

**FILED
AND
ENTERED**
ON 6-6 2008

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF WESTCHESTER

3 -----X

4 RICHARD OTTINGER & JUNE OTTINER

5 Petitioner(s),

INDEX NO.
3892-08

6 -against-

7 JOHN DOE 1-100 & JANE DOE 1-100,

8 Respondent(s). Proceedings

9 -----X

10 May 28, 2008

11 111 Martin Luther King Blvd.
12 White, Plains, New York 10601

13 B E F O R E :

14 THE HONORABLE RORY J. BELLANTONE
15 JUSTICE.

16 A P P E A R A N C E S :

17 For the Petitioners:
18 RUSSELL J. IPPOLITO, ESQ.
150 White Plains Road
Tarrytown, New York 10591

19 For the Respondents:
20 SATTERLEE STEPHENS BURKE & BURKE, LLP
230 Park Avenue
New York, NY 10169
21 BY: MARK A. FOWLER, ESQ.

FILED
JUN 06 2008
TIMOTHY B. HENRY
COUNTY CLERK
COUNTY OF WESTCHESTER

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EVA VERSACI
SENIOR COURT REPORTER

1 THE CLERK: In the matter of Richard
2 Ottinger, 3892 of 2008.

3 MR. IPPOLITO: Russell J. Ippolito, 150
4 White Plains Road, Tarrytown, New York, 10591, on
5 behalf of plaintiff, your Honor, the Ottingers.

6 MR. FOWLER: I'm Mark Fowler from
7 Satterlee Stephens Burke & Burke, F-O-W-L-E-R,
8 attorney for the Journal News.

9 THE COURT: The Does didn't want to send
10 a lawyer here and make it easy?

11 MR. IPPOLITO: Not yet, your Honor.

12 THE COURT: Counsel, you can stand if you
13 want or you can have a seat. The way I handle these
14 conferences, they're conferences on the record so if
15 I feel I am ready to make a decision at some point I
16 can do that on the record and so order the
17 transcript. If I need to reserve I will. I do read
18 everything that comes into chambers. Right now I
19 have the luxury to do that as I switch from criminal
20 to civil. I know at some point that may stop. I'll
21 either die trying or I don't know what will happen.
22 I do like to read everything that comes in. I also
23 advise the parties make your arguments as if I
24 haven't read the papers so the record is complete
25 with respect to the facts, cause of action and

1 arguments being made is. Why don't you start by
2 providing some background. I know part of the
3 argument is that you should have moved for this
4 information prior to starting the lawsuit. The only
5 significance I see in the respondents -- the Journal
6 News' papers -- he'll make his argument as to the
7 significance -- is whether or not it raises your
8 burden of what you must prove in this proceeding to
9 be able to get what it is you're seeking. I don't
10 know if the argument is prior to instituting a
11 proceeding the burden is higher, now it's less.
12 Let's just try to get into the underlying cause of
13 action, why you commenced it against Jane and John
14 Doe without any pre-filing discovery so to speak, and
15 why you believe you're entitled to this information
16 now.

17 MR. IPPOLITO: Your Honor, the Ottingers,
18 and you have heard Richard Ottinger who has been a
19 Congressman for any number of years, and was also
20 the dean and now dean emeritus of Pace Law, and his
21 wife were filing for certain building permits. They
22 were going through attempting to get their home
23 built in a renovation. Apparently many of the
24 neighbors did not like the size of the house, and as
25 what happens often enough, things started up in the

1 zoning process and the like. The Ottingers have
2 since had their certificate of occupancy issued to
3 them and are in the house. The zoning fight is
4 basically --

5 THE COURT: I apologize for jumping in.
6 Give me some idea of how long that battle, if it did
7 go on for some time, when did they first -- maybe
8 I'm making a wrong assumption, but did this go on
9 for a couple of years that they tried to build, or
10 was this in six months?

