

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 Phone Number: (720) 865-8301	DATE FILED: December 17, 2021 5:00 PM FILING ID: 93F44FC17B248 CASE NUMBER: 2020CV34319
ERIC COOMER, Ph.D., Plaintiff Vs. DONALD J. TRUMP FOR PRESIDENT, INC., et al., Defendants.	▲ COURT USE ONLY ▲
.	Case Number: 2020CV34319 Courtroom 409
[DTR's Proposed] Findings of Fact and Conclusions of Law	

UPON CONSIDERATION of the Special Motion to Dismiss filed by Defending the Republic, Inc. pursuant to C.R.S. § 13-20-1101, the Court ORDERS AS FOLLOWS:

Background

Defending the Republic, Inc. (“DTR”) has filed a Special Motion to Dismiss (“Motion”) under Colorado’s Anti-SLAPP statute, C.R.S. § 13-20-1101 (“the Statute”).¹

Plaintiff generally alleges that certain statements were made in early November 2020 by Defendant Oltmann in various media channels, and thereafter these statements were published by other Defendants. Plaintiff alleges these statements were defamatory and has asserted various claims on this underlying theory.

¹ DTR incorporates by reference the Special Motion to Dismiss and proposed Findings of Fact and Conclusions of law filed by Defendants Sidney Powell and Sidney Powell, P.C.

All Defendants have filed special motions to dismiss under the Statute, generally alleging that the statements alleged by Plaintiff are protected by the First Amendment and that Plaintiff is unable to meet his burden under the Statute to overcome the special motions to dismiss.

The Anti-SLAPP Statute applies to Plaintiff's allegations.

The Statute applies to any “cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States constitution or the state constitution in connection with a public issue”. C.R.S. 13-20-1101(3)(a).

The Statute provides that acts in furtherance of a person’s right of petition or free speech include:

Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body or any other official proceeding authorized by law;

Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; and

Any other conduct or communication in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

C.R.S. § 13-20-1101(2)(a)(II), (III) and IV).

Plaintiff has sued DTR based solely on the theory that it is vicariously liable for the statements made by Defendant Sidney Powell. Paragraph 14, footnote 4 of the First Amended Complaint alleges:

Powell is a director and representative of Defending the Republic. Her actions relevant to this case were as a representative of Defending the Republic and within the scope and furtherance of her work for Defending the Republic. She had actual or apparent authority as an agent of Defending the Republic. Defending the Republic is vicariously liable for Powell’s tortious conduct described herein.

This theory of vicarious liability is Plaintiff's sole basis for liability against DTR, for all his claims (defamation, outrageous conduct, and civil conspiracy).

Plaintiff has sued Defendant Powell based on statements she made on November 19 and 20, 2020, as alleged in paras. 64 through 71 in Plaintiff's First Amended Complaint. These statements generally repeat allegations first made in early November 2020 by other defendants that Plaintiff made a statement, which was available in a recording, that he had "rigged" the 2020 U.S. Presidential election. *See* First Amended Complaint at paras. 64 and 67, footnotes 114 and 117.²

These alleged statements were clearly made in furtherance of Powell's right to petition and free speech, in connection with an issue of public interest and in furtherance of Powell's exercise of her constitutional right to petition for redress and to speak in connection with a public issue and an issue of public interest. These statements squarely fall within the broad definition of rights of petition and speech in the Statute. *See* Salazar v. Public Trust Institute ("Salazar"), Denver District Court Case 20CV33689, Order on Special Motion to Dismiss, March 10, 2021, at page 3 and note 2; Alfasigma USA, Inc. v. First Databank, Inc., 398 F. Supp. 3d 578, 584 (N.D. Cal. 2019) (because "it is in the public interest to encourage continued participation in matters of public significance, and [because] this participation should not be chilled through abuse of the judicial process," the anti-SLAPP statute is to be "construed broadly").

Therefore, Plaintiff's complaint is subject to the special motion to dismiss procedure provided under the Statute.

² For purposes of determining DTR's Special Motion, the court does not need to determine if these were affirmative statements by Powell or reports of statements made by other defendants. Powell's position is the latter.

Plaintiff's burden under the Statute.

To survive the Motion, Plaintiff must establish a reasonable likelihood of prevailing on his claims, C.R.S. § 13-20-1101(3)(a). To meet this standard, Plaintiff must demonstrate that the First Amended Complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by him is credited by a jury. Salazar at 6-7, relying on Mindy's Cosmetics, Inc. v. Dakar, 611 F.3d 590, 598-99 (9th Cir. 2010).

Plaintiff has the burden of proving he can prevail under the Statute. Under the Statute, the Court may consider "pleadings and supporting affidavits". C.R.S. 13-21-1101(3)(b). Evidence considered must be admissible. Evans v. Unkow, 45 Cal. Rptr. 2d 624, 628-29 (Cal. Ct. App. 1995).

Analysis.

Plaintiff alleges that DTR is a "nonprofit corporation organized and existing under the laws of Texas". First Amended Complaint at par. 14. The relevant evidence before the court relating to DTR consists, first, of a "certificate of formation", which shows that DTR was formed or organized as a Texas non-profit corporation on December 1, 2020, which is ten days after Powell's alleged defamatory statements. *See* Exhibit 100.

