SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, Ph.D.,	*	
Plaintiff,	*	
	*	**2012 CA 008263 B**
v.	*	**Judge Jennifer M. Anderson**
	*	**Civil I, Calendar 3**
NATIONAL REVIEW, INC., *et al*.,	*	
Defendants.	*	

ORDER GRANTING DEFENDANT NATIONAL REVIEW'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court upon consideration of Defendant National Review Inc.'s Renewed Motion for Summary Judgment, filed on October 7, 2020; Plaintiff's Corrected Opposition to Defendant National Review's Renewed Motion for Summary Judgment, filed on November 5, 2020; and Defendant National Review Inc.'s Reply in Support of Renewed Motion for Summary Judgment, filed on November 17, 2020.

I. Background

On July 15, 2012, Mark Steyn ("Defendant Steyn") posted an article titled "Football and Hockey" on National Review Inc.'s ("Defendant National Review") website's blog section, The Corner. On July 23, 2012, Plaintiff Dr. Michael Mann's counsel sent a letter to National Review threatening to sue over Defendant Steyn's post. On August 22, 2012, Rich Lowry ("Mr. Lowry") editor of National Review, wrote an article in National Review, addressing Plaintiff's threatened lawsuit. On October 22, 2020, Plaintiff filed suit against Defendants National Review, Steyn, Competitive Enterprise Institute ("CEI"), and Rand Simberg. Plaintiff alleged libel *per se* against Defendant National Review for the allegedly defamatory statements in Defendant Steyn's article

and Mr. Lowry's article. On December 14, 2012, Defendants Steyn and National Review filed a Special Motion to Dismiss Pursuant to D.C. Anti-SLAPP Act (D.C. Code § 16-5501 *et seq*.) and Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim.

On July 19, 2013, the Honorable Natalia M. Combs Greene issued an Order, denying Defendants National Review and Steyn's Special Motion to Dismiss Pursuant to D.C. Anti-SLAPP Act (D.C. Code § 16-5501 *et seq*.) and Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim. On September 17, 2013, Defendants National Review and Steyn filed a Notice of Appeal of Judge Combs Greene's July 19, 2013 Order and Judge Combs Greene's August 30, 2013 Order Denying Defendants' Motion for Reconsideration of July 19, 2013 Order.

The District of Columbia Court of Appeals ("Court of Appeals") affirmed the trial court's decision in part and reversed in part. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018). The Court of Appeals dismissed Plaintiff's defamation claim based on Mr. Lowry's August 22 article. *Id*. at 1249-50. The Court of Appeals also dismissed Plaintiff's claims for intentional infliction of emotional distress. *Id*. at 1261. However, the Court of Appeals held that Defendant Steyn's article was potentially actionable. *Id.* at 1248-49. The only pending claim remaining against Defendant National Review is the defamation claim based on Defendant Steyn's post on The Corner quoting Defendant Simberg's post.

On February 27, 2020, Defendant National Review filed a motion for summary judgment. On May 29, 2020, the Court denied Defendant National Review's motion without prejudice and permitted Plaintiff to conduct limited additional discovery. On October 7, 2020, Defendant National Review filed its renewed motion for summary. In its motion now before the Court, Defendant National Review argues that there is no evidence to show it had actual malice at the time of the publication of Defendant Steyn's article because none of its employees knew of the

publication before the article became available to the public. Def. Summ J. Mot. at 1; 9-13, Oct. 7, 2020. Defendant National Review relatedly argues that Defendant Steyn is not its employee, rather he is an independent contractor, and that liability is permissible under the First Amendment only in the case of an employee. *Id.* at 1; 13-14; Def. Reply at 2-7, Nov. 17, 2020. Alternatively, Defendant National Review contends that it is immune from defamation liability under Section 230 of the Communications Decency Act ("CDA") because it is an interactive computer service provider that was not involved in the creation or development of the article at issue. *Id.* at 2; 15-20.

In his Opposition, Plaintiff primarily argues that Defendant National Review's Motion for Summary Judgment should be denied because several disputed issues of material fact remain. Pl. Opp'n. at 1, Nov. 5, 2020. Plaintiff disagrees with Defendant National Review's characterization of the state of the law regarding actual malice; Plaintiff argues that actual malice of a non-employee agent may be imputed to the principal under the doctrine of respondeat superior. *Id*. at 10. Plaintiff contends that Defendant Steyn's his actual malice may be imputed to Defendant National Review because Defendant Steyn acted with actual authority and apparent authority and Defendant National Review also ratified Defendant Steyn's conduct. *Id*. at 12-15. Plaintiff further maintains that genuine issues of material fact whether Defendant Steyn is another information content provider preclude summary judgment as well. *Id*. at 16-20.

