

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART COUNTY OF WESTCHESTER

FILED
AND
ENTERED
ON 7-1 2008

To commence the statutory time period of appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry, upon all parties.

PRESENT: HON. RORY J. BELLANTONI,
Justice

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IN THE MATTER OF THE APPLICATION PURSUANT TO CPLR 3102 OF:

RICHARD OTTINGER and JUNE OTTINGER,
Petitioners,

- against -

NON-PARTY *THE JOURNAL NEWS*, A DIVISION OF GANNETT
SATELLITE INFORMATION NETWORK, INC.
Respondent.

INDEX NO: 08-03892

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The instant action was commenced by the filing of a summons and complaint on February 25, 2008. The complaint alleges that certain defamatory statements were made concerning Richard Ottinger and June Ottinger, which statements were posted on a "LoHUD" blog hosted by the New York Journal News. The defendants named in that action were John Doe 1-100 and Jane Doe 1-100.

In the complaint, plaintiffs set forth several statements by certain anonymous persons posted on the LoHUD blog. Those statements include the following:

"It now appears that it has been proven, that the Ottinger's, . . . have presented a FRAUDULENT deed in order to claim that they own land under water. . . . We are talking about the Ottingers LYING to the State, the Building Department, the ZBA and necessarily either bribing or coercing other people to do the same." (Posted September 11, 2007 by SAVE10543.)

"Equally outrageous, was that as Ms. McCrory was informing the dumbstruck BOT of the Ottingers criminal behavior . . . and advocated for the Ottinger's position in order to further their illegal scam." (Posted September 15, 2007 by hadnough.)

"He [the mayor of Mamaroneck] took the juice from Richard and June Ottinger to the tune of \$25,000 so they could build their starter Taj Mahal on a substandard lot. Their money bought a compliant ZBA and Building Inspector. . ." (Posted September 19, 2007 by aoxomoxoa.)

THEY PAID THE RIGHT PEOPLE OFF! They started with taking care of the Mayor, everybody knows that. I would guess the Building Inspector and Zoning Board were not forgotten in their largesse. The Ottingers have been very generous in greasing the wheels of corruption. With the news of the fraudulent deed they submitted it becomes quite clear that they also must have taken care of the surveyor and the prior owner of the property, unless they are two of the dumbest people on earth! (Posted September 23, 2007 by SAVE10543.)

In an effort to ascertain the names of the anonymous bloggers, plaintiffs served a subpoena on The Journal News on February 28, 2008.

On March 21, 2008, The Journal News made a CPLR §2304 motion to quash the subpoena. On April 11, 2008, plaintiffs cross-moved to compel pursuant to CPLR R.3124 or, in the alternative, to convert the instant action to a special proceeding pursuant to CPLR §103(c) and allow pre-action disclosure pursuant to CPLR §3102(c).

On May 28, 2008, this court held a hearing regarding the pending motions. Upon stipulation of the parties, it was ordered that the instant action be converted to a special proceeding allowing plaintiffs (now petitioners) to seek pre-action disclosure pursuant to CPLR §3102(c).

The internet is creating emerging legal issues, from jurisdiction to discovery. The identification of anonymous bloggers—posting defamatory statements on the internet—is one of those issues. There is no question that the First Amendment protects the right of a person to speak anonymously. That protection, however, is no greater than the right of a person to speak when their identity is known. Anonymous speech is not absolute and does not provide a safe haven for defamatory speech.

The New York Court of Appeals and Appellate Divisions have not yet addressed this issue. The only reported decision in New York is from the Supreme Court New York County (*Greenbaum v. Google, Inc.*, 18 Misc.3d 185 [2007]). That case, however, failed to set a standard because the court found, as a matter of law, that the statements made were not defamatory.

The parties have urged this court to consider persuasive authority from other jurisdictions, specifically the Superior Court of New Jersey, Appellate Division decision in *Dendrite International v. Doe* (775 A.2d 756 [2001]) and the Delaware Supreme Court decision in *Doe v. Cahill* (884 A2d 451 [2005]). The court finds both decisions helpful in reaching a decision in this matter.

In *Dendrite* the Superior Court of New Jersey, Appellate Division established four guidelines in deciding applications for expedited discovery and compelling an internet service

provider to disclose the identity of anonymous internet posters who are sued for allegedly violating the rights of individuals or corporations:

[T]he trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board;

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech;

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named defendants. In addition to establishing that its action can withstand a motion to dismiss . . . the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis; and

The court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff properly to proceed.

At the hearing on May 28, 2008, the court applied the first step in *Dendrite*.

The court reserved its decision on the pending motions and directed the petitioners to undertake certain steps specified by the court to post a notification on certain Forums making known (a) the existence of the special proceeding, (b) the relief sought herein, and (c) the fact that any individual who believed that his or her rights might be affected could seek to intervene anonymously or otherwise in the special proceeding to appear on June 25, 2008. The notice was timely posted on the Forums in compliance with the direction of the court. On June 25, 2008,

the court held a further hearing on the matter on pending motions. At that time, no individual sought to intervene.

At this point the court finds that the petitioners in this matter have identified and set forth the exact alleged defamatory statements made by each anonymous poster. The complaint and all information provided to the court establishes that petitioners have set forth a prima facie cause of action against the fictitiously-named defendants. Petitioners have produced sufficient evidence supporting each element of its cause of action, on a prima facie basis, except that of constitutional malice.

With regards to constitutional malice, the court finds *The Delaware Supreme Court Doe v. Cahill* (884 A2d 451 [2005]) helpful. In *Cahill*, the Delaware Supreme court held a plaintiff must produce evidence on all elements of a defamation claim within the plaintiff's control. The constitutional malice element is not within a plaintiff's control. As the Delaware court pointed out,

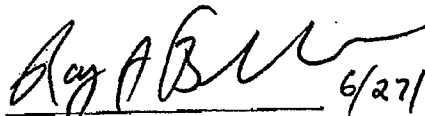
we are mindful that public figures in a defamation case must prove that the defendant made the statements with actual malice. Without discovery of the defendant's identity, satisfying this element may be difficult, if not impossible. Consequently, we do NOT hold that the public figure defamation plaintiff is required to produce evidence on this element of the claim.

(*Id.* at 464 [capitalization of "NOT" in original].) The court agrees and finds that the petitioners, at this point in the proceeding, need not prove this element to obtain pre-action disclosure.

Applying the fourth prong of *Dendrite*, the court finds that the balance in this case weighs in favor of the petitioners.

IT IS HEREBY ORDERED, that the motion of The Journal News is denied and the cross-motion of petitioners is granted as follows:

Within five business days of the date of this Order, The Journal News shall disclose to petitioners such information, if any, in its possession or control that could reasonably lead to the identification of the Anonymous Posters using the screen names "hadenough," "SAVE10543," and "aoxomoxoa," including posters' names, mailing addresses, any email addresses or other registration information that it may have for them including the IP address from which the blogs were posted, the corresponding internet service provider, other such information which will allow plaintiffs to identify the person(s) posting the blog entries.


6/27/08
Rory J. Bellantoni
A.J.S.C.