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.	))))))))))	COMBINED ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION AND MOTION TO AMEND

Pending before the Court are Plaintiff William Livezey's motion for reconsideration and motion to amend complaint. The Defendant, MTM Acquisition, Inc., d/b/a MaineToday Media ("MTM") opposes both motions. Mr. Livezey is represented by Stephen Whiting, Esq. and MTM is represented by Jonathan Piper, Esq., Sigmund Schutz, Esq., and Benjamin Piper, Esq. Pursuant to its discretionary authority under M.R. Civ. P. 7(b)(7) the Court elects to decide the motions without holding oral argument.

BACKGROUND

Mr. Livezey filed a complaint (the "Complaint) against MTM for libel and defamation based on its reporting on his conduct investigating wildlife crimes undercover in Allagash, Maine between 2012 and 2014. MTM did not answer the Complaint, instead filing a motion to dismiss for failure to state a claim pursuant to M.R. Civ. P. 12(b)(6). Mr. Livezey opposed the motion to dismiss on its merits, but did not bring a motion to amend the Complaint. On September 21, 2018, this Court entered its order granting MTM's motion to dismiss (the "Prior Order") on the grounds that the Complaint failed to plead facts that could support a finding that MTM published the allegedly defamatory statement with "actual malice," an essential element to a defamation claim brought by a "public figure" like Mr. Livezey. *See, e.g.*, *Roche v. Egan*, 433 A.2d 757, 762 (Me.

1981). Mr. Livezey thereafter brought the two motions now under consideration and filed a proposed amended complaint (the "Amended Complaint.")

DISCUSSION

I. Plaintiff's Motion for Reconsideration

"A motion for reconsideration of the judgment shall be treated as a motion to alter or amend the judgment." M.R. Civ. P. 59(e). Courts should order relief pursuant to M.R. Civ. P. 59(e) when it is "reasonably clear that prejudicial error has been committed or that substantial justice has not been done." *Cates v. Farrington*, 423 A.2d 539, 541 (Me. 1980). Under M.R. Civ. P. 7(b)(5), a motion for reconsideration "shall not be filed unless required to bring to the court's attention an error, omission, or new material that could not previously have been presented." "Rule 7(b)(5) is intended to deter disappointed litigants from seeking 'to reargue points that were or could have been presented to the court on the underlying motion.'" *Shaw v. Shaw*, 2003 ME 153, ¶ 8, 839 A.2d 714 (quoting M.R. Civ. P. 7(b)(5) advisory committee's notes to 2000 amend., 3A Harvey & Merritt, *Maine Civil Practice* 270 (3d, 2011 ed.)). A trial court's ruling on a motion for reconsideration is reviewable for an abuse of discretion. *Shaw*, 2003 ME 153, ¶ 12, 839 A.2d 714.

Mr. Livezey's stated grounds for reconsideration of the Prior Order is that he subsequently filed a motion to amend his complaint, along with a proposed amended complaint, and that the Amended Complaint alleges sufficient facts to support his claims. (Pl's Mot. Reconsideration ¶¶ 2-4.) Mr. Livezey's motion does not bring to the Court's attention an error, omission, or new material that could not previously have been presented; nor does it claim that prejudicial error has been committed or that substantial justice has not been done.[1] The Court therefore concludes that

[1] The Court infers that Mr. Livezey brought the motion for reconsideration not to argue that the motion to dismiss was wrongly decided, but rather as a procedural mechanism to enable the Court to consider his motion to amend complaint given that an order dismissing a complaint pursuant to M.R. Civ. P. 12(b)(6) is generally with prejudice. *See Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 9, 708 A.2d 283. However, as explained in more detail

there is no basis for reconsideration of the Prior Order and Mr. Livezey's motion for reconsideration is DENIED.

II. Plaintiff's Motion to Amend Complaint

As a threshold matter, MTM claims that the Court need not reach the merits of Mr. Livezey's motion to amend complaint because the Prior Order dismissed Mr. Livezey's Complaint with prejudice and he did not move to amend his complaint until after that dismissal. Mr. Livezey responds that it is reversible error for a court to deny a plaintiff's motion to amend his complaint after granting a Rule 12(b)(6) motion to dismiss.

