

COMMONWEALTH OF KENTUCKY
MADISON CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 08-CI-1296

ENTERED

MAR 26 2010

TIME 12:26 A.M./P.M.
MADISON CIRCUIT COURT
LINDA SPURLOCK GATES, CLERK

KYMBERLY CLEM

PLAINTIFF

VS.

ORDER

AN UNKNOWN PERSON

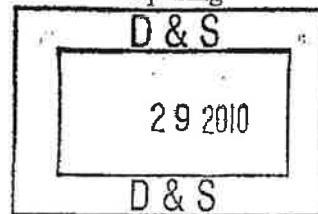
DEFENDANT

This matter comes before the Court on Newspaper Holdings, Inc.'s (hereinafter "NHI"), a non-party recipient of a subpoena duces tecum, Motion to Quash Subpoena, Plaintiff having filed a Response, the Court having reviewed the record and being otherwise sufficiently advised finds and orders as follows:

Plaintiff, KyMBERly Clem filed a Complaint against an Unknown Person posting on the Richmond Register website as "12bme" alleging that Defendant placed a post on the Richmond Register electronic forum which stated that Plaintiff intentionally exposed her "private parts" to a woman and children at the Richmond Mall. Plaintiff further alleges that said statement was false and defamatory and that Plaintiff suffered damages as a result thereof.

Upon motion and affidavit, a Warning Order Attorney for Defendant was appointed. The Warning Order Attorney attempted service on Defendant by delivering a letter to the Madison Circuit for delivery at an unknown address. Thereafter, the Warning Order Attorney filed a report as required by law.

On March 3, 2009, Plaintiff issued a Subpoena and Subpoena Duces Tecum to Lorie Love, Richmond Register requiring her appearance for a deposition and requiring



the production of "Any and all identifying information, contact information, source computer information, I.P. address, e-mail address, or any other information associated with the log-in I.D. '12bme' who placed a post on the Richmond Register/NHI website on August 13, 2008 in reference to the news story 'You can buy it at the mall, but you can't wear it there.'"

NHI filed a Motion to Quash the Subpoena on two grounds. First, NHI asserts that the information sought is protected by the privilege against revealing the source of new reporters' information. Second, NHI asserts that the disclosure of the information sought would violate the First Amendment to the United States Constitution by infringing the rights of persons to speak anonymously on the Internet.

According to NHI, the information sought involves a post by the Unknown Defendant on the Internet Web page associated with the on-line edition of the Richmond Register. NHI uses Groupee.com to service the host message board associated with the Richmond Register. According to the Response to Motion to Quash Subpoena filed by Plaintiff, Groupee.com notes in its terms of service "Groupee does not control the Content posted by users on the service and, as such, does not guarantee the accuracy, integrity or quality of such Content." *Groupee.com Terms of Service*

The posting appeared August 13, 2008 and concerned an episode in which Clem was escorted from the Richmond Mall on August 9, 2008. NHI states that the posting was a response to an on-line Richmond Register news story dated August 12, 2008 which reported that Clem was escorted from the mall because the dress she was wearing at the time was short. The story appeared under the headline "You can buy it at the mall, but you can't wear it there." The Unknown Defendant claimed that Plaintiff exposed herself

at the mall to a woman with two children and Plaintiff claims that the statement is false and defamatory.

Privileged Information

Reporters are granted immunity from disclosing the source of any information procured or obtained pursuant to KRS 421.100 which states:

No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or an committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

The Unknown Defendant posted a comment about the Plaintiff on a Web site associated with the Richmond Register. The posting was not procured or obtained by any reporter of the Richmond Register for purposes of publishing the information in the Richmond Register. In fact, the story regarding Plaintiff was printed in the Richmond Register the day before the Unknown Defendant posted on the web site. Mere posting on a newspaper web site does not grant the poster the immunity provided in KRS 421.100. The content of the posting is not controlled by the newspaper nor does the newspaper take any responsibility for the accuracy of the contents of the web posting. To allow an anonymous web poster the immunity of KRS 421.100, would well extend the purpose of the privilege against disclosure of sources of information published by a news organization.

