

SUPERIOR COURT OF NEW JERSEY

JAN 03 2002



A. RUSSELLO
JUDGE

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December 21, 2001

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711a

Re: Vincent Donato, et al

vs.

Stephen Moldow, et al

- - - - -

Stephen Moldow, et al

vs.

Kenneth Hoffman, et al

Docket No. BER-L-6214-01

Counsel:

Here is the Court's decision regarding the motion that was orally argued on December 7, 2001.

The orders pertaining to this motion and the discovery motions are attached to the written decision.

FACTUAL SUMMARY

Plaintiffs, Vincent S. Donato and plaintiff, Gina Calogero, are elected Emerson Councilpersons. Plaintiff, Lawrence Campagna, is the Republican Municipal Chairman of the Borough of Emerson and the husband of plaintiff, Gina Calogero. Plaintiff, Eric Obernauer, was a candidate for elected public office in the Borough of Emerson.

The defendant, Moldow, is the webmaster of an unofficial website concerning the Borough of Emerson, commonly known as "Eye on Emerson", which is hosted by Vantage Net, Inc., a Minnesota corporation. The website includes a discussion forum in which users may post messages.

Defendants, John Does 1-40 and defendants, Jane Does 1-20, are fictitious names representing one or more individuals who have posted anonymous messages on the Eye on Emerson website.

Plaintiffs allege defamation, harassment, intentional infliction of emotional distress and slander per se in counts one through four of their complaint against defendant, Moldow. Counts one, two and four are alleged against the defendants, John Does 1-40 and Jane Does 1-20, even though those defendants are not named in the damage clause of count four.

Defendant Moldow filed a counterclaim against the plaintiff.

MOTION TO QUASH THE SUBPOENA

Plaintiffs sent the subpoena to Vantage Net Inc. in St. Paul, Minnesota by mailing it to them by Federal Express.

Defendant's motion to quash the subpoena is granted for the following reasons:

1. The mailed subpoena is procedurally defective both under N.J. and Minnesota laws. Under Minnesota's Rules of Civil Procedure, the plaintiffs have to request a Court Administrator to issue the subpoena. Plaintiffs failed to do so. A subpoena in N.J. cannot be mailed by Federal Express.
2. The Consent Order entered into between the plaintiffs and the defendant Moldow, provides for service of a subpoena on Vantage Net as to the "IP addresses of the users identified in the complaint". The subpoena, however, seeks information on numerous anonymous posters not identified in the complaint. As a result, the subpoena extends beyond the boundaries which were authorized in the Consent Order and thus is overbroad and should be quashed. In short, plaintiffs are seeking information as to authors not identified as defendants, John or Jane Does, in the complaint.

3. Plaintiffs have failed to satisfy the safeguards as set forth in Dendrite. As a result, the plaintiffs' subpoena should be quashed. For example, plaintiffs have submitted a booklet in opposition to the motion to quash containing one hundred seventeen (117) postings that appeared on the "Eye on Emerson" website. Plaintiffs have subpoenaed the identity of the authors of these postings from Vantage Net, Inc.. Plaintiffs contend there are more than these one hundred seventeen (117) postings, but either can not locate same or they could not be supplied. In addressing the one hundred seventeen (117) postings that plaintiffs did supply to the Court, as mentioned in reason number two, supra, many of these postings are not even referenced or mentioned in plaintiffs' complaint. More importantly, it is incumbent upon plaintiffs, not the Court or the defendants, to set forth with specificity why each of the postings set forth in the subpoena constitute actionable speech. Plaintiffs failed to do so. The mere attaching to a certification of numerous postings or the submission of a booklet of same allegedly containing actionable statements does not, without more, satisfy Dendrite.

4. Elementary due process requires notice and an opportunity to be heard. Plaintiffs failed to undertake efforts to notify the anonymous posters, whether they are represented by counsel or not, that they (the anonymous posters) were the subject of the subpoena, in contravention of Dendrite and the consent order. 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.