The general rule is that a "Rule 12(b)(6) dismissal is technically an adjudication on the merits and is with prejudice." *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 9, 708 A.2d 283. However, that general rule is subject to an important caveat: "unless, as is usually the case, leave is granted to amend the complaint." *Id.* (quoting *Dutil v. Burns*, 1997 ME 1, ¶ 5, 687 A.2d 639). Put simply, "[a] dismissal under Rule 12(b)(6) is technically an adjudication on the merits under Rule 41(b)(3). It ordinarily does not have this effect, however, because leave to amend is freely granted under Rule 15(a)." 2 Harvey & Merritt, *Maine Civil Practice*, § 12:11 at 422 (3d, 2011 ed.).

MTM argues that because Mr. Livezey did not formally move to amend his complaint until after the Court's ruling on MTM's motion to dismiss, that he is now foreclosed from amending the Complaint because the entire case was dismissed with prejudice. Generally, the common practice in this Court is for a plaintiff to bring a motion to amend her complaint in conjunction with her opposition to a defendant's Rule 12(b)(6) motion to dismiss. When this procedure is followed, the rule is well-established: "a trial court should ordinarily rule on a motion to amend

below, the Court need not grant the motion for reconsideration in order to consider Mr. Livezey's motion to amend complaint on its merits.

before acting on a motion that could be dispositive of the original complaint." *Sherbert v. Remmel*, 2006 ME 116, ¶ 8, 908 A.2d 622. Although Mr. Livezey did not formally move to amend his complaint or file a proposed amended complaint before the Prior Order was entered, in his opposition to MTM's motion to dismiss, Mr. Livezey did argue that "if the Court concludes that the Complaint needs to contain more supporting facts, the Plaintiff's claims should not be dismissed, but rather the Plaintiff should be given an opportunity to amend his Complaint." (Pl's Opp'n Mot. Dismiss 4.)

The Court concludes that although its dismissal of Mr. Livezey's complaint was technically an adjudication on the merits and with prejudice, he should nonetheless be allowed an opportunity to amend his complaint. *See* 2 Harvey & Merritt, *Maine Civil Practice*, § 15:3 at 478 (3d, 2011 ed.) ("After judgment on dismissal of a complaint for failure to state a claim, the right to amend depends upon leave of court, but the admonition to allow amendment 'freely' still applies."). *See also Barkley v. Good Will Home Asso.*, 495 A.2d 1238, 1240 (Me. 1985) (citing M.R. Civ. P. 15(a) for the proposition that "leave [to amend] shall be freely given when justice so requires" even after dismissal and holding that in the absence of "evidence of bad faith or dilatory motives" on the part of the plaintiffs, or undue prejudice to the defendant, that denying the plaintiffs an opportunity to amend their complaint was an abuse of discretion). Here, there is nothing suggesting bad faith or dilatory motives on Mr. Livezey's part. There is likewise no undue prejudice to MTM, as MTM also argues in its opposition memorandum that the Amended Complaint does not state a claim for defamation. The Court thus treats MTM's substantive opposition to Mr. Livezey's motion to amend complaint as a motion to dismiss the Amended Complaint under M.R. Civ. P. 12(b)(6) and proceeds to determine whether the Amended Complaint states a claim for defamation.

"The plaintiff in a defamation case must prove that the published statements made were

defamatory, meaning that the statements harmed his reputation so as to lower him in the estimation of the community." *Schoff v. York County*, 2000 ME 205, ¶ 9 n.3, 761 A.2d 869. (quotation omitted). "Moreover, the plaintiff must prove that the defamatory statements are false." *Id.*, ¶ 9. "[W]ords that on their face without further proof or explanation injure the plaintiff in his business or occupation . . . are defamatory per se." *Ramirez v. Rogers*, 540 A.2d 475, 478 (Me. 1988).

