2004 WL 1944849
United States District Court, District of Columbia.

Edward MAZUR, Plaintiff,
v.
Michael SZPORER, Defendant.

No. Civ.A. 03–00042(HHK).
|
June 1, 2004.

Attorneys and Law Firms

Eric Anthony Welter, Welter Law Firm, PC, Herndon, VA, for Plaintiff.

Kara L. Daniels, Holland & Knight LLP, Washington, DC, for Defendant.

MEMORANDUM OPINION AND ORDER

KENNEDY, J.

***1** Edward Mazur ("Mazur") brings this action against Michael Szporer ("Szporer") seeking to hold Szporer liable for defamation and false light invasion of privacy. Mazur also seeks a preliminary and permanent injunction that would enjoin Szporer and his agents from publishing further false and defamatory statements about Mazur. Presently before this court is Szporer's motion to dismiss the complaint [# 3]. Upon consideration of the motion, the opposition thereto, and the record of this case, the court concludes that the motion must be granted in part and denied in part.

I. BACKGROUND INFORMATION

Mazur is an American citizen who emigrated from Poland in 1962. He has worked for various international companies as an employee and as a consultant in the area of international trade. He has or has had ownership interests in a number of businesses in the United States, Canada, and Poland. In addition to his business interests, Mazur has been actively involved in several social and community-based activities, including acting as president of a social and athletic club in Chicago founded by Polish immigrants. Currently, Mazur is the director of the American Center of Polish Culture in Washington, D.C. and is involved in establishing a foundation that will grant scholarships to needy students. Mazur lives and works in Glenview, Illinois.

Szporer is the editor and co-founder of The Siec, an online newsletter that is published and disseminated "at least nationwide" by e-mail. Compl. ¶ 3. The Siec posts original articles and information from outside authors, as well as summarizes and translates articles from mainstream Polish newspapers.

This case arises from two articles published in The Siec on March 20 and April 3, 2002. The first article [1] stated that Mazur was reportedly linked to the murder of a police chief in Warsaw, Poland. The article also stated that Mazur was rumored to have been involved in organized crime in Poland and involved in government corruption with current Polish officials. The second article [2] explained that the sources for the first article were summaries from news widely reported in the Polish press and included a link to an online article allegedly reporting the same controversies described in the first article. The second article also stated that The Siec had no intention to malign Mazur and reported that Mazur's spokesman had "flatly denied these allegations." Ex. B to Compl.

II. ANALYSIS

Szporer moves to dismiss this action under FED. R. CIV. P. 12(b)(6) on the grounds that Mazur has failed to adequately plead the elements necessary to establish either a claim for defamation *per se* or false light invasion of privacy. Szporer also moves for dismissal on the grounds that the injunctive relief sought would be an unconstitutional prior restraint and would infringe on the free exercise of editorial control and judgment.

A. Legal Standard

A motion to dismiss is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Martin v. Ezeagu,* 816 F.Supp. 20, 23 (D.D.C.1993) (internal quotation marks and citation omitted); *see Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (stating that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can

prove no set of facts in support of his claim which would entitle him to relief"). In addition, the court must construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. *In re United Mine Workers of Am. Employee Ben. Plans Litig.,* 854 F.Supp. 914, 915 (D.D.C.1994); *see Schuler v. United States,* 617 F.2d 605, 608 (D.C.Cir.1979) (stating that the court must give the plaintiff "the benefit of all inferences that can be derived from the facts alleged"). In evaluating a Rule 12(b)(6) motion to dismiss, the court is limited to considering facts alleged in the complaint, any documents either attached to or incorporated in the complaint, matters of which the court may take judicial notice, *EEOC v. St. Francis Xavier Parochial Sch.,* 117 F.3d 621, 624 (D.C.Cir.1997), and matters of public record, *Marshall County Health Care Auth. v. Shalala,* 988 F.2d 1221, 1226 n. 6 (D.C.Cir.1993). Factual allegations in briefs or memoranda of law may not be considered when deciding a 12(b)(6) motion, particularly when the facts they contain contradict those alleged in the complaint. *Henthorn v. Dep't of Navy,* 29 F.3d 682, 688 (D.C.Cir.1994).

