreement that Lee would be Fiu Fiu's 'Spokesmodel.'" (Defs.' Mot. to Dismiss 11.) In defendants' view, plaintiffs have failed to allege the "existence of the contract that is said to have been interfered with." (Defs.' Reply Mem. Supp. Mot. Dismiss 4.) The Court disagrees. Plaintiffs have alleged, *inter alia*, that they approached Lee to be a "Spokesmodel for their company and she agreed to do the same;" that they "designed and contracted for products specifically targeted to be advertised by [Lee], by designing a clothing line and a bathing suit line with her name on it;" and that, after being contacted by Mrs. Schlarbaum, "Lee requested that her products be shipped to her, and her images taken down from fiufiu.com." (Compl. ¶¶ 24-25, 49) Accepting, as it must, that the facts alleged in the Complaint are true, and drawing all reasonable inferences in favor of plaintiffs, the Court finds that plaintiffs have sufficiently alleged the existence of a contract for a "celebrity clothing line." Therefore, the Motion to Dismiss Count V for failure to "satisfy basic elements of the tort" is denied.

Defendants also argue that because the parties to any contract - real or prospective - were Fiu Fiu and Lee only, the claims of plaintiffs Baurer and Rossi in Counts V and VI must be dismissed. Generally, "in an action for tortious interference with contract, the only person protected '. . . is the specified person with whom the third person had a contract that the actor caused him not to perform.'" Glass Bottle Blowers Ass'n of U.S. and Canada, AFL-CIO v. National Bottle Co., 584 F. Supp. 970, 972 (E.D. Pa. 1983) (citing Restatement (Second) of Torts § 766). However, courts have held that an individual corporate officer may sue for tortious interference where the complaint alleges that the officer, not the corporation, suffered monetary,

emotional, and reputational injuries that are separate from any suffered by the corporate entity involved. See Total Care Systems, Inc. v. Coons, 860 F.Supp. 236, 240 (E.D. Pa. 1994).

Plaintiffs Baurer and Rossi have alleged that "[o]n top of the loss of enormous business opportunity," they have suffered "much anguish from their losses" and their marriage has suffered as a result of defendants' "illegal and unwarranted action." (Compl. ¶¶ 54-55) They also allege that they were forced to sell a "substantial part of their assets to keep their business going," (Compl. ¶ 54), and that defendants eliminated "imminent opportunities that would have resulted in tremendous profit for all plaintiffs." (Compl. ¶ 52) Finally, they claim that "[d]efendants' wrongful and intentional interference has caused and continues to cause harm to Plaintiffs' business reputations, and irreparable damage to their good will." (Compl. ¶ 81) Thus, because the Complaint alleges that plaintiffs Baurer and Rossi "suffered monetary, emotional, and reputational injuries separate from the corporation," defendants' Motion to Dismiss the claims of plaintiffs Baurer and Rossi asserted in Counts V and VI is denied.

C. Count VII - Invasion of Privacy

Count VII asserts a claim for "false light" invasion of privacy. Specifically, plaintiff Rossi alleges that defendant Janet Schlarbaum "misrepresent[ed]" her "in a negative light" by stating to a business associate of Rossi's and to a reporter that Rossi was a "prostitute with a criminal record." (Compl. ¶ 83.) Rossi has asserted that the allegations against her are "baseless and false" and that they were "extreme and outrageous to any ordinary person, and attache[d] a negative stigma to [her] . . . ." (Compl. ¶¶ 38-39, 86.)

"The tort of false light-invasion of privacy involves 'publicity that unreasonably places the other in a false light before the public.'" Rush v. Philadelphia Newspapers, Inc., 732 A.2d

648, 654 (Pa. Super. 1999) (quoting Strickland v. University of Scranton, 700 A.2d 979, 987 (Pa. Super.1997)). "A cause of action for invasion of privacy will be found where a major misrepresentation of a person's character, history, activities or beliefs is made that could reasonably be expected to cause a reasonable man to take serious offense." Id. "The elements to be proven are publicity, given to private facts, which would be highly offensive to a reasonable person and which are not of legitimate concern to the public." Id. In addition, "the person making the statement that is accused of rendering another in a false light must act with 'knowledge of or . . . in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.'" Id. (quoting Larsen v. Philadelphia Newspapers, Inc., 543 A.2d 1181, 1188 (Pa. Super. 1988)).

Defendants argue that plaintiff's claim for false light invasion of privacy must fail for three reasons: 1) Mrs. Schlarbaum's statements were matters of legitimate concern to the public and/or not private facts; 2) the Complaint does not allege that Mrs. Schlarbaum knew her statements to be false; and 3) even on the face of the Complaint, Mrs. Schlarbaum's statements cannot be construed as a major misrepresentation of plaintiff Rossi's character. (Defs.' Mot. to Dismiss 12.)

