IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

HARMON FRANKLIN and NANCY FRANKLIN,	)	
Plaintiffs,	)	
VS.	)	No. 01-1380
M.S. CARRIERS, ET AL.,	)	
Defendants.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Harmon Franklin, filed this action against M.S. Carriers, Inc. ("MSC"); Mike Starnes, the Chief Executive Office of MSC; and Mike Reaves, the Senior Vice President of Driver Services, alleging violation of federal regulations governing interstate commercial motor carriers, based upon 49 U.S.C. § 14704(a)(2). The plaintiff also invokes the Court's supplemental jurisdiction under 28 U.S.C. § 1367 to hear state law claims for breach of contract and defamation. In an order entered May 17, 2002, the Court, on motion of defendants Starnes and Reaves, dismissed all claims against those individual defendants.[1]

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[1] In his response to the motion to dismiss, Harmon Franklin attempted to argue that Starnes and Reaves had conspired to fraudulently interfere with the contract. The Court noted that the complaint did not assert claims for civil conspiracy or tortious interference with contract, and contained no factual allegations supporting such claims. Furthermore, the Court noted that under Tennessee law, as long as employees of a corporation are acting within the scope of their employment, and not to further their own personal purposes, their actions are attributed to the corporation, so that there can be no conspiracy. See Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 703-04 (Tenn. 2002).

The Court also dismissed all claims purportedly brought on behalf of Harmon Franklin's wife, Nancy Franklin.[2] On June 17, 2002, Harmon Franklin filed a notice of appeal from the May 17 interlocutory order. However, such an appeal does not require a stay of these proceedings. Cf. 28 U.S.C. § 1292(b) (an application for an interlocutory appeal does not stay proceedings in the district court unless the district court or the court of appeals so orders).

Presently before the Court is plaintiff's motion for summary judgment on his claims against MSC for breach of contract.[3] MSC has responded to the motion.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.

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[2] Nancy Franklin is named as a plaintiff, but she did not sign the complaint. Therefore, she is not actually a party to this action. In federal court, a party may proceed either *pro se* or through an attorney. See 28 U.S.C. § 1654. As Mr. Franklin does not claim to be an attorney, he may not represent his wife in this action. In addition, the Court held that even if Nancy Franklin was a party, she had failed to state a claim upon which relief could be granted because she was not a third party beneficiary to the contract between MSC and her husband.

[3] Although plaintiff's motion also seeks summary judgment against defendants Starnes and Reaves, the Court's order of May 17 renders that portion of his motion moot.

R. Civ. P. 56(e); see also Celotex Corp., 477 U.S. at 323.

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). However, the court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. Id. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970).

The Court first notes that it is not entirely clear from the complaint or the motion for summary judgment whether plaintiff intended to assert the defamation, civil conspiracy and tortious interference claims against MSC as well as the individual defendants. If so, those claims are subject to dismissal for the same reasons stated in the May 17 order of dismissal. There is no evidence that the alleged libel was published outside the normal course of business to anyone who was not an agent or employee of MSC, as the letter in question was sent by Reaves only to Harmon Franklin himself, with a copy to Starnes. In addition, there

are no factual allegations in the complaint or in plaintiff's motion for summary judgment supporting a claim for civil conspiracy or tortious interference with contract. Plaintiff makes only bare, conclusory allegations of conspiracy, unsupported by any facts. Furthermore, even if there were such factual allegations, plaintiff has submitted no actual evidence to support his claims.

With regard to plaintiff's claim against MSC for breach of contract, the undisputed evidence shows that plaintiff and MSC entered into a contract hauling agreement on May 8, 2000, under which plaintiff agreed to haul freight for MSC as an independent contractor. That agreement expired on December 31, 2000, but a second, identical contract hauling agreement apparently was entered into on or about January 20, 2001.[4] The agreement provides, in relevant part, as follows:

> 8. DRUG/ALCOHOL TESTING. All drivers must be subjected to U.S. Department of Transportation drug/alcohol testing to qualify to operate the vehicles. Testing shall include all tests required by State and Federal Rules and Regulations, i.e. random, post accident, reasonable suspicion, pre-employment, return to duty, follow up and periodic. . . . Any driver who is disqualified due to failure of testing or refusal of the test is no longer qualified . . . and cannot operate equipment under this Agreement.
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> . . . .
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> 18. In the event either party commits a material breach of any term of this Contract, the other party shall have the right to terminate this Contract immediately and hold the party committing the breach liable for damages.
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> . . . .

