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Wilson College v. Doe

WILSON COLLEGE AND SELENA ROBINSON v. JOHN AND/OR JANE DOE
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Law, No. 2006-1367

Motion to Quash; Procedure of a Subpoena; Purpose of a Subpoena; First Amendment Protection of Anonymous Internet Speech

1. A Statement Regarding the Nature of the Claim rectifies Defendants' claim that Plaintiffs failed to articulate a claim or valid reason for the issuance and enforcement of a subpoena.

2. The proper procedure was followed when the Plaintiffs issued a subpoena to a third party to learn the identity of the Defendants when the third party does business in the state and does not object to the subpoena.

3. A subpoena is a proper pre-complaint discovery tool pursuant to Pa. R.C.P. 4001(c).

4. A party is no longer required to establish a prima facie case for the basis of a claim to obtain pre-complaint discovery.

5. The trial court must exercise discretion in weighing the importance of a pre-complaint discovery request against the burden imposed on the subject party to determine whether it is practical to permit the discovery request.

6. Plaintiffs assert a good faith belief that the identity of the injuring party is material and necessary to the filing of a Complaint.

7. The First Amendment does protect the right to speak anonymously, but the right to free speech is not absolute. Defamatory and libelous speech enjoys no constitutional protections.

8. The Court will not create new law granting protection to anonymous speech on the Internet where that speech is being portrayed as the opinions of a third party.

9. Plaintiffs are entitled to learn the identity of the individual(s) against whom they are attempting to file a Complaint where an Internet posting was not merely anonymous, but was made by usurping the identity of another.

Appearances:

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Julie S. Lee, Esq., *Attorney for Plaintiff*

Vincent Carissimi, Esq., *Attorney for Defendant*

Justin G. Weber, Esq., *Attorney for Defendant*

OPINION

Van Horn, J., January 19, 2007

Statement of the Case

Wilson College and Selena Robinson ("Plaintiffs") filed suit through a Praecipe for Writ of Summons against John and/or Jane Doe ("Defendants"). Plaintiffs filed a Statement Regarding the Nature of their Cause of Action simultaneously with their Brief in Response to Defendants' Motion to Quash Subpoena. In their Statement, Plaintiffs explain that a false profile on Myspace.com was created under the name of Plaintiff Selena Robinson, a Wilson College employee, and the director of Wilson's Women with Children program. Plaintiffs allege that the Myspace.com profile contains false and defamatory statements about Plaintiff Robinson, including statements that Plaintiff Robinson is a liar and hates retarded children.

Plaintiffs filed a Praecipe for Writ of Summons, on or about April 19, 2006, against the six individual students listed as "s[sic]elena's Friends" on the Myspace.com page. Plaintiff Wilson College stated that it could not in good faith initiate an action against those individuals without more evidence of their involvement in the creation of the page, and therefore filed a Praecipe for Writ of Summons against John and/or Jane Doe on April 28, 2006. Plaintiffs have no knowledge of the identity of the individuals who created the Myspace.com page, and thus have been unable to serve a copy of the Writ on any individual or entity.

Plaintiffs initiated pre-complaint discovery by requesting that a Subpoena to Attend and Testify be issued on Myspace.com. Myspace.com forwarded information, including the alleged profile creator's name and email address, on May 4, 2006. Myspace.com also provided a log showing the various Internet protocol ("IP") addresses used by the page creator to access the page. Many of the IP addresses were assigned to Wilson College, but were not sufficient to identify specific computers used. The Myspace.com information indicated that the account was accessed from an IP address assigned to Verizon. Plaintiffs noted that Myspace.com at no point objected to the enforceability of the subpoena.

Upon learning that the IP address was from a Verizon Internet account, Plaintiff requested that a Subpoena be issued to Verizon. Pursuant to internal policy, Verizon contacted the account holder and informed him or her that he or she would have ten (10) days to object to the release of the account information pursuant to the subpoena. Verizon did not object to the enforceability of the subpoena.

Opposing counsel then contacted Plaintiff's counsel, indicating that his firm had been retained on behalf of the Verizon account holder. On July 13, 2006, Plaintiffs amended the caption of the Writ to include Plaintiff Selena Robinson. On July 14, 2006, Defendants filed a Motion to Quash and supporting brief.

Discussion

A. Procedure of the Subpoena

Defendants argue that the subpoena issued to Verizon is procedurally defective, and that the subpoena violates Defendants' First Amendment rights. Defendant asserts that Plaintiffs have failed to articulate any claim or valid reason for the issuance and enforcement of a subpoena. Plaintiff remedied this failure by filing a Statement Regarding the Nature of the Claim at the time it filed its Response Motion and Brief. The Statement provided information concerning Plaintiffs' claim.

