

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

RUSSELL J. HARLAN and)
MALGORZATA-NATASZA CIMOSZEWICZ,)

Plaintiffs,)

v.)

No. 06 L 4317

WPROST, AGENCJA WYDAWNICZO-)
REKLAMOWA "WPROST" SP. Z O.O.,)
MAREK KROL, FIJOR PUBLISHING,)
JAN M. FIJOR, MACIEJ RYBINSKI,)
and LOWELL INTERNATIONAL CO.,)

Defendants.)



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DEPT. OF CIRCUIT COURT
CLERK OF LAW DIVISION

DEFENDANT LOWELL INTERNATIONAL'S
MOTION FOR SUMMARY JUDGMENT

Now comes Defendant, LOWELL INTERNATIONAL COMPANY (hereinafter "LOWELL INT'L"), by and through its attorneys, ~~KRALOVEC & MARQUARD~~, CHARTERED, and hereby asks this Court pursuant to 735 ILCS 5/2-1005, to enter a final and appealable order granting Summary Judgment in its favor and against Plaintiffs. In support of said motion, Defendant, Lowell International, states as follows:

I. FACTS

A. Pleadings

In their Complaint, Plaintiffs, Malgorzata-Natasza Cimoszewicz ("Cimoszewicz"), and her husband, Russell Harlan ("Harlan"), claim that their character and reputation were defamed by certain statements published about them by the Defendants in this case. (See Complaint, attached hereto as Exhibit A, p.1, "Nature of Complaint"). These statements consist of three articles that were published in Poland's largest weekly magazine, *Wprost*, which is principally

owned by Marek Krol (“Krol”), and its publishing agent, Agencja Wydawniczo-Reklamowa “Wprost” Sp.z.o.o. (“Agencja”). These three articles were written by two Polish authors, Jan M. Fijor (“Fijor”) and Maciej Rybinski (“Rybinski”).¹ (See Ex. A, ¶¶ 4-9). According to the Complaint, Lowell International is the distributor of *Wprost* in the U.S. and sells and makes the magazine available to Polish residents as well. (See Ex. A, ¶10).

Fijor and his publishing agency, Agencja, authored and published the first article in *Wprost* on August 30, 2005. (See Ex. A, ¶12). Defendant Lowell International then distributed copies of *Wprost* containing the article. (See Ex. A, ¶12). Plaintiffs were allegedly defamed by its content, because Fijor made accusations that they had illegally transferred money to Poland without properly reporting the transfer to the IRS and that Cimoszewicz’s father, a Polish politician, was involved in a “conspiracy involving money laundering.” (See Ex. A, ¶¶12-18). Fijor’s article also claimed that Harlan was a lawyer and that his involvement in the alleged criminal activity was sufficient enough to bar him from practicing law in South Carolina. (See Ex. A., ¶19). According to the Plaintiffs, these were all unfounded accusations and misstatements of facts, which were not investigated by Fijor, Krol, *Wprost*, Agencja, and *Wprost*’s U.S. distributor, Lowell International. (See Ex. A., ¶21).

The second article was also written by Fijor and allegedly published by *Wprost*, Agencja, and Lowell International on September 9, 2005. (See Ex. A, ¶22). Again, the topic of insider trading was addressed, and Plaintiffs were compared with well-known figures such as Ivan Boesky, Michael Milken, and Martha Stewart. (See Ex. A, ¶24). The Plaintiffs were also referred to as “public persons.” (See Ex. A, ¶26). Regarding the third article, Plaintiffs allege that on September 18, 2005, Defendants, *Wprost*, Krol, Agencja, and Lowell International

¹ *Wprost*, Krol, Agencja, Fijor, and Rybinski are Defendants who reside and/or do business in Poland.

published an article that was authored by Rybinski. (See Ex. A, ¶27). Allegedly, this article was a response to the present lawsuit, and because of the Plaintiffs' political associations in Poland, they were likened to the Corleone family from *The Godfather*. (See Ex. A, ¶28). In his article, Rybinski warns Krol about publishing untrue statements, because things might end up "badly." (See Ex. A, ¶¶29-30). Overall, Plaintiffs claim that these three articles have caused them grievous injury, including embarrassment, humiliation, mental anguish, and severe damage to their reputation. (See Ex. A, ¶¶31-33).

