

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.

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DIGITAL BROADBAND NETWORKS, INC.)
and PATRICK LIM,)
)
v.)
)
“DBBDISFUNNY”, “DALILAMA”, “STOCK PICK”,)
“SMOOTHER 1999”, “WNSRFR”, “MRWRIGHTAIDE”,)
“PSEEKER”, AND JOHN DOES 1-10,)

**BRIEF IN SUPPORT
OF PSEEKER’S MOTION
FOR LEAVE TO APPEAL**

This is an action in which a company operating in Malaysia and its president complain about a series of critical statements posted on Internet bulletin boards by seven individuals, identified by their Internet pseudonyms, and by a variety of other posters. Plaintiffs allege that some of the postings are defamatory and that the purpose of the postings is to affect the company’s stock price so that the defendants can make a profit through selling the stock short. The complaint did not, however, specify which defendant made which of the allegedly defamatory statements, and the trial judge ordered all seven defendants identified simply because she concluded that one of the statements alleged in the complaint was defamatory. Because, once the defendants are identified, their right of anonymous expression will be irrevocably lost, because this Court’s leading decision on the identification of anonymous Internet posters

requires evidence and not just allegations to support breaching the First Amendment right of anonymous expression, *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A2d 756 (2001), and because, in any event, the trial court must find that **each** of the defendants to be identified was engaged in potentially wrongful conduct, and that the case was properly filed in New Jersey, this Court should grant leave to appeal and should summarily reverse the decision below.

STATEMENT

A. Facts¹

According to the complaint, ¶ 2, plaintiff Digital Broadband Networks, Inc., (“DBBD”) is a company that is incorporated in Delaware whose principal operations are in Malaysia but whose “principal United States office” is located at 9 Main Street in Flemington, New Jersey. The complaint says nothing about DBBD’s business, but the company’s 10QSB filing with the SEC states as follows:

The Company is a total system solution provider involved in application development, network operation and delivery of value-added applications and services, as well as sale of its EyStar SmartHome Console. The multi protocol EyStar SmartHome Console bridges external data networks such as the Internet to internal home networks like Ethernet, telephone lines, power lines and the 802.11b wireless LAN eliminating the need for any additional wiring in the home. The Console will enable more value-added services to be offered to subscribers. These services include home healthcare in conjunction with hospitals and health advisors; interconnection and control of appliances produced by different manufacturers; and security applications that allow subscribers to check on their homes remotely. This Console is designed to operate on both the narrow and broadband fixed line/wireless networks. The Company is also a facilities-based

¹This statement of facts is based on the Complaint, a copy of which has been posted online at <http://www.bymarked.dk/dbbdsuit.pdf>, on the trial court’s decision, which is posted on the New Jersey court web site, and on SEC filings and other sources available online. Although plaintiffs’ counsel has repeatedly promised to send movant’s lead counsel, Paul Alan Levy of Washington, D.C., a copy of his ex parte motion for leave to seek pre-litigation discovery, the papers have never been sent, and counsel have been unable to obtain them otherwise.

and network service provider of wireless broadband applications and services in Malaysia.

<http://secfilings.nasdaq.com/filingFrameset.asp?FileName=0001157523%2D03%2D006558%2Etxt&FilePath=%5C2003%5C11%5C12%5C&>, at page 6

A more recent announcement by DBBD's new public relations firm characterizes its business this way: It "is at the forefront of providing secured shipping services and supply chain management for companies in the Far East and particularly those exporting goods to the United States. . . . [It is] involved in the development, integration and provision of secured shipping and supply chain management service; the sale of biometrics security systems and the development of Web based interactive multimedia content. The group is also involved in the sale of the EyStar SmartHome Console, broadband modems and IP cameras." http://finance.lycos.com/qc/news/story.aspx?symbols=BB:SDGL&story=200403021501_BWR__BW5478.

DBBD's 10Q statement further reveals that its principal executive office is located in Malaysia. *Id.* at 1. *See also* http://finance.lycos.com/qc/news/story.aspx?symbols=BB:SDGL&story=200402051430_BWR__BW5378 (company press release identifying principal office). Other Internet postings, however, established the company's "United States office" is actually located at its (former) public relations firm. *See* http://www.zangani.com/modules.php?name=Contact_Us (showing L.G. Zangani, the PR firm identified in the press release cited above, located at 9 Main Street in Flemington). The complaint does not identify the citizenship or residence of plaintiff Patrick Lim, but SEC filings reveal that DBBD's principal officer is Patrick Soon-Hock Lim, *id.* at 28, and posting on the company's own web site strongly imply that he is a Malaysian citizen and that he works in Malaysia. <http://www.digitalapps.net/corporate/directors.htm>. Curiously, the complaint never alleges that plaintiffs have been injured in New

Jersey, or suggests any other possible basis for personal jurisdiction in this forum.