B. Defamation

***2** In order to state a defamation claim under Illinois law, [3] a plaintiff must allege facts sufficient to show: (1) that the defendant made a false statement concerning the plaintiff, (2) that there was unprivileged publication to a third party through the fault of the defendant, and (3) damage to the plaintiff. *Krasinski v. United Parcel Serv., Inc.,* 124 Ill.2d 483, 125 Ill.Dec. 310, 530 N.E.2d 468, 471 (Ill.1988) (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)); *Green v. Trinity Int'l Univ.,* 344 Ill.App.3d 1079, 280 Ill.Dec. 263, 801 N.E.2d 1208, 1219 (Ill.App.Ct.2003) (citations omitted). A complaint for defamation must clearly identify the specific defamatory statement of which the plaintiff complains. *Heying v. Simonaitis,* 126 Ill.App.3d 157, 81 Ill.Dec. 335, 466 N.E.2d 1137, 1141–42 (Ill.App.Ct.1984). In addition, a plaintiff who is a public figure must also show that the statement was made with " 'actual malice,'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *see Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 162, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (Warren, J., concurring in result) (extending the requirement of showing of *New York Times* actual malice beyond public officials to public figures). On the other hand, a plaintiff who is a private individual need only show negligence to recover actual damages. *Troman v. Wood,* 62 Ill.2d 184, 340 N.E.2d 292, 299 (Ill.1975); *see Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 347, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (permitting states to define the standard for liability for defamation of private individuals, so long as liability is not imposed without fault).

"A statement is considered defamatory *per se* when its defamatory character is apparent on its face," *Green,* 280 Ill.Dec. 263, 801 N.E.2d at 1219, such that it imputes: "(1) the commission of a criminal offense, (2) infection with a loathsome communicable disease, (3) malfeasance or misfeasance in the discharge of duties of employment or (4) unfitness for one's trade, profession or business." *Hollymatic Corp. v. Daniels Food Equip., Inc.,* 39 F.Supp.2d 1115, 1118 (N.D.Ill.1999); *see Kolegas v. Heftel Broad. Corp.,* 154 Ill.2d 1, 180 Ill.Dec. 307, 607 N.E.2d 201, 206 (Ill.1992). "In determining whether [a] statement is defamatory, [the court] must 'focus on the predictable effect the statement had on those who received the publication." ' *Parker v. House O'Lite Corp.,* 324 Ill.App.3d 1014, 258 Ill.Dec. 304, 756 N.E.2d 286, 292 (Ill.App.Ct.2001) (citation omitted). An accusation of a criminal act is not a constitutionally protected statement of opinion. *See Catalano v. Pechous,* 83 Ill.2d 146, 50 Ill.Dec. 242, 419 N.E.2d 350, 359 (Ill.1980). To constitute defamation *per se* by imputing the commission of a crime, a statement must impute a crime that is indictable and punishable by death or imprisonment in lieu of a fine. *Kirchner v. Greene,* 294 Ill.App.3d 672, 229 Ill.Dec. 171, 691 N.E.2d 107, 114 (Ill.App.Ct.1998); *Adams v. Sussman & Hertzberg, Ltd.,* 292 Ill.App.3d 30, 225 Ill.Dec. 944, 684 N.E.2d 935, 947 (Ill.App.Ct.1997).

"Even if a statement falls into one of the recognized categories of words that are actionable *per se,* it will not be found actionable *per se* if it is reasonably capable of an innocent construction." *Bryson v. News Am. Publ'ns, Inc.,* 174 Ill.2d 77, 220 Ill.Dec. 195, 672 N.E.2d 1207, 1215 (Ill.1996). The innocent construction rules requires a court "to consider a written or oral statement in context, giving the words, and their implications, their natural and obvious meaning." *Id.* Whether the statement is actually true or false is a question of fact for the jury. *Id.* at 1220.

