SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

W. GYUDE MOORE, **Plaintiff,** **v.** **HENRY COSTA,** **Defendant.**	**Case No. 2016 CA 4038 B** **Judge Steven M. Wellner** **Calendar 14**

ORDER

Before the Court is the Special Motion To Dismiss The Complaint Pursuant To The D.C. Anti-SLAPP Statute, filed by Defendant Henry Costa on July 7, 2016 ("the Special Motion To Dismiss"). For the reasons stated in this Order, the Motion is granted.

I. PLAINTIFF'S COMPLAINT

Plaintiff W. Gyude Moore asserts the following in the Complaint he filed on June 2, 2016:

Plaintiff is a citizen of the Republic of Liberia. He serves as Liberia's Minister of Public Works and previously held various positions within the Liberian government, including Deputy Chief of Staff to the President of the Republic and Head of the President's Delivery Unit. Plaintiff also sits on the boards of charitable and education institutions, some of which are located in Washington, D.C. Plaintiff brought claims for slander and libel against Defendant, a Liberian citizen who is the host of "The Costa Show," a daily talk show broadcast from a studio in Delaware to a worldwide audience over FM radio and through the Internet. The audience includes people in West Africa and the District of Columbia.

Plaintiff asserts that Defendant defamed him in five episodes of "The Costa Show" made available to the public from December 22, 2015, to January 19, 2016. Plaintiff contends that statements made by Defendant "were of and concerning Plaintiff, were false, were known to be false at the time they were made or were made with reckless disregard for their falsity, and were intended to cause, and did and will cause, injury to Plaintiff." Compl. ¶ 34.

Episode No. 1

Plaintiff alleges that during Defendant's radio program on December 22, 2015, Defendant falsely "accused Plaintiff of awarding contracts for road construction to Chinese contractors over Liberian ones, because Plaintiff was promised, or received, personal financial gain." *Id*. at ¶ 8. Plaintiff contends the awards "were made in scrupulous adherence to the requirements imposed by Liberian law." *Id*. at ¶ 9. Thus, according to Plaintiff, the "allegation that the Minister solicited, was offered, or accepted a bribe is utterly false." *Id*.

Episode No. 2

Plaintiff's Complaint states that on December 24, 2015, Defendant falsely stated that Plaintiff had "an interest" in awarding a construction contract award to a Chinese company and that Defendant described Plaintiff as "corrupt." *Id*. at ¶ 10. Plaintiff denies the truth of these statements, claiming that the contracts were awarded, as the law mandates, to a "responsive bidder offering the lowest price." *Id*. at ¶ 12.

Episode No. 3

Plaintiff's Complaint declares that Defendant defamed him during his radio show on December 30, 2015, by saying "Gyude Moore is bought" and that "He's in people's pocket. . . . He didn't award those contracts for nothing. No, I believe . . . Gyude got a kickball. That is what I believe now. It didn't happen for nothing." *Id*. at ¶ 13. Plaintiff contends these

statements “impugn his character, honestly, and integrity” and are “completely false.” *Id*. at ¶ 14.

Episode No. 4

In the Complaint, Plaintiff argues that Defendant falsely implied Plaintiff received a car in exchange for awarding a public contract by broadcasting the following in January 2016:

> We understand Gyude was gifted with that vehicle. . . . It was Christmas. Wow! Imagine what you have to do for someone to give you that gift, as expensive, worth $80, 90,000. He must have given them a contract that is worth $3, 4, 5 million!

Id. at ¶ 15. According to the Complaint, a “basic investigation” would have revealed Plaintiff bought a 2011 Nissan Patrol SUV for $33,000 from a local construction company. *Id*. at ¶ 17.

Episode No. 5

Plaintiff alleges Defendant made false statements on January 19, 2016, implying Plaintiff accepted a bribe in exchange for a new car in a conversation with his co-host:

> Gyude Moore, we are still waiting for you to tell us whose vehicle is that. How did you come to have it in your possession? . . . How you got that car, Gyude? Because I know your private vehicle was a Pathfinder. You’ve really upgraded, my brother, to an $80,000 car. . . . You have crooks at the Ministry, what do you expect? You think Gyude will stay there a day without getting corrupted?

Id. at ¶ 18. Again, Plaintiff claims Defendant’s statements were “utterly false” and that a “cursory examination of the facts would have revealed that they were false.” *Id*. at ¶ 19.

On July 7, 2016, Defendant filed the Special Motion To Dismiss. Plaintiff filed an Opposition To Defendant’s Special Motion To Dismiss (“the Opposition”) on July 29, 2016.