DBBD's stock price has been in decline, and as is common for companies in the high-tech sector, plaintiffs blame their difficulties in the stock market on outside criticism rather than on management's performance. The complaint alleges that numerous posters on Internet bulletin boards maintained by Raging Bull and Yahoo!, not just the seven defendants in this case but "certain [other] posters", ¶ 21, have posted denigrating and false statements, for the purpose of driving the stock price lower. ¶ 22. The complaint alleges, only on "information and belief" that some or all of the seven pseudonyms against whom the complaint has been brought are used by the same one or more persons, and, similarly on information and belief, that one or more of the defendants are former employees or consultants of DBBD who are posting in violation of written employment agreements. ¶ 12. The complaint does not explain any basis for this "belief."

The complaint, ¶ 20, alleges seven discrete statements that "defendants" posted on the Internet, which were allegedly actionable. However, the complaint does not attribute any of the specific statements to any of the seven pseudonyms whose owners are being sued in this case; the complaint does not even assert that each of the seven pseudonyms was used to post the seven statements combined.

Movant is one of the anonymous defendants, who has posted messages on Raging Bull concerning the company using the pseudonym "pseeker." On remand, movant is prepared to establish that he is not and has never been an employee or consultant for DBBD or for any of its competitors, and indeed that he has neither bought nor sold stock in that company. He will also establish that he does not reside or work in New Jersey, but rather operates a small business in New England.

B. Proceedings Below.

Plaintiffs filed their complaint in December, 2003. The complaint purports to allege claims for defamation, but although it alleges that defendants published their statements “with malice” and that they “knew that they were defaming DBBD and Lim,” there is no allegation of “actual malice,” and indeed no allegations that defendants either knew that their statements were false, wrote with reckless disregard of probable falsity, or even that defendants should have known that their statements were false. Because movant’s repeated requests to be provided with a copy of that motion have not been honored, movant is unable to describe the contents of those papers in this brief.

In an order set for hearing on March 5, 2004, the Honorable Rosemarie Ruggiero Williams granted the motion. The judge acknowledged the leading New Jersey case on the identification of anonymous Internet posters, *Dendrite Int’l v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (2001), but the judge proceeded to ignore the rules set forth in that decision deciding instead to follow what she thought was a different test enunciated by a California federal judge in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). Under that test, the judge explained, it is sufficient to identify the defendants, show what efforts have been taken to find them, determine that plaintiff’s suit could withstand a motion to dismiss, and then explain why the specific discovery requested will identify those defendants.

The trial judge then stated that even though plaintiffs had claimed in their papers “that all if its claims against Defendants can withstand a motion to dismiss[, t]he court notes that, for the purpose of this motion, they need make only one showing.” The judge then examined only one of the statements alleged in the complaint – that most of DBBD’s contracts were awarded by

“invisible companies” – and, without stating which of the seven Doe pseudonyms had actually posted that statement, ruled that this single statement fairly imputed violations of the securities laws to DBBD, and on that basis decided that plaintiffs should be allowed to pursue discovery to identify **all** of the defendants. The judge did not, however, decide whether there was any evidence refuting the alleged “invisibility” of DBBD’s contractors or showing that any defendant had made this statement with actual malice or even negligence with respect to falsity. Nor did the judge address the question whether plaintiffs had provided any reason to believe that the court had personal jurisdiction over the defendants.

Finally, Judge Williams decided that the case sounded primarily in tort, and hence should have been filed in the Law Division. Accordingly, she ruled that she would not retain jurisdiction. This order has never been sent to the defendants. However, on March 17, 2004, Raging Bull sent out an email (copy attached) advising that it had received a subpoena to identify the persons using five specified Raging Bull pseudonyms (apparently, two defendants have been identified by other means). Movant has therefore filed this motion for leave to appeal.

ASSUMING THAT THE DISCOVERY ORDER UNDER APPEAL IS INTERLOCUTORY DESPITE THE COURT’S DECISION NOT TO RETAIN JURISDICTION, MOVANT SHOULD BE GRANTED LEAVE TO APPEAL.

The Court should grant leave to appeal in this case because the order below implicates the First Amendment rights of movant and, indeed, of each of the other defendants whose identities are subject to disclosure, and if leave to appeal is denied the defendants’ First Amendment rights will be irrevocably denied. In *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A,2d 756 (2001), this Court recognized that the First Amendment provides a right to communicate anonymously over the Internet, 342 N.J. Super. at 148, *citing Buckley v. American*

Constitutional Law Found., 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960), and held that this right cannot be denied simply because a plaintiff files a complaint against anonymous speakers and desires to identify those speakers through discovery. Rather, granting leave to appeal an otherwise interlocutory order that denied a motion for leave to pursue discovery, the Court created a multi-step balancing test to determine the sufficiency of the plaintiff's complaint and the sufficiency of the evidence supporting each element of plaintiff's claim. And yet, if plaintiffs in this case are permitted to pursue discovery under the trial court's order, plaintiffs will be able to identify defendants and, regardless of whether the case proceeds to judgment against any of the defendants and the case against them is proved, their right to make their criticisms of plaintiffs anonymously will be irrevocably lost.²

