SUPERIOR COURT OF DISTRICT OF COLUMBIA
CIVIL DIVISION

SUSAN L. BURKE,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	2012 CA 007525 B
vs.	)	
	)	
	)	
JOHN DOES 1-10,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF SUSAN BURKE'S MEMORANDUM IN OPPOSITION TO DEFENDANT JOHN DOE NO. 1'S MOTION TO QUASH PLAINTIFF'S SUBPOENA

Defamatory speech is entitled to no Constitutional protection, and an anonymous speaker is entitled to no greater protection than a known one. *Solers v. Doe*, 977 A.2d 941, 951 (D.C. 2009) (quoting *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005)). Defendant admits that he published factually inaccurate statements on a web page discussing the career and biography of Plaintiff Susan Burke. These statements claimed that a federal judge had issued an order finding that Ms. Burke was guilty of the reckless violations of others' constitutional rights, that she withheld substantial exculpatory evidence from defendants and the Court, and that she presented distorted versions of testimony before a Grand Jury. It is undisputed that Ms. Burke was never involved in the case in which that order was entered. These wholly inaccurate claims are per se defamatory, as they impugn Ms. Burke's professional abilities and standards.

Despite this acknowledged defamation, Defendant seeks to quash the subpoena seeking his identity by claiming the protection of the recently enacted D.C. Anti-Slapp statute, D.C. Stat. 16-5501 et seq. (2012)[1] The facts show that his statements about Ms. Burke are not the kind of political speech that the D.C. statute was designed to protect, but instead are comments about Ms. Burke, a private citizen, and as a result the DC statute does not protect Defendant's defamatory comments. Ms. Burke is not a "public figure" as that term is used in the D.C. statute. In addition, Defendant has failed to make a prima facia showing that commercial interests are not involved. In any event, Plaintiff's claims have a substantial likelihood of succeeding on the merits, thus taking Defendant's defamatory statements outside the protection of the DC statute. Defendant's non-statutory efforts to obtain a protective order based on oppression and burden are meritless. Defendant's conclusory argument should be rejected and his motion to quash denied.

FACTUAL BACKGROUND

Ms. Burke is a private attorney licensed to practice law in the District of Columbia, Virginia and Pennsylvania. During a distinguished career, she has litigated numerous cases around the country. She has been affiliated with Covington & Burling LLP, Mintz Levin, and Montgomery McCracken Walker & Rhoads and now runs her own firm in the District. In 2009, she was retained by the families of victims of a mass shooting in Iraq to bring a lawsuit against the perpetrators and the company that employed them, then known as Blackwater Inc. That lawsuit was filed in the District of Columbia in 2009. The case settled on terms favorable to the Plaintiffs in 2010. See Declaration of Susan L. Burke ("Burke Dec.") at ¶¶ 1-4, attached as Exhibit A.

[1] D.C. Stat. §16-5501, et seq. (2012) (hereinafter "D.C. statute").

Separate and apart from Ms. Burke's civil action, the United States Department of Justice presented testimony before a Grand Jury that resulted in the indictment of six Blackwater personnel. Those indictments were later dismissed by the District Court based on, inter alia, the criminal immunity that the State Department had provided the six employees during the State Department's initial investigation of the massacre. The Department of Justice later obtained new indictments, and the case remains pending. At the time of these actions, Ms. Burke did not work for the Department of Justice and played no part in the prosecution of these Blackwater employees.[2] Burke Dec. at ¶ 6.

In October 2011, an anonymous Wikipedia contributor published a Wikipedia page devoted to Ms. Burke, without Ms. Burke's involvement or approval. Defendant John Doe No. 1 published edits to this page in January 2012, in which he made defamatory statements impugning Ms. Burke's professionalism. Specifically, Defendant stated that Ms. Burke, as prosecutor of the case, was guilty of reckless violations of others' constitutional rights, that she withheld substantial exculpatory evidence from defendants and the Court, and that she presented distorted versions of testimony before a Grand Jury. See Burke Dec. at ¶ 9, Exhibit 1 (Wikipedia print out). As support for these defamatory claims, Doe No.1 cited a New York Times article. That article does not mention Ms. Burke, actually names the prosecutor leading the case described in the story, and notes that there is in fact another civil suit that touches on certain of the same facts underlying the criminal case that is separate and apart from the criminal prosecution. See Burke Dec. at ¶ 10, Exhibit 2 (New York Times article). John Doe No. 1 knowingly or recklessly distorted the facts.