11 MR. IPPOLITO: I don't have the exact
12 dates because it wasn't an issue in the lawsuit
13 itself. It's safe to say I believe it went on a for
14 over a year and it had some front page coverage from
15 the Journal News at particular points about
16 neighbors complaining. Again, that's not really
17 relevant for this case either. At some point the
18 Low Hud dot com web site sponsored by the Journal
19 News, some persons who we have no idea who they are,
20 Richard Ottinger -- somebody must have told him that
21 they're posting blogs about you out on the Journal
22 News website, Richard went out there and downloaded
23 some of those blogs, which we had in the main
24 complaint as an exhibit to the main complaint. They
25 basically are accusing the Ottingers, and, your

1 Honor, in my motion on the notice of cross motion on
2 page three of my affirmation --

3 THE COURT: I just looked at the original
4 complaint. Is that easier?

5 MR. IPPOLITO: Yes, that's fine, too.

6 THE COURT: Exhibit A?

7 MR. IPPOLITO: Yes. It's on page two
8 paragraph 6. You see A through D. There were more
9 postings but those are the ones I brought up because
10 the CPLR does require a certain amount of
11 specificity. Here we had the actual words that
12 appear on the blog. If I could direct your
13 attention to subsection C of number 6, one of the
14 things we see is that Richard and June Ottinger paid
15 to the mayor \$25,000, and then in subsection D it
16 says they paid off the right people and they just
17 accuse them of paying off the mayor and different
18 board members in bribes, and they also accuse them
19 of filing a fraudulent deed.

20 THE COURT: You jump to C and D, if these
21 are verbatim, one of the concerns I focused in on is
22 not only the language in C and D but A, it now
23 appears that it has been proven that the Ottingers
24 have presented a fraudulent deed. In trying to
25 figure out my role in here and what speech is

1 protected and what isn't, if this is as it appeared
2 on the blog, that's kind of different than saying
3 we'll get to the substance of it, but I want the
4 record to reflect that in that subparagraph the
5 language appears: It has now been proven that the
6 Ottinger's, comma, dot dot dot, have presented a
7 fraudulent deed in order to claim they own land
8 under water and four dots following that.

9 MR. IPPOLITO: Your Honor that's verbatim
10 except where the ellipsis were -- where I took out
11 language I have not added any emphasis, at least I
12 don't recall, and normally if I add emphasis I would
13 indicate such in there, also, so that is verbatim of
14 what was on the blogs; the basis of those statements
15 that caused us to sue John and Jane doe one through
16 one hundred. I commenced the action and then sought
17 discovery. The Journal News had issue with that and
18 said we should have gone by way of special
19 proceeding. Assuming they're right, your Honor,
20 that's fine with me, if we convert it to a special
21 proceeding. The Journal News has not objected to
22 it, and for the limited purpose of a special
23 proceeding, I believe the Journal news consents to
24 it, CPLR as amended, two thousand one now allows
25 greater flexibility for a starting an action in one

1 method and converting it to another if need be. If
2 it needs to be started by way of special proceeding,
3 your Honor, rather than just a straight commencement
4 and discovery of a non-party, again --

5 THE COURT: I assume John and Jane Doe
6 were their screen names.

7 MR. IPPOLITO: I think they did have
8 screen names. I think it goes back to the complaint
9 in paragraph six, six screen names were on there.

10 THE COURT: Didn't the New York County
11 Assistant District Attorney's Office preserve
12 statutes of limitations in rape cases, file
13 indictments against folks with DNA profiles and that
14 was upheld, if one has a name one can use an alias
15 but a DNA profile is deemed to be more specific.
16 There's all kinds of case law out there for starting
17 these causes of action against John and Jane Does
18 in criminal cases. As I said before they extended
19 the rape statute of limitation. We had DNA profiles
20 that were indicted. Let me address that issue
21 first. Does it really need to be converted? Does
22 it change what they're doing here, or are you just
23 arguing there needs to be a higher burden of proof
24 that they need to demonstrate?

25 MR. FOWLER: Basically to cut through it,

1 my client is concerned about the standard and the
2 procedure in these matters because it will come up
3 again. Basically the approach that we're urging is
4 the approach that was taken in the Greenbaum case
5 before Judge Friedman down in New York County, and
6 that case, similar circumstance, it was a libel case
7 started seeking information concerning anonymous
8 posters, and it was started with precommencement
9 discovery. What that does is puts the burden on the
10 party seeking precommencement discovery to make some
11 showing not only of the complaint, the face of the
12 complaint, but some showing on the merits as one of
13 several steps in order to justify requiring the
14 internet service provider, the host of the website,
15 to turn over this information concerning that they
16 have about anonymous posters.