Defendants argue that the subpoena issued to Verizon is procedurally defective because it was served in Texas. Defendants assert that the subpoena power of this Court does not extend to Texas, citing 42 Pa. C.S.A. §5905. Section 5905 states that every court of record shall have the power to issue subpoenas "into any county of this Commonwealth to witnesses to appear before the court or any appointive judicial officer." Defendants argue that this statute does not provide authority to enforce a subpoena issued from this Court upon a person in Texas.

Plaintiffs respond by claiming that Defendants have no standing to raise an objection to the issuance and service of the subpoenas against Verizon. Plaintiffs assert that only the party subpoenaed may object to the enforceability of the subpoena, and Verizon has not objected. Instead, Verizon accepted service of the subpoena and complied with their internal policy by issuing a notice to Defendants of its intention to provide the information requested.

Neither party cites case law for this argument. In a Court of Common Pleas of Lackawanna County case filed in 2000 in which the defendants objected to subpoenas on the grounds that the subpoenas were improperly issued because the subpoenaed parties were outside of the Commonwealth of Pennsylvania, and that the offices of the non-parties within the Commonwealth did not possess the documents requested in discovery, the court found that the subpoenas were validly issued under 42 Pa. C.S. §5905. Ruby v. Delta International Machinery Corp., 2000 WL 33364209, 50 Pa. D.&C.4th 80 (2000). The Ruby Court, however, did not explain its rationale for this finding. The reported Plaintiff's argument in

that case was that 42 Pa. C.S.A. §5905 does not specifically preclude the issuance of a subpoena on out-of-state entities, but merely provides powers to county courts to issue subpoenas. Id. at *86. Additionally, the Plaintiff in that case was able to assert that the court had personal jurisdiction because the Defendants were registered with the Commonwealth of Pennsylvania as businesses, and could be served within Pennsylvania. Plaintiffs in this case do not discuss this aspect of service; however, Verizon does obviously do business in the Commonwealth.

Defendants next argue that Plaintiffs failed to properly provide notice of the deposition to the Verizon Legal Compliance Custodian of Records. Defendants claim that the subpoena itself is not sufficient notice, and the Plaintiffs did not provide a statement of the nature of its cause of action. Plaintiffs did fail to provide a statement with the notice of the deposition as per Pa. R.C.P. 4007.1(c), but remedied this objection by filing a Statement Regarding the Nature of the Complaint at the time of filing their Response Brief.

Plaintiffs respond that the subpoena issued upon Verizon in Texas on May 22, 2006, provided notice to the Verizon Legal Custodian of Records of the time and place of the deposition. Plaintiffs later continued the deposition, reissuing a subpoena rescheduling the deposition, this time to Rex Looney, Verizon Online Legal Compliance in Reston, Virginia. Plaintiff asserts that proper procedure was followed pursuant to Pa. R.C.P. 234.6, providing sufficient notice to the deponent. Plaintiffs assert that notice could not be provided to Defendants because their identity is unknown.

While not binding, the Delaware Supreme Court case that Defendants cite only in their free speech discussion states that when a case arises involving the Internet, a "plaintiff must post a message notifying the anonymous defendant of the plaintiff's discovery request on the same message board where the allegedly defamatory statement was originally posted." Doe v. Cahill, 884 A. 2d 451, 460 (Del. 2005). Posting a message to anonymous Defendants on the same forum Defendants have used is a good way to attempt to reach them; however, the Delaware case is distinguishable in that the discovery request in that case was aimed at the Defendants, unlike this case where the discovery request was provided to a third party.

The Court finds that Plaintiffs followed proper procedure in issuing a subpoena upon Verizon.

B. Purpose of the Subpoena

Defendants next argue that the subpoena was issued for an improper purpose. Defendants claim that Plaintiffs have not articulated any claim, and Defendants believe that Plaintiff instituted this lawsuit to further an internal disciplinary proceeding. They argue that a subpoena should not be used for a mere fishing expedition. Cohen v. Pelagatti, 493 A.2d 767, 770 (Pa. Super. 1985). Defendants' support for their assertion that Plaintiffs are using the civil process only to further an internal disciplinary proceeding includes several points: (1) the action was commenced only after Plaintiffs failed to identify the anonymous speaker through its internal disciplinary process, (2) Plaintiffs have not identified any claim against Defendants, (3) the identity of the person(s) who posted the profile would not provide Plaintiffs with any additional information for its claim, other than the identity of Defendants, (4) Plaintiffs already have the content of the profile and have disciplined the students identified as "friends" of the profile, and (5) Plaintiffs seek only the identity of the anonymous speaker and have not requested any information that would add to a potential claim against Defendants.

