SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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THE PUBLIC RELATIONS SOCIETY OF AMERICA, INC. and CATHERINE A. BOLTON,

Petitioners, Index No. 116210/04

v.

ROAD RUNNER HIGH SPEED ONLINE,

Respondent,

v.

JOHN DOE,

Intervenor.
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MEMORANDUM OF LAW IN SUPPORT OF THE MOTION BY JOHN DOE TO DISMISS THE PETITION

This memorandum of law is submitted by Intervenor John Doe in support of Doe's motion to dismiss the Petition filed by the Public Relations Society of America, Inc. ("PRSA") and Catherine A. Bolton ("Bolton) against Road Runner High Speed Online ("Road Runner") on November 16, 2004.

Preliminary Statement

This case is prompted by Petitioners' application for pre-action disclosure pursuant to CPLR § 3102(c) from Road Runner, an internet service provider, of the identity of one of its subscribers in order to enable Petitioners to sue the author of an anonymous email sent to the Board of Directors of PRSA. The Petition should be dismissed because Petitioners have made no showing of their entitlement to override

Doe's First Amendment right to articulate an opinion anonymously, as they are required to do under § 3102. Their threadbare Petition does not even come close to making a minimal showing that they are entitled to the information they seek.

Doe's First Amendment rights will be lost if this information is disclosed to Petitioners. Once this information has been disclosed by Road Runner it cannot be retracted, and Petitioners have indicated that they want it for the purpose of suing Doe in defamation. Thus, Doe will immediately be subjected to losing anonymity and defending what, as demonstrated below, is a wholly meritless claim.

Under CPLR § 3102(c) and applicable law, to obtain Doe's identity Petitioners are required to demonstrate that they have a *prima facie* cause of action in defamation against Doe. They have utterly failed to do this. A review of relevant case law demonstrates that Petitioners do not have even a scintilla of a case against Doe for defamation; nor have they suffered the requisite harm necessary to sustain such an action. To override Doe's constitutionally protected rights and require disclosure of Doe's identity on Petitioners' wholly specious claims will deprive Doe of Doe's First Amendment rights and will also have a chilling effect on the public's willingness to engage in anonymous internet communications. For this reason, their Petition should be dismissed.

Factual Background

Petitioners PRSA and Bolton commenced this proceeding on or about November 16, 2004 by order to show cause in which they sought, pursuant to CPRL § 3102(c), an order requiring Road Runner to turn over all documents in its possession concerning the identity of the person who used, owned, or was otherwise in possession or control of the

IP address 66.108.84.160 on Monday October 18, 2004 at or about 11:19 p.m. and to produce all documents concerning an email that was sent from this location on that date and time. A copy of Petitioners' papers are annexed to the Affirmation of Carol A. Dunning, dated December 9, 2004 (hereinafter the "Dunning Aff.") as Exhibit A.

According to Petitioners, this email allegedly contained defamatory statements about PRSA and Bolton and was sent to undisclosed recipients, including members of the Board of Directors of PRSA on October 18, 2004. According to their papers, Petitioners were unable to identify the author of this email and sought information from Road Runner concerning the author's identity for the purposes of commencing an action against this person for defamation. *See* Affirmation of Amy C. Opp, dated November 16, 2004, (hereinafter "Opp Aff.") at ¶ 4 (included as part of Ex. A).

Upon presentation of the Petition on November 16, 2004, the Court granted a temporary restraining order prohibiting Road Runner from erasing, destroying or otherwise disposing of any of the requested documents. Oral argument on Petitioners' motion was held on November 24, 2004, whereupon the Court granted Petitioners' the relief they sought on default because Road Runner failed to appear on that date or otherwise contest the motion. The Court thereby issued an Order directing Road Runner to provide Petitioners with the requested documents and providing that the temporary restraining order would remain in effect until Road Runner did so. An unsigned copy of this Court's November 24, 2004 Order (the "Order") is annexed to the Dunning Aff. as Exhibit B.