The Consent Order entered into between plaintiffs and the only named defendant, Moldow, states that notice has been posted on "Eye on Emerson" regarding plaintiffs' motion to serve an expedited subpoena on Vantage Net. However, this type of notice does not, standing alone, satisfy the notice requirement contemplated by Dendrite. Under Dendrite, notification efforts should include a notice on the pertinent message board and there is no proof where this notice appeared, other than being posted on "Eye on Emerson".

In addition, there is no evidence that the subpoena itself (which contained the anonymous user's messages) was posted along with the notice prior to the "serving" of the subpoena on Vantage Net. This is important because although the Dendrite notice requirement acknowledges that an anonymous poster could conceivably make a singular posting on a pertinent message board and subsequently never visit or make a posting on the message board ever again, the fictitiously named defendants need to be afforded a reasonable opportunity to have notice of what messages were the subject matter of the subpoena and to file and serve opposition to the application. An anonymous user would not know whether his or her message is the subject of the subpoena unless the subpoena, containing the anonymous users messages, was attached and posted on the pertinent message board.

According to the 10/17/01 certification of plaintiff, Gina Calogero, in paragraph 41, "Moldow has posted the subpoena duces tecum on the web site AFTER (emphasis mine) it was served on Vantage Net including the exhibits" The certification in the next paragraph goes on to say that "shortly after the subpoena was "served", Richard Ravin, Esq. posted a message offering to represent any of the anonymous defendants in an application to quash the subpoena".

Since plaintiffs have not undertaken sufficient efforts to notify the anonymous posters, the motion to quash the subpoena is granted, whether or not the defendant, Anonymous Posters, are represented by counsel.

The First Amendment guarantees the right not only to speak freely but to speak anonymously and these protections apply to speech on the internet.

The Court declines to address the other issues raised by Dendrite until proper notice is given to the anonymous posters by plaintiffs, and to ascertain whether the plaintiffs will be amending their complaint or not.

MOTION TO DISMISS THE COMPLAINT AGAINST DEFENDANT, MOLDOW

Plaintiffs have sued the defendant, Moldow, the web master of the Eye on Emerson site and the sponsor of the message board on which the alleged actionable messages have been posted.

The defendant, Moldow's motion to dismiss the complaint against him is granted for the following reasons:

1. The Communications Decency Act (CDA), 47 U.S.C. 230 (c) (1), provides that " no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider". The CDA creates a federal immunity against suit under any law, federal or state, that might impose liability on an internet provider for content supplied to a web site by a different person. This immunity extends to both actual Internet Service Providers (ISP) such as America On Line as well as to persons, such as the defendant, Moldow who organize web sites that include message boards.

Section 230 was intended to encourage the creation of opportunities for members of the public to receive information in which they are interested and to participate in discussions about topics of interest, which would, of course, include local politics. Extending immunity to persons in defendant Moldow's position would comport with the underlying policy of the statute. If citizens like the defendant Moldow, who created this web site, has to face the prospect of a lawsuit from any person who is criticized in that forum, on the theory that he is liable for anything that any poster may say on his message board, then this would indeed discourage the creation of web sites because of the chilling effect of protracted and costly litigation.

Plaintiffs argue and allege that defendant Moldow has actively participated in selective editing, deletion and re-writing of anonymously posted messages on the message board and that defendant Moldow bans users whose message he finds disruptive and is quick to remove any negative message about himself or people he associates with and that defendant Moldow has actively participated in the editing of messages that were particularly nasty and that defendant Moldow edited one message to remove profanity.

However, in addition to providing a blanket immunity for the providers of interactive computer services (section 230 (c) (1) that the Court cited supra), the statute also has a Good Samaritan provision that prevents a provider or even a user of an interactive computer service from being held liable for any action undertaken to limit the availability of information that is lewd or in any way objectionable. See section 230 (c) (2) (A). That provision also protects against the imposition of liability. Thus, the editing of statements to remove profanity by defendant Moldow and/or the removal of some messages but not others, is not a proper basis for the imposition of liability in this case.

