

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & COUNSUMER DOCKET
DOCKET NO. BCD-CV-18-22

WILLIAM LIVEZEY,)
)
 Plaintiff,)
)
 v.)
)
 MTM ACQUISITION, INC., d/b/a/)
 MAINETODAY MEDIA,)
)
 Defendant.)

ORDER ON DEFENDANT’S MOTION
TO DISMISS

This matter is before the Court on Defendant MTM Acquisition, Inc., d/b/a/ MaineToday Media’s (“MTM”) motion to dismiss the Complaint pursuant to M.R. Civ. P. 12(b)(6). Plaintiff William Livezey opposes the motion. The Court heard oral argument on the motion on August 28, 2018. MTM was represented by Jonathan Piper, Esq. and Mr. Livezey was represented by Stephen Whiting, Esq.

BACKGROUND

This claim arises from MTM’s reporting on Mr. Livezey’s conduct as an undercover law enforcement officer in connection with a two-year sting operation in Allagash. Mr. Livezey was an undercover operative with the Maine Warden Service from 1996 to 2016. (Pl’s Compl. ¶¶ 6-7.) In 2012, he began a covert investigation of suspected poaching in Allagash. (Pl’s Compl. ¶ 9.) There were three primary targets of Mr. Livezey’s investigation, and he ingratiated himself with the primary targets and their associates. (Pl’s Compl. ¶¶ 10-11.) Mr. Livezey’s investigation resulted in arrests, prosecutions, and convictions. (Pl’s Compl. ¶¶ 15-16.)

Beginning on May 8, 2016, MTM published an investigative series of at least twenty-six articles on the Maine Warden Service, including the Allagash prosecutions and prior undercover

investigations Mr. Livezey conducted throughout his career. (Pl’s Compl. ¶¶ 25-56.) Mr. Livezey alleges that those articles included twelve untrue statements about him, which are explained in more detail below. (Pl’s Compl. ¶¶ 28-29, 31.) Mr. Livezey also alleges that eight of the statements misrepresented the contents of a 2006 Maine Supreme Judicial Court opinion regarding a prior investigation by Mr. Livezey in 2003: *State v. Perry*, 2006 ME 76, 899 A.2d 806. (Pl’s Compl. ¶¶ 30-31.)

STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6), courts “consider the facts in the complaint as if they were admitted.” *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed “in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). “Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim.” *Id.* “The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law” and thus subject to de novo appellate review. *Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2, 125 A.3d 1141.

DISCUSSION

MTM’s primary argument is that Mr. Livezey has failed to allege “actual malice” on the part of MTM, which the Supreme Court of the United States has held to be an essential element of defamation claims brought by “public figures.” (Mot. Dismiss 6-8.) Mr. Livezey responds that he “alleges over half a dozen times that the Defendant’s statements were made ‘maliciously, with known falsity and reckless disregard for the truth.’” (Opp’n Mot. Dismiss 2.)

The parties agree that Mr. Livezey is a “public figure” under Maine law. *See Roche v. Egan*, 433 A.2d 757, 762 (Me. 1981). (Mot. Dismiss 7; *see* Opp’n Mot. Dismiss 1-3.) “Discussion of public officials and public figures on matters of public concern . . . deserves special favor in a democratic society, and thus such discussion is subject to a conditional privilege—the ‘First Amendment privilege’—that can be overcome only by clear and convincing evidence of knowledge or disregard of falsity.” *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991) (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964)). “Actual malice” in this context is a term of art specific to defamation cases and means that a false statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times*, 376 U.S. at 280; *see also Lester*, 596 A.2d at 69 n.7.

MTM argues that Mr. Livezey merely recites the legal standard for actual malice without pleading any facts that, if true, would support the claim. Mr. Livezey responds that general allegations that the statements were made maliciously, with known falsity and reckless disregard for the truth, is sufficient to survive a motion to dismiss. In the alternative, Mr. Livezey argues that taken as true, and in a light most favorable to him, the allegations support a finding of actual malice.

