SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Peter D. Antonoplos and **The Law Offices of Peter D. Antonoplos, PLLC, d/b/a/ Antonoplos & Associates, Attorneys at Law,**	)	No. 2019 CA 002415 B
Plaintiffs,	)	Judge Robert Rigsby
v.	)	Next Judicial Event Initial Scheduling Conference
John Doe,	)	July 26, 2019
Defendant**.**	)	

SPECIAL MOTION TO QUASH
SUBPOENA TO IDENTIFY DEFENDANT DOE

This defamation action was brought by Peter Antonoplos, a local lawyer who assumes that the author of an online negative review is not a real client. Antonoplos alleges, entirely on information and belief, that the critical reviews posted on both Yelp and Google by the Doe defendant, who used a pseudonym when criticizing Antonoplos for his comments and his manner during an intake interview, were posted by a competitor. Antonoplos apparently contends that the review's statements about a client meeting must be false because his records do not reveal any interviews with a prospective client who used the pseudonym under which Doe posted. Therefore, Antonoplos alleges that Doe can be held liable for defamation, and, based on the pendency of this action, he has issued a California foreign subpoena seeking to identify Doe, his online critic.

In *Solers v. Doe*, 977 A.2d 941 (D.C. 2009), the D.C. Court of Appeals recognized that the First Amendment protects the right to make online criticisms anonymously, or using pseudonyms, and that before a plaintiff can use discovery to compel the identification of an anonymous Internet user whom the plaintiff wishes to sue, the plaintiff must make an evidentiary showing that the plaintiff can make out a prima facie case against the Doe defendant. Thus, when the D.C. Council

adopted the D.C. Anti-SLAPP law the following year, D.C. Code §§ 16-5501 *et seq.*, it provided a procedure for anonymous defendants to challenge subpoenas seeking to identify them: such defendants could file a "special motion to quash," on which plaintiffs can prevail only if they "demonstrate . . . that the underlying claim is likely to succeed on the merits." § 16-5503(b). In *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014), the Court of Appeals held that this showing must be made by presenting a prima facie case sufficient to satisfy each of the elements of the plaintiff's claim.

Here, not only does plaintiff have no evidence of falsity, but attachments to this motion show that Doe was a real potential client who had an appointment to meet with plaintiff Antonoplos. Moreover, plaintiffs appear to be using the pendency of this action to subpoena identifying information about reviewers whose speech they do not even **allege** to be defamatory, suggesting that the subpoenas may have been issued in bad faith. Consequently, Doe's motion to quash should be granted, and defendant should be awarded attorney fees for having to file this motion.

STATEMENT OF FACTS

Plaintiff Peter Antonoplos is a lawyer who maintains a legal practice as the head of plaintiff Antonoplos and Associates. The home page of his law firm's web site, located at https://www.antonlegal.com/, has links to a series of forms that allow prospective clients to arrange for a free, in-person consultation to determine whether the client would like to hire plaintiffs. After an available date and time are selected, the prospective client is invited to provide a name, phone number, and email address, and to furnish a "Brief Description of the Matter." Levy Affidavit ¶ 7 and Exhibit C.

Defendant Doe used this procedure to set up an appointment to speak to consult about what

her online reviews described as "a routine real estate contract matter."[1] Doe received an email from plaintiffs confirming this appointment. Levy Affidavit ¶ 8 and Exhibit D. Following the meeting, Doe posted the following review on Antonoplos's Yelp page:

> Unprofessional waste of time
>
> Came to Antonoplos with a routine real estate contract matter. We met in person for a free consultation after describing my need using their online inquiry form.
>
> In person, Peter Antonoplos immediately told me not to pursue the contract. No basis, just "don't do it." An attorney's job is not to tell you what to do, but to present available options and describe the risks involved. Peter was the antithesis of this. When pressed to point to any concrete risks or rationale, he made some bogus claims that didn't make any sense.
>
> When his arguments were revealed to be baseless, he resorted to ad hominem attacks. "Did you go to law school? I didn't think so."
>
> Then he bloviated for minutes about conflict of interest, which didn't actually explain anything and should not have been an impediment. Finally he refused to take up the matter. The need had been clearly stated in the initial inquiry, so I have no idea why he accepted the consultation in the first place.
>
> I may not have gone to law school, but I can use logic and spot a rotten apple. I've never seen a lawyer behave so unprofessionally.
>
> All of the other attorneys I talked to about this contract matter immediately offered several possible options and had handled similar cases before.
>
> Went with another firm instead and had no issue. Don't waste your time with Antonoplos & Associates.
>
> Complaint, ¶ 22 and Exhibit B.