Plaintiffs further allege that defendant Moldow actively posted messages and that he published various statements knowing them to be false. These bare conclusory allegations are insufficient to withstand defendant Moldow's motion to dismiss the complaint. Plaintiffs contend that discovery is incomplete, and, if the Court allows the subpoena to be served on Vantage Net Inc., it may prove that defendant Moldow was the author of some of the defamatory postings. Plaintiffs' last contention is very similar to placing the cart before the horse and leads the Court to its second reason for dismissing the complaint against the defendant Moldow. See infra.

2. In Dendrite v. Doe, 342 N.J. Super 134, 775 A.2d 756 (App.Div.2001), our Appellate Court gave us a four part test that plaintiff must satisfy before enforcing a subpoena that seeks to obtain identifying information about anonymous posters, 1) notice must be given and 2) plaintiffs are required to set forth the precise words alleged to be actionable and to show that those words are actionable and 3) that plaintiffs be required to present sufficient evidence establishing that it has a genuine chance of prevailing on the claim against each anonymous speaker and 4) that the Court balance the equities before deciding on whether to divest each speaker of her or his anonymity.

Plaintiffs have failed to satisfy the second and third parts of the Dendrite test as to this defendant Moldow. As a result, the Court will not permit the subpoena to be served so that plaintiffs can ascertain whether or not, defendant Moldow was or was not an author of a defamatory statement.

Defendant Moldow's motion to dismiss the complaint is granted.

DISMISSAL OF THE COMPLAINT AGAINST DEFENDANTS

JOHN DOES 1-40 AND JANE DOES 1-20

The Court declines to address the issue of dismissing the complaint against the defendants, John Does 1-40 and Jane Does 1-20.

It's premature.

DEFENDANT. MOLDOW'S REQUEST FOR COUNSEL FEES AND COSTS

Defendant, Moldow's request for counsel fees and costs is denied. This Court does not find that plaintiffs' complaint against this defendant is frivolous. This complaint against this defendant was not commenced, used or continued in bad faith solely for the purpose of delay, harassment or needlessly increasing the cost of litigation. Indeed, this case is only a few months old.

Plaintiffs' claims against defendant, Moldow, took into account that the law pertaining to the internet is still in its embryonic stages of development and this Court finds that the plaintiffs made these allegations in good faith and were warranted by plaintiffs' non-frivolous argument for the extension of existing law and/or the establishment of new law.

The statute and court rule authorizing attorney fees and costs for frivolous claims will be strictly construed by this Court in recognition of the principle that all of our citizens should have ready access to all branches of our government, especially the judicial branch and should not be dissuaded from accessing the courts.

Defendant, Moldow's request for counsel fees and costs is denied.

WHETHER OR NOT HARASSMENT IS A TORT

Plaintiffs allege harassment in count two of their complaint against defendant Moldow and defendants, John Does 1-40 and Jane Does 1-20.

Harassment under N.J.S.A. 2C:33-4 is a quasi-criminal, petty disorderly offense.

This Court is unaware of any case law or statutory authority which recognizes the tort of harassment in New Jersey. It is not the duty or obligation of trial courts to make law and this Court declines to do so, deferring to our Legislature and higher tribunals.

Plaintiffs' good faith reliance upon Paternoster v. Shuster, 296 N.J. Super 544 (App.Div.1997) and Aly v. Garcia, 333 N.J. Super 195 (App.Div. 2000) is misplaced. Neither case provides any authority for allowing a new tort of harassment.

In Paternoster, the issue before our Appellate Court was not whether harassment is a tort, rather, whether the motion court properly exercised its equitable jurisdiction in applying the permanent injunction standard. In Aly, the Court questioned whether a cause of action for harassment exists under New Jersey law leaving that issue to be decided on another day.