Mr. Livezey’s first argument is without merit. To survive a motion to dismiss, “[t]he complaint must allege facts with sufficient particularity so that, if true, they give rise to a cause of action; merely reciting the elements of a claim is not enough.” *America v. Sunspray Condo. Ass’n*, 2013 ME 19, ¶ 13, 61 A.3d 1249, *see also Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56-57 (1st Cir. 2012). If there are no factual allegations to support the conclusion that MTM acted with actual malice, then the Complaint should be dismissed, regardless of Mr. Livezey’s

characterization of MTM's employees' states of mind when MTM published the allegedly false statements about Mr. Livezey. *See Schatz*, 669 F.3d at 56.

The Court next turns to the Complaint to determine whether the factual allegations therein, taken as true, could support a finding that MTM acted with actual malice. In so doing, the Court considers not only the allegations in the Complaint but also the series of Maine Sunday Telegram articles on which Mr. Livezey's Complaint is based, attached to MTM's motion as Defendant's Exhibit 1. *See Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 11, 843 A.2d 43 (“[D]ocuments that are central to the plaintiff's claim, and documents referred to in the complaint may be properly considered on a motion to dismiss without converting the motion to one for a summary judgment when the authenticity of such documents is not challenged.”); *see also Schatz*, 669 F.3d at 56.

The first allegedly defamatory statement is that Mr. Livezey “heard a lot of talk about poaching, but he never caught either [primary target of the investigation] actually doing it.” (Pl's Compl. ¶ 31.a.) Mr. Livezey points out that he earlier alleged that he “observed more than three hundred . . . wildlife crimes committed by the Primary Targets of the investigation” and that his investigation resulted in numerous convictions. (Pl's Compl. ¶¶ 12, 20.) Mr. Livezey argues that these latter two allegations show that MTM's employees knew that the statement that “he never caught either man actually [poaching]” was false, and yet MTM published it anyway.

The Court disagrees. The allegations in Paragraphs Twelve and Twenty of the Complaint could not support a finding that MTM acted with actual malice when it published the statement in Paragraph 31, subparagraph a. At most, they could establish the falsity of the published statement, not MTM's knowledge of its falsity. Furthermore, as MTM points out on page 2 of its rebuttal brief, the statements are not necessarily even factually inconsistent. “Poaching” is not synonymous

with “wildlife crimes,” and the convictions could have resulted whether or not Mr. Livezey personally observed poaching.

Mr. Livezey next points to the following three allegedly defamatory statements, which show that MTM’s reporters read Mr. Livezey’s reports. (Pl’s Compl. ¶¶ 31.b-31.d.) Mr. Livezey alleges earlier in the Complaint that he “made detailed contemporaneous reports of his investigation.” (Pl’s Compl. ¶ 13.) In defending against this motion to dismiss, Mr. Livezey claims that because MTM’s journalists read his reports, they must have known that the statements in Paragraph 31, subparagraphs a. through d. were not true based on what was in those reports. However, even if MTM published a statement that was inconsistent with what was in Mr. Livezey’s report, this does not show that MTM’s journalists knew that the published statement was false or were recklessly indifferent to its truthfulness. The articles and the Complaint make clear that Mr. Livezey’s reports were not MTM’s only sources. (Pl’s Compl. ¶¶ 24-25; Def’s Ex. 1.) At most, these published statements show that MTM’s journalists did not accept everything in Mr. Livezey’s reports as true.

The last eight allegedly defamatory statements in the Complaint refer to an opinion of the Maine Supreme Judicial Court sitting as the Law Court: *State v. Perry*, 2006 ME 76, 899 A.2d 806. (Pl’s Compl. ¶¶ 31.e-31.l.) Mr. Livezey alleges that the articles “repeatedly and maliciously, with known falsity and a reckless disregard for the truth, patently misstated and misrepresented the contents of [the opinion] regarding a prior investigation by Plaintiff in 2003 in Oxford County, Maine.” (Pl’s Compl. ¶ 30.) The complained-of language is some variation of: “The court ruled that Livezey’s behavior in an Oxford County undercover operation might have been ‘repugnant,’ but ‘not so outrageous’ that all criminal charges against the man targeted in that investigation should be dismissed.” (Pl’s Compl. ¶ 31.e; *see* Pl’s Compl. ¶¶ 31.e-31.l.)