[2] Ms. Burke had worked in the Civil Division of the Department of Justice over 10 years earlier.

Ms. Burke brought suit against John Doe No. 1 and another contributor for redress from these wrongs and to determine if others, including Blackwater, may be involved in the repeated defamation of Ms. Burke's professional standing.[3] Burke Dec. at ¶ 11. Ms. Burke issued a subpoena to Wikipedia to learn the identity of her accusers, since both contributors had refused to identify themselves on Wikipedia. To date, Plaintiff has been unable to learn the true identities of John Doe No. 1 or John Doe No. 2.

ARGUMENT

Defendant fails to present a prima facia case that his defamatory writings are protected under the D.C. Anti-Slapp statute. First, Ms. Burke, a private attorney, is not a "public figure" as that term is used in the D.C. statute. Although the statute does not define "public figure," Ms. Burke is not a "general purpose public figure" or a "limited purpose public figure" as those terms are typically employed in defamation case law. Second, Defendant has not provided prima facia evidence that his comments were not commercially motivated thus barring the application of the D.C. statute. Third, even if the Defendant is able to bring his statements within the scope of the D.C. statute, Plaintiff's claims are likely to succeed on the merits, and are therefore excluded from the D.C. statute. Finally, Defendant also seeks a protective order based on unsupported claims of annoyance, embarrassment, oppression or undue burden. Defendant offers no authority supporting a claim that a subpoena asking an anonymous defamer to identify himself is grounds for a protective order, and none should be entered.

[3] The founder and prior owner of Blackwater, Erik Prince, has previously threatened Ms. Burke personally.

I. Defendant Fails To Establish that Plaintiff is a Public Figure as that Term is Employed in the D.C. Anti-Slapp Statute.

In an effort to shield his defamatory publication, Defendant seeks to place his conduct within the scope of the recently passed D.C. Anti-Slapp statute, but his prima facia showing falls short. This lawsuit is not a "Strategic Lawsuit to Prevent Public Participation" which anti-slapp statutes, like the D.C. statute, were designed to protect, as Defendant was not speaking out on political issues, but on Ms. Burke on a biographical entry on Wikipedia.[4]

The Anti-Slapp statute provides a mechanism for an anonymous speaker to protect his or her identity if the speaker can prove that "the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Stat. § 16-5503(b). These terms are defined in section 5501 of the Act. "An act in furtherance of the right of advocacy on issues of public interest" can be either a written or oral statement, addressed under section (1)(A), or "other expression or expressive conduct," addressed in section (1)(B).[5] Under either prong, the Defendant must meet the test of commenting on an "Issue of Public Interest" under 5501(3). As defined in the statute, this includes commenting "on an issue related to ... a public figure." Under the statute, then, Defendant must prove both (1) Ms. Burke is a public figure and (2) he was commenting on an issue related to Ms. Burke. Defendants fail to present a prima facia showing of either requirement.

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[4] See *3M v. Boulter*, 842 F.Supp.2d 85 (D.D.C. 2012) ("The D.C. Council passed the legislation in response to what it recognized as a growing "litigation phenomenon": " 'Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making.' " Council of the District of Columbia, Committee on Public Safety and the Judiciary Report, Bill 18–893, at 2 (Nov. 18, 2010)").

[5] While Defendant argues that the operable text of the D.C. Anti-Slapp statute is section 5501(1)(B), that section only applies to "other expression or expressive conduct," not written statements and that section does not apply here.

Defendant argues that pursuant to 16-5503, his defamatory statements were made "in connection with an issue of public interest" because Ms. Burke is a public figure. Ms. Burke is not a public figure for purposes of the statute. While Defendant appears to argue that Ms. Burke is both a "general purpose public figure" and a "limited purpose public figure" as those terms are used in cases addressing the constitutional limits of defamation and libel claims, the record reveals that Ms. Burke is neither. A general purpose public figure is famous in the community, equivalent to a public official, and carries "pervasive fame or notoriety." *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 347-50 (1974). In *Gertz*, the Supreme Court stated that "[a]bsent 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." 418 U.S. at 352. In that case, Gertz – an attorney in private practice -- brought a defamation claim based on commentary about one of his cases that attacked him as a Communist. The Court held that Gertz could not be a general purpose public figure based on the fact that none of the prospective jurors in the case had ever heard of Mr. Gertz. As the Supreme Court noted, courts should "not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." *Gertz* at 352. [6] Applying the *Gertz* standard, the fact that several articles or interviews have been published about cases in which Ms. Burke has been involved is not sufficient to make her a general purpose public figure.