17 THE COURT: Did that case say that the
18 special proceeding was the only way to commence? In
19 other words, what is to prevent me from allowing a
20 lawsuit against John and Jane Doe, but applying the
21 same standard that you're asking me to apply? To
22 say I don't have a problem with a heightened showing
23 as opposed to deposing or asking for anybody's
24 information, I'll allow them to commence the suit.
25 I don't know if I could stop them from commencing an

1 action against John and Jane Doe, but in this
2 proceeding I'll hold them to that burden of proof
3 you're asking me to hold them to.

4 MR. FOWLER: The Journal News already
5 indicated that we consent to the conversion to
6 precommencement discovery to a special proceeding.
7 We have no problem with that as long as part of the
8 showing they make, they are required to make a
9 showing on the merits. I think there is a reason,
10 as we pointed out in our papers, why it should be
11 done by precommencement discovery, namely, there is
12 a limitation on suing Does. You know, that you have
13 to ask permission of the Court to sue Does. That's
14 that. I think that to some degree we jumped over
15 that hoop, and really the significance of the
16 posture at the moment is that, as we believe, one of
17 four points that Mr. Ippolito has to show, he has to
18 make some factual showing on the merits and --

19 THE COURT: What if he sued them by their
20 screen names?

21 MR. FOWLER: I believe that would be
22 equivalent to a pseudonym, an alias. Again, I don't
23 think that's really the crux of our issue so much
24 as precommencement. Discovery clearly requires some
25 kind of showing on the merits. We think if this

1 Court adopts this, we suggest it should, the
2 Dendrite standard, the leading case compelling
3 disclosure of information concerning anonymous
4 posters, there would have to be some factual showing
5 on the merits. Mr. Ippolito and I agree on a lot of
6 things. We agree --

7 THE COURT: Do you want to go
8 off-the-record and talk about cutting through it?

9 MR. FOWLER: I think I can tick them off
10 quickly. We agree there's a Constitutional right,
11 First Amendment right to speak anonymously. We both
12 agree that that right is not absolute. It can be
13 overcome. I think that we both agree that the
14 leading cases on this particular circumstance where
15 somebody in a civil litigation is seeking to compel
16 disclosure of information that would identify an
17 anonymous poster and implicate that person's right
18 to speech, the leading cases are the Dendrite case,
19 the Cahill (phonetic) case, the Greenbaum case in
20 New York County, all of which get to the same point.
21 Basically they hold that there are four steps: One,
22 showing on the merit which we talked about already;
23 secondly, identification of the actual statements
24 complained of in a libel circumstance, or if this is
25 treated as a slap suit, there should be an

1 identification of the actual statements complained
2 of which I believe in the complaint you've done.

3 THE COURT: Let me just stop you for one
4 second. Unless the complaint was just a sampling, I
5 don't want them precluded at some point.

6 MR. FOWLER: We're arguing for your Honor
7 to make a determination here whether the Journal
8 News should turn over this information, that he has
9 to identify statements that are defamatory, and then
10 make some factual showing beyond just articulating
11 it in the complaint.

12 MR. IPPOLITO: He was going through
13 Dendrite facts. They're laid out in my memorandum
14 of law on page ten. I'm sure they're also laid on
15 the Journal News.

16 THE COURT: Don't stop him. Put the other
17 two on the record.

18 MR. IPPOLITO: Can we go off the record
19 for a moment?

20 THE COURT: Let me get the last two on.

21 MR. FOWLER: The one extremely important
22 to us is there should be an effort to notify the
23 anonymous poster. It may not work. It may be
24 fruitless to notify anonymous posters, but in other
25 cases, including the Dendrite case, the Court has

1 indicated that that should be done, an effort should
2 be made. If it's fruitless, if it doesn't show up,
3 fine. But in order to protect his first amendment
4 right to speech or her first amendment right to
5 anonymous speech, he should -- they should be given
6 the opportunity to come in by an attorney and make
7 the arguments. It shouldn't be on the Journal News'
8 part, or internet service provider's part to make
9 the arguments on their behalf. What the Courts have
10 done is say basically, suspend the proceedings, ask
11 the person seeking the information to make the
12 effort, put on the notice and then come back and
13 maybe the anonymous posters will show up, maybe they
14 won't. At that point the hoop will have jumped
15 through and they would have been given their chance,
16 due consideration will have been given to their
17 first amendment rights, and then the Court can
18 decide, based upon the showing, that Mr. Ippolito
19 has made, balancing any other factors that may bear
20 on the appropriateness of ordering this disclosure,
21 whether we should turn over what information we
22 have. We do have some information we're not just --