Plaintiffs' request during oral argument for the Court to amend the complaint to substitute a new cause of action for invasion of privacy is denied since there was no formal motion (or cross motion, as the case may be) filed by plaintiffs and no opportunity for the defendants to respond to same.

Count two of plaintiffs' complaint alleging the tort of harassment is dismissed for failing to state a claim upon which relief can be granted. However, since plaintiffs repeated and re-alleged each and every allegation of the other counts as if fully set forth at length, the allegations of Count two survive dismissal and may constitute a cause of action as set forth in the other counts of plaintiffs' complaint, if, but only if, plaintiffs amend their complaint and comply with Dendrite.

THE LEGAL STATUS OF EACH OF THE PLAINTIFFS

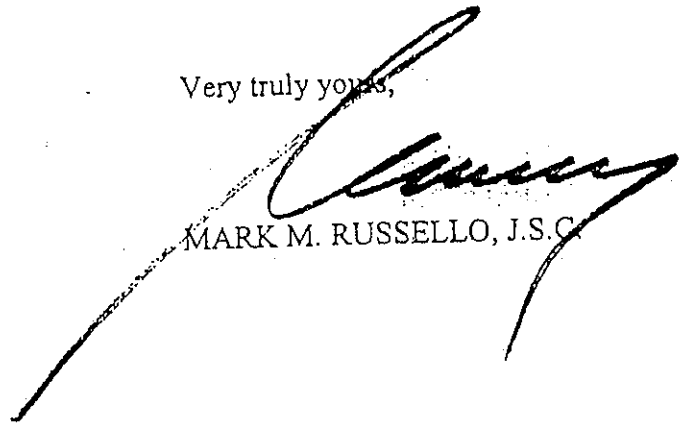
Plaintiffs, Vincent Donato and Gina Calogero, were elected public officials of the Town of Emerson at the time of the postings in question and they are, public figures.

Plaintiff, Eric Obernauer, was a candidate for the public office of councilman in the 2001 Emerson Municipal election at the times of the postings in question. Plaintiffs concede that Obernauer is at least a limited purpose public figure because of his candidacy for public office. The decisions in Newman v. Delahunty, 293 N.J. Super. 491 (Law Div. 1994), aff'd 293 N.J. Super 496 (App.Div.1996) and McLaughlin v. Rosanio. Bailets & Talamo, Inc., 331 N.J. Super 303, 313 (App. Div. 2000) leaves no doubt that plaintiff, Eric Obernauer, was a public figure at the time of the alleged defamatory postings. The certifications indicate that plaintiff, Obernauer, (as well as plaintiff, Lawrence Campagna, who will be discussed infra) wrote articles pertaining to the Borough of Emerson, including letters to the editor of the newspaper regarding matters of the local government and politics and regularly attended council meetings. Plaintiff, Lawrence Campagna's participation in the local government and politics of Emerson militates against his being classified as a private figure and warrants a finding that he is a limited purpose public figure. Plaintiff, Lawrence Campagna, regularly attends local council meetings in Emerson and has spoken out at council meetings on numerous governmental and political issues and has written letters to the editor on local government affairs. In addition, plaintiff, Lawrence Campagna, is the Municipal Chairman of the Republican Party of the Borough of Emerson, a position he had to be elected to by fellow Republicans on the County Committee from all the districts within Emerson. The fact that plaintiff, Lawrence Campagna, is the husband of plaintiff, Gina Calogero is irrelevant to ascertaining his legal status. As Municipal Chairman, plaintiff, Lawrence Campagna, organizes local election campaigns, has a say on who should run for office on the Republican platform locally, participates in preparing campaign literature and also has a say in filling any Republican vacancies in office. Plaintiff, Lawrence Campagna, is a limited purpose public figure by virtue of thrusting himself into the activities of the local government and political community of Emerson.

As a result, the "actual malice" burden of persuasion applies to all of the plaintiffs' defamation claims.

Thank you.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read "Mark M. Rusello". The signature is written over the typed name below it.

MARK M. RUSSELLO, J.S.C.

MMR/br