Doe assigned a rating of one star out of five possible to her rating on Yelp; hers was one of about thirty reviews, many of which were highly complimentary, but several of which also assign only one

[1] This brief uses generic female-gender pronouns to refer to Doe, without any intention of signaling the actual gender of defendant Doe.

star. A common theme in the one-star reviews is that Antonoplos is peremptory and rude. Doe posted an identically worded review on Google. Complaint ¶ 22 and Exhibit B. Doe used the pseudonym "Paul Herrera" on Google, and "Paul 'PH' H." on Yelp. Complaint Exhibits A and B.

Plaintiffs then filed this action. The complaint acknowledges that Paul Herrera is a "fake name," Complaint ¶ 1, or a "fictitious name." *Id.* ¶ 27. At the same time, the complaint hypothesizes that the reviews must be false because plaintiffs' records do not reflect any meeting with anybody named Paul Herrera, *id.*, ¶ 25; it further hypothesizes that Doe must be a competitor who is trying to harm Doe's competitors in the market for legal services. *Id.* ¶¶ 27-28. In fact, the evidence shows that Doe sought a consultation by filling out a form on plaintiffs' web site requesting a free consultation, and that a meeting was set up by an email from plaintiffs to Doe. Levy Affidavit, ¶¶ 7-8 and Exhibits C and D. Plaintiffs offer no **evidence** that the meeting did not occur as the review describes.

Plaintiff then obtained a foreign subpoena from the California Superior Court and served it on Yelp, Levy Affidavit, Exhibit B, seeking to identify three persons: the Doe defendant in this case, as well as a Yelp user posting as "Samantha S.," who apparently posted reviews about a certain restaurant, and a Yelp user posting as "T H.", who also had unflattering things to say about plaintiff. The complaint does not allege any claims against either of these two additional Yelp reviewers.

Pursuant to its standard practice, Yelp provided a notice of subpoena to Doe. Levy Affidavit ¶ 4 and Exhibit A. Doe now asks the Court to quash the subpoena, protecting her First Amendment right to speak anonymously.

ARGUMENT

The Supreme Court held in *McIntyre v. Ohio Elections Comm.,* 514 U.S. 334 (1995), that

the First Amendment protects the right to speak anonymously or pseudonymously:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.
>
> 514 U.S. at 341-342, 356.

Accordingly, the D.C. Court of Appeals, joining the rulings of several other states, has held that the mere fact that a plaintiff alleges that his rights were violated by the wrongful speech of some pseudonymous person is not sufficient to warrant enforcement of process compelling the identification of the accused speaker. Instead, the plaintiff is required to give notice to the speaker of the pendency of discovery seeking identification, and the plaintiff must show the Court both that he has legally valid claims against the speaker, and that he has at least enough evidence to support a prima facie case on the elements of his claim. *Solers v. Doe*, 977 A.2d 941 (D.C. 2009); *see also Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001).

A. The Anti-SLAPP Law Uses a Burden Shifting Approach to Adjudicate Subpoenas to Identify Speakers.

The D.C. Anti-SLAPP law, D.C. Code §§ 16-5501 *et seq.*, created a procedure for deciding when a plaintiff suing over allegedly wrongful online speech should be entitled to enforce a subpoena seeking information that would identify online speakers who chose not to provide their real

names with their statements. Just as an identified defendant may file a special motion to dismiss the complaint under section 16-5502, section 16-5503 provides that an anonymous defendant may file a "special motion to quash":

> (b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

In *Doe No. 1 v. Burke*, the D.C.Court of Appeals confirmed that the law contemplates a two-step process:

> To establish the grounds for . . . quashing of a subpoena—the moving party must show that his speech is of the sort that the statute is designed to protect. Specifically, the moving party must "make[ ] a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b); *see also* D.C. Code § 16-5503(b). Upon such a showing, the motion will be granted unless the opposing party demonstrates a likelihood of success on the merits of his or her underlying claim. *Id.*