1. Statements in March 20, 2002, Article

***3** With respect to the statements in the March 20, 2002 article, Szporer argues that Mazur is a public figure who has failed to allege facts that could show actual malice. In the alternative, if the court finds that Mazur is not a public figure, Szporer argues that Mazur cannot show negligence in publishing the allegedly defamatory statements because the March 20, 2002 article relies on news accounts from other newspapers. Mazur rejoins that he is not a public figure, and thus, he was not required to allege actual malice. Further, Mazur maintains that he has sufficiently alleged defamation *per se* because the disputed statements impute unlawful acts to him.

a. Public Figure

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court stated that a distinction exists between public and private plaintiffs who bring defamation claims because unlike private individuals, public officials and public figures subject themselves to public scrutiny as a consequence of their involvement in public affairs. *Id.* at 344. Public figures also "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.*

It is possible, but exceedingly rare, for a person to become a public figure through no purposeful actions of her own. *Id.* at 345. Most involuntary public figures achieve their status by assuming roles of prominence in the affairs of society. *Id.* A public figure can hold a position of such power and influence that she is deemed a public figure for all purposes. *Id.* "More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies, in order to influence the resolution of the issues involved" and thus become public figures for a "limited range of issues." *Id.* at 345, 351. General purpose public figures must always establish actual malice to prevail in a defamation action; limited purpose public figures must establish actual malice only when the allegedly defamatory statements are "sufficiently connected to controversies in which they have chosen to accept a leadership role." *Kessler v. Zekman,* 250 Ill.App.3d 172, 189 Ill.Dec. 932, 620 N.E.2d 1249, 1255 (Ill.App.Ct.1993).

"Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Gertz,* 418 U.S. at 352. A person can be a general public figure "only if he is a 'celebrity [,]' his name a 'household word' whose ideas and actions the public in fact follows with great interest." *Waldbaum v. Fairchild Publ'ns, Inc.,* 627 F.2d 1287, 1292 (D.C.Cir.1980).[4] As a general rule, a person who meets the test for a general public figure has access to the media if defamed; the public's preoccupation with her indicates that the media would cover the individual's response to any purportedly defamatory statements. *Id.* at 1294. The *Gertz* Court observed that "[w]e would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." 418 U.S. at 352 (holding that even though the plaintiff was well known in certain circles, served as an officer of local civic groups and various professional organizations, and had published several books and articles, he had not achieved general fame or notoriety in the community as such to consider him a general public figure); *see also Tavoulareas v. Piro,* 817 F.2d 762, 772 (D.C.Cir.1987) (stating that the plaintiff was a highly prominent individual, especially in business circles, but that his celebrity in society at large did not approach the archetype of a general purpose public figure, such as a well-known entertainer or athlete); *Blue Ridge Bank v. Veribanc, Inc.,* 866 F.2d 681, 687 (4th Cir.1989) (holding that even though the plaintiff occupied a position of considerable importance in the economy of its county, it lacked the widespread power or influence necessary to affect the resolution of public issues to elevate it to a general purpose public figure).

***4** Mazur apparently is a successful business man with ownership interests in a number of businesses in the United States and elsewhere. He is also an active participant and leader in a number of social and community-based activities, primarily among the Polish–American community. Nevertheless, the court is unable to find that the degree of Mazur's prominence in the community and his profession as alleged is sufficient to elevate him to the status of a general purpose public figure, one whose actions the public follows with great interest. Therefore, the court concludes that the allegations in the complaint do not sufficiently allege that Mazur is a general purpose public figure.

The court now considers whether Mazur can be considered a limited purpose public figure. Under the three-part inquiry for determining if a person is a public

figure for limited purposes, the court must examine whether: (1) there is a public controversy, (2) the plaintiff played a sufficiently central role in that controversy, and (3) the alleged defamation was germane to the plaintiff's involvement in the controversy. *Waldbaum,* 627 F.2d at 1296–98.

In order to determine whether a public controversy existed, the court must examine if "the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants." *Id.* at 1297. The controversies at issue concern the murder of a Polish police officer, money-laundering, and shady dealings with Polish government officials. Compl. ¶ 11. The allegations involved officials including the Polish Prime Minister and Justice Minister of Poland. *Id.* The implications of such a controversy affect Polish citizens and the Polish community in the United States, as well as others who may have an interest in Polish affairs, because members of the Polish government are involved. Moreover, news sources other than The Siec also reported these events. *See* Ex. B to Compl. Therefore, the court finds that a public controversy existed in connection with the alleged defamatory statements regarding murder and corruption.