It is similarly true that Ms. Burke is not a limited purpose public figure. Limited purpose public figures were defined in *Clampitt v. American University*, 957 A.2d 23 (D.C. 2008), as individuals who are not deemed public figures for all purposes, but "who assume roles 'in the forefront of particular public controversies in order to influence the resolution of the issues

[6] The fact that all attorneys function as "officers of the Court" similarly does not make them public figures for purposes of the libel laws. *Gertz* at 351.

involved,' and who are deemed public figures only for purposes of the controversy in which they are influential." *Clampitt,* 957 A.2d at 43 n.25; see also *Moss v. Stockard*, 580 A.2d 1011, 1030 (D.C. 1990); *Gertz*, 418 U.S. at 345. Defendant has made no showing that Ms. Burke assumed a role in the forefront of the issues surrounding the criminal prosecution of Blackwater employees. Nor has he presented any evidence that she did so in order to influence the resolution of the issues involved. As noted above, Ms. Burke had no role in the prosecution of Blackwater employees. To the contrary, Ms. Burke filed a civil suit on behalf of private parties against other private parties. As in Gertz, Burke had filed a civil lawsuit which received public attention, while a separate criminal action arising from the same facts was proceeding, a criminal action in which Burke had no role. Clearly with respect to the criminal prosecution of Blackwater employees, Ms. Burke was not a limited purpose public figure and as a result the D.C. Anti-Slapp statute does not apply.

Without discussing the legal contours of the constitutional case law guiding this determination, Defendants argue that Burke is a public figure because she has a Wikipedia page, has been interviewed by the press on several different topics and has filed lawsuits which have garnered attention. None of these facts support a finding that Ms. Burke is a "public figure." The Wikipedia page itself is not proof that Plaintiff is a "public figure." As Wikipedia itself notes, any contributor can create a biographical page devoted to a person. It is an open forum. See http://en.wikipedia.org/wiki/Wikipedia:About (viewed December 21, 2012) ("Anyone with Internet access can write and make changes to Wikipedia articles"). Similarly, the fact that Plaintiff has been interviewed about the Blackwater civil action or other cases is not in itself "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society." *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (plaintiff who held

press conferences during trial not a public figure for defamation purposes); *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999) ("*Firestone* makes clear that voluntary discussion of events with the press does not per se indicate that a defamation plaintiff has "thrust herself to the forefront of [a public] controversy."). Conclusory statements that Plaintiff thrust herself into prominence carry no weight, as they are not backed by any factual support. To the extent Defendant is arguing the Ms. Burke is a "limited purpose public figure," the three cited "articles in the media" do not support such a claim, because two of the articles are not about the Blackwater litigation, and none are regarding the criminal prosecution of Blackwater employees. In short, a private lawsuit by private parties against a private company is not "an issue of public interest," and Plaintiff did not become a public figure simply because the press reported on some of her litigated cases.

Even if the Court were to conclude that Ms. Burke was a "public figure" because of her litigation against Blackwater, Defendant must still show a causal connection between his comments and the issue. In fact, Defendant was commenting – providing an opinion or stance – not on Blackwater, the Iraq war or the use of private contractors, but on Ms. Burke's alleged professional misdeeds. There is no nexus between the issue upon which Defendant was commenting and the issue on which Ms. Burke may be a public figure. Defaming a limited use public figure on an issue unrelated to why she is a limited use public figure takes the Defendant outside the scope of the D.C. Anti-Slapp statute.

Lastly, the D.C. Anti-Slapp statute contains an exception for private interests, such as the speaker's commercial interests. D.C. Stat. 16-5501(3). As to this exception, Defendant has made no prima facia case. Many Wikipedia commentators are paid for their services or otherwise used so that other commentators can stay out of the public discussion of an issue. In order to make a prima facia showing that his statements are on an issue of public interest,

Defendant should be required to submit evidence that the commercial interest exception does not apply. No such showing has been made here.