Violation of First Amendment

A lawsuit over an alleged defamatory statement that happened to occur online would proceed like any other defamation action if the accused were know and named.

The issue before the court is whether the First Amendment protects the anonymity of someone such as the Unknown Defendant, who posted an alleged defamatory statement on the Internet, and if so, under what circumstance a plaintiff such as Ms. Clem may invoke court processes to learn of the Unknown Defendants identity and have her day in court.

It is well settled that the First Amendment shelters the right to speak anonymously. *Buckley v. Am. Constitutional Law Foundation*, 525 U.S. 182 (1999) and *Talley v. California*, 362 U.S. 60 (1960). "Against the backdrop of First Amendment protection for Anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns." *Sony Music Entertainment v. Does*, F.Supp.2d 556, 565 (S.D.N.Y 2004). Accordingly, "the constitutional rights of Internet users; including the First Amendment right to speak anonymously, must be carefully safeguarded." *Doe v. 2themart.com Inc.*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001).

This issue appears to be one of first impression in Kentucky. The seminal federal case on this issue is *Doe v. 2TheMart.com Inc., Id.*. In *Doe*, shareholders of 2TheMart.com filed suit against the company amid allegations of fraud. Some of the disgruntled shareholders made their discontent known by posting messages critical of 2TheMart.com on Internet bulletin boards. The bulletin boards were created and maintained by InfoSpace, an ISP to which these shareholders subscribed. The messages, on of which referred to officials of 2TheMart.com as "lying, cheating, thieving, stealing lowlife criminals," were posted anonymously or by people using pseudonyms including "NoGuano."

2TheMart.com responded by presenting a subpoena to InfoSpace in an attempt to obtain the identities of the anonymous posters. The Court allowed NoGuano to object to the subpoena as “John Doe” and sustained the objections. The Court stated, “[i]f Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.” *Id.* at 1093.

The Court balanced the interests in protecting a party’s online anonymity with preserving an opposing party’s right to sue for libel. The Court set forth a four-part test, such that the identity of an anonymous Internet user could be disclosed if: “(1) the subpoena seeking the information was issued in good faith and not for any improper purpose; (2) the information sought relates to a core claim or defense; (3) the identifying information that is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.” *Id.* at 1095. Applying the test, the Court denied the issuance of the subpoena, concluding that 2TheMart.com’s real purpose in seeking it was to intimidate its critics into silence.

The desire to protect the identity of online speakers has led many courts to adopt a multi-part test similar to *Doe*. A trend among state courts is to apply the *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A2d 756 (N.J. App. Div. 2001) test or the *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) test.

In *Dendrite*, the appellate court set forth a four-part test for trial courts to follow where plaintiffs seek an expedited discovery order compelling Internet Service Providers (ISPs) to disclose the identity of an anonymous online poster. The New Jersey appeals court required the plaintiff to “(1) use the Internet to notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the allegedly actionable online speech; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation; and (5) show the court that, on balance and in the particulars of the case, the right to identify the speaker outweighs the First Amendment right of anonymous speech.” when making its determination, the *Dendrite* Court concluded that the anonymous poster’s identity should not be disclosed where *Dendrite* failed to sufficiently demonstrate that John Doe No. 3’s postings caused any damages to *Dendrite*’s stock value. As such, the motion to compel the anonymous poster’s identity was denied.

In *Cahill*, the Delaware Supreme Court adopted a summary judgment standard, holding that the plaintiff must (1) make reasonable efforts to notify the defendant and (2) submit sufficient evidence to establish a genuine issue of material fact for each essential element of its claim within the plaintiff’s control. *Id.* at 460.

In *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1, 2007), the Arizona Court of Appeals adopted a three-part test that incorporates two parts from the *Cahill* case, and adds a third element found in *Dendrite*. The court held that “in order to compel discovery of an anonymous internet speaker’s identity, the requesting party must show: (1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request, (2) the requesting party’s cause of action could survive a motion

for summary judgment on elements o dependent on the speaker's identity, and (3) a balance of the parties' competing interest favors disclosure." *Id.* at 721.