Next, the court must analyze the Mazur's role in the controversy by examining whether he purposefully tried to influence the outcome or could have realistically been expected to influence the outcome because of her position in the controversy. *Waldbaum,* 627 F.2d at 1297. To be considered a limited purpose public figure, the plaintiff must have " 'thrust [herself] to the forefront' " of the issue or achieved a special prominence in the debate such that her participation became a factor in the ultimate resolution of the controversy. *Id.* at 1292 (quoting *Gertz,* 418 U.S. at 345); *see Dubinsky v. United Airlines Master Executive Council,* 303 Ill.App.3d 317, 236 Ill.Dec. 855, 708 N.E.2d 441, 455 (Ill.App.Ct.1999) (finding that the plaintiffs were limited public figures where they were the highest ranking members of the union, the intended audience of the alleged defamatory materials were the members of the union, and the plaintiffs thrust themselves to the forefront of the union issue to influence the outcome). Courts have emphasized a plaintiff's affirmative actions in trying to "influence" the outcome of the controversy. *Waldbaum,* 627 F.2d at 1300 (holding that the plaintiff was a public figure for a controversy when the evidence showed that plaintiff was an activist in the area because of efforts to influence policies in the area generally). The allegations in the complaint do not indicate that Mazur engaged the attention of the public in an attempt to influence the resolution of the controversies at issue. Consequently, based on the allegations in the complaint, the court is unable to conclude that Mazur is a limited public figure who, thus, is required to allege actual malice in the complaint. Accordingly, the court will deny Szporer's motion to dismiss on this ground.

b. Defamation *Per Se*

***5** Mazur maintains that he has stated a cause of action for defamation *per se* as to the statements in the March 20, 2002, article. Mazur argues that the statements alleging his connections to murder, the mafia, government corruption, and money-laundering impute unlawful acts to him. Szporer does not dispute that the March 20, 2002, statements were defamatory in nature. Rather, Szporer contends that if Mazur is not a public figure, Mazur has not pled any facts to show that Szporer was negligent in publishing the statements. The complaint alleges that Szporer "knew when he published the Statements that they were false or published them with reckless disregard as to their truth or falsity." Compl. ¶ 15. Although Illinois courts require that a complaint "set forth factual allegations from which actual malice may reasonably be said to exist as opposed to the bare assertion of actual malice," *Sweeney v. Sengstacke Enters., Inc.,* 180 Ill.App.3d 1044, 129 Ill.Dec. 773, 536 N.E.2d 823, 826 (Ill App.Ct.1989), the court could find no such requirement when mere negligence was the standard of liability in a defamation action. As a result, the court concludes that Mazur has adequately pled a claim for defamation *per se* with respect to the statements in the March 20, 2002 article. [5]

Accordingly, Szporer's motion to dismiss Mazur's defamation *per se* claims based on statements made in the March 20, 2002 article must be denied.

2. Statements in April 3, 2002 Article

As for the April 3, 2002 article, Szporer moves to dismiss on the grounds that the statements therein are not defamatory as a matter of law. The court, having examined these statements, agrees that these statements cannot reasonably be read to impute to Mazur a criminal offense, infection with a loathsome communicable disease, malfeasance in the discharge of his duties of employment,

or unfitness for his profession. *See Hollymatic Corp.,* 39 F.Supp.2d at 1118; *Kolegas,* 180 Ill.Dec. 307, 607 N.E.2d at 206. The April 3, 2002 article merely states that The Siec summarized information about the murder of Marek Papala in its March 20, 2002 article and had "no intention to malign" Mazur, cites two articles from other new sources, and indicates that Mazur denied the allegations in the prior article. *See* Ex. B to Compl. Therefore, the court concludes that Mazur fails to adequately allege defamation *per se* as to the statements in the April 3, 2002 article.

Accordingly, Szporer's motion to dismiss the defamation *per se* claims based on statements made in the April 3, 2002 article must be granted.

C. False Light Invasion of Privacy

"The tort of false light invasion of privacy protects one's interest in being let alone from false publicity." *Parker,* 258 Ill.Dec. 304, 756 N.E.2d at 301 (citation omitted). In a false light claim, the plaintiff must prove that: "(1) he was placed in a false light before the public as a result of the defendant's action; (2) the false light in which he was placed would be highly offensive to a reasonable person; and (3) the defendant acted with knowledge that the information he published was false or with reckless disregard for whether the information was true or false." *Id.* (citations omitted). The Illinois Supreme Court has adopted the "actual malice" approach "to require proof of knowledge of the falsity of the publication or that the defendant acted in reckless disregard of the truth." *Kirchner,* 229 Ill.Dec. 171, 691 N.E.2d at 116 (citing *Lovgren v. Citizens First Nat'l Bank of Princeton,* 126 Ill.2d 411, 128 Ill.Dec. 542, 534 N.E.2d 987 (Ill.1989)) (internal citations omitted). "In cases where both defamation and false light claims are applicable, the plaintiff can proceed under either theory, or both, although there is only one recovery for each instance of publicity." *Parker,* 258 Ill.Dec. 304, 756 N.E.2d at 301 (citation omitted).

