SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

STEVEN J. ROSEN,	
Plaintiff,	
v.	**Civil Action No. 09-1256**
	Calendar 12
AMERICAN ISRAEL PUBIC AFFAIRS COMMITTEE, INC., *et al.*,	**Judge Jeanette J. Clark**
Defendants.	

PLAINTIFF'S SUR REPLY TO DEFENDANTS' REPLY TO OPPOSITION TO MOTION TO DISMISS

As defendants' reply to plaintiff's opposition to the motion to dismiss raised some new points, plaintiff offers the following brief sur reply in response.

I. Plaintiff has met the burden required to survive a motion to dismiss.

Defendants' motion to dismiss should be denied, because Plaintiff has met his burden of rasing the right to relief above the speculative level. *See, Chamberlain v. American Honda Finance Corp.*, 931 A.2d 1018, 1023 (D.C. 2007) (citing *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005); and *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)). In order to survive the motion to dismiss, plaintiff need only plead "enough facts to raise a reasonable expectation that discovery will reveal evidence." *Twombly*, 127 S.Ct. 1955, 1965. That is, plaintiff need only allege facts that, taken as true, are "suggestive of illegal conduct." *Id.*, n. 8. The complaint contains more than "threadbare recitals of a cause of action's elements, supported by mere conclusory statements," and should survive the defendants'

motion to dismiss. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

The his complaint, Mr. Rosen has provided more than sufficient factual allegations to raise his claims for relief above the speculative level. Indeed, the complaint explains that Mr. Rosen's responsibilities at AIPAC involved routinely receiving information on foreign policy provided by the government which is not generally available to the wider public, and that AIPAC and its leadership (including the named defendants) were well aware of this aspect of his job and expected this of him. Complaint, p.8. It further explains that Mr. Rosen was particularly valued for this reason, and that other AIPAC officers and directors, including several named defendants, also engaged in this practice. *Id.* It was this practice that was the subject of the federal indictment, and therefore to which AIPAC was referring when it made its defamatory statements. These factual allegations are not merely conclusory statements of law, or a threadbare recital of the elements of defamation. To the contrary, they demonstrate that Mr. Rosen has a plausible claim that defendants made statements about him that were untrue, injurious to him professionally, and for which they had no reasonable basis for believing were true. Mr. Rosen will be in a position to substantiate these allegations as true with evidence following discovery. *See, Twombly*, 127 S.Ct. 1955, 1965. Accordingly, it would be inappropriate to dispose of this case on a motion to dismiss.

II. The equitable tolling doctrine is applicable to these facts.

In their argument against application of the equitable tolling doctrine to the facts of this case, defendants have erroneously stated that equitable tolling *only* applies to situations where a plaintiff is unable to gain the information necessary to be aware of his right to relief before the statute of limitations has run. Further, defendants have misrepresented the doctrine as essentially

identical to the doctrine of equitable estoppel. In fact, Plaintiff does not argue that equitable estoppel applies to these facts, but that the doctrine of equitable tolling does. These arguments demonstrate a misunderstanding on defendants' part of the doctrine of equitable tolling and the reasons it does apply to the facts of this case.

Defendants argue that "the doctrine of equitable tolling...*only* allows a plaintiff to delay filing his clams if 'despite all due diligence [he] is unable to obtain vital information bearing on the existence of his claim.'" Defendants' Reply to Plaintiff's Opposition to the Motion to Dismiss ("Defendants' Reply"), p.4 (emphasis added), quoting *Chung v. U.S. Dept. of Justice*, 333 F.3d 273, 278 (D.C. Cir. 2003). This is just plain wrong. A lack of information is not the only valid circumstance on which the doctrine can be based. Indeed, in *Chung v. U.S. Dept. of Justice*, the D.C. Circuit explained that the plaintiff in that case may have been entitled to relief under the doctrine, even though he did *not* suffer from a lack of information, "if [he] fear[ed] that his lawsuit would jeopardize his request for leniency." *Chung*, 333 F.3d at 279. This ground is distinct from an inability to obtain information, which defendants incorrectly identified as the *only* ground on which equitable tolling could be based. Similar to Chung, Mr. Rosen was afraid of bringing a lawsuit against AIPAC sooner than he did, because he believed it would jeopardize his ability to defend himself in the federal criminal prosecution. He was advised by his attorney in the criminal case, forcefully and repeatedly, that filing a civil defamation suit against AIPAC before the criminal case was resolved could be injurious to his criminal defense in the event of trial. It was, therefore, reasonable for him to delay until March 2, 2009. Thus, the doctrine of equitable tolling is applicable to these facts, and Mr. Rosen's claims should not be disposed of on the motion to dismiss.