23 THE COURT: And what would be the last
24 standard?

25 MR. FOWLER: The fourth point is the Court

1 should balance the first amendment right of
2 anonymous free speech against the strength of the
3 case presented by Mr. Ippolito. To some degree
4 that, I think, collapses with the point about making
5 a factual showing on the merits. But, you know,
6 if -- here we believe -- it's really the anonymous
7 posters. We believe the Ottingers are public
8 figures. They have a lot to show in order to
9 ultimately prevail on this case. Basically we're
10 talking about a showing of factual support for the
11 claim, articulation of the various statements at
12 issue, those two are already well in the works, and
13 the one I think we're talking about here is
14 Mr. Ippolito being directed to make an effort to
15 notify the anonymous posters, give them a chance to
16 come in anonymously and fight for their own first
17 amendment rights. If they don't show -- our concern
18 here is that we --

19 THE COURT: If I understand what the
20 concern is, you don't want bad precedent.

21 MR. FOWLER: Our wish list would be for
22 the Court to agree with Judge Friedman and follow
23 the Dendrite standard, and then we'll know what to
24 do, and everybody will know what to do the next time
25 this comes up. And that will make it simpler for

1 the Journal News and for people in the Ottinger's
2 position, it will make it simpler for the Court and
3 save everybody money, and we'll all know what the
4 rules are. Again I don't think we're in
5 disagreement about --

6 THE COURT: In converting this matter --
7 you say conversion you then would lose -- to the
8 extent you filed, although haven't served John and
9 Jane doe, I'm not quite sure what the conversion
10 standard would do. If somebody files, perhaps
11 doesn't serve but files timely, makes every attempt
12 to serve, doesn't preserve that right, I'm not quite
13 sure I want to -- I want to say the only way to do
14 this is by special proceeding. I don't see any
15 reason why, if it is commenced in the way it's been
16 commenced, that the standards that have been
17 articulated shouldn't also apply. I don't see why
18 pre or post filing we shouldn't go through those
19 four facts, and the analysis that we just discussed.
20 If in this case you're consenting to a conversion I
21 don't know what that means necessarily. When you
22 find the right people you can't amend anymore, you
23 have to start again because you converted this to a
24 special proceeding? You can't have it both ways.
25 It's either converted or it's not. Are you giving

1 up the summons and complaint once you convert this?

2 MR. IPPOLITO: Your Honor, I believe that
3 actually Cahill was started not by way of special
4 proceeding, and an action was commenced and
5 discovery was sought. Frankly that's the method I
6 had followed. On Exhibit A on my notice of cross
7 motion, your Honor, you have the amended caption,
8 the way it would look, I believe, if it went to a
9 special proceeding. The answer is yes, for a moment
10 I'm withdrawing my summons and complaint except by
11 way of exhibit in this case. If we prevail and your
12 Honor directs the Journal News provide us with the
13 names, the next summons I write will have the names
14 of bloggers on it. It will no longer be anonymous.
15 That's the protection the Journal News is saying,
16 before you pierce that veil, Cahill and Dendrite
17 say you have to jump a hurdle. We have no appellate
18 division or high court cases on it. So the fact of
19 the matter is something needs to be set apparently,
20 and I don't have a problem jumping. I think we
21 jumped, in either of those cases, hurdles. If I
22 convert to special proceeding --

23 THE COURT: I just want it clear for
24 this record. If you're consenting to that I'm
25 making no ruling on that. By waiving dicta,

1 whatever you want to call it, I don't see why the
2 action can't be commenced against John and Jane Doe,
3 as long as the standard is the same. If you feel
4 it's easier to start a special proceeding and move
5 on, that's fine. If the Journal News doesn't care
6 either, and as long as the standard is the same,
7 that's fine. You tell me what you want to do and
8 we'll do it. If you want to move forward under John
9 and Jane Doe and test the waters, I have no problem
10 doing that, provided the standard will be the same
11 or very similar to the one imposed in the special
12 proceedings. If you're willing to withdraw it so
13 there isn't a fight over form, over substance, then
14 it's your petition. Tell me what you want to do.

15 MR. IPPOLITO: I consent to conversion
16 because I'm a little worried, especially when we
17 talk about preaction disclosure and everything else,
18 the bloggers then come in and say how can you seek
19 preaction disclosure when you commenced? Now I got
20 myself another little hiccup in the road that
21 doesn't mean anything to me.

22 THE COURT: I would call it disclosure and
23 just apply the same heightened standard given the
24 first amendment rights that are implicated. It
25 would be disclosure pursuant to the CPLR with a

1 heightened standard given. If there were a special
2 proceeding this would be the standard and one
3 shouldn't benefit by commencing the action one way
4 or the other and getting a different standard;
5 either way the standard should be same. If you want
6 to withdraw it right now we'll convert it on the
7 record. Tell me what you want to do.

8 MR. IPPOLITO: I will convert on the
9 record and go by way of special proceeding.

10 THE COURT: At this time I'll convert this
11 matter to read as it does in Exhibit A, Supreme
12 Court of the State of New York, County of
13 Westchester, In The Matter of the Application
14 Pursuant to CPLR 3102 of Richard Ottinger and June
15 Ottinger, petitioners against non-party, the Journal
16 News, division of Gannett Satellite Information
17 Network, Inc. respondent, index 08-03892.

18 Are you ready to move forward with
19 argument?

20 MR. IPPOLITO: Yes, your Honor.

21 THE COURT: We'll go off the record.

22 (An off-the-record discussion was held
23 between the Court and counsel.)

24 THE COURT: We've had an extensive
25 conference off the record. I want to reiterate,

1 I've not made a ruling as to whether or not this
2 type of action must or should move forward by
3 special proceeding or by regular commencement of an
4 action against John or Jane Doe as it was
5 originally, however, plaintiff in this matter has
6 consented to the amendment of the caption to read as
7 it did earlier in the record. I do believe,
8 however, that no matter how the action is commenced,
9 the heightened standards we discussed on the record
10 should be applicable.

11 In addition, as counsel stated off the
12 record, my finding at this time that, at least
13 preliminarily, agree with the standards set forth in
14 Dendrite, at least standards that have gotten us to
15 this point. I made some findings with respect to
16 the statements, that is, the likelihood that they
17 will be defamatory and a factual showing that
18 statements were made. I agree at this point the
19 next stage of the proceeding should be to give those
20 whose identities might be compromised some notice.
21 Counsel has agreed, counsel for the Ottinger's, to
22 publish that notice on at least two forums, that is,
23 two separate websites; is that correct?

24 MR. FOWLER: Two forums will be the
25 correct phrase, it's a single web site.

1 THE COURT: Two separate forums on Low Hud
2 dot com, the caption should read -- the notice, as
3 follows, it does not have to be verbatim, but in sum
4 and substance: That a special proceeding has been
5 commenced and the caption should be noted in the
6 notice seeking information that could disclose the
7 actual identity or identities of the posters using
8 the following screen names on Low Hud dot com. Then
9 obviously those screen names should be set forth.
10 Anyone who believes that his or her identity maybe
11 revealed by the disclosure of such information may
12 intervene in this action by appearing through
13 counsel, anonymously, or otherwise on June 25th,
14 2008 at 10:00 a.m. before the Honorable Rory J.
15 Bellantoni, Acting Justice of the Supreme court in
16 courtroom 301 at 111 Doctor Martin Luther King
17 Junior Boulevard, White Plains, New York, 10601, the
18 zip code, and that should be done by counsel for the
19 Ottingers by June 4th, a week from today.

20 Is there anything else that needs to be
21 put on the record at this time?

22 MR. IPPOLITO: On the record at this time,
23 I don't believe so.

24 MR. FOWLER: No, your Honor. Thank you.

25 THE COURT: Thank you very much.

1 The foregoing constitutes the decision and
2 order of this court. I'll so order the transcript.
3

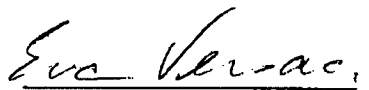
4 So ordered:

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6 
7

8 Hon. Rory J. Bellantoni
9

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11 -000-

12 CERTIFIED to be a true and accurate
13 transcription of the stenographic notes.
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15 
16 Eva Versaci
17 Senior Court Reporter
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