1. Statements in March 20, 2002 Article

***6** In order to satisfy the most basic element of a false light cause of action, there must be some allegation that a specific statement was false. *Kirchner,* 229 Ill.Dec. 171, 691 N.E.2d at 116. In *Kurczaba v. Pollock,* 318 Ill.App.3d 686, 252 Ill.Dec. 175, 742 N.E.2d 425 (Ill.App.Ct.2000), the court held that a complaint alleging that all allegations of wrongdoing were false sufficiently alleged falsity because the allegation necessarily encompassed each individual statement of wrongdoing. *Id.* at 435. In the instant case, the complaint alleges that the statements about Mazur's involvement with murder, organized crime, and improper influence over Polish government officials printed in The Siec on March 20, 2002 and April 3, 2002 are false. *See* Compl. ¶¶ 11, 14, 18. The court finds that the complaint adequately pleads falsity as to the statements in the March 20, 2002 article.

The publicity requirement for a false light invasion of privacy claim is satisfied by

> "[A]ny publication in a newspaper or magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section."

Kurczaba, 252 Ill.Dec. 175, 742 N.E.2d at 435 (quoting RESTATEMENT (SECOND) OF TORTS,, § 652D, cmt. a (1977)). The Siec is a newsletter that is allegedly disseminated "at least nationwide" by email. Compl. ¶ 3. Thus, the publicity requirement of a false light invasion of privacy claim is met.

The court next turns to the question of whether a trier of fact could find that the false light in which the plaintiff was placed would be "highly offensive to a reasonable person." *Dubinsky,* 236 Ill.Dec. 855, 708 N.E.2d at 451. The court finds that the statements in the March 20, 2002, article regarding involvement in conspiracy to murder, and engaged in money-laundering and corruption would be "highly offensive to a reasonable person" because of the unlawful nature of the imputed acts.

Finally, as for the malice requirement of a false light claim, the complaint alleges that Szporer intended to place Mazur in a false light. Compl. ¶ 19. The complaint further alleges that Szporer knew the statements were false or acted with reckless disregard for the statements' truth or falsity when he published them. Compl. ¶ 20. In *Dubinsky,* the court held that the plaintiffs satisfied the malice standard of false light invasion of privacy by pleading that the defendants knew the statements were

false or acted with reckless disregard for the statements' truth or falsity. 236 Ill.Dec. 855, 708 N.E.2d at 452. Thus, the court finds that Mazur's complaint has adequately pled the requisite malice.

2. Statements in April 3, 2002 Article

The claims based on the statements in the April 3, 2002 article, however, fail to satisfy the basic element of an action for false light because the statements in this article do not allege any wrongdoing, make any specific criminal allegations, or otherwise place Mazur in a false light. *See Dubinsky,* 236 Ill.Dec. 855, 708 N.E.2d at 452 (stating that statements that referred to possible wrongdoing under federal laws by the plaintiff did not place the plaintiff in a false light because no specific criminal allegations were made). The April 3, 2002 article merely states that The Siec previously summarized information about the murder of Marek Papala but did not intend to malign Mazur, and cites two articles. *See* Ex. B to Compl. Therefore, Mazur's claims for false light based on statements in the second article must be dismissed for failure to state a claim.

***7** Accordingly, Szporer's motion to dismiss the claim for false light invasion of privacy must be denied with respect to statements contained in the March 20, 2002 article and granted with respect to statements in the April 3, 2002 article.

D. Request for Preliminary and Permanent Injunction

The court now turns to Mazur's request for a preliminary and permanent injunctive relief against Szporer that would enjoin him and his agents from publishing further "false and defamatory statements about Mazur or his family." Compl. ¶ 22. Mazur also seeks a mandatory injunction ordering Szporer to publish a statement in The Siec that states that the previously published statements are false. Compl. ¶ 23. Szporer argues that Mazur's claim for injunction should be dismissed because it seeks an unconstitutional prior restraint and impermissibly infringes on the free exercise of editorial control and judgment.