II. D.C. ANTI-SLAPP ACT

Defendant brought the Special Motion To Dismiss under the District of Columbia Anti-SLAPP Act. D.C. Code §§ 16-5501-05. Similar to anti-SLAPP statutes enacted in nearly 30 states, the D.C. Anti-SLAPP Act protects speakers against “strategic lawsuits against public

participation" ("SLAPPs"), which are lawsuits "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014). The D.C. Anti-SLAPP Act's Special Motion To Dismiss provision allows defendants to quickly resolve lawsuits filed "as a weapon to chill or silence speech" without the usual burden, costs, and delays of litigation. *Id.*; *see also Boley v. Atl. Monthly Group*, 950 F. Supp. 2d 249, 255 (D.D.C. 2013) (applying D.C. law).

A Special Motion To Dismiss under the D.C. Anti-SLAPP Act is resolved in a two-step process. First, a moving party must "make a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502 (b). Second, if the moving party makes such a showing, the motion "shall be granted unless the non-moving party demonstrates that the claim is likely to succeed on the merits." *Id*.

III. ANALYSIS

A. Prima Facie Showing of Protected Activity

Defendant argues the suit at issue arises from an act in furtherance of his right of advocacy on issues of public interest. Mot. at 11. The Act defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" to include:

> (A) Any written or oral statement made:
>
> > (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
> >
> > (ii) In a place open to the public or a public forum in connection with an issue of public interest; or
>
> (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

D.C. Code § 16-5501 (1). The Act defines an "[i]ssue of public interest" as "an issue related to health or safety; environmental, economic, or community well-being; the District government; a *public figure*; or a good, product, or service in the market place." D.C. Code § 16-5501 (3) (emphasis added).

Defendant's statements are covered by D.C. Code § 16-5501 (1)(A)(ii) because they are all "oral statement[s] made . . . [i]n a place open to the public or a public forum in connection with an issue of public interest." D.C. Code § 16-5501 (1)(A)(ii). First, Defendant made the statements on "The Costa Show," which is broadcast by radio and also made available over the Internet. Statements published online are deemed made in a place open to the public, or a public forum. *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 (D.D.C. 2012). Second, Defendant's statements about Plaintiff concerned "an issue of public interest" *because* Plaintiff is a "public figure." D.C. Code § 16-5501 (3). Although the Act does not define "public figure," courts have interpreted the term under D.C. Anti-SLAPP Act as having the same meaning as it does for purposes of defamation law. *See Doe No. 1*, 91 A.3d at 1041 ("[W]e presume that the use of this term imports the definition of 'public figure' used throughout defamation law"); *Boley*, 950 F. Supp. 2d at 256 (finding that plaintiff, a "'prominent' former public servant" in Liberia who had been a candidate for president of that country, was a "limited purpose public figure" for purposes of defamation law and the D.C. Anti-SLAPP Act).

Consistent with rulings made by the U.S. Supreme Court, this jurisdiction recognizes two types of public figures in the defamation context: general-purpose public figures, and limited-purpose public figures. *Doe No. 1*, 91 A.3d at 1041; *Gertz v. Robert Welch, Inc*, 418 U.S. 323, 351 (1974). General-purpose public figures are deemed public figures for all purposes because of their "position of such pervasive power and influence." *Doe No. 1*, 91 A.3d at 1041 (quoting

Gertz, 418 U.S. at 323). Limited-purpose public figures, on the other hand, assume roles in particular public controversies and are deemed public figures only for the particular controversy in which they are influential. *Doe No. 1*, 91 A.3d at 1041. In this case, Plaintiff is not a general-purpose public figure because he is not a "well-known celebrity, his name a household word." *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987) (en banc). Plaintiff is, however, a limited-purpose public figure, as explained below.

The District of Columbia Court of Appeals has adopted a form of the *Waldbaum* test, initially articulated by the U.S. Court of Appeals for the District of Columbia Circuit, to determine whether a person is a limited-purpose public figure for purposes of defamation law:

> Under the *Waldbaum* test, the court should first decide whether there is a public controversy, and determine its scope. . . . [T]his inquiry has two components: (1) whether the controversy to which the defamation relates was the subject of public discussion prior to the defamation, and (2) whether "a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution."
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> * * *
>
> Having defined the controversy, the court must next consider the plaintiff's role in it. [3] The plaintiff must have achieved a special prominence in the debate, and either "must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution."

Moss v. Stockard, 580 A.2d 1011, 1031 (D.C. 1990) (internal citations omitted); see *Doe No. 1 v. Burke*, 91 A.3d 1031, 1042 (D.C. 2014) (similar expression of the *Waldbaum* test).

