STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-13-359

MARIE GUNNING,

Plaintiff

v.

ORDER

JOHN DOE,

Defendant

Before the court are motions to quash a deposition subpoena issued by plaintiff Marie Gunning to non-party witness Richard Simard – motions that are filed by both Simard and by a person designated as John Doe # 1. The file contains a copy of a declaration from John Doe # 1 stating that he is the person who owns the URL for the *Crow's Nest* website where the statements that form the basis for Gunning's claims of defamation were published.[1]

This action was filed on August 13, 2013 and Gunning subsequently filed a subpoena in California seeking to have the California company that hosted that *Crow's Nest* website disclose the owner of that site. That subpoena was quashed by the California Superior Court in a series of rulings that appear in this action as attachments to John Doe #1's opposition to a motion for alternate service dated February 6, 2014.[2]

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[1] See John Doe # 1 declaration dated October 17, 2013 ¶ 2. That declaration, which was filed in the California subpoena proceeding, also states that John Doe # 1 did not write the allegedly defamatory content. Another individual, designated as John Doe # 2, has been identified as the author of the content. See Kallin Affidavit dated November 7, 2013 ¶ 4.

[2] The first of those rulings was in the form of a recommendation dated December 4, 2013 by a Judge pro tem. That ruling was adopted by a Superior Court Judge in an order dated December 11, 2013. An amended order was subsequently issued on January 24, 2014 because the December 11, 2013 order erroneously listed the underlying action as pending in Oregon rather than Maine.

On March 21, 2014 the court granted Gunning leave to conduct up to three depositions prior to service of the summons and complaint. That motion was not opposed. Implicit in the order allowing Gunning to conduct discovery was a suspension of any deadline for her to file returns of service.

On October 15, 2014, the court requested a status report on the case. At that time counsel for Gunning responded that Richard Simard, to whom Gunning had issued a subpoena, had submitted an affidavit stating that he did not own the *Crow's Nest* website or publish the *Crow's Nest* and did not know who did. The status report also stated that Gunning was pursuing certain Freedom of Access requests made to the Town of Freeport but that the cost of complying with the requests was under negotiation and the requests had not yet been responded to.

New counsel appeared for Gunning in February 2015. In May 2015 that counsel requested a Rule 26(g) discovery conference because, based on new information, Gunning was no longer satisfied by Simard's affidavit and wished to pursue her request for his deposition. A discovery conference was held on June 18, 2014 at which counsel for Gunning, for Simard, and for John Doe # 1 appeared. Counsel for John Doe # 1 opposed the subpoena based on the constitutional right of anonymous speech, and counsel for Simard opposed the subpoena on the ground of undue burden.[3] Given the issues, involved the court granted the parties leave to brief the issues, and those briefs have now been filed.

First, although Simard contends that appearing at a deposition would be an undue burden, the court disagrees. Nothing in the record suggests that a deposition that, according to counsel for Gunning, will take approximately two hours poses anything close to the kind of burden that would justify quashing the subpoena pursuant to Rule 45(c)(3)(A)(iv). The motions to quash

[3] Counsel for Simard did not argue that Gunning had to issue another subpoena although he now makes a suggestion to that effect in his memorandum. Gunning would have been granted leave to issue another subpoena if that argument had been made and the court will therefore not entertain that argument now.

before the court turn on whether Gunning has met her burden of demonstrating entitlement to proceed with discovery when her rights are weighed against what the Law Court has stated as "the recognized right of anonymous speech." *Fitch v. Doe,* 2005 ME 39 ¶ 26, 869 A.2d 722, *citing Dendrite Int'l Inc. v. Doe,* 775 A.2d 756 (N.J. App. 2001). While it is doubtful that a non-party witness such as Simard has standing to raise an objection based on John Doe's right to engage in anonymous speech, counsel for John Doe # 1 has filed a special appearance to raise that argument.