Mazur maintains that he has adequately pled the elements necessary for injunctive relief because he has alleged that he has a clearly ascertainable right, has no adequate remedy at law, will suffer irreparable harm if injunctive relief is not granted, and that the balance of equities weighs in his favor. Compl. ¶¶ 24–26. *Lucas v. Peters,* 318 Ill.App.3d 1, 251 Ill.Dec. 719, 741 N.E.2d 313, 325–26 (Ill.App.Ct.2000).

Because Mazur seeks to obtain injunctive relief from the publication of defamatory statements, he must bring himself within the exceptions to two general principles that ordinarily operate to deny injunctive relief. *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees of Am., C.I.O.,* 400 Ill. 38, 79 N.E.2d 46, 48 (Ill.1948); *see Matchett v. Chicago Bar Ass'n,* 125 Ill.App.3d 1004, 81 Ill.Dec. 571, 467 N.E.2d 271, 275 (Ill.App.Ct.1984) ("[I]t is settled law that unless a plaintiff can establish the existence of one of a very limited number of exceptions, equity will not enjoin the publication of a libel."). "The first general principle is that equity does not have jurisdiction to enjoin the commission of crimes and libels; and the second general principle is that the constitutional guaranty of free speech as a general rule prohibits both the courts and the legislature from putting previous restraints on publications." *Montgomery Ward,* 79 N.E.2d at 48. An injunction is not available to prevent actual or threatened publications of a defamatory character absent a showing of a "violation of some property right, or some breach of trust or contract," or unless the defamatory language is "used as coercion in connection with picketing; or is connected with violence or the injuring of property." *Id.* at 48, 50. The burden is on the plaintiff to show facts which bring herself within these exceptions. *Id.* at 50. Mazur has not alleged facts that would show that the alleged defamatory statements fall into any of these exceptions. Accordingly, the court concludes that Mazur has failed to state a claim for injunctive relief from the publication of future defamatory statements. [6]

***8** Mazur's claim for injunctive relief requiring Szporer to publish that the previously published statements were false also must be dismissed. In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), the Supreme Court held that governmental intrusion into the function of newspaper editors in deciding what to publish is a violation of the First Amendment. *Id.* at 258. The Court stated that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials-whether fair or unfair-constitute the exercise of editorial control and judgment." *Id.* A party cannot compel another to publish information it has

chosen not to publish. *See Matchett,* 81 Ill.Dec. 571, 467 N.E.2d at 275 (refusing to grant the plaintiff's request to force a newspaper to publish an apology or retraction). Accordingly, Mazur's request to compel Szporer to publish a statement in The Siec must be dismissed. [7]

III. CONCLUSION

For the foregoing reasons, the court concludes that Szporer's motion to dismiss must be granted in part and denied in part.

ORDER

Accordingly, it is this 1st day of June, 2004, hereby:

ORDERED, that Szporer's motion to dismiss is GRANTED as to Mazur's defamation and false light claims based on statements in the April 3, 2002, article and as to his request for injunctive relief; and it is further

ORDERED, that Szporer's motion to dismiss is DENIED in all other respects.

All Citations

Not Reported in F.Supp.2d, 2004 WL 1944849, 32 Media L. Rep. 1833

Footnotes

1 The first article was sent out via email on March 20, 2002, and stated the following:

> Wealthy Chicago businessman Edward M (Mazur not Moskal) has reportedly been linked to the murder of police chief Marek Papala (by assassins with mafia connections to the Pruszkow gang.) Rumored in Chicago of possible money-laundering and shady dealings with ruling SLD (post-communist) party officials, Edward M apparently was a personal friend of current prime minister Leszek Miller. SLD has denied similar allegations made in the daily Zycie [a former mainstream polish newspaper].
>
> Leszek Miller (now prime minister) nominated Papala in his second day in the office as minister of Internal Security. General Papala, who knew Edward M and had contact with him on his last day of his life, received several shots to the head in his cherry Daewoo upon leaving his home in Warsaw in 1997, according to PIS (Law and Justice) parliamentarians on orders of Edward M.

Ex. A to Compl.