II. Standard of Law

Motions for Summary Judgment are governed by Superior Court Civil Rule 56. *See* Super. Ct. Civ. R. 56 (c). To prevail on a motion for summary judgment, Rule 56(c) requires a moving party to demonstrate—based on pleadings, discovery, and any affidavits—that there is no genuine

issue of material fact and the movant is entitled to judgment as matter of law. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001). If the movant meets its initial burden of demonstrating the absence of a genuine issue of material fact, then the burden shifts to the non-moving party to establish specific material facts showing that there is a genuine issue for trial. *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

When considering a motion for summary judgment, the Court must view all evidence in the light most favorable to the non-moving party. *O'Donnell v. Associated Gen. Contractors of Am.*, 645 A.2d 1084, 1086 (D.C. 1994). However, the non-moving party "must produce at least enough evidence to make out a prima facie case in support of his [or her] position." *Joeckel v. Disabled Am. Veterans*, 793 A.2d 1279, 1281-82 (D.C. 2002). "'The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].'" *LaPrade v. Rosinsky*, 882 A.2d 192, 196 (D.C. 2005) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986)) (alteration in original). A plaintiff, opposing a defense motion for summary judgment, must show that he or she has a plausible ground for the maintenance of the cause of action in order to advance to trial. *Bruno v. W. Union Fin. Servs., Inc.,* 973 A.2d 713, 717 (D.C. 2009). "[I]f it is clear that the plaintiff has not established a prima facie case, [the court] must grant judgment as a matter of law for the defendant." *Board of Trs. of the Univ. of the District of Columbia v. DiSalvo*, 974 A.2d 868, 870 (D.C. 2009) (internal quotation marks omitted). In sum, a motion for summary judgment should be granted if after taking all reasonable inferences in the light most favorable to the non-moving party, a reasonable juror, acting reasonably, could not find for the non-moving party. *Sherman v. District of Columbia*, 653 A.2d 866, 869 (D.C. 1995).

III. Discussion

A. Imputing Actual Malice from an Agent to a Principal

Plaintiff and Defendant National Review sharply disagree over whether Defendant Steyn's alleged actual malice can be imputed to Defendant National Review. Plaintiff asserts that the actual malice of an agent, who acted with the principal's authority, may be attributed to the principal under the doctrine of respondeat superior. Pl. Opp'n. at 7, 10. Plaintiff argues that Defendant Steyn is a non-employee agent of Defendant National Review and that Defendant National Review authorized Defendant Steyn to post the defamatory statements so he therefore acted with actual authority; Defendant National Review repeatedly cloaked Defendant Steyn with apparent authority and Defendant National Review ratified Defendant Steyn's conduct. *Id.* at 10-16. Defendant National Review, conversely, maintains that Defendant Steyn's status as an independent contractor or even as non-employee agent is legally insufficient to attribute his state of mind to National Review. Def. Summ J. Mot. at 13-15.

Actual malice cannot be imputed to a company based on the state of mind of a writer who is an independent contractor. *See Nader v. de Toledano*, 408 A.2d 31, 57 n.15 (D.C. 1979). Plaintiff, however, skirts the issue of whether Defendant Steyn is an employee or independent contractor by asserting that the distinction between employee and independent contractor is irrelevant. *See* Pl. Opp'n. at 20. Rather Plaintiff argues that Defendant Steyn is Defendant National Review's non-employee agent, i*d.* at 10, and cites *Secord v. Cockburn,* 747 F. Supp. 779 (D. D.C. 1990) and *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir. 1996) for the proposition that the actual malice of a non-employee agent can be imputed to the principal. A review of those cases indicates otherwise.

The court in *Secord* held that actual malice "cannot be imputed from one defendant to another absent an *employer-employee relationship* giving rise to respondeat superior." 747 F. Supp. at 787 (italics added for emphasis). In *McFarlane*, the United States Court of Appeals for the District of Columbia Circuit expressly considered whether "the malice of a non-employee agent can be imputed to the principal under *New York Times v. Sullivan*" where the defendant company had established some sort of agency relationship with the author. 74 F.3d at 1302. The court conducted its own lengthy inquiry on the question and concluded that the plaintiff could show the defendant's malice "only through evidence of the information available to, and conduct of, its employees." *Id.* at 1303. This Court does not read either *Secord* or *McFarlane* as standing for the broad proposition that the distinction between an employee and non-employee agent is not material to the doctrine of respondeat superior and that the actual malice of a non-employee agent can be imputed to the principal.