The U.S. District Court for the District of Columbia applied the *Waldbaum* test in a case strikingly similar to this one and concluded that a former high-ranking Liberian public official was a limited-purpose public figure whose defamation case against a news magazine and its reporter should be dismissed under the D.C. Anti-SLAPP Act. *Boley*, 950 F. Supp. 2d at 260-62.

The plaintiff in the *Boley* case, George Boley, brought a defamation claim based on two articles that appeared in *The Atlantic* magazine in 2010 and an online version of the magazine. *Id*. at 253. He focused on two excerpts in particular:

> (1)
>
> Some news out of New York. George Boley, a warlord I first met when covering the Liberian civil war in the mid-90s, and who later moved to New York, was arrested January 15th by U.S. Immigration and Customs and is now sitting in a jail cell in upstate Batavia. So far, he's being charged administratively, with lying in order to gain entry into the U.S., and with committing extrajudicial killings while in another country. Other branches of Homeland Security, I've been told, are looking at charging him with actual war crimes, which is a good thing, because he belongs in the Hague with his fellow warlord, Charles Taylor.
>
> . . . I knew, from firsthand observation, that his organization, the grossly-misnamed Liberian Peace Council, recruited and armed child soldiers; fed them drugs; and ordered them to rape and kill.
>
> * * *
>
> (2)
>
> You should pardon the expression, but, Christ. Charles Taylor is an evil man, more evil than my own personal Liberian warlord, George Boley. I suppose I shouldn't be surprised by Pat Robertson, but this is fairly unbelievable.

Id. at 253 (internal citations omitted).

In concluding that Mr. Boley was a "limited purpose public figure," the court addressed the factors described in *Waldbaum*. First, as to the existence of a public controversy, the court concluded that the Liberian civil war was already the subject of considerable attention from the U.S. government and the international press, and that related reports of human rights abuses concerned "participants and nonparticipants alike." *Id*. at 261. Second as to whether a reasonable person might expect persons outside the immediate players to be affected by the outcome of the Liberian conflict, the court emphasized that "a limited purpose public figure is defined 'not in terms of geography but in terms of the controversy that he has stepped into,'"

[and] the Liberian Civil War[] stretched beyond that country's borders, garnering attention from the United States government and the global press. *Id*. The impact of resolving the conflict might therefore also be expected to reach well beyond the persons immediately involved. Third, as to the connection between the plaintiff and the alleged defamatory statement, the court found that the defendants' "characterization of Boley as a warlord directly concerned Boley's involvement in the Liberian Civil War" and was, in fact, based on the reporter's experience covering Mr. Boley during the war. *Id*. at 262. In addition, Mr. Boley himself hoped to affect "the resolution of the civil war through his stature as a prominent Liberian." *Id.* at 261.

The *Waldbaum* analysis leads to the same result here. First, although the statements at issue relate to alleged corruption within the Liberian government between December 2015 and January 2016, the public discussion of corruption within the Liberian government has a much longer history. In its Special Motion To Dismiss, Defendant asserts that the Liberian government has been plagued by suspicions of corruption for years. Defendant included with its Motion a 2013 Human Rights Report indicating that the country's "most serious human rights abuses were those tied to a lack of justice: judicial inefficiency and corruption . . . ." Mot. at 4 (citing Exhibit #8). Defendant has also cited a 2016 article by *Front Page Africa*, which is published in Liberia and on the Internet, reporting that "the Ministry of Public Works has *always* been at the core of controversies with reports of corruption in the reporting of contracts to construction companies." Mot. at 5 (emphasis added). The same article states that after a "few months in charge at the Ministry, Moore [referring to Plaintiff] and his team have come under strong criticisms for alleged acts of corruption, administrative malpractices and other acts said to be creating problems for the smooth implementation of projects." *Id*. Plaintiff began his term as

Liberia's Minister of Public Works in December 2014 (Compl. ¶5); thus, these criticisms predate Defendant's statements.

Indeed, Plaintiff does not dispute the evidence of a pre-existing issue of public interest. He acknowledges longstanding concerns about corruption within the Liberian government and notes that the Liberian President "would undoubtedly herself be the first to admit that perfection has not yet been achieved, and that the challenges posed by corrupt officials continue to present themselves." Thus, because "the controversy to which the defamation relates was the subject of public discussion prior to the defamation," the first prong of the *Waldbaum* test is satisfied.