The Court first addresses plaintiffs' second argument - that Count VII should be dismissed because the Complaint fails to allege that "Janet Schlarbaum knew the statement was false or that she was reckless in the assertion that it was true." (Defs.' Mot. to Dismiss 13.) Generally, a complaint is "deemed to have alleged sufficient facts if it adequately put[s] the defendants on notice of the essential elements of the plaintiffs' cause of action." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). However, a plaintiff "need not explicitly allege the existence of

every element in a cause of action if fair notice of the transaction is given and the complaint sets forth the material points necessary to sustain recovery." Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 124 (3d Cir. 1998) (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1216, 154-162 (2d ed.1990)); see also Phillips, 2008 WL 305025, at *3. A "complaint will withstand a . . . 12(b)(6) attack if the material facts as alleged, in addition to inferences drawn from those allegations, provide a basis for recovery." Id. at 124-25.

Plaintiff has alleged, *inter alia*, that Janet Schlarbaum "intentionally used private information . . . to misrepresent details of [plaintiff's] life and work history in a negative light" (Compl. ¶ 83); that defendant made "baseless and false" statements to plaintiff's former employers, business associates, and the local press (Compl. ¶¶ 34-37, 38-40); that defendant's "statement[s] . . . were extreme and outrageous to any ordinary person, and attaches a negative stigma to Plaintiff . . ." (Compl. ¶ 86); and that "[p]laintiff continues to suffer great embarrassment and distress of being falsely accused as a result of Defendant's malicious acts" (Compl. ¶ 88). Taken as a whole, these paragraphs of the Complaint sufficiently aver that Janet Schlarbaum knew the statements were false or that she was reckless in asserting that they were true. Thus, the Court will not dismiss Count VII on this basis.

In addressing defendants' first and third bases for seeking dismissal of Count VII, it bears repeating that, in a motion to dismiss, the Court's focus is on the sufficiency of the allegations in the complaint, and not on the merits of the dispute. See Phillips, 2008 WL 305025, at *5; Cardinal Health 110, Inc. v. Kuzy's Drug Store, Inc., 2008 WL 339526, at *6 (W.D. Pa. Feb. 4, 2008). Guided by this principle, the Court rejects defendants' first and third arguments. Defendants' first argument is that Janet Schlarbaum's statements were matters of legitimate

concern to the public and/or not private facts. Defendants' third argument is that, even on the face of the Complaint, Janet Schlarbaum's statements cannot be construed as a major misrepresentation of Rossi's character. The Court disagrees that Count VII should be dismissed on these grounds and concludes that the Complaint sufficiently alleges these elements of the claim of false light invasion of privacy - that Janet Schlarbaum's statements concerned private facts (see e.g. Compl. ¶ 83), and that they constituted a major misrepresentation of Rossi's character (see e.g. Compl. ¶¶ 34-37, 88). Otherwise stated, the Complaint contains "enough factual matter (taken as true) to suggest" the elements of the claim asserted. Phillips, 2008 WL 305025, at *6 (quoting Twombly, 127 S.Ct. at 1965). Therefore, defendant's Motion to Dismiss Count VII is denied.

D. Counts XI and XII

Defendants contend that Counts XI (slander) and XII (libel) should be dismissed because they duplicate the count for defamation. It is correct that slander and libel are both "species of defamation." (Defs.' Mot. to Dismiss 18.) However, as defendants implicitly acknowledge, the two are distinct causes of action. "Libel may be defined . . . as '[a] method of defamation expressed by print, writing, pictures, or signs,'" while slander, is "usually understood to mean oral defamation." Agriss v. Roadway Exp., Inc., 483 A.2d 456, 469 (Pa. Super. 1984). These two "kinds of defamation" should not be confused; collapsing them into a single claim of defamation risks doing so. While adding a general count of defamation to separate counts of slander and libel *is*, in the Court's view, duplicative, the Court will not dismiss the general defamation count on the present state of the record. Therefore, defendants' Motion to Dismiss Counts XI and XII is denied.

IV. Conclusion

For the reasons outlined above, Defendants' Motion to Dismiss is granted in part and denied in part as provided by the accompanying Order. Based on the Court's decision, the following counts remain: Count I, as asserted by plaintiff Rossi against defendant Mark Schlarbaum; Counts V and VI (as plead); Count VII (as plead); and Counts X through XII (as plead). All other claims and counts are dismissed with prejudice.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.