On the one hand, the right to engage in anonymous speech is not a license to engage in defamation. On the other hand, litigants should not be able to unmask anonymous speakers merely by alleging that they have been defamed. Faced with these competing interests, the *Dendrite* court set forth a test that has been adopted by a number of courts as "the appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously." *Mortgage Specialists v. Implode-Explode Heavy Industries,* 999 A.2d 184, 193 (N.H. 2010) (joining various courts in applying the *Dendrite* standard). Although it did not have to reach the *Dendrite* issue, the Law Court cited *Dendrite* with approval in *Fitch v. Doe,* and this court will apply at least those aspects of *Dendrite* that appear to be almost universally accepted in connection with the pending motions to quash.[4]

Dendrite first requires that the parties seeking anonymity have notice of the proceeding, 775 A.2d at 760, a requirement that has been met here. Second, *Dendrite* requires the plaintiff to

[4] Other courts that have addressed this issue have modified the *Dendrite* standard. *See, e.g., Doe v. Cahill,* 884 A.2d 451, 461 (Del. 2005); *Krinsky v. Doe,* 159 Cal. App. 4th 1154, 1170-72, 72 Cal. Rptr.3d 231 (Cal. App. 2008). However, for purposes of this decision the distinction between the *Dendrite* test and the test applied by other courts is immaterial because all of the tests in question require the equivalent of a prima facie showing and some supporting evidence before allowing discovery designed to reveal the identity of an anonymous speaker.

identify and set forth the exact statements alleged to be defamatory, *id.*, and Gunning has appended the allegedly defamatory statements to her complaint.

The third prong of the *Dendrite* standard is that the court must determine that the plaintiff has set forth a prima facie case sufficient to withstand a motion to dismiss and the plaintiff must produce evidence supporting each element of the cause of action. *Id.*

Under *Dendrite,* there is a fourth and final prong – the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented by plaintiff and the need to disclose the anonymous speaker's identity. 775 A.2d at 760-61. Other courts, however, have held that this final prong is unnecessary because defamation is not protected by the First Amendment and once a party has made an adequate showing to support a claim of defamation, it has necessarily established enough to proceed with its case. *See, e.g., Doe v. Cahill,* 884 A.2d at 461; *Krinsky v. Doe,* 159 Cal. App. 4th at 1172.

The court is inclined to agree with the *Cahill and Krinsky* courts on the latter issue. However, that issue does not affect the court's ruling on the pending motions. The primary focus of the arguments made by Simard and John Doe # 1 are that Gunning has not set forth a prima facie case, that she has not produced evidence to support all the elements of her claim, and that she is collaterally estopped by the rulings of the California Superior Court.

Left to its own devices, the court would be to conclude that Dunning has set forth a prima facie case and that she has submitted evidence sufficient to support the elements of her libel claim. Even if Gunning is required to present evidence sufficient to meet a summary judgment standard,[5] her affidavit and the other evidence in the record appear to establish that there is at least a disputed issue for trial on her claim of libel. While many of the statements about Gunning and attributed to Gunning in the *Crow's Nest* might be characterized as crudely phrased

[5] *See Doe v. Cahill,* 884 A.2d at 457.

statements of opinion, Gunning has submitted evidence that on at least one occasion the *Crow's Nest* stated the following:

> Rumors continue that [Gunning] is suffering from a bipolar disorder with acute depression and paranoia, amplified by substance abuse.

Statements that Gunning suffers from mental illness and has a problem with substance abuse appear to be defamatory. The fact that those statements are attributed to "rumors" does not make them any less defamatory. *See Restatement Second of Torts* § 578, comment c.

Simard and John Doe # 1, however, contend that the statements are not defamatory because on their face the statements fall within the "parody exception" for statements that could not reasonably be understood to depict actual facts or events. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Even though the *Crow's Nest* describes itself in small print on its masthead as "a parody look at the news," the court would be inclined to find that there is at least a factual dispute as to whether the description of Gunning as rumored to be "suffering from bipolar disorder with acute depression and paranoia, amplified by substance abuse" would reasonably be understood to constitute a parody.

However, the court is not writing on a clean slate on that issue. Gunning previously litigated that issue in California in the course of her application under California's Interstate Deposition and Discovery Act, California Code of Civil Procedure § 2019.100 et seq., when she sought to subpoena information from the company that hosted the *Crow's Nest* website. *Doe v. Gunning,* No. CPF-13-513271 (Cal. Superior Court, County of San Francisco, orders dated December 4, 2013, December 11, 2013, and January 24, 2014). The California court found that Gunning had "failed to make [a] prima facie showing" on her claim of libel because, although the content of the *Crow's Nest* "could be seen as rude and distasteful, taking into consideration the context and the contents of the statements at issue, it is parody." Order dated December 11, 2013.