2 The second article was sent out via email on April 3, 2002, and stated the following:

> The Siec in its news note of 3/20/02 summarized information about the hit on Marek Papala widely reported in the Polish press and raised by Polish parliamentarians, and had no intention to malign Chicago businessman Edward Mazur. See for example Rzeczpospolita ("Looking for Motives" 3/9/02) available on the web www.rzeczpospolita.pl/gazeta/wydanie_020309/kraj/kraj–a–7.html. Similarly, 3/20/02 issue of Dziennik Chicagowski ran the article Mazur (sic) with a headline "Edward Mazur Zamieszany w Morderstwo Papaly?" (["]Edward entangled in the murder of Papala?") In his communications to us, spokesman for Mr. Mazur flatly denied these allegations.

Ex. B to Compl.

3 In a diversity case, such as this one, "[a] federal court must apply the choice of law rules of the jurisdiction in which it sits." *GEICO v. Fetisoff,* 958 F.2d 1137, 1141 (D.C.Cir.1992). In defamation actions, "[t]he weight of authority considers that the law to be applied is ... [that of] the place where the plaintiff suffered injury by reason of his loss of reputation." *Weyrich v. New Republic, Inc.,* 235 F.3d 617, 626 (D.C.Cir.2001) (internal quotation marks and citation omitted). Given that Mazur lives, works, is involved in his community in Illinois and relies on Illinois law, and given that Szporer does not object to the application of Illinois law, the court will apply Illinois law in assessing Mazur's claims.

4 Although Illinois law applies under the court's choice of law analysis, the court in *Kessler* stated that *Waldbaum* is "universally regarded as the benchmark decision in the application of the rule in *Gertz."Kessler,* 189 Ill.Dec. 932, 620 N.E.2d at 1255.

5 Although Mazur is a private figure under the facts as alleged in the complaint, he must sufficiently allege actual malice to pursue a claim for punitive damages. *Gertz,* 418 U.S. at 349. The complaint asserts that Szporer "knew when he published the Statements that they were false or published them with reckless disregard as to their truth or falsity," but

contains no factual allegations to support a finding of actual malice. Compl. ¶ 15. Because Mazur has failed to allege any facts supporting his merely conclusory assertion of actual malice, the court concludes that Mazur's claims for punitive damages must be dismissed.

6 The court notes that under D.C. law, "equity does not enjoin a libel or slander and ... the only remedy for libel or slander is an action for damages." *Cmty. for Creative Non–Violence v. Pierce,* 814 F.2d 663m 672 (D.C.Cir.1987) (internal quotation marks and citations omitted); *see Leo Winters Assocs., Inc. v. Dep't of Health & Human Servs.,* 497 F.Supp. 429, 432 (D.D.C.1980); *Hoxsey Cancer Clinic v. Folsom,* 155 F.Supp. 376, 378 (D.D.C.1957); *Kakatush Mining Corp. v. SEC,* 198 F.Supp. 508 (D.D.C.1961); *aff'd,* 309 F.2d 647 (D.C.Cir.1962).

7 The court finds it proper to dismiss Mazur's claim for injunctive relief at the motion to dismiss stage of the proceedings. Courts have dismissed complaints requesting similar injunctive relief on motions to dismiss. *See, e.g., Tackett v. KRIV–TV (Channel 26),* 1994 WL 591637, at *2 (S.D.Tex.2994) (granting a Rule 12(b)(6) motion in a defamation action that sought an injunction against future broadcasts of the offending publication and compelling a retraction and apology); *Amiri v. WUSA TV–Channel Nine,* 751 F.Supp. 211, 212 (D.D.C.1990), *aff'd,* 946 F.2d 1563 (D.C.Cir.1991) (granting a Rule 12(b)(6) motion in an action seeking to compel a broadcaster to air the plaintiff's statements and stating that "[t]he First Amendment guarantees each individual freedom from being coerced into unwanted expression"); *Bergman v. Stein,* 404 F.Supp. 287, 299 (S.D.N.Y.1975) (granting a Rule 12(b)(6) motion in an action seeking to enjoin publication of further alleged libels because it would be an unconstitutional prior restraint); *Matchett,* 81 Ill.Dec. 571, 467 N.E.2d at 275 (dismissing a complaint that sought publication of a response, a retraction or apology, and an injunction against future publication stating that the defendant could not be compelled to "publish information it has chosen not to publish").