Defendants' primary argument here is that Plaintiffs had not articulated a claim or basis for the enforcement of the subpoena. Plaintiffs later filed a Statement Regarding the Nature of the Claim in Response to Defendant's Motion to Quash, thereby providing further information to Defendant.

Plaintiffs respond by asserting that the subpoena is a proper pre-complaint discovery tool, pursuant to Pa. R.C.P. 4001(c):

> Subject to the provisions of this chapter, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery, **or for preparation of pleadings**, or for preparation or trial of a case, or for use at a hearing upon petition, motion or rule, or for any combination of the foregoing purposes.

Pa. R.C.P. 4001(c). (Emphasis added by Plaintiff.)

Plaintiffs argue that a party is no longer required to establish a prima facie case for the basis of a claim to obtain pre-complaint discovery. McNeil v. Jordan, 894 A.2d 1260, 1279 (Pa. 2006). Plaintiffs correctly cite McNeil as the most recent Pennsylvania Supreme Court discussion on pre-complaint discovery. The McNeil Court determined that the trial court retains "undisputed discretion to grant or deny pre-complaint discovery requests according to the exigencies of a given case." Id. The Court rejected the holding of the Superior Court, which required a prima facie case prior to the approval of a pre-complaint

discovery request, because it effectively eliminated all pre-complaint discovery. Id. at 1278. The Court held that a party must demonstrate good faith and "probable cause that the information sought is both material and necessary to the filing of a complaint in a pending action." Id. The Court went on to specify that a plaintiff should describe the materials sought and identify the probable cause for his or her belief that the information will materially advance the pleading, in addition to averring that, but for the discovery request, the plaintiff will be unable to formulate a legally sufficient pleading. See id. The McNeil Court agreed with the Defendants that a "fishing expedition" is not to be tolerated. 864 A.2d at 1278. The trial court must exercise discretion in "weighing the importance of the request against the burdens imposed on the subject party to determine, as a practical matter, whether the discovery request should be permitted." Id. at 1279.

Plaintiffs in this matter assert a good faith belief that the essential element of instituting an action, the identity of the injuring party, is material and necessary to the filing of a Complaint. Plaintiffs assert that the Myspace.com page, stating that Plaintiff Robinson is a liar and that she hates retarded children, is defamation per se.[1] Plaintiffs have a good faith belief that they are entitled to know the identify of the individuals who made the allegations on Myspace.com, as the profile was falsely represented as being created by and belonging to Plaintiff Robinson, and contained false, offensive, and defamatory statements of fact regarding the Plaintiffs.

Plaintiffs also assert that the pre-complaint discovery sought is as narrow as possible, as they seek only the identity of the individual(s) who created the Myspace.com posting. Thus, Plaintiffs emphasize, their request cannot be considered a "fishing expedition."

C. First Amendment Rights

Defendants' final argument is that the First Amendment protects the right of the Defendants to speak anonymously. Defendants cite many cases supporting this assertion, including cases specifically dealing with Internet speech. Defendants nobly argue that if the right to compel disclosure of anonymous speakers is liberally granted, there will be a chilling effect on Internet speech and First Amendment rights. Doe v. 2TheMart.com, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). However, Defendants do not explain that the 2TheMart.com case involved a request to compel the identity of a witness, rather than a party. See Id. In 2TheMart.com, the court explained that "when the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity." Id. at 1095. When identifying information is sought regarding defendants, the litigation cannot go forward unless the defendants are identified. See id.

Defendants also cite cases in which anonymous speakers use the Internet to criticize politicians, Doe v. Cahill, 884 A.2d 451 (Del. 2005); a newspaper published an editorial advocating for the rights of African-Americans to vote, New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); and a case in which the NAACP did not release the names of its members under the protection of free association, NAACP v. Alabama, 357 U.S. 449 (1958). Defendants also cite authority supporting the well-established right to communicate anonymously over the Internet. Reno v. ACLU, 521 U.S. 844, 885 (1997).

Plaintiffs do not argue with Defendants' assertion that one may speak anonymously online. Talley v. State of California, 362 U.S. 60 (1960). Plaintiffs, however, point out that Defendants do not address the fact that the First Amendment does not protect defamation. Plaintiffs cite cases that explain that the right to free speech is not absolute, and "lewd, obscene, profane, libelous and insulting or fighting words ... are not constitutionally protected." Commonwealth of Pennsylvania v. Baker, 722 A.2d 718, 722 (Pa. Super. 1998); Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942). Both of these cases, however, deal with threats and fighting words rather than defamation or libel. Plaintiffs assert that defamatory statements posted online do not receive First Amendment protection, but do not cite any case law on this point.

