

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-012619

12/28/2005

JUDGE PRO TEM GLENN M. DAVIS

CLERK OF THE COURT
L. Muhammad
Deputy

FILED: 01/04/2006

MOBILISA INC

v.

JOHN DOE

CHARLES LEE MUDD JR
PRO HAC VICE
3344 N ALBANY AVE
CHICAGO IL 60618

UNDER ADVISEMENT RULING

The Court has reviewed and considered Plaintiff's Motion to Conduct Discovery, the Opposition filed by The Suggestion Box, and the Reply thereto. Further, the Court has reviewed the file, the pleadings, and the materials filed by the parties in support of their positions on the motion.

Based upon consideration of the foregoing and the argument presented by counsel,

The Court makes the following FINDINGS and enters the following ORDERS in this case:

Plaintiff seeks to obtain information from an email service regarding the identity of the sender of an anonymous email. The email passed along information from a personal email sent within Plaintiff's computer system by one of Plaintiff's employees. Plaintiff alleges that a full investigation has been completed and has concluded that the source of the emailed information is "almost certainly the unauthorized and illegal access" of Plaintiff's computer system.

Plaintiff does not allege that the statements in the anonymous email were false or defamatory. In fact, the email seems to simply convey what was in the email sent within the company system with an 'editorial comment' suggesting the company employee is not suitable to be in his current position.

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The cases cited by both parties agree that Internet communications such as this anonymous email are subject to protection under the First Amendment. All cases cited suggest that a test or standard be applied to determine whether the identity of the anonymous speaker should be revealed by Court Order, taking into consideration the constitutional interest to be protected.

The Court is aware of only one state Supreme Court case on the issue of the standard to be applied to this situation. The Court agrees with the standard applied in that case, for the reasons more fully set out in the Opinion. That case, *Doe v. Cahill*, 884 A.2d 451 (2005), provided that before obtaining identity of anonymous speaker through a compulsory discovery process, two requirements must be met:

1. The Plaintiff must, to the extent reasonably practicable under the circumstances, undertake efforts to notify the anonymous speaker that the speaker is the subject of a subpoena or application for order of disclosure, and plaintiff must also withhold action to afford the anonymous Defendant a reasonable opportunity to file and serve opposition to the discovery request.
2. The Plaintiff must show that the claim asserted would survive a Motion for Summary Judgment.

THE COURT FINDS that the higher “summary judgment” standard should apply given the First Amendment issues involved. Further, there are additional privacy protections contained in the Arizona Constitution.

Based upon a review of the materials submitted, the Motion for Leave to Conduct Discovery meets neither of the standards to be applied. As the Court can determine, there has been no effort to have the email service contact the sender of the email as to the pending discovery request and no opportunity for the anonymous sender to file and serve opposition to the request.

Secondly, while the allegations of the underlying Complaint by Plaintiff might be sufficient to survive a motion to dismiss, there is not sufficient verified evidence provided to the Court at this point for the Court to find that the underlying claim would survive a motion for summary judgment.

Since the two requirements have not been met, the Court could simply deny the motion and allow it to be filed again if Plaintiff is able to make the additional showing required. However, in the interest of efficiency, the Court will instead defer ruling on the motion to allow leave for the Plaintiff to provide additional supplementation of the motion and to allow the sender to be notified and present any opposition to the motion to compel.

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Therefore,

IT IS ORDERED that The Suggestion Box shall make an effort to personally notify the email sender of the pending discovery request **within ten days**. The email sender may file opposition to the discovery motion **within twenty days** of being notified. Such opposition may be provided in a manner that retains the anonymity of the sender, such as through a John Doe filing or filing of an affidavit with the Court under seal.

IT IS FURTHER ORDERED that the parties to the motion and the sender may -- within the time allowed for the email sender to file opposition to the discovery motion -- file additional memoranda and affidavits on the issue of whether the underlying claim would survive a motion for summary judgment.

CC VIA PREPAID RETURN ADDRESSED ENVELOPES:

W DENNIS GORMAN JR ESQ
RANDY PAPETTI ESQ