It is evident that in ruling that Gunning had failed to make a prima facie showing, the California Superior Court was applying one of the essential Dendrite requirements. The court did

not cite *Dendrite*, but it did cite *Doe v. Krinsky,* which adopted the prima facie showing requirement found in *Dendrite.* 159 Cal. App. 4th at 1172. Accordingly, whether or not this court agrees with the California ruling, the issue of whether Gunning has made the necessary prima facie showing was actually litigated in California, was decided adversely to Gunning, and was essential to the outcome of the California action.

The decision of the California Superior Court constituted a final decision on Gunning's application for interstate discovery. Gunning could have sought review of that decision by filing a petition to the California Court of Appeal for an extraordinary writ. California Code of Civil Procedure § 2019.650(a). While there is an exception to collateral estoppel when the party sought to be precluded could not have obtained appellate review, the availability of discretionary review is sufficient to permit the application of collateral estoppel. *See Restatement Second of Judgments,* § 28 comment a. No appeal was sought. Accordingly, the California decision is entitled to collateral estoppel effect and precludes Gunning from relitigating the same issue here in Maine.

Two other points should be made. John Dow # 1 also contends that he is entitled to immunity under the Federal Communications Decency Act, 47 U.S.C. § 230(c), which protects "providers and users of an interactive computer service." The short answer to this argument is that the record does not demonstrate that the *Crow's Nest* website was an "interactive" computer service such as Facebook or Instagram, and 47 U.S.C. § 230(c) is inapplicable.[6]

There is also a dispute between the parties as to whether Gunning, having run for the Freeport Town Council, was still a "public figure" who would be required to show "actual malice" within the meaning of *New York Times v. Sullivan,* 376 U.S. 254 (1964) in order to recover for defamation. Gunning contends that most or all of the defamatory statements were

[6] In addition, John Doe # 1 has provided a declaration that he did not write the content of the *Crow's Nest* website but does not deny that, as the owner of the *Crow's Nest* website, he was the publisher of the allegedly defamatory statements. He would not therefore qualify as the passive host of a website with no responsibility for its contents. Moreover, it would be highly unfair to accept John Doe # 1 's assertions as to his role in the *Crow's Nest* without allowing Gunning discovery to contest those assertions. Finally, Gunning has offered evidence that the *Crow's Nest* was distributed in print as well as on the internet, and the Federal Communications Decency Act is not applicable to print media.

made after the election when she was a private citizen occasionally speaking at council meetings. The court does not have to reach this issue because, whether or not Gunning is or was a public figure, the court finds that she is collaterally estopped by the ruling of the California Superior Court.[7]

Finally, it is the court's recollection that at the discovery conference on June 18, the parties agreed that if the subpoena to Simard were quashed, Gunning had no further avenues to pursue disclosure of the identities of John Does # 1 and # 2. If any other avenues do exist, Gunning has had more than ample time to pursue those since the court's March 21, 2014 order allowing discovery. Accordingly, the court concludes that the action should now be dismissed without prejudice pursuant to M.R.Civ.P. 3 based on Gunning's inability to serve the John Doe defendants.

The entry shall be:

The motions to quash the subpoena are granted and the case is dismissed without prejudice. Plaintiff's motion to strike is denied as moot. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: October 22, 2015

Thomas D. Warren
Justice, Superior Court

[7] John Doe # 1's reply memorandum contains a footnote based on information purportedly derived from the internet to demonstrate that, since her unsuccessful campaign for the Town Council, Gunning has been a frequent participant at Town meetings. Gunning has moved to strike that footnote as based on inadmissible hearsay. She may be correct but in light of the ruling above, the court does not need to reach that issue and concludes that Gunning's motion to strike is therefore moot.

One reason the court declines to reach the public figure issue is that, assuming that Gunning were to qualify as a public figure, the consequence would be that she could not recover unless she were able to show that defamatory statements were made with knowledge of their falsity or with reckless disregard of whether they were true or false. Because that issue would turn on the defendants' state of mind, it could not fairly be litigated without allowing Gunning to take discovery from the defendants.