

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

PAT TOVEY,)	
)	
Plaintiff,)	
)	
vs.)	Cause No. 2:14-cv-242-WTL-MJD
)	
STADLER & CO., INC.,)	
)	
Defendant.)	

**ENTRY ON DEFENDANT’S MOTION TO DISMISS AND
PLAINTIFF’S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

This cause is before the Court on the Defendant’s motion to dismiss (Dkt. No. 23) and the Plaintiff’s motion for leave to file an amended complaint (Dkt. No. 42). The Plaintiff’s motion is fully briefed, and the Court, being duly advised, **GRANTS** the motion for leave to file an amended complaint, for the reasons set forth below. In light of this ruling, the Court construes the Defendant’s motion to dismiss as against Plaintiff’s amended complaint. That motion is also fully briefed, and the Court, being duly advised, **DENIES** the motion to dismiss, for the reasons set forth below.

I. MOTION TO AMEND

The Plaintiff, Pat Tovey, moves the Court for leave to file an amended complaint to add Andrew Stadler (“Andrew”), the Chief Executive Officer and President of Defendant Stadler & Co., Inc. (“Stadler”), as a defendant in this case. According to Tovey, Andrew “personally directed and participated in the acts which constitute the basis of [P]laintiff’s claims for the tort of defamation and trade disparagement under the Lanham Act.” Tovey’s Mot. at ¶ 2. Thus, Tovey argues that Andrew is personally liable to him. In response, Stadler argues that

the issue . . . is whether Andrew Stadler, when he “directed and participated” in the production of the television commercials at issue, was acting within the scope of his employment as the president and CEO of Stadler & Co. If he was, he cannot be individually liable for the claims raised by Plaintiff. If he was not, and exceeded the scope of his authority, then Stadler cannot be held vicariously liable for the individual torts of Andrew Stadler that were beyond the scope of his duties and president and CEO. . . . Plaintiff cannot have it both ways.

Stadler’s Resp. at 3-4.

It is much too early to determine whether Andrew is personally liable to Tovey. Thus, Stadler’s arguments are premature and not appropriate at this stage.

The case management plan provided that all motions for leave to amend pleadings and/or join additional parties were to be filed on or before December 19, 2014. Dkt. No. 18 at 3. Tovey met this deadline. Finding no other justification for denying Tovey’s motion, such as undue delay, bad faith, unfair surprise, or prejudice, the Court **GRANTS** Tovey’s motion to amend. **The Clerk is instructed to docket Tovey’s amended complaint (found at Dkt. No. 42-1) as of the date of this Entry.**

II. MOTION TO DISMISS

A. Standard

In reviewing a Federal Rule of Civil Procedure 12(b)(6) motion, the Court “must accept all well pled facts as true and draw all permissible inferences in favor of the plaintiff.” *Agnew v. National Collegiate Athletic Ass’n*, 638 F.3d 328, 334 (7th Cir. 2012). For a claim to survive a motion to dismiss for failure to state a claim, it must provide the defendant with “fair notice of what the . . . claim is and the grounds upon which it rests.” *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (omission in original)). A complaint must “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Agnew*, 638 F.3d at 334 (citations omitted). A complaint’s factual

allegations are plausible if they “raise the right to relief above the speculative level.” *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 556 (2007).

B. Plaintiff’s Allegations

Tovey is employed full-time as a tax preparer for Wabash Tax Service, Inc. (“Wabash”) in Terre Haute, Indiana. Tovey has worked as a tax preparer for Wabash for approximately twenty years. For the past ten years, Tovey has used the nickname “Pat the Tax Man” in his tax preparation business.

Stadler also provides tax preparation services to customers in Terre Haute. Stadler and its employees are direct competitors of Wabash and Tovey.

Beginning in January 2014, and continuing through April 2014, Stadler ran the following commercial on the Time Warner Cable systems in and around Terre Haute:

(Commercial opens with a man holding a pipe and looking at a sink.)

Man: (screams as water is spayed in his face from broken plumbing)

Actor portraying “Pat the Tax Man”: Wow, this is going to cost a lot of money to repair. But the good news is you can use your tax return money you got last week.

Man: How do you know about my tax refund?