In their Complaint, Plaintiffs allege two Counts: Count I is based on defamation *per se*, and Count II is based on defamation. (See Ex. A, ¶¶34-42). According to Count I (defamation *per se*), the Defendants' conduct amounted to defamation, because they knowingly published written statements that were false regarding Plaintiffs' alleged criminal activity. (See Ex. A, ¶35). The statements that were published presumably held Plaintiffs up to "public hatred, contempt, or ridicule," and therefore amounted to defamation *per se*. Allegedly, Defendants' conduct was also committed with actual malice. (See Ex. A, ¶¶37-38). Count II (defamation) duplicates the allegations stated in Count I, with the additional assertion that Defendants' conduct amounted to libel. (See Ex. A, ¶¶39-42).

B. Deposition Testimony

1. Plaintiffs, Malgorzata-Natasza Cimoszewicz and Russell J. Harlan

Cimoszewicz has been a resident of South Carolina for approximately six and a half years. (Deposition of Malgorzata-Natasza Cimoszewicz, p. 5, 10-11, attached hereto as Exhibit B). She and Harlan have been married since 2000. (Deposition of Russell Harlan, p. 4, 9, attached hereto as Exhibit C). Mr. Harlan is not a lawyer. (See Complaint, ¶19, Ex. A; Harlan Dep., p. 24, Ex. C). Prior to living in South Carolina, Cimoszewicz lived in Poland.

(Cimoszewicz Dep. p. 10, Ex. B). Her father is a Polish politician who has held various offices, including Attorney General, Prime Minister, Minister of Justice, Secretary of State, Vice Prime Minister, and Minister. (Cimoszewicz Dep., p. 10-11, Ex. B).

During her discovery deposition, Cimoszewicz testified that Lowell International is a distributor of Polish products, including *Wprost*. (Cimoszewicz, p. 72, Ex. B). She presumes that the authors of the allegedly defamatory articles in question work for *Wprost*. (Cimoszewicz, p. 73, Ex. B). Krol is the owner of *Wprost* and the publishing house, Agencja, which publishes and advertises *Wprost*. (Cimoszewicz Dep, p. 73, Ex. B). According to Cimoszewicz, *Wprost* is the biggest weekly magazine in Poland. (Cimoszewicz Dep., p. 38, Ex. B). It addresses political issues, social issues, and the news. (Cimoszewicz Dep., p. 39, Ex. B). Cimoszewicz equates *Wprost* with *Time* and *Newsweek*, because these magazines cover people, politics, social issues, and business. (Cimoszewicz Dep., p. 39, Ex. B). Mr. Harlan has no reason to doubt the high regard that his wife holds for *Wprost* in her comparison of it to *Newsweek* or *Time*. (Dep of Harlan, p. 33, Ex. C).

2. Defendant, Conrad Lowell (Lowell International Co.)

Conrad Lowell is the President and CEO of Lowell International Company. According to Mr. Lowell's deposition testimony, he does not know Co-Defendants, Krol, Fijor, or Rybinski. (Deposition of Conrad Lowell, p. 6-7, attached hereto as Exhibit D). He has heard of Cimoszewicz's father, but he does not follow politics. (Lowell Dep., p. 8, Ex. D). Lowell International distributes Polish food products and Polish magazines. (Lowell Dep., pp. 11-13, Ex. D). The magazines are purchased in Poland and shipped by air to Chicago. (Lowell Dep., pp. 11-13, Ex. D). Since 2003 he has been purchasing *Wprost* from Amex Company. (Lowell Dep., pp. 16-17, Ex. D). Further, Mr. Lowell testified that *Wprost* is a reputable magazine

comparable to *Time* or *Newsweek*, as opposed to the *National Enquirer*. (Lowell Dep., p. 18, Ex. D). It is directed to a more intelligent audience. (Lowell Dep., p. 18, Ex. D). As a distributor of 300 magazines, including *Wprost*, he never reads any of the articles in these magazines, nor does he approve them. (Lowell Dep., p. 28, Ex. D). Lowell International distributes *Wprost* to between 200 and 300 locations in Chicago. (Lowell Dep., p. 20, Ex. D).

