

CAUSE NO. B-172,785

IN RE:) IN THE DISTRICT COURT OF
)
JIMMIE P. COKINOS,) JEFFERSON COUNTY, TEXAS
)
Petitioner.) 60th JUDICIAL DISTRICT

REPLY MEMORANDUM IN SUPPORT OF MOTION TO QUASH

This memorandum explains why petitioner Jimmie Cokinos has failed to demonstrate that he is entitled to breach the First Amendment right of movant recall_carl01 to maintain the anonymity of his criticisms of Cokinos.

1. Our opening memorandum showed that every reported decision of the state and federal courts that have confronted the question – from California to Connecticut and from Washington to Virginia – have insisted that plaintiffs who seek to identify anonymous Internet speakers for the purported purpose of suing them for defamation do more than simply claim in general terms that they want to pursue litigation. Pre-litigation discovery is commonly allowed in all of these states, but when First Amendment rights are at issue, courts routinely require would-be litigants to demonstrate at the outset that they have valid claims and that they have evidence to support those claims.

Cokinos does not deny this consensus standard, and yet he does not advance the necessary allegations or produce any evidence in support of his claims. Instead, he says that he needs to know the identity of his detractor to determine whether recall_carl made statements about Cokinos with knowledge of their falsity. However, because Cokinos has introduced no evidence that anything recall_carl said about him is false and has not identified any statements that are actionable for defamation, Cokinos has no right to pursue discovery about whether recall_carl thought those statements were false.

Moreover, Cokinos has not alleged actual malice, exposing himself to possible sanctions for

violating Rule 13 of the Texas Rules of Civil Procedure, as he would have to do if he sued recall_carl as a Doe defendant as authorized in such cases as *Novak v. M.D. Anderson Cancer Center*, 50 S.W.3d 512 (Tex. App. - Austin 2000), and *Operation Rescue-National v. Planned Parenthood of Houston*, 937 S.W.2d 60 (Tex. App. - Houston 1996). Instead, he seeks a fishing expedition to decide whether there is any basis for claiming actual malice before he decides whether to sue. The pre-litigation petition for discovery is not intended to serve that objective, and in any event, given the danger that recall_carl could suffer on-the-job retaliation for criticizing the County Judge once his identity is revealed, on this record recall_carl's right of anonymous free speech outweighs Cokinos' asserted interest in deciding whether he wants to file a lawsuit.

2. Cokinos apparently abandons contentions that recall_carl's emails violated the Texas Election Code or accused him of criminal conduct. He contends, however, that, read together, recall_carl's emails can be understood to endorse an alleged "whisper campaign that money had been corruptly misdirected by the commissioners." Cokinos Mem. at 3. In fact, none of the emails even hint at corruption. They say nothing to suggest that public funds have been "diverted"—that word is found only in Cokinos' own papers. The emails charge that the expenditures "wasted" the public fisc, *e.g.*, Cokinos Exhibits 2, 13, not that they were corrupt. Recall_carl was entitled to join other members of the public who accused Cokinos of being too close to County Judge Carl Griffith by emailing a satirical cartoon that made fun of that closeness.¹ Similarly, after Cokinos and Hallmark skipped two candidate forums to which they had been invited,

¹ See Gallaspy, *In County Politics, an Enemy Today is a Friend Tomorrow*, Beaumont Enterprise, September 22, 2004, at A9 (Cokinos typically votes with Hallmark and Griffith); Gallaspy, *Grass-roots campaigning*, Beaumont Enterprise, January 17, 2004, at A11 (candidate argued that "Cokinos was acting as Griffith's puppet reading from a prepared script at meetings").

recall_carl could properly send an email that accused them of ducking hard questions.² Likewise, recall_carl did not implicitly accuse Cokinos of corruption by sending emails that contained truthful complaints about the amount of expenditures on Ford Park and about public subsidies for a private golf course.

Furthermore, Cokinos has not produced any evidence that a whisper campaign claiming corruption even existed. Cokinos states that the “existence of this anonymous campaign was acknowledged and rejected by the mainstream press,” Mem. at 3, *citing* Editorial, *Ford Park Issues Require Decisive Action by County*, Beaumont Enterprise, Mar. 10, 2004, page A10, but the document that he cites for this proposition says nothing of the sort. The article, which is attached to this memorandum, says only that detractors of the expenditure of funds on Ford Park are wrong to have suggested that the county commissioners should have anticipated that Ford Park would not do well financially. The article does not say that anyone had suggested a corrupt purpose for the expenditures.

“Whether a publication is capable of a defamatory meaning is initially a question for the court.” *New Times v. Isaacks*, 146 S.W.3d 144, 155 (Tex. 2004). No reasonable reader of recall_carl’s emails could have construed them as charging corrupt handling of public funds. Nor do the cases cited by Cokinos to show that allegations of political corruption can be actionable in defamation. In *Monitor Patriot Co. v. Roy*, 401 US 265 (1971), a public official had been accused of being a “former small-time bootlegger.” *Foster v. Laredo Newspapers*, 541 S.W.2d 809, 817 (Tex. 1976), by contrast, the statement at issue

² See Gallaspy, *Grass-roots campaigning*, Beaumont Enterprise, January 17, 2004, at A11 (Cokinos and Hallmark did not attend candidate forum); Gallaspy, *Primary Concerns*, Beaumont Enterprise, February 10, 2004, at A1 (same).

had nothing to do with corruption (and the cited page is a discussion showing why the plaintiff there was not a public figure).

Our review of Texas authority has not uncovered a single case in which a libel claim alleging that plaintiff had been accused of corruption was allowed to proceed without highly explicit use of the word “corrupt” or explicit charges of criminal conduct or association with criminals. There is no authority suggesting that a member of the public can be forced to stand trial for defamation on the theory that truthful statements about an incumbent running for re-election might be understood by somebody to imply corruption. Indeed, the precedent of allowing a public official to impose the costs of a libel defense on constituents who criticize them, based on such vague libel claims, is chilling indeed.

CONCLUSION

The motion to quash should be granted.

Respectfully submitted,

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