Doe is the author of the email. *See* Dunning Aff. at ¶ 2. The email in question was sent only to the members of the Board of Directors of PBSA. *See id*.

Argument

I.

Petitioners Are Not Entitled to Obtain Pre-Action Disclosure Regarding Doe's Identity

A. Petitioners Have Not Made an Adequate Showing Under CPLR § 3102(c)

Petitioners are not entitled to disclosure of Doe's identity. Apart from self-serving and conclusory statements in their Petition that the email contains defamatory statements regarding both PRSA and Bolton, Petitioners have utterly failed to demonstrate why Doe's First Amendment right to make such anonymous statements should be disregarded in this instance.

It is well-settled that the First Amendment protects anonymous speech. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 332 (1995). Anonymous speech made via the Internet is entitled to the same protection. *See Reno v. ACLU*, 521 U.S. 844 (1997); *United States v. Perez*, 247 F. Supp.2d 459 (S.D.N.Y. 2003). While it is true that the First Amendment does not protect anonymous defamatory speech, when reviewing an application for the identity of an email subscriber courts are required to carefully balance an Internet user's First Amendment right to speak anonymously against the right of allegedly injured parties to seek redress. *See, e.g., Doe v. Ashcroft*, 334 F. Supp.2d 471 (S.D.N.Y. 2004) ("Every court that has addressed this issue has held that individual internet subscribers have a right to engage in anonymous speech, though anonymity may be trumped in a given case by other concerns.")

As a result, discovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny to avoid the potential chilling effect on Internet communications, and thus on basic First Amendment rights. *See Doe v.*

2THEMART.com, Inc., 140 F. Supp.2d 1088 (W.D. Wash. 2001). In this case, Petitioners seek to obtain information regarding Doe's identity for the purpose of bringing a defamation claim against Doe; yet, they have made absolutely no showing, as they are required to do under CPLR § 3102(c) that they have a *prima facie* case against Doe.

1. Plaintiffs Seeking Pre-Action Discovery Must Demonstrate That They Have A Valid *Prima Facie* Cause of Action Against The Anonymous Defendant.

"It is well-settled that pre-action disclosure pursuant to CPLR 3102(c) 'is available only where there is a demonstration that the party bringing such a petition has a *meritorious cause of action* and that the information being sought is material and necessary to the actionable wrong.'" *Matter of Bliss v. Jaffin*, 176 A.D.2d 106, 108, 573 N.Y.S.2d 687 (1st Dep't 1991) (*quoting Liberty Imports v. Bourguet*, 146 A.D.2d 535, 536, 536 N.Y.S2d 784 (1st Dep't 1989) (emphasis added); *see also Matter of Gleich v. Kissinger*, 111 A.D.2d 130, 489 N.Y.S.2d 510 (1st Dep't 1985). A party that fails to make out such a claim is not entitled to the relief sought. *See Holzman v. Manhattan & Bronx Surface Transit Operating Authority*, 271 A.D.2d 346, 347, 707 N.Y.S.2d 159, 161 (1st Dep't 2000) ("Petitioner has not met this burden, as he has failed to allege any facts supporting his bare claim that respondents were negligent and that this negligence caused his injury."). *See also Bliss*, 176 A.D.2d at 108, 573 N.Y.S.2d at 688.

Numerous other jurisdictions which have taken up the issue of pre-action disclosure regarding anonymous speech via the Internet have reached the same conclusion, including the Second Circuit, as well as the Ninth Circuit and the state courts in Virginia and New Jersey. Like the requirement under CPLR § 3102(c), these courts uniformly mandate that a plaintiff seeking disclosure of an internet subscriber's identity

first establish a *prima facie* cause of action against the unknown defendant, something that Petitioners have utterly failed to do here.