Furthermore, Mr. Livezey is a "public figure" under Maine law. *See Roche v. Egan*, 433 A.2d 757, 762 (Me. 1981). "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 of 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.

In the Amended Complaint, Mr. Livezey clarifies that he is not necessarily claiming that MTM's statements about his behavior during the investigation were made with actual malice, but rather that MTM's statements claiming that Mr. Livezey's own reports reference this behavior were made with actual malice.[2] For example, an allegedly defamatory statement is that "Livezey

[2] The Amended Complaint reiterates that the statement "Livezey heard a lot of talk about poaching, but he never caught either man actually doing it" is defamatory and was made with actual malice. (Am. Compl. ¶ 31, 53-54.) However, beyond the bald allegation that MTM's journalist acted with actual malice, the Amended Complaint still does not allege any facts that could support such a finding. As the Court previously concluded in the Prior Order, as a matter of law, the mere fact that the statement is inconsistent with Mr. Livezey's reports (*see* Am. Compl. ¶¶ 33-52) cannot establish that the statement was made with actual malice. (Prior Order at 4-5.) *Cf. Tucci v. Guy Gannet Pub. Co.*, 464 A.2d 161, 170 (Me. 1983) ("Negligent investigative reporting alone does not constitute actual malice[.]").

would spend 40 days in Allagash . . . according to his own reports—doing his best to tempt locals into violating fish, game and other laws." (Am. Compl. ¶ 58.) Mr. Livezey then alleges that "nowhere in his own reports did the Plaintiff state that he was 'doing his best to tempt locals into violating fish, game and other laws.'" (Am. Compl. ¶ 60.) This allegation, if proven, could establish that MTM's employee knowingly and intentionally—or with reckless disregard as to it veracity—published a false statement, if what MTM published was indeed inconsistent with what is in his reports. (Am. Compl. ¶ 61.) One other allegedly defamatory statement similarly characterizes Mr. Livezey's reports themselves, as opposed to merely reporting on his behavior during the investigation generally: "The agent's own reports say he gave a target a firearm and ammunition—and that he even killed a deer in the target's presence—in an effort to entice him poach." (Am. Compl. ¶ 66.)

Mr. Livezey's reports were not presented to the Court when it decided the motion to dismiss, and the Court therefore accepted Mr. Livezey's allegations with regards to those reports as true. *See Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830. MTM attached the reports to its opposition to Mr. Livezey's instant motion to amend, as they are "documents that are central to the plaintiff's claim[] and . . . referred to in the complaint [and] the authenticity of [the] documents is not challenged." *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 11, 843 A.2d 43.[3] Having reviewed the reports the Court concludes that Mr. Livezey cannot prove by clear and convincing evidence, as a matter of law, that MTM's employee knowingly and intentionally—or with reckless disregard—published a false statement when it published the two statements reproduced above about Mr. Livezey's reports.

Mr. Livezey points out that this is a motion for summary judgment, and the issue of MTM's

[3] As noted above, the Court treats MTM's substantive opposition as a motion to dismiss the Amended Complaint.

employee's state of mind is a question of fact. *See Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2, 125 A.3d 1141 ("When the trial court acts on a motion to dismiss pursuant to M.R. Civ. P. 12(b)(6), facts are not adjudicated"). "[A]s a general proposition, questions concerning the state of mind a person had when he performed a particular act" are factual questions to be answered by a jury. *Geary v. Stanley Med. Res. Inst.*, 2008 ME 9, ¶ 20, 939 A.2d 86. However, this general proposition can be abrogated in "special case[s]" where a "definitive standard" has been established by which to judge a person's conduct. *Id.* ¶¶ 20-21. The "actual malice" standard announced in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) and adopted by our Law Court in *Michaud v. Livermore Falls*, 381 A.2d 1110, 1112-13 (Me. 1978) is such a "definitive standard." *See Tucci v. Guy Gannet Pub. Co.*, 464 A.2d 161, 170 (Me. 1983) (affirming summary judgment for defendant in defamation case where jury could not reasonably infer actual malice as a matter of law).