Further, Exhibit 101 provides deposition testimony from Brandon Johnson, an attorney who works with DTR and who testified for DTR pursuant to C.R.C.P. 30(b)(6). Johnson's testimony, which is uncontested, confirms that DTR was formed on December 1, 2020 (*see* Exhibit 101 at 11:9-12); and further that DTR was not involved in any of the four lawsuits filed by Powell (Exhibit 101 at 16:18-21). There is no evidence DTR's name appeared on any

complaints filed in those cases, because DTR “wasn’t up and running at that time” (Exhibit 101 at 19:7-14); and “did not have a bank account. And I don’t see how it would have been – there’s a whole process for soliciting – you know; so that process also had not been completed at that time.” (Exhibit 101 at 24:12-17). Sidney Powell was not acting in any capacity as DTR’s representative on November 19 or 20, 2020 (Exhibit 101 at 31:23-32:3).³ Plaintiff stipulated to the admission of the Exhibits 100 and 101. *See* November 13, 2021 Plaintiff’s Notice of Objections to Defendants’ Anti-SLAPP Evidence, at page 1.⁴

“A corporation can only act through its agents.” Dallas Creek Water Co. v. Huey, 933 P.2d 27, 47 (Colo.1997); Colorado Coffee Bean, LLC v. Peaberry Coffee Inc., 251 P.3d 9, 29 (Colo. App. 2010), as modified on denial of reh’g (Apr. 1, 2010). Moreover, “[o]ne cannot act as the agent of a nonexistent principal.” Coopers & Lybrand v. Fox, 758 P.2d 683, 685 (Colo. App. 1988). In other words, a person cannot act as the representative of a corporation that has not yet been created. Miser Gold Mining & Milling Co. v. Moody, 86 P. 335, 337 (Colo. 1906) (“Cotton and Ballintine did not act as the representatives of the corporation because it was not yet created. There can be no representative or agent of a person not in esse.”); Knox v. First Sec. Bank of

³ Thus, it is irrelevant when the lawsuits were filed, though all except the Arizona lawsuit were filed prior to December 1, 2020, and the Arizona suit was filed December 2, 2020.

⁴ Moreover, certified corporate records obtained from a Secretary of State are admissible as public records setting forth the activities of an agency or observations made pursuant to a duty imposed by law. C.R.E. 803(8)(A) and (B); *see also* People v. Fuston, 717 P.2d 978, 981 (Colo.App. 1985), *aff’d in part*, 749 P.2d 952 (Colo. 1988). In addition, the Court may take judicial notice of the formation of DTR, on December 1, 2020, as evidenced by the Texas Secretary of State records. *See* C.R.E. 201; Mountain States Mutual Cas. Co. v. Roinestad, 296 P.2d 1020, 1024 (Colo. 2013); Overhead Solutions, Inc. v. A1 Garage Door Service, LLC, 2021 WL 4046408 at 5 (D. Colo. 2021); U.S. v. Gardley, 2013 WL 4857691 (D. Nev. 2013) (certified corporate records from the government are self-authenticating under Fed.R.Evid. 902(4) and are not hearsay under rule 803(8)).

Utah, 196 F.2d 112, 116 (10th Cir. 1952) (those contemplating the organization of a corporation lack the power, either as agents or otherwise, to contractually bind the corporation prior to organization). *See also* C.J.I. Civ. 8:1, Agency Relationship Defined (2020) (an agency relationship is created only upon an agreement between two persons that one of them may act on behalf of and subject to the control of the other).

The undisputed and admissible evidence before the Court is that DTR did not exist until December 1, 2020. *See* Exhibit 100 (certified copy of Texas Certificate of Formation of DTR). Therefore, the alleged defamatory statements by Powell were made before DTR existed as an entity.⁵ DTR's alleged liability is based solely on the theory of vicarious liability. However, it did not exist as a corporation until after the allegedly defamatory statements were made. Thus,

⁵ Plaintiff clearly was aware of the date of DTR's formation as a Texas nonprofit corporation (December 1, 2020) on June 30, 2021 when it served its Rule 30(b)(6) notice of DTR's deposition, requesting testimony regarding "[t]he circumstances surrounding the formation of DTR and its organizational structure, including the job responsibilities and duties of any employees or agents." Plaintiff's Notice of Deposition of DTR, attachment A, ¶ 15 (06/30/2021). On August 4, 2021, at DTR's deposition, plaintiff questioned DTR's representative about the December 1, 2020 formation date, using plaintiff's marked deposition Exhibit 52, the Texas Certificate of Formation of DTR, which states that the "Original Date of Filing" is "December 1, 2020." *See* DTR's Exhibit 101, Depo. 14:1-4; DTR's Exhibit 100, Texas Certificate of Formation. DTR's representative confirmed that DTR did not exist as a legal entity until December 1, 2020. On October 4, 2021, DTR attached these formation exhibits from the Texas Secretary of State as hearing exhibits 100 and 101 to DTR's Reply to Special Motion to Dismiss.

In contrast, five days before the hearing on the special motions to dismiss, October 8, 2021, plaintiff served DTR and other defendants with thousands of pages of additional evidence and expert reports. The court has ruled that most of that evidence is admissible in support of plaintiff's defense. Therefore, it would be improper for the court to refuse to consider DTR's legal defense, that it did not exist until December 2020, on the basis that it was not specifically addressed in its special motion to dismiss but was raised in DTR's reply.

Plaintiff's complaint is not legally sufficient, and he has not made a sufficient prima facie showing of facts to sustain a favorable judgment against DTR.

For these reasons, the Court GRANTS the Special Motion to Dismiss filed by Defending the Republic, Inc. under the Statute. Pursuant to C.R.S. § 13-21-1101(4), DTR is entitled to recover attorney fees and costs, which are hereby GRANTED, and which shall be determined pursuant to C.R.C.P. 121 Section 1-22.

Dated: _____

BY THE COURT:

Marie Avery Moses
District Court Judge