In *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), the United States District Court for the Southern District of New York considered this issue for the first time and fashioned a five-factor test that plaintiffs must satisfy before obtaining the identity of an internet subscriber.[1] Among other requirements, a plaintiff must make a concrete showing of a *prima facie* claim of actionable harm. *See* 326 F. Supp.2d at 565. *See also Elektra Entertainment Group, Inc. v. Does 1-9*, 2004 WL 2095581 (S.D.N.Y. Sept. 8, 2004) (applying same standard).

The Northern District of California ruled similarly in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), requiring a threshold demonstration by the plaintiff that its suit could withstand a motion to dismiss against the defendant. *See also Doe v. 2THEMART.com, Inc.*, 140 F. Supp.2d 1088 (W.D. Wash. 2001) (requiring same showing by plaintiff). As well, in *Dendrite International, Inc. v. John Doe No. 3*, 775 A.2d 756 (N.J. App. Div. 2001), a New Jersey appellate court held that a plaintiff seeking expedited discovery from an internet service provider regarding the identity of a customer who allegedly made defamatory statements in an internet chat room was required to produce sufficient evidence supporting each element of its cause of action prior to the court ordering such disclosure. *See also Immunomedics, Inc. v. Doe*, 775 A.2d 773 (N.J. App. Div. 2001) (same).

[1] Although this case arises in the context of an application for pre-action disclosure and Petitioners obtained a court order instead of a subpoena, *Sony Music Entertainment, Inc.* and the other cases cited thereafter are nonetheless applicable here because Petitioners seek the same information as they would in a subpoena and they have explicitly expressed their intention to file a lawsuit against Doe should they obtain this information. *See* Opp Aff. at ¶¶ 4, 7.

In *In re Subpoena Duces Tecum to America Online, Inc*., 2000 WL 1210372 (Va. Cir. Ct. 2001) (rev'd on other grounds), the Virginia Circuit court required a plaintiff seeking the release of names of subscribers from an internet service provider who had allegedly made anonymous defamatory postings on internet chat rooms to plead with specificity a *prima facie* claim that it was the victim of particular tortious conduct as a prerequisite to permitting the release of the information.

2. Petitioners Have Not Made A *Prima Facie* Showing of Defamation.

Petitioners have made no showing whatsoever that they have a valid *prima facie* claim of defamation against Doe as they are required to do under CPLR § 3102(c). Nor have they demonstrated that they have been harmed in any way as a result of the email written by Doe.

In order to establish a *prima facie* claim of defamation, a party must show a "false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must cause special harm or constitute defamation *per se*." *Dillon v. City of New York*, 261 A.D.2d 34, 704 N.Y.S.2d 1 (1st Dep't 1999). Special harm consists of "the loss of something having economic and pecuniary value." *Matherson v. Marchello*, 100 A.D.2d 233, 473 N.Y.S.2d 998 (2nd Dep't 1984). Damages arising from defamation must be "fully and accurately identified with sufficient particularity to identify actual losses." *Id*. at 235, 473 N.Y.S.2d at 1001. Words are defamatory *per se* if they tend to "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." *Rinald v. Holt Reinhart & Winston*, 42 N.Y.2d 369, 379, 397 N.Y.S.2d 943 (1977).

The determination of whether particular words are defamatory presents a question to be resolved by the court in the first instance. *See Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074, 659 N.Y.S.2d 836 (1997). Petitioners in this case have asserted only conclusory statements regarding Doe's alleged defamation, such as that the email in question "contained defamatory remarks about PRSA" and "numerous defamatory remarks concerning Bolton, both professionally and personally." Opp Aff. at ¶ 2. Nowhere do they set forth what statements in the email are allegedly defamatory, nor do they specify what damages, if any, they have allegedly suffered as a result. In this regard, they have failed to make out a *prima facie* cause of action for defamation that would survive a motion to dismiss. *See, e.g., Dillon*, 261 A.D. 2d at 39, 704 N.Y.S.2d at 6 (vague and conclusory allegations in pleading insufficient for defamation action); *Lasky v. Kempton*, 285 A.D.2d 1121, 140 N.Y.S.2d 526 (1st Dep't 1955) (reference to entirety of article, without pleading which part is false and defamatory, insufficient to establish *prima facie* claim). Accordingly, the Petition should be dismissed.