The District of Columbia Court of Appeals case of *Solers, Inc. v Doe*, 977 A2d 941 (D.C. 2009), essentially upholds the *Cahill* decision. In this case, an anonymous John Doe reported to the Software & Information Industry Association (SIIA) that Solers Inc., a defense contractor, was engaged in copyright infringement. SIIA investigated the charge and found no wrongdoing. Solers then sought to obtain the identity of the Doe in order to sue for defamation.

The Court announced a five-step test trial courts must apply before stripping a defamation speaker of his or her anonymity: "(1) ensure that the plaintiff has adequately pleaded the elements of the defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is *within its control*, and (5) determine that the information sought is important to enable the plaintiff to proceed with his lawsuit." *Id.* at 954.

The *Solers* court followed with directives on how the above requirements could be accomplished. First, the court noted "We leave it to the trial court to determine in the circumstance of each case who should notify the anonymous defendant of the efforts to discover his identity." *Id.* at 955. "Once suitable efforts have been made to notify the defendant, the court should delay action to allow him a reasonable opportunity to file a

motion to quash the subpoena. ‘A court should not consider impacting a speaker’s First Amendment rights without affording the speaker an opportunity to respond to the discovery request.’” *Id.* at 955, citing *Mobilisa, Inc. v. Doe*, 170 P3d 712, 719 (Ariz. Ct. App. 2007).

“The plaintiff next is required to proffer evidence to show that it has a viable claim of defamation. Whether this evidence is presented in the form of affidavits, deposition transcripts, or courtroom testimony under oath, it must be sufficient to create a genuine issue of material fact with respect to all the elements of the defamation claim *within the plaintiff’s control*, see *Cahill*, 884 A2d at 463 – ‘in other words, all element not dependent upon knowing the identity of the anonymous speaker.’” *Id.* at 955, citing *Mobilisa*, 170 P.3d at 720. The *Solers* court points out that the court may refuse to compel the disclosure of the unknown defendant’s identity if the plaintiff fails to present statements that are actionable.

Finally, the court concluded that a balancing test at the end of the analysis was not necessary. Quoting *Krinsky* 72 Cal. Rptr. 3d at 245-46, the court found: “a further balancing of interest should not be necessary to overcome the defendant’s constitutional right to speak anonymously.” *Id.* at 956.

This Court adopts the five (5) step requirements as set forth in *Solers*. The Plaintiff has met the pleading requirement as set forth in CR 8.01 but has not specifically quoted the alleged defamatory statement. Second, the Plaintiff must make reasonable efforts to notify the Unknown Defendant. The Unknown Defendant was terminated from the Richmond Register web site and notification would be unsuccessful if Plaintiff posted

notification on the web site. Notice may also be accomplished through a court order requiring the internet service provider (ISP) to notify the person of the pending lawsuit. See *Krinsky*, 72 Cal. Rptr.3d 231, 235 (Cal. App. 6 Dist. 2008) and *Immunomedics, Inc. v. Doe*, 775 S2d 773, 775 (N.J. Super. Ct. App. Div. 2001).

The Court professes limit knowledge of how one would locate the Unknown Defendant on the Internet. The internet blog is owned by the Richmond Register/ NHI; however, the Court is unclear whether NHI or Groupee.com would have access to the IP address associated with the blog. An IP address is an electronic number that specifically identifies a particular computer using the internet. IP addresses are often owned by the internet service providers (ISP) who then assign them to subscribers when they use the internet. These addresses are unique and assigned to only one ISP subscriber at a time. Thus, if the ISP knows the time and the date that postings were made from a specific IP address, it can determine the identity of its subscriber. Further information is needed to determine which entity has the ability to notify the Unknown Defendant of this action.

Wherefore, the Motion to Quash the Subpoena is GRANTED and the Subpoena is QUASHED pending further compliance with the Court's Order herein.

Dated this the 25th of March, 2010.


James L. Adams
Madison Circuit Court, Division II

Distribution:
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