Second, as to whether "persons beyond the immediate participants in the dispute" would be affected by resolution of the matters underlying the defamation claim, the answer is yes. Others interested in, or affected by, the outcome would include Liberian citizens generally and persons with financial or other interests in Liberia, regardless of nationality. The effects of government corruption, like the effects of civil war, are felt beyond national boundaries. Thus, the second *Waldbaum* prong is satisfied.

Third, as to Plaintiff's role in the controversy, the record suggests that Plaintiff sought to be recognized as having a role in the matter, responding to the corruption allegations in an interview with the *Daily Observer* that resulted in an article titled "'No Money Paid For Awarding Contracts.'" *See* Mot. 5; Exhibit #14. Further, because of Plaintiff's "position in the controversy" as the Minister of Public Works, it "could realistically have been expected" that Plaintiff would have an impact on its resolution. *See Doe No. 1*, 91 A.3d at 1042. Accordingly, the Plaintiff satisfies the third *Waldbaum* prong.

Under the *Waldbaum* test, Plaintiff is a limited-purpose public figure for purposes of the controversy at issue in this case. This leads to the conclusion that Defendant made the

statements in “a place open to the public or a public forum in connection with an issue of public interest,” and, consequently, that Defendant has made a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.

B. Likelihood of Success on the Merits

Because Defendant’s statements are protected under the D.C. Anti-SLAPP Act, the burden shifts to Plaintiff “to demonstrate[] that the claim is likely to succeed on the merits.” D.C. Code § 16-5502 (b). The District of Columbia Court of Appeals has not construed this standard in the context of the D.C. Anti-SLAPP Act, but other courts have suggested that the question is whether the “complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” *See Boley*, 950 F. Supp. 2d at 257; *Mann v. National Review, Inc., et al.*, No. 12-8263 at *15-16 (D.C. Super. Ct. July 19, 2013).

In order to survive dismissal in this case, Plaintiff must prove a likelihood of success on the following elements of defamation: “(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.” *Williams v. District of Columbia*, 9 A.3d 484, 491 (D.C. 2010) (quoting *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001)). If the plaintiff is a public figure, the fault component of the third element is heightened, and the plaintiff must show by “clear and convincing evidence” the statements were published with “actual malice.” *Doe No. 1*, 91 A.3d at 1044.

In its Special Motion To Dismiss, Defendant contends Plaintiff cannot prove a likelihood of success on the merits because his statements were not made with actual malice. As addressed above, Plaintiff is a limited-purpose public figure regarding the statements at issue. Accordingly, to survive dismissal under the Anti-SLAPP Act, Plaintiff must "demonstrate[] that the claim is likely to succeed on the merits" by proving by clear and convincing evidence Defendant's statements were made with "actual malice, i.e. either subjective knowledge of the statement's falsity or a reckless disregard for whether or not the statement was false." *Id*. Reckless disregard for the truth "requires more than a departure from reasonably prudent conduct." *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989). It demands "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Beeton v. District of Columbia*, 779 A.2d 918, 924 (D.C. 2001) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

Plaintiff purports to show actual malice in three ways. First, in his Opposition, Plaintiff claims actual malice is demonstrated by the fact that Defendant "continued to utter highly critical statements about Plaintiff even after he received the April 14, 2016, cease-and-desist letter from undersigned counsel." Oppos. at 13. However, the receipt of a cease-and-desist letter does not establish actual malice, as "an author's knowledge of 'denials, however vehement' does not show actual malice." *Parsi v. Daioleslam*, 890 F. Supp. 2d 77, 92 (D.D.C. 2012) (quoting *Harte-Hanks Communications*, 491 U.S. at n.37). Thus, Plaintiff's actions after receiving the cease-and-desist letter are not clear and convincing evidence of malice.

Second, Plaintiff alleges that Defendant must have published the statements with actual malice because Defendant did not explain his sources. Oppos. at 13. The D.C. Anti-SLAPP Act expressly requires, however, that the plaintiff "demonstrate that the claim is likely to succeed on

the merits." D.C. Code § 16-5502 (b). Whether or not an identification of sources might ultimately be relevant to the issue of actual malice, the failure to identify sources is hardly clear and convincing evidence of Defendant's state of mind. At this stage of the litigation, Defendant is under no obligation to put on evidence contradicting Plaintiff's assertions, let alone reveal his sources. The plaintiff – not the defendant – bears the burden of proving the statements were made with actual malice. In sum, Defendant's failure to explain his sources does not constitute actual malice.