C. Petitioners Have No Claim for Defamation Against Doe

Not only have Petitioners failed to state a *prima facie* claim of defamation, such a claim does not exist here. The contents of the email are nothing more than opinion, albeit an angry one, and thus are not actionable. Moreover, PRSA has no standing to bring such a claim against Doe and Petitioners have suffered no damages whatsoever as a result of the email.

In cases involving libel or slander, a threshold issue for the court's determination is whether the statements at issue constitute fact or opinion. *See Parks v. Steinbrenner*, 131 A.D.2d 60, 62, 520 N.Y.S.2d 374, 375 (1st Dep't 1987). Statements constituting pure

opinion, "even if false and libelous, and no matter how pejorative or pernicious," are absolutely privileged and may not form the basis of an action in defamation. *Id., citing Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289, 508 N.Y.S.2d 901 (1986).

Whether a statement constitutes fact or opinion is a question of law for the Court's determination. *See Rinaldi*, 42 N.Y.2d 369, 397 N.Y.S.2d 943. To make such a determination, courts look to the following factors: (1) whether the specific language at issue has a precise meaning which is readily understood; (2) whether the statement(s) is capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers that what is being read is likely to be opinion, not fact. *See Brian v. Richardson*, 87 N.Y.2d 46, 637 N.Y.S.2d 347 (1995) (internal quotations and citations omitted).

1. PRSA Lacks Standing to Sue Doe and Was Not Defamed

Petitioners' allegations that the email contained defamatory remarks regarding PRSA miss the mark entirely. First, there is nothing in the email that is addressed specifically to PRSA. Thus, as none of the remarks refer specifically to PRSA, it lacks standing to bring a claim for defamation. *See, e.g., Arts4all, Ltd. v. Hancock*, 5 A.D.3d 106, 773 N.Y.S.2d 348 (1st Dep't 2004) (employer had no standing to maintain action for defamation regarding statements made by former employee since allegedly defamatory statements were only directed toward chief executive officer).

Even if PRSA had standing to sue Doe, *i.e.* on behalf of its Board of Directors, the statements in the email, to the extent they can even be construed as critical of the Board,

can only be characterized as pure opinion, which receives absolute protection under the law. *See Parks,* 131 A.D.2d at 62, 520 N.Y.S.2d at 375. These statements include:

(a) "Your employee survey was flawed."

(b) "Nobody buys [Bolton's] fake sincerity except the board."

(c) "[The board] thinks [Bolton] walks on water."

(d) "On January 1, [the executive committee of the board] should boot Bolton and pay her severance."

(e) "[The board] would have tanked without [Rob]."

These statements are not susceptible of being proven either true or false. Moreover, when read in the context of the full email, a reasonable reader can only conclude that these statements are opinion, not fact. *See Brian*, 87 N.Y.2d at 53, 637 N.Y.S.2d at 351. Therefore, they cannot be considered defamatory. *See id.; Steinhilber*, 68 N.Y.2d at 289, 508 N.Y.S.2d at 904. Thus, even assuming that PRSA has standing to bring an action on behalf of its Board of Directors, which appears highly unlikely given the fact that a corporation is legally distinct from its Board, these statements are simply not actionable.

Moreover, this email was only sent to members of the Board. *See* Affidavit of Carol A. Dunning, dated December 10, 2003 (the "Dunning Aff.") at ¶ 2. Thus, even if PSRA could show that these statements were somehow defamatory, and even if it could bring such an action on behalf of its Board of Directors, it cannot show that these statements were "published" to third persons, which is a necessary prerequisite to an action for defamation. *See Fedrizzi v. Washingtonville Central School Dist.*, 204 A.D.2d 267, 611 N.Y.S.2d 584 (2nd Dep't 1994) (words are "published" within the meaning of the law of libel when they are read by someone other than the person who was allegedly defamed). For this same reason, PSRA cannot demonstrate any harm resulting from the

statements. Thus, as PSRA's claim for defamation is without merit for a variety of reasons, it would not survive a motion to dismiss.

