

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JANE DOE,)
)
Movant,)
)
v.) Misc. No. CA-00-71-MC
)
JOHN HRITZ,)
)
Respondent.)

**REPLY MEMORANDUM IN SUPPORT OF
MOTION TO QUASH SUBPOENA**

In opposition to the motion of Jane Doe to quash the subpoena, respondent Hritz has advanced several different arguments, but most of them boil down to a single proposition – that the case could not be properly removed to the United States District Court for the Southern District of Ohio, and, for that reason, the subpoena of the Virginia Circuit Court could still be enforced by that Court. Argument I, pages 4-5. In support of his non-removability argument, he contends that this Court lacks subject matter jurisdiction, Argument II, pages 5-7, and that the Ohio state courts are the proper place to decide whether AOL should have to make the disclosure demanded by the Virginia state court subpoena. Argument III, pages 7-8.

The question of whether removal was proper is currently pending before the United States District Court for the Southern District of Ohio, where Hritz has filed a motion for remand; Doe’s response to that motion is due in approximately two weeks. Thus, although it would be theoretically possible to treat the motion to quash the subpoena as a removal of the Loudoun County subpoena proceeding to this Court (inasmuch as the motion contained recitals about diversity jurisdiction), the proper place to litigate the issue of removal is in the court where the original removal notice was

filed; it would surely be a waste of judicial resources to litigate exactly the same question in two federal courts at the same time. Accordingly, we do not address the foregoing arguments further in this Court. Indeed, given the fact that Hritz' opposition prayed, in the alternative, that the motion to quash be stayed pending the decision in the Ohio federal court, we have offered to join respondent in a motion to stay consideration of this motion [fill in depending on ultimate response].¹

Hritz also objects to Doe's First Amendment arguments for three reasons: (1) the Ohio state court granted Hritz' ex parte petition for leave to pursue discovery in other courts, and this court should defer to that decision as a matter of comity; (2) Doe has supposedly consented to AOL's disclosure of her identity; (3) and Doe's statements were, allegedly, unprotected under the First Amendment. None of these arguments has any merit.

1. On the first point, Hritz notes in passing that the Ohio state court's proceeding was "concededly not adversarial." This is an understatement. Hritz, without the slightest effort to notify Doe of his efforts, such as by posting notice on the Yahoo message board, made an ex parte motion in his local county court, in which he did not set forth the allegedly actionable words, did not make any of the allegations needed to state a claim for defamation under Ohio law, and made no reference

¹ We anticipated Hritz' argument that the Virginia court still has the authority to enforce its subpoena, and responded to it at page 7 of our opening brief. Hritz' argument that *Granny Goose Foods* applies only to orders and not to process, Opp. at 4, is contradicted by the language of 28 U.S.C. § 1446(d), which provides, without qualification, that "the State court shall proceed no further unless and until the case is remanded." The distinction should make no difference – for example, a state court summons is "process," but upon removal it becomes a summons of the federal court. Moreover, in correspondence with AOL counsel Laura Heymann after removal but before the motion to quash was filed, Hritz' counsel repeatedly referred to the outstanding subpoena as an "order" that remained in effect despite removal, and even threatened AOL with "contempt" if it did not provide the records immediately. See October 3 and 5 letters from Robert Shank to AOL counsel Laura Heymann, attached as Exhibit –.

to the First Amendment. Nor is there any indication whatsoever that the First Amendment received any consideration there. Thus, although Hritz argues that the Ohio court's order granting him permission represents a "judgment" that Hritz' claims against Doe are not frivolous, a judgment to which Hritz urges deference, Opp. at 8, it is hard to understand how that court could have made such a judgment on the record before it. In any event, principles of comity do not require courts in this jurisdiction "to blindly defer to a ruling of another court which would substantially abridge the constitutional rights of the John Does." *In re Subpoena Duces Tecum to America Online, Inc.*, Misc. Law No. 40570 (Va. Cir. Ct., Fairfax 2000). *Cf. Baker by Thomas v. General Motors Corp.*, 522 U.S. 222 (1998) (Full Faith and Credit clause applies only to final judgments of courts of competent jurisdiction).

Our opening brief argued at pages 11-13, in light of *NAACP v. Alabama*, 357 U.S. 449, 461 (1958), and similar cases, that enforcing this order by stripping Doe of his anonymity, without any consideration of his free speech rights, would violate due process, and Hritz has chosen to make no response to this argument.² Nor, indeed, did the Ohio court preclude any consideration of defenses to discovery; it simply gave Hritz the right to serve subpoenas in other parts of the country, subject to consideration under whatever standards were appropriate in those jurisdictions. In short, this argument is an exercise in question-begging – Rule 45 provides the procedure for responding to subpoenas, and a Rule 45 motion is the issue now before the Court.

² Indeed, Hritz' argument that there is "no underlying controversy" unwittingly supports our point that compelling the release of Doe's name in these circumstances would violate due process. *Compare* Opp. at 5 ("Here, there is no underlying controversy. Mr. Hritz has not yet sued Doe."), *with* Doe Br. at 12 ("Indeed, there is no assurance that, after obtaining the disclosure he seeks, Hritz will ever file a complaint.").

2. On the second point, the AOL Privacy Policy which Hritz cites to the Court does not constitute agreement to waive otherwise valid objections to subpoenas and other court orders. In its privacy policy, AOL promises not to give out personal information about customers “except to comply with valid legal process such as a search warrant, subpoena or court order.” AOL’s policy is to comply with subpoenas unless the person about whom information is sought intervenes in the court proceeding to object to disclosure, at which point it awaits the decision on the motion to quash. The AOL privacy policy is a protection for AOL against being sued by its subscribers for disclosing information when a subpoena is served and no objection is filed, or when an objection is filed and the court enforces the subpoena. That is the process to which Doe agreed by becoming an AOL subscriber. Now that process is occurring – the question in this miscellaneous proceeding is whether the “subpoena” for