91 A.3d at 1036.

B. Doe's Speech is Protected by the Anti-SLAPP Law.

Doe can easily meet her burden of showing that this case is within the ambit of the statute's protection, because section 16-5501(1) defines advocacy on issues of public interest as including:

> (A) Any written or oral statement made:
>
> * * *
>
> (ii) In a place open to the public or a public forum in connection with an issue of public interest; or
>
> (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

The statute defines the term "issue of public interest" as including "an issue related to . . . a good, product, or service in the market place." D.C. Code § 16-5501(3). Here, Doe's reviews contain "written statements . . . in a public forum" and "communicat[e] views to members of the public" about the legal services that Antonoplos offers in the market place. Therefore, they are, within the meaning of the statute, a form of advocacy on an issue of public interest.

The complaint apparently seeks to take advantage of an exception to the protection for speech about goods and services in the market place: section 16-5501(3) excludes from protection "private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance." In that regard, the complaint alleges, based only on information and belief, that Doe is one of plaintiffs' business competitors, who is posting negative reviews to gain a competitive advantage in the marketplace by driving business away from plaintiffs. Complaint, ¶¶ 27, 28. However, no sound basis for that allegation is offered. It is, indeed, a common theme in libel claims over critical reviews of business for businesses to assert, solely based on information and belief, that the reviews must be from competitors.

However, plaintiffs cannot defeat application of the anti-SLAPP law simply by expressing suspicions about whether their critics have a commercial motivation. Thus, in *Doe v. Burke*, another case where a lawyer filed a defamation case over online criticism, the trial court had accepted the plaintiff lawyer's expression of belief that her critic was a competitor and placed the burden on the Doe defendant in that case to prove that he was not. However, the Court of Appeals reversed:

> This apparent presumption of commercial interest has no foundation in the statute which merely states what an issue of public interest is and is not. . . . [Plaintiff's] unsubstantiated suspicion did not increase [defendant's] initial burden. Indeed, it would turn the statute on its head if a party seeking a special motion to quash had to reveal his professional affiliation or other identifying information to disprove a disqualifying commercial motivation not apparent from his speech alone.
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> 91 A.3d at 1043.

Similarly, in this case, plaintiffs have nothing more than their wishful thinking as a basis for alleging that Doe is a competitor, and their allegations do not meet the test of plausibility. They recognize (Complaint ¶¶ 1, 27) that the name under which Doe posted her criticisms was not her real name. What the Complaint ignored is that the fact that plaintiffs' files do not reveal any meeting with a person using that fictional name has no probative value in assessing whether Doe participated in a meeting.

In sum, Doe has met her burden of showing that the subpoena in this case is within the protections of the D.C. Anti-SLAPP law.

C. Plaintiffs Have Not Shown That Doe's Criticisms Are Actionable.

Because Doe has met her burden of showing that the subpoena falls within the protections of the anti-SLAPP law, the burden shifts to plaintiffs to establish a prima facie case on each of the elements of their claim of defamation:

> (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.
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> *Doe v. Burke*, 91 A.3d at 1044 (quoting *Rosen v. Am. Israel Pub. Affairs Comm., Inc.,* 41 A.3d 1250, 1256 (D.C. 2012)).

Here, the only basis for alleging that Doe's statement is false is the contention that because Doe's

pseudonym does not show up anywhere in the records of the clients or prospective clients with whom plaintiff Antonoplos has ever met, it follows that no such meeting ever occurred, and hence everything stated in the review is false. But plaintiffs' logic is faulty. As plaintiffs acknowledge, the name that does not appear in their records is a pseudonym.

Moreover, evidence attached to this motion shows that Doe did, in fact, set up a meeting with plaintiff Antonoplos: using an appointment process provided on the firm's web site, Levy Affidavit ¶ 7 and Exhibit C, Doe made contact with the firm and received a confirmatory email welcoming her visit for a time and date certain to discuss a real estate contract. *Id.* ¶ 8 and Exhibit D. The review explains the manner in which plaintiff Peter Antonoplos conducted an interview with a prospective client about a real estate contract. Complaint ¶ 22 and Exhibits A and B. In short, plaintiffs may prefer to believe that Doe was not one of their prospective customers, but the evidence shows that they are wrong.