2. Bolton Also Has No Claim for Defamation Against Doe.

Bolton also lacks a valid claim for defamation against Doe. As demonstrated above, the statements in the email constitute protected opinion, no matter how damning they are. In addition, unless PRSA has taken some action against Bolton as a result of this email, something that seems highly unlikely given that it came to Court in conjunction with (and presumably in support of) Bolton, she cannot show, as she must, that she has suffered special damages or that that these comments constitute defamation *per se*.

Virtually all of the statements in the email directed at Bolton are either articulations of the author's opinion or are otherwise written in a way that lacks a precise meaning which is readily understood. When viewed in the context of the entire email, a reasonable person could only assume that they opinion. The opinions directed at Bolton include the following:

(a) "[Bolton] can manage a budget and deliver a powerful presentation with Powerpoint. That's it. [Bolton] is a fast-talking non-strategic PR person."

(b) "[Bolton] cannot manage or lead an organization."

(c) "[Bolton's] quarterly reports to staff are garbage."

(d) "Nobody buys [Bolton's] fake sincerity."

(e) "All of [Bolton's] initiatives are met with great expectations and no results."

(f) "Original thought and good writing skills are foreign to [Bolton]."

(g) "[Bolton] can't write more than a sound bite."

(h) "Executive Directors are supposed to write annual reports and quarterly reports. Not powerpoint presentations!"

(i) "With Rhonda, Cheryl and Jeff on the new Exec[utive] Comm[ittee], there should be some changes. On January 1, they should boot Bolton and pay her severance."

(j) "[Bolton] ignores Jennifer and her team."

(k) "[Rob] was not the best person for the job, but [Bolton's denigrating him in meetings and frequently yelling him in plain view of his staff] was awful for morale."

Even if these statements are somehow capable of being proven true or false and thus do not constitute pure opinion, Bolton cannot meet her burden to demonstrate that she suffered special harm at the hands of Doe, or otherwise lost something having economic and pecuniary value, which she is required to fully and accurately identify with sufficient particularity to survive a motion to dismiss. *See Matherson*, 100 A.D.2d at 235, 473 N.Y.S.2d at 1001. Unless Bolton can show that she was fired from her position or that she received a demotion with a resulting loss of pay as a result of the email, which appears extremely unlikely, she will be unable to demonstrate that she suffered any harm at all.

Any claim by Bolton that the statements in the email are defamatory *per se* is also unavailing. In order to show defamation *per se*, Bolton must demonstrate that the alleged defamatory language exposed her to "public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [the company] in the minds of right-thinking persons," or "deprive [the company] of friendly intercourse in society." *Rinaldi*, 42 N.Y.2d at 379, 397 N.Y.S.2d at 943. By bringing this action, PRSA has clearly rallied around Bolton, rather than ridiculing or holding her in contempt or disgrace. Thus, even if some of the statements in the email are found to be factual in nature, which they are not, none come

close to meeting the high standard required to establish defamation *per se*. Therefore, any claim brought by Bolton against Doe for defamation would be without merit and Bolton should not be given documents disclosing Doe's identity.

III.

Conclusion

Petitioners have failed to satisfy their obligation under CPLR § 3102(c) to state a prima facie claim of defamation against Doe and will be unable to do so. To allow Petitioners to trample Doe's First Amendment rights and obtain Doe's identity for the sole purpose of bringing a lawsuit that is wholly lacking in merit would harm Doe and would also have a chilling effect on individuals' First Amendment right to freely engage in anonymous internet communications. For this reason, the Petition should be dismissed with prejudice, and for such other and further relief as this Court deems necessary.

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