These allegations show that at most MTM reporters misinterpreted what the *Perry* opinion says. The actual language from *Perry* is as follows:

We have acknowledged that there may be cases in which government officers are so enmeshed in the criminal activity that the prosecution of another participant in that activity might be “repugnant to our concept of criminal justice.” *State v. Smith*, 615 A.2d 1162, 1165 (Me. 1992). The warden's activities here were clearly designed to ingratiate himself with Perry and Perry's friends and clients so that he could personally observe violations of the fish and wildlife laws. His testimony was replete with instances of how he attempted to avoid committing a crime personally. We are not convinced that the warden's conduct was so outrageous that due process requires a dismissal of all charges.

State v. Perry, 2006 ME 76, ¶ 27, 899 A.2d 806. The *Perry* opinion quotes *Smith*, 615 A.2d at 1165 (quoting *United States v. Russell*, 411 U.S. 423, 428, 431-32 (1973)):

When government investigators are enmeshed in the criminal activity for which the defendant is prosecuted, the prosecution of that defendant is repugnant to our concept of criminal justice. This defense, however, is available only when the “conduct of law enforcement agents is so outrageous due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction.”

The Law Court's holding in *Perry* would be ambiguous to a layperson, and a person trained in legal research would understand that reading the citation to *Smith* is important to resolve that ambiguity. While the complained-of language may be an error in legal interpretation, journalists cannot be held to the same standard as a lawyer, judge, or legal scholar. *See Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971) (“Time[] . . . adopt[ed] one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of ‘malice’ under *New York Times*.”) Mr. Livezey alleged that MTM acted “maliciously, with

known falsity and a reckless disregard for the truth” in interpreting a legal opinion of the Law Court that would be ambiguous to a layperson, but does not allege any facts to support that conclusion. Even if “the decision does not say what the Defendant purported to quote it to say,” it does not necessarily follow that “Defendant . . . must have made up those quotes, and knowingly or recklessly falsified its reports[]” in the absence of any further allegations bearing on MTM’s reporters’ states of mind.¹ (Opp’n Mot. Dismiss 3.)

In sum, Mr. Livezey has failed to plead facts that could support a finding that MTM published the allegedly defamatory statements with “actual malice,” that is, with knowledge that the statements were false or with reckless disregard of whether they were false or not. As this is an essential element to a public figure’s defamation claim, Mr. Livezey’s Complaint should be dismissed.

CONCLUSION

Based on the foregoing it is hereby ORDERED:

That Defendant MTM’s motion to dismiss is GRANTED. Plaintiff William Livezey’s Complaint is dismissed.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: September, 21,2018

/s
M. Michaela Murphy
Justice, Business and Consumer Court

¹ Furthermore, it is unlikely that the statements in Pl’s Compl. ¶¶ 31.e-31.l. are defamatory. With the exception of ¶ 31.h, MTM described the Law Court as “finding” or “ruling” that Mr. Livezey’s behavior “may” or “might” have been “repugnant.” Not only do MTM’s journalists (who presumably are not lawyers) condition their interpretation of the Law Court’s holding, but many courts have held that words like “repugnant” cannot be actionable in any event. *See Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F. 3d 122, 129 (1st Cir. 1997) (“trashy”); *Fleming v. Benzaquin*, 454 N.E.2d 95, 99 n.7, 100 (Mass. 1983) (“reprehensible”); *Hickey v. Capital Cities*, 792 F. Supp. 1195, 1199 (D. Or. 1992) (applying Oregon law) (“repulsive”).