II. The D.C Anti-Slapp Statute Does Not Apply Because Plaintiff Is Likely to Succeed on the Merits of Her Defamation Action.

By its own terms, the D.C. Anti-Slapp statute does not apply when the party seeking the identifying information "demonstrates that the underlying claim is likely to succeed on the merits." D.C. Stat §16-5503(b). Pursuant to D.C. law, a claim for defamation requires "four elements: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Solers, Inc. v. Doe,* 977 A.2d 941 (D.C. 2009) (citing *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)). Here there is no question of falsehood and publication. Similarly, as the defamatory statements "would adversely affect Plaintiff's fitness for the proper conduct of [her] lawful business, trade or profession, no proof of special harm is required." *Wallace v. Skadden, Arps, Slate , Meagher and Flom*, 715 A.2d 873 (D.C. 1998), *citing* Restatement (Second) of Torts § 573 (1977). The only issue, and the only issue raised by Defendant, is whether Plaintiff is likely to succeed in proving either negligence or malice in the publication.

As noted above, Ms. Burke is neither a public figure nor a limited purpose public figure with respect to the Blackwater criminal litigation, and need only prove that the statements were published negligently. At a minimum, the article Defendant cited in support of his statements demonstrates negligence. Ms. Burke is not mentioned in the article, and the attorney in charge of

the case is identified as another person. See Burke Dec. Ex. 2. The article also makes clear that the civil action was separate and apart from the criminal prosecution. Id. Defendant's statements are at a minimum negligent.

The same article also provides sufficient proof that Plaintiff is likely to succeed on the merits even if malice is required. If proof of malice is required, Plaintiff will be required to present evidence of an "intentional or reckless disregard for the falsity" of Defendant's statements. *Moss*, 580 A.22d at 1029 (citing *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). The cited article in the New York Times was written for the general population, and did not require special legal knowledge to understand that it did not mention Ms. Burke. See Burke Dec. Ex. 2. Malice can be established by the uncontroverted fact that Defendant recklessly disregarded the very article that he was citing as support. If this is not sufficient to show a likelihood of success as it relates to the malice requirement, at this point in the litigation and prior to quashing the subpoena, discovery on malice should be allowed. Additional evidence regarding potential malice remains in the exclusive control of Defendant, and Plaintiff should be allowed discovery on this issue before the Court rules on the evidence available to establish malice. See *Solers v. Doe,* 977 A.2d 941, 958 (D.C. 2008) (approving of authority that recognizes the difficulty of presenting evidence of the Defendants state of mind when the identity of the Defendant remains unknown and allowing discovery). One reason that Plaintiffs seek to identify the Defendant is to determine whether he was working for or on behalf of others who have stated an intent to harm Plaintiff. Her efforts to seek this evidence should not be dismissed from Court without allowing some discovery of the issue.

III. The Motion For Protective Order Should be Denied.

In addition to the D.C. Anti-Slapp statute, Defendant seeks a protective order on the basis of unenumerated "annoyance, oppression and undue burden or expense," but such claims are completely unsupported by the record. Plaintiff's subpoena issued to Wikipedia asked that non-party to identify Defendant. Defendant suffers no annoyance, oppression, burden of expense in having a third party respond. The identification of Defendant raises no "constitutional" burden, as many Courts have recognized that defamatory speech earns no protection from the First Amendment, and that same principle applies when the speech is anonymous. See, e.g. *Solers v. Doe*, 977 A.2d 941, 951 (D.C. 2009). Defendant's effort to obtain a protective order should be denied.

CONCLUSION

Defendant defamed Plaintiff in an anonymous internet posting about a judge's admonition to the lawyers in a case in which she was not involved. The defendant cited a published news article for support of its claims, but this very article contradicts his statement and gives rise to legitimate questions of malice in Defendant's posting. Defendant's effort to quash Plaintiff's third party subpoena should be denied, as the recently enacted D.C. Anti-Slapp statute does not by its own terms apply here. Defendant was not joining in a political debate about the Iraq war or private contractors, but was instead smearing Plaintiff's reputation built over 25 years of practicing law. Defendant should, like any other, be required to defend his actions before the Court.

Respectfully Submitted,

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