In *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971), the United States Supreme Court held that because "Time[ ] . . . adopt[ed] one of a number of possible rational interpretations of a document that bristled with ambiguities[,] [t]he 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*." MTM's journalist's interpretation of Mr. Livezey's reports is analogous to that of Time's journalist's interpretation of a government report in *Time, Inc.*, where the Supreme Court justified the rational interpretation "safe harbor" on the grounds that the actual malice requirement applies

> . . . with even greater force to the situation where the alleged libel consists in the claimed misinterpretation of the gist of a lengthy government document. Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of "truth" that would not put the publisher virtually at the mercy of the unguided discretion of a jury.

Id., 401 U.S. at 291. In that case, the Supreme Court was concerned that anything less than a strict application of the actual malice requirement would

> . . . compel[] the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—lead[ing] to . . . "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred . . . . [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

Id. at 290 (quoting *N.Y. Times Co.*, 376 U.S. at 279. This Court shares those concerns, and determines that dismissal of Mr. Livezey's Amended Complaint is necessary to maintain the First Amendment protections established by the United States Supreme Court and our Law Court. *See Time, Inc.*, 401 U.S. 279; *N.Y. Times Co.*, 376 U.S. 254; *Lester*, 596 A.2d 65; *Tucci*, 464 A.2d 161; *Roche*, 433 A.2d 757; *Michaud*, 381 A.2d 1110.

Mr. Livezey's investigative reports are replete with examples of behavior that could be rationally interpreted as efforts to entice his targets to commit wildlife crimes. In his reports, Mr. Livezey recorded that he told one target that he would buy a large buck deer from him and then later "told [him] that if he saw a big buck, to kill it" so that Mr. Livezey could buy it from him. (Def's Ex. 1 at 16, 32.) Elsewhere, Mr. Livezey reports that he provided a target with his rifle, sometimes loading it with his own ammunition, during night hunting expeditions. (Def's Ex. 1 at 67, 72, 80.) Mr. Livezey's reports also describe how he shot and killed a deer "too small to register" from a vehicle while "night hunting" with a target. (Def's Ex. 1 at 70.) MTM cites several more examples from Mr. Livezey's reports in its memorandum that could be rationally interpreted as efforts to entice his targets to commit wildlife crimes. (Def's Opp'n Mot. Amend 5-6.) The Court

thus concludes as a matter of law that no reasonable juror could determine that the allegedly defamatory statements found at paragraphs sixty-one and sixty-six of the Amended Complaint are anything less than rational interpretations of what is included in those reports.

Finally, the Amended Complaint includes additional allegations surrounding MTM's statements with regards to an opinion of the Maine Supreme Judicial Court sitting as the Law Court: *State v. Perry*, 2006 ME 76, 899 A.2d 806. In his reply memorandum, Mr. Livezey claims that the Amended Complaint now states a claim for defamation as to those statements because they misrepresent what the Law Court actually said. Mr. Livezey also alleges an additional defamatory statement in MTM's reporting on the *Perry* opinion. (Pl's Am. Compl. ¶ 75.)

In essence, Mr. Livezey's argument as to these statements merely rehashes what he previously argued in opposition to MTM's first motion to dismiss—an argument this Court already rejected. (Prior Order at 5-7.) The Court is not inclined to revisit that argument and merely reiterates that even if MTM's statements misrepresent what the *Perry* opinion actually says, no reasonable juror could determine that they are not rational interpretations of the *Perry* opinion, and the statements are thus insufficient to create a jury issue of actual malice under *New York Times Co.*, 376 U.S. 254. *See Time, Inc.*, 401 U.S. at 290.

CONCLUSION

Based on the foregoing it is hereby ordered:

1. Plaintiff William Livezey's motion for reconsideration is DENIED.
2. Plaintiff William Livezey's motion to amend complaint is GRANTED; however, the Amended Complaint is DISMISSED for failure to state a claim for which relief may be granted.

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: January 4, 2019

____/s_____
M. Michaela Murphy
Justice, Business and Consumer Court