Even if there were a tenable claim of falsity, plaintiffs have neither alleged nor proved special damages, and under the single instance rule, which is followed in several states, assertions that a businessman or professional behaved badly on a single occasion is not actionable without proof of special damages. *Cottrell v. Smith*, 788 S.E.2d 772, 782 (Ga. 2016); *Cook v. Relin,* 721 N.Y.S.2d 885, 886 (N.Y. App. Div. 4th Dept. 2001); *Woodmont Corp. v. Rockwood Ctr. Partn.*, 811 F. Supp. 1478, 1484 (D. Kan. 1993); *Williams v Burns*, 540 F. Supp. 1243 (D. Colo. 1982); *Amelkin v. Commercial Trading Co*., 23 A.D.2d 830, 259 N.Y.S.2d 396 (1965), *aff'd mem*, 17 N.Y.2d 500, 267 N.Y.S.2d 218, 214 N.E.2d 379 (1966); *Blende v. Hearst Publications*, 200 Wash. 426, 93 P.2d 733 (1939). Counsel have found no case in which the D.C. Court of Appeals has yet addressed whether the District applies the single instance rule.

Assuming that this rule applies under D.C. law, the complaint does not allege that Doe's review has caused special damages. The complaint contains some very general allegations about the impact that one-star reviews can have on a business's overall ranking, and about the impact that a lower ranking can have on the ability of a business to attract new customers. Complaint ¶¶ 16-19. But the complaint makes no allegations about loss of new business since Doe's review was posted to Yelp or Google in April 2019, and in any event Antonoplos has received multiple one-star reviews on both Yelp and Google. A common theme in those one-star reviews is that plaintiff Antonoplos has a brusque manner comparable to the conversation that Doe describes in the review over which she has been sued. To make out a claim for special damages, plaintiffs will need evidence showing that it was Doe's review in particular that cost them business. Indeed, because Doe's Yelp review is currently among the group that Yelp's recommendation software has identified as "not currently recommended," her review's star-ranking has no impact on Antonplos' overall star ranking on Yelp. (This fact is explained in the video, and in the caption for the video, which is seen when a user clicks "27 other reviews that are not currently recommended.")

Finally, the subpoena should be quashed because reason exists to believe that it was issued in bad faith. In addition to seeking to identify Doe, the subpoena demands that Yelp identify two additional Yelp users: "Samantha S." and "T H." So far as the attachments to the subpoena reveal, Samantha S. has not reviewed plaintiffs—the attached review is about a restaurant. Although T H. has given plaintiffs a one-star review, nothing in the complaint alleges any cause of action against the anonymous individual who wrote that review. Filing a lawsuit against a single critic does not give plaintiffs any roving commission to issue discovery to identify Yelp users whom they have not sued. Although Doe has no connection to these other reviewers, and no standing to quash discovery

directed to them, the very fact that they have been tossed into the subpoena smacks of bad faith. Courts in other jurisdictions have cited good faith as an additional requirement for the enforcement of subpoenas to identify anonymous speakers. *In re Subp. Duces Tecum to Am. Online*, 52 Va. Cir. 26 (Va. Cir. 2000), *rev'd on other grounds sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001); *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999). *See also Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001).

CONCLUSION

Doe's special motion to quash the subpoena to Yelp should be granted. Following issuance of that order, Doe will submit an application for an award of attorney fees pursuant to Section 16-5504 of the D.C. Code. An oral hearing is requested.

Respectfully submitted,

/s/ Paul Alan Levy

Paul Alan Levy (DC. Bar 946400)
Micah Bluming (Cal. Bar No. 314273)[2]

Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-7725
plevy@citizen.org

Attorneys for Doe

May 21, 2019

[2] Active member in good standing of the State Bar of California and the Supreme Court of California, authorized to practice under the direct supervision of Paul Alan Levy pursuant to D.C. Court of Appeals Rule 49(c)(8) during the pendency of his first application to the D.C. Bar submitted within 90 days of commencing practice in the District of Columbia.