Mr. Lowell testified that he did not know or have any information with regard to the accusations contained within the subject articles. (Lowell Dep. p. 28-38, Ex. D). For instance, he knew nothing about the following: whether or not the Plaintiffs could be “pursued by the organs of international justice” (p. 28); whether the Harlans had laundered money (p. 28); whether they violated federal law in transferring funds to Poland (p. 29); whether they had engaged in any conspiracy to commit a crime (p. 30); whether they had engaged in any type of activity “which would be deemed terrorism or a dangerous tool for terrorists;” (p. 30-31); whether Harlan was a lawyer (p. 31); if the Harlans were like Martha Stewart or even who Martha Stewart was (p. 32); whether they would be subject to prosecution by the IRS (p. 35); or if he knew why Rybinski would have warned Krol not to publish untrue articles (p.38). (Lowell Dep, p, 28-38, Ex. D).

II. ARGUMENT

A. **Standard for Summary Judgment**

Summary judgment is proper where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. 735 ILCS 5/2-1005. To avoid summary judgment, the non-moving party must affirmatively set forth specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (U.S. 1986).

For the reasons stated below, Lowell International is entitled to summary judgment because there has been no evidence to set forth a genuine issue of material fact to place before a jury with regard to the allegations made against it.

B. Lowell International cannot be held liable for defamation as a mere distributor of *Wprost*, because it did not have knowledge of the defamatory nature of the articles in question.

Under Illinois law, “[t]o prove defamation, a plaintiff must show: (1) the defendant made a false statement concerning the plaintiff; (2) there was an unprivileged publication of the defamatory statement to a third party by defendant; (3) publication of the defamatory statement damaged the plaintiff.” *Brennan v. Kadner*, 351 Ill.App.3d 963, 968, 814 N.E.2d 951, 956-957 (1st Dist. 2004). For any cause of action for defamation, publication is an essential element. *Emery v. Northeast Illinois Regional Commuter R.R. Corp.*, 377 Ill.App.3d 1013, 1021, 880 N.E.2d 1002 (1st Dist. 2007).

To establish publication Plaintiff must prove that the alleged defamatory statements were communicated to someone other than the Plaintiff by the Defendant. *Emery v. Northeast Illinois Regional Commuter R.R. Corp.*, 377 Ill.App.3d 1013, 1021, 880 N.E.2d 1002 (1st Dist. 2007). A distributor of defamatory matter published by a third party may be subject to liability for defamation; however, the standards of liability for the original publisher and the secondary distributor are different. *Zeran v. America Online, Inc.*, 129 F.3d 327, (C.A.4 1997). In order to recover against a distributor of defamatory material published by a third party, Plaintiff must establish that the distributor knew or should have known of the defamatory content of the distributed material. *Barrett v. Fonorow*, 343 Ill.App.3d 1184, 1193 (2d Dist. 2003). The difference between the standard of liability of a primary publisher of allegedly defamatory material and a mere distributor/seller of a publication of a third party is explained and illustrated

in §581 of the Restatement (Second) of Torts (1979) (“Transmission of Defamation Published by Third Person”). Subsection (1) of §581 specifically provides that one who delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reasons to know of its defamatory character. Comment D to subsection (1) illustrates the standard to be applied to distributors such as Lowell International. It provides as follows:

d. News dealers. Under the rule stated in this Section, a news dealer is not liable for defamatory statements appearing in the newspapers or magazines that he sells if he neither knows nor has reason to know of the defamatory article. The dealer is under no duty to examine the various publications that he offers for sale to ascertain whether they contain any defamatory items. Unless there are special circumstances that should warn the dealer that a particular publication is defamatory, he is under no duty to ascertain its innocent or defamatory character. On the other hand, when a dealer offers for sale a particular paper or magazine that notoriously persists in printing scandalous items, the vendor may do so at the risk that any particular issue may contain defamatory language. (Emphasis added).