[4] A copy of the second contract is not currently in the record; however, MSC does not appear to dispute that it was identical to the first contract, and that it was in effect at all relevant times in this case.

> 22. This Contract shall continue in effect from the day and date first above written until date of termination . . . and during that time may be terminated by either party by giving ten (10) days written notice from date of mailing to last known address of other party.
> 23. Notices shall be effective if in writing and sent by Registered or Certified Mail, telegram or cable addressed to the other party at the address stated in this Agreement or as changed by written notice.

(MSC Resp., Ex. 1.)

On March 13, 2001, while he was at an MSC terminal in Seagoville, Texas, plaintiff was told that he had been selected for a random drug test. He signed the appropriate form and was given directions to a drug-testing center approximately 25 miles away. After the test was administered, plaintiff then returned to the Seagoville terminal.

In support of his motion for summary judgment, the plaintiff has submitted what appears to be a transcript of conversations he had with the MSC dispatchers via the Qualcomm system in his truck on May 23, 2001. At that time, plaintiff was in Roanoke, Texas. The transcript indicates that the MSC dispatcher instructed plaintiff to "deadhead", *i.e.*, drive without a load, to the terminal in Seagoville, approximately 65 miles from Roanoke, where he was to see Sharon Boson in "Safety" as soon as possible. The reason for the instruction was so that another random drug test could be administered, although when plaintiff asked the dispatcher why he needed to see Safety, the dispatcher replied that he did not know. Plaintiff then asked for a telephone number so that he could call the Seagoville terminal, but the dispatcher stated he did not have the number. (Pl.'s Mot., Ex. D at 1.) Plaintiff clearly believed that he was going to be asked to take another random drug test, as

he then responded:

> The last time I went there I had to drive fifty miles for free to take a drug test. I do not mind to take a drug test, I do mind to drive fifty miles for free, there there is no reason you can't call and get a phone no. I don't mind talking to safety, I can talk to them on the phone just the same as I can drive over there. What could be so urgent that I can't talk to safety in Memphis? I am going to be there this night.

Id., at 1-2.

The MSC dispatcher continued to tell plaintiff that he had to report to the Seagoville terminal and plaintiff continued to resist. Plaintiff asked for a load so he could go home, and stated that he was going home "one way or the other" because his family had gathered from various places around the country. Id. at 2-3. He was told he would be given a load when he complied with the instructions he had been given. Id. at 4. Plaintiff also seems to have been asking why he could not report directly to the drug-testing center, which apparently was closer, instead of having to go all the way to Seagoville. Id. at 4-5. He was told by Stan McWilliams, who was in charge of the dispatchers, that he must see Ms. Boson in Seagoville before 4:00 p.m. that day or his contract would be terminated. Plaintiff then stated that he was going home, and was told that his contract was canceled. Id. at 5-7. When plaintiff later wrote a letter complaining about the termination of his contract and asking that it be reinstated, Reaves responded in writing that, "very simply put, you did not respond to a federally required random drug test." (Pl.'s Mot., Ex. E-F.)

Most of plaintiff's motion for summary judgment is devoted to his claims for defamation, civil conspiracy and tortious interference, which the Court has already dealt

with. However, he also appears to argue that MSC breached the contract by refusing to tell him, specifically, why he was being directed to report to the Seagoville terminal, and by then terminating the contract for refusal to take a drug test when he would not report as instructed.[5] Stan McWilliams has submitted his affidavit, in which he states that drivers selected for random drug tests are not always specifically told why they are being called into a terminal in order to minimize the driver's ability to take actions that could affect the outcome of the test. In any event, MSC maintains that plaintiff was aware that he was being asked to report for a random drug test, and that his refusal to do so justified immediate termination of his contract.

There are clearly disputed issues of material fact regarding whether the contract in this case was breached, materially or otherwise, and if so, by which party. The contract itself is silent regarding the manner in which drivers are to be notified that they have been selected for a random drug test. The contract also is silent regarding what constitutes a "refusal" to take a random drug test. Absent evidence regarding any requirements for such notification, and/or further evidence as to the customary practice of MSC, the Court finds that summary judgment is not appropriate on plaintiff's breach of contract claim.

Accordingly, the plaintiff's motion for summary judgment is DENIED.

IT IS SO ORDERED.

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[5] The complaint alleges that MSC materially breached the contract by failing to comply with various federal regulations. These claims are not addressed in plaintiff's motion for summary judgment.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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DATE