Numerous other federal courts have also found that an employment relationship is necessary to impute liability to a publisher. *See, e.g.*, *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1446 (8th Cir. 1989); *Hunt v. Liberty Lobby*, 720 F.2d 631, 648-49 (11th Cir. 1983); *AdvanFort Co. v. The Mar. Exec.*, LLC, No. 1:15-cv-220, 2015 U.S. Dist. LEXIS 99208, at *16-17 (E.D. Va. July 28, 2015); *Stern v. Cosby*, 645 F. Supp. 2d 258, 286 (S.D.N.Y. 2009); *Masson v. New Yorker Magazine*, 832 F. Supp. 1350, 1370-73 (N.D. Cal. 1993); *Murray v. Bailey*, 613 F. Supp. 1276, 1281 (N.D. Cal. 1985). Many of these courts have explicitly rejected the view that an agency relationship alone could serve to impute liability to a publisher in the absence of an employment relationship. The court in *Masson* considered at length the issue of liability based on agency in the First Amendment context and held that "the constitutional mandate of *New York Times v. Sullivan* prohibits liability based solely upon an agency relationship." 832 F. Supp. at 1373. The

court in *Murray* similarly held that "[t]he stringent standards required by the First Amendment make application of an agency theory inappropriate." 613 F. Supp. at 1281.

Plaintiff has staked his case against Defendant National Review on an agency theory. Plaintiff insists that the distinction between an employee and non-employee agent is not material to the doctrine of respondeat superior and that actual malice may be imputed from an independent contractor acting with actual or apparent authority. Pl. Opp'n at 20. While Plaintiff describes at length Defendant Steyn's alleged actual and apparent authority, Plaintiff has not cited any case where a court has imputed the liability of a non-employee agent to the principal based on actual or apparent authority. Rather courts have consistently declined to impute actual malice to a defendant from another defendant if there is not an employer-employee relationship between them. Accordingly, this Court finds that Plaintiff's argument that liability may be imputed to the principal based on an agency relationship alone fails as a matter of law. Rather Plaintiff may show Defendant National Review's malice only through evidence of the information available to, and conduct of, its employees. *See McFarlane*, 74 F.3d at 1302.

Plaintiff has not alleged that any National Review employee was involved in the post that Defendant Steyn published on National Review's blog, The Corner, in July 2012, or knew or suspected it was false. While Plaintiff fleetingly asserts once at the end of its motion that Defendant Steyn was Defendant National Review's employee, Plaintiff simultaneously then states that Defendant Steyn could have been Defendant National Review's agent. *See* Pl. Opp'n at 20 ("Mr. Steyn was National Review's employee or agent."). Notably, however, Plaintiff relies solely on an agency theory in its current motion, repeatedly referring to Defendant Steyn as a non-employee agent. *See* Pl. Opp'n at 10-15. It is apparent from the Amended Complaint as well as its current motion that Plaintiff has made no argument for this Court to consider that Defendant

Steyn was an employee of National Review. *See Graham v. United States,* 12 A.3d 1159, 1165 n.9 (D.C. 2011) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones . . .") (internal citations and quotation marks omitted).

However, this Court has already found that Defendant National Review cannot be held liable for Defendant Steyn's post based on an agency relationship.[1] Thus, Plaintiff's allegations as to Defendant Steyn's actual malice cannot be imputed to Defendant National Review and fail as a matter of law. The Court therefore need not address Defendant National Review's alternative argument that it is shielded from liability by the CDA.

Accordingly, it is this 19th day of March 2021

ORDERED that Defendant National Review's Motion for Summary Judgment is **GRANTED**.

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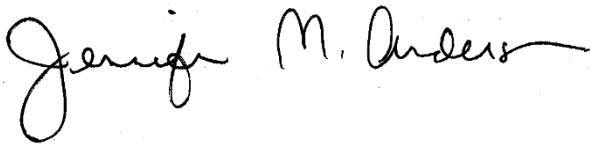

Judge Jennifer M. Anderson
Signed in Chambers

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[1] Plaintiff's other related argument to agency that Defendant National Review ratified Defendant Steyn's statement is without merit as the Court of Appeals has already noted "Mr. Lowry's editorial does not repeat or endorse the factual assertions that Dr. Mann engaged in deception and misconduct that we have found to be actionable in Mr. Simberg's and Mr. Steyn's articles." *Competitive Enter. Inst.*, 150 A.3d at 1249.

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