Further, defendants incorrectly represent the doctrine of equitable tolling as basically identical to the doctrine of equitable estoppel. It is true that in *Chung*, the plaintiff sued the very agency that was prosecuting him, and Mr. Rosen is not. *See*, *Chung*, 333 F.3d at 278. Defendants have argued that this distinguishes the two cases for equitable tolling purposes, because "Plaintiff has misdirected his anger...[by] su[ing] a third party." Defendants' Reply, p. 5. This argument might be applicable if Mr. Rosen were claiming relief under the equitable estoppel doctrine, which "precludes a defendant, because of his own inequitable conduct,...from invoking the statute of limitations." *Chung*, 333 F.3d at 278. However, Mr. Rosen is not claiming that he was unable to bring this suit because of defendants' misconduct; he was unable to bring this suit within the limitations period because of the practical impossibility the federal indictment created. In this way, this case is very similar to *Chung*. In *Chung*, even though the plaintiff *was* suing the agency that was investigating him, the court found the equitable estoppel doctrine inapplicable, even to his case, because of his "failure to allege any specific act or misleading statement by the defendant." *Id.* at 279. However, this was fatal to Chung's claim "only insofar as Chung urge[d] equitable estoppel." *Id.* Here, Mr. Rosen is not alleging that defendants' misconduct prevented him from filing his case. Instead, it was the circumstances involved with the federal investigation and prosecution, and AIPAC's involvement, that made it practicably impossible to bring this suit. As such, the equitable tolling doctrine, which revolves "around the circumstances of the plaintiff" is very much applicable, as opposed to equitable estoppel, which revolves "around the conduct of the defendant." *Id.* at 279 (internal citations omitted). Just as the D.C. Circuit found that Chung "may be entitled to relief pursuant to the doctrine of equitable tolling if [he] fear[ed] that his lawsuit would jeopardize his request for leniency," so too should this Court

find that Mr. Rosen's claim for the equitable tolling of the statute of limitations is available in this case. *Id.* at 279.

Finally, defendants' argument that the fact that Mr. Rosen filed suit two months before the criminal prosecution was formally dismissed shows that he could have brought his claims within the statutory period should be rejected. Mr. Rosen filed suit at the point in time that it became clear to him that the criminal case against him was collapsing and charges would be dropped. At this time, his criminal defense attorney did not advise postponing this civil suit as strenuously as he had previously. In February 2009, Mr. Rosen asked AIPAC to toll the statute voluntarily until the conclusion of the criminal proceedings, but AIPAC refused. Therefore, Mr. Rosen's timing for filing suit the following month was reasonable under the circumstances. *See, id.* ("equitable tolling - as a method for adjusting the rights of two 'innocent parties' - merely ensures that a plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit." (internal citations omitted)). It makes no sense to assert, as defendants have, that Mr. Rosen should have waited *longer* to file his suit in order to be able to claim relief under the equitable tolling doctrine. March 2009 was a reasonable time to bring these claims, because it was clear by this point that the criminal charges would be dropped, and Mr. Rosen no longer had to fear that he would be compromised in the federal case by suing Defendants.

III. Defendants' remaining arguments all go to the merits, and the plaintiff's claims should not be disposed of on these grounds on a motion to dismiss.

Defendants' remaining arguments are that (a) the March 2008 statement was not defamatory because "[b]y any objective or subjective measure, being subject of a criminal

indictment is not conduct an employer expects of an employee" and so the statement was not false, (b) plaintiff has not alleged facts sufficient to establish the legal burden of malice required to deny defendants a qualified privilege against liability for defamation, and (c) the defendant board members did not engage in willful misconduct. Defendants' Response, p. 7-11. These are all issues that go to the merits of the case. Accordingly, the disposition of each of these issues will depend on the resolution of several questions of fact. Plaintiff will be in a position to prove his allegations with evidence following discovery, and he has certainly pled "enough facts to raise a reasonable expectation that discovery will reveal evidence." *Twombly*, 127 S.Ct. at 1959.

Conclusion

For the foregoing reasons, in addition to those in plaintiff's initial opposition to the motion to dismiss, that motion to dismiss must be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT the foregoing sur reply to defendants' reply to the opposition to the motion to dismiss is being electronically filed with the Clerk of the Superior Court for the District of Columbia using the Court's CaseFile Express system (which will automatically serve a copy of said filing via email to counsel of record for Defendants, Thomas L. McCally (tlm@carmaloney.com) and Allie M. Wright (arnw@carmaloney.com), of Carr Maloney, P.C., 1615 L Street, N.W., Suite 500, washington, DC 20036, on this 24th day of August, 2009.

David H. Shapiro
SWICK & SHAPIRO, P.C.

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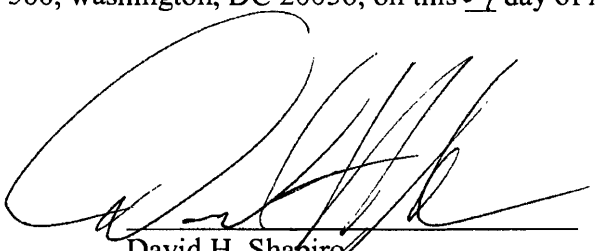

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