In similar circumstances to those presented here, the Pennsylvania Supreme Court held that an order allowing discovery into the identity of an anonymous Internet speaker was an appealable interlocutory order. *Melvin v. Doe*, — Pa. —, 836 A.2d 42 (Pa. 2003). In *Melvin*, a trial judge had deferred ruling on such discovery to permit the defendant to move for summary judgment, but ultimately rejected summary judgment because, it believed, Pennsylvania law did not require proof of actual economic harm before a claim for defamation could proceed; accordingly, the judge ordered identification of the Internet speaker. The Supreme Court ruled that the order could be appealed, even though it was interlocutory, because

the court-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question

²Because the trial judge did not retain jurisdiction, it is arguable that hers was a final, appealable order. In that case, the Court is requested to treat this Notice of Motion and Brief as a Notice of Appeal.

that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.

836 A.2d at 50.

The court should authorize appeal of the order below for the same reasons.

Nor, indeed, did the trial judge properly follow *Dendrite*. The *Dendrite* Court went out of its way to establish broad guidelines for trial judges faced with motions for leave to discover identities of Internet speakers, and developed the following five part standard:

We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

[1] We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.

[2] The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

[3] The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. **[4]** In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to R. 4:6-2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a

prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.

[5] Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 342 N.J. Super. at 141-142, 775 A.2d at 760-761 (emphasis and numbering of elements added).³

Even though this procedure was described as the Court's **holding**, at 342 N. J. Super. 141, the trial judge completely ignored this procedure in favor of what she perceived as a different test applied by a federal judge in California. Thus, the trial judge did not examine "the exact statements purportedly made by each anonymous poster" (prong two), but rather examined only one statement made by one of the posters. Moreover, the Court did not determine whether plaintiffs "produce[d] sufficient evidence supporting each element of its cause of action, on a prima facie basis" (prong 4), and it did not conduct the requisite balancing test weighing "the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented." The trial judge's failure to apply *Dendrite* is so plain that the Court

³ *Dendrite* has received a favorable reception among commentators. *E.g.*, O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham LRev 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. LRev 195 (2001); Furman, *Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle ULRev 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J.Computer & Info. L. 493 (2001).

should consider summarily reversing the decision and remanding to permit the judge to apply that decision properly.⁴

The trial judge also erred by failing to consider whether there was any basis for personal jurisdiction in New Jersey. Although plaintiffs in libel cases are sometimes allowed to sue out-of-state defendants in the plaintiff's home state, the United States Court of Appeals for the Third Circuit has held that, even when a multi-national corporation has its principal place of business in New Jersey, suit may not be filed in New Jersey unless the focal point of the harm caused by the tort was in this forum, thus requiring the courts to inquire into the aspect of the company's business at which the allegedly tortious acts were directed, *Imo Industries v. Kiekert AG*, 155 F.3d 254, 256, 261-265 (1998), and whether the defendants expressly aimed their wrongful conduct at New Jersey. *Id.* at 265. Similarly, in *Blakey v. Continental Airlines*, 164 N.J. 38, 751 A.2d 538 (2000), the New Jersey Supreme Court held that a sexual harassment suit over Internet postings that denigrated a pilot who was based in New Jersey could not be maintained in this state unless the postings were directed at her activities in New Jersey, 164 N.J. at 68-70, **and** the defendants were aware that New Jersey was the focus of the activities. *Id.* at 70.

Here, the complaint alleges only that DBBD, the corporate plaintiff, had its principal United States office in New Jersey, but does not even allege that New Jersey is DBBD's principal place of business. The complaint says nothing about the nature of plaintiffs' business, except for its admission that most of DBBD's business is in Malaysia, and nothing about the forum at which defendants' Internet postings were directed. Moreover, plaintiffs' SEC filings

⁴ The trial judge erred by assuming that *Seescandy* allows identification based solely on application of a motion to dismiss standard. The issue in that case was whether the anonymous defendant had infringed plaintiff's trademark, and the judge allowed disclosure only after examining evidence of actual confusion supplied by the plaintiff. 185 F.R.D. at 580.

and press releases, which are readily accessible on the Internet, reveal that DBBD is a Malaysian company whose activities are principally conducted there, and whose main office is located in Malaysia; similarly, those materials plainly reveal that plaintiff Lim is a Malaysian national who works there and who has no relationship with New Jersey. Indeed, it appears that the “principal United States office” alleged in the Complaint is simply the office of DBBD’s PR firm. Accordingly, there is no basis for maintaining this action in New Jersey, and plaintiffs’ failure to set forth a prima facie case for personal jurisdiction also requires reversal of the discovery order below.

CONCLUSION

The motion for leave to appeal should be granted.

Respectfully submitted,

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