In this case, there exists no genuine issue of material fact with regard to Lowell International’s relationship with *Wprost* magazine: Lowell International is not, and has never been, a publisher of *Wprost* or any of the articles contained therein; it merely sells *Wprost* in the U.S. by purchasing copies of the magazine from a Polish distributor (which, at the time the articles appeared, was Amex Company). (Lowell Dep., p. 11, 14-17, Ex. D). Even the Plaintiff in this case, Cimoszewicz, concedes that Lowell International is a mere distributor of *Wprost* (Cimoszewicz Dep., p. 72-73, Ex. B).

Assuming *arguendo* that Plaintiffs’ allegations are true and that all three articles in *Wprost* contained defamatory material, Lowell International could not be liable to Plaintiffs as a distributor, i.e. seller, because it neither knew nor had reason to know of the defamatory articles. Mr. Lowell has never read, approved, or published any of the articles. (Lowell Dep., p. 28, Ex.

D). He had never even heard of the Harlans apart from this lawsuit. Because he knew nothing of the Harlans or the content of the articles, Plaintiff cannot establish that Mr. Lowell knew that the articles were defamatory of the Harlans. Additionally, there is no evidence in the record that *Wprost* was notorious for printing scandalous materials such that Lowell International would be placed on notice of its reputation for defaming people. To the contrary, according to Mr. Lowell's testimony, as well as the testimony of Cimoszewicz, *Wprost's* reputation is comparable to *Time* or *Newsweek*, publications that do not have a reputation for printing scandalous and defamatory articles; therefore, Lowell International had no reason to believe the subject articles were defamatory.

In this matter, *Wprost* has editorial control over the material that it prints and publishes. Lowell International has no such editorial control; therefore, holding Lowell to the same standard of liability as *Wprost* would be unfair. To avoid liability as a publisher Lowell would be forced to review every article in all 300 magazines it sells for defamatory content for purposes of determining which magazines it could place into the stream of commerce. This duty would extend not only to Lowell, but to each and every Polish delicatessen which sells the magazines it purchases from Lowell. Imposing this duty on Lowell and others in the distributive chain would be unduly burdensome, unjust and contrary to law. §581 Restatement (Second) of Torts (1979).

III. CONCLUSION

As a matter of law, Lowell Int'l should be granted summary judgment, because no genuine issue of material fact exists. Defendant has shown, and Plaintiff agrees, that Lowell International is a distributor of *Wprost*. In order to recover against Lowell International Plaintiff must establish it knew or had reason to know of the defamatory nature of the articles. The evidence clearly establishes the contrary. Conrad Lowell never read the subject articles before

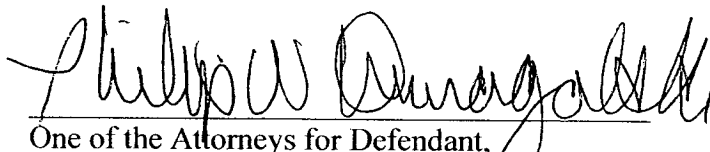
they were distributed, nor did he have reason to believe that articles appearing in a publication comparable to *Time* or *Newsweek* would be defamatory. Furthermore, *Wprost's* positive reputation also imposed no duty on Lowell International to review the content of the publication. For these reasons, Lowell International is entitled to summary judgment.

WHEREFORE, Defendant, LOWELL INTERNATIONAL COMPANY, prays that this Court enter a final and appealable order granting Summary Judgment in its favor and against Plaintiffs, RUSSELL J. HARLAN and MALGORZATA-NATASZA CIMOSZEWICZ.

Respectfully submitted,

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