Third, Plaintiff argues that actual malice should be presumed from Defendant's failure to investigate or pursue certain leads that might have revealed other relevant information. For example, the Complaint alleges that certain statements made in Episode No. 4 must have been made with actual malice because "[a] basic investigation would have disclosed to Defendant that Plaintiff at the end of 2015 purchased a 2011 (not a 'brand new') Nissan Patrol SUV." Compl. ¶ 17. Plaintiff may be correct about the automobile purchase, but while a "failure to inquire further and learn more about the subject . . . might be evidence of negligence," it does *not* "demonstrate[] clear and convincing evidence of the 'intentional or reckless disregard for [the statement's] falsity.'" *Doe No. 1*, 91 A.3d at 1045 (quoting *Moss*, 580 A.2d at 1029).

In addition, Plaintiff contends that allegations that Plaintiff took bribes in exchange for awarding government contracts could have been refuted through public documents showing how those government contracts were actually awarded. Opps. at 12. As Plaintiff states in his Opposition, "Defendant holds himself out as someone experienced in uncovering fraud and waste in the Liberian Government; surely he has access to public documents that he can review before making such allegations as the ones at issue." *Id*. But whether or not Defendant might

have had access to certain public documents as part of his investigation, his failure to review those documents is not clear and convincing evidence of actual malice.

Finally, Plaintiff argues Defendant's statements about Plaintiff receiving a Nissan Patrol SUV as a gift must have been made with actual malice because Defendant "made no effort to investigate, and there is no indication that he contacted Plaintiff, the seller of the car, or the bank that financed the transaction." Oppos. at 4-5. Again, the wisdom of Defendant's failure to contact potential sources is not at issue because a failure to investigate is not a sufficient showing of actual malice.

Although Plaintiff has not shown Defendant knew the statements at issue were false, Plaintiff could still prevail by showing Defendant's failure to inquire or investigate constituted a "reckless disregard" for the truth. The U.S. Supreme Court has been clear, however, that a "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Communications*, 491 U.S. at 688; *St. Amant*, 390 U.S. at 727. To successfully prove "reckless disregard," a plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731. Plaintiff has not made a showing that Defendant "entertained serious doubts as to the truth" of the statements.

Plaintiff's defamation claim is unlikely to succeed on the merits because Plaintiff has not shown by clear and convincing evidence that Defendant's statements, whether considered alone or in the aggregate, were made with actual malice. Accordingly, Defendant's Special Motion To Dismiss is granted.

IV. ATTORNEY'S FEES

Under the D.C. Anti-SLAPP Act, the "court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees." D.C. Code § 16-5504 (a).

Defendant argues that the language of Section 16-5504 (a) of the D.C. Anti-SLAPP Act and its subsequent interpretation by the D.C. Court of Appeals' in *Doe v. Burke*, 133 A.3d 569 (D.C. 2016), established a presumption of attorney's fees and requires this Court to allow Defendant to submit a proposed motion for attorney's fees and costs. Mot. at 17-20. Plaintiff, on the other hand, asks this Court to exercise its discretion and forbid Defendant from seeking attorney's fees and costs. Oppos. at 15.

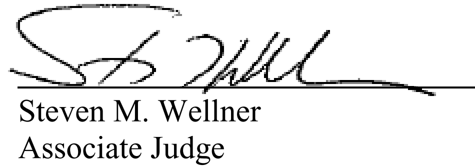
In *Doe*, the Court of Appeals faced the question of whether a defendant who prevails on a special motion to quash a subpoena under § 16-5503 of the D.C. Anti-SLAPP Act is entitled to attorney's fees under D.C. Code § 16-5504 (a). The Court of Appeals, through an analysis of the statute and its legislative history, concluded that "a successful movant under § 16-5503 is entitled to reasonable attorney's fees in the ordinary course – *i.e.*, presumptively – unless special circumstances in the case make a fee award unjust." *Doe*, 113 A.3d at 571.

Because D.C. Code § 16-5504 (a) reads "§ 16-5502 or § 16-5503," this Court finds that the Court of Appeals' decision in *Doe* giving successful defendants on a special motion to quash a presumption of attorney's fees applies with equal force to defendants who are successful on a special motion to dismiss. Accordingly, because Defendant has been successful on its Special Motion To Dismiss and no special circumstances exists in this case, Defendant is presumed to be entitled to reasonable attorney's fees.

V. CONCLUSION AND ORDER

For the reasons stated above, and considering the record as a whole, it is therefore **ORDERED** that Defendant's Special Motion To Dismiss is **GRANTED**, and the case is **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that Defendant **SHALL FILE** any file a motion for attorney's fees and costs under the Anti-SLAPP Act by **February 10, 2017**.

DATED: December 12, 2016



Steven M. Wellner
Associate Judge

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