Plaintiffs stress that Defendants have failed to offer any precedent holding a constitutional right to defame anonymously. Plaintiffs also take issue with Defendants' reliance on Talley v. State of California. Defendants have cited this case to argue that the First Amendment protects the right to speak anonymously, but, as Plaintiffs interject, the Talley Court also held that the protections given to an anonymous speaker do not protect false or injurious speech. 362 U.S. 60, 63 (1960). The Talley Court did hold that an ordinance prohibiting the distribution of handbills that did not contain the printed names and addresses of those preparing, distributing, or sponsoring them was unconstitutional as a violation of the freedom of speech and of the press. The Talley Court did not discuss false or injurious speech, but did find that the ordinance was not aimed at providing a way to identify those responsible for fraud, false advertising, or libel, and thus could not be excused as a justifiable means to prevent the dissemination of untruths. Melvin v. Doe, 836 A.2d 42, 48 (Pa. 2003).

Plaintiff correctly informs that Doe v. Cahill deals with communications concerning an elected town council member, and sets forth a test for Delaware public figure defamation. 884 A.2d 451 (Del. 21005). Dendrite Int'l, Inc. v. Doe addresses communications and criticisms of a publicly traded company and the status of the company's stock. 884 A.2d 756 (N.J. Super. 2001). These issues are not involved in the present matter. As Plaintiffs correctly assert, there is no controlling law in the Commonwealth on this point and Defendants are asking the Court to create new law regarding the level of protection that should be granted to anonymous speech on the Internet. Melvin v. Doe is the only Pennsylvania appellate case that touches on anonymous Internet speech. 836 A.2d 42 (2003). In Melvin, a judge brought a defamation action against anonymous authors of statements about her on a web site. In its discussion, the Court noted that the United States Supreme Court has held that while there is a right to anonymous free speech, the States have a justifiable interest in preventing evils, and libel is one of those evils. Melvin, 836 A.2d at 49. In Melvin, the Court found that a court-ordered disclosure of Appellant's identities presented a "significant possibility of trespass upon their First Amendment rights." Id. at 50. Plaintiffs argue that this case is not dispositive, because the Pennsylvania Supreme Court rendered no decision, finding that the trial court's discovery order fell within Pa. R.A.P. 313, the exception to the final order rule, and remanded to the Superior Court for consideration of the constitutional free speech issue. As Plaintiffs note, Melvin involved a public official and political speech.

Plaintiff also discusses a Philadelphia County case, Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Development, in which the plaintiff sought disclosure of the identities of anonymous posters on the Internet. 2006 WL 37030 (Phila. Co. 2006) not reported in A.2d. The Klehr Court works through the newly developed standards of New Jersey and Delaware, and rejects both of them. Id. at *9. The court finds that the rush to apply new standards should be slowed, and asserts that a balancing of the plaintiff's right to information against the John Doe's First Amendment rights is built into our rules of civil procedure. Id., citing Pa. R.C.P. 4011, 4003.1(a). Noting that the United States Supreme Court has instructed that free speech is not always absolute, and that "defamatory and libelous speech enjoys no Constitutional protection," the Klehr Court found that the defendants were not unreasonably burdened by a denial of the their request that the identities of the anonymous posters not be revealed. Id. at *10. Recognizing that the Klehr case is not binding on this Court, we nonetheless recognize the Plaintiffs' right to learn the identity of the individual(s) against whom they are attempting to file a cause of action where the posting was not merely anonymous, but was made by usurping the identity of another.

Conclusion

The Court notes Defendants' point concerning the importance of free speech and anonymous speech, but maintains that the freedom to express anonymous speech differs vastly from the issue present in this case. The cases discussed in the First Amendment context involve those individuals posting their own opinions anonymously online. The present matter involves an anonymous poster pretending to be someone else, and passing the posted opinions off as belonging to someone else. For these and all the reasons discussed above, the Defendants' Motion to Quash Subpoena is denied.

ORDER OF COURT

And now this 19th day of January 2007, after consideration of Defendant's Motion for to Quash Subpoena, briefs submitted by counsel and oral argument presented to the Court on this matter, it is hereby ordered Defendant's Motion to Quash Subpoena is denied. Plaintiffs shall be permitted to continue discovery after the expiration of the appeal period for this Order.

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[1] Plaintiffs assert that a statement is defamatory per se as accusation of business misconduct if it ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for proper conduct of his lawful business. Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp.2d 570, affirmed 229 F.3d 1139 (1999).