Actor portraying “Pat the Tax Man”: Because it’s me, Pat the Tax Man. (Actor portraying Pat opens up his shirt to show t-shirt with the words “Pat the Tax Man” taped onto it.) I did your taxes last week for what half the other guy charges. But if the IRS calls, don’t give ‘em my name.

Narrator: Don’t trust your taxes to someone like Pat. (The word “Pat” is shown in large letters on the screen with a red circle and slash through the name.) Call Stadler & Company – America’s elite tax experts. Call the real licensed tax professionals. Stadler, the tax pros. (song)

Compl. at ¶ 7.

Also beginning in January 2014, and continuing through April 2014, Stadler ran a second “Pat the Tax Man” commercial:

(Commercial opens with a young woman laying on her stomach on a massage table covered by a sheet. The male actor playing Pat is massaging her bare shoulders.)

Actor portraying “Pat the Tax Man”: So I see you are treating yourself to a massage with all that money you got back last week on your taxes.

Woman: Oh Yeah, (Close-up of woman’s face) Wait a minute, how do you know about my refund?

Actor portraying “Pat the Tax Man”: Because it’s me, Pat the Tax Man. (Actor portraying Pat opens up his shirt to show t-shirt with the words “Pat the Tax Man” taped onto it.) I did your taxes last week, remember? For half of what the other guy charged. But don’t call me if the . . . uh, IRS calls.

Narrator: Don’t let just anybody touch your taxes. Call Stadler & Company – America’s elite tax experts. We are trained professionals and licensed to serve your tax needs.

Compl. at ¶ 7. The actor in the commercials also bore a striking resemblance to Tovey.

After the commercials aired, Tovey filed suit against Stadler in Vigo County Superior Court alleging defamation *per se* and trade disparagement under the Lanham Act, 15 U.S.C. § 1125(a). The matter was removed to this Court on August 8, 2014.

C. Discussion

Stadler argues that both of Tovey’s claims should be dismissed “[b]ecause [as a matter of law,] the commercials are so exaggerated in their nature, they are considered parody and, therefore, not actionable.” Stadler’s Br. at 2. Stadler’s specific arguments are discussed in more detail below.

1. Defamation

The difference between defamation and parody was discussed at length by the Indiana Court of Appeals in *Hamilton v. Prewett*, 860 N.E.2d 1234 (Ind. Ct. App. 2007). In that case,

Paul Hamilton was the owner and operator of Hamilton Water Conditioning. At some point, Morgan Prewett, developed a website entitled “Paul Hamilton—The World’s Smartest Man.” The website appeared to be authored by Hamilton and “portrayed [him] as a manipulative individual both personally and professionally.” *Id.* at 1238.¹ After Hamilton discovered the website, he filed suit against Prewett alleging defamation and intentional infliction of emotional distress. In response, Prewett argued, among other things, that the website “was a form of comedy, parody, or satire,” and thus not actionable. *Id.* Citing the Supreme Court case *Hustler v. Falwell*, 485 U.S. 46 (1988) and an *American Jurisprudence* article on libel and slander, the court reasoned as follows:

The United States Supreme Court provided guidance on parody when it declined to impose liability on a magazine that portrayed a parodistic depiction of Jerry Falwell, a popular evangelist, losing his virginity to his mother in an outhouse. *Hustler v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L.Ed.2d 41 (1988). The Court noted that the parody “could not reasonably be understood as describing actual facts about respondent or action events in which he participated” and that the trial court properly dismissed Falwell’s defamation claim. *Id.* at 57, 108 S.Ct. 876. . . .

Regarding the relationship between defamation and parody, *American Jurisprudence* provides:

Defamation is, by its nature, mutually exclusive of parody. By definition, defamation requires a false statement of fact; parody, to the degree that it is perceived as parody by its intended audience, conveys the message that it is not the original and, therefore, cannot constitute a false statement of fact.... If a parody could be actionable because, while recognizable as a joke, it

¹ For example, the website stated:

I am a very intelligent, older American male and have my own very successful business dealing with the water conditioning field. I have a Master’s Degree in Water Conditioning from Smartass University, a prestigious mail order college. While I am somewhat attractive, I am known for my ability to seduce women with my quick wit. I have several methods of attracting women as well as socializing skills, which are in the book I am writing . . .

Id. at 1238-39.

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