

**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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23  
24  
25  
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

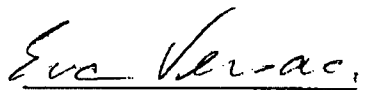
4   So ordered:

5  
6                     
7

8   Hon. Rory J. Bellantoni  
9

10  
11                   -000-

12                   CERTIFIED to be a true and accurate  
13                   transcription of the stenographic notes.  
14

15                     
16                   Eva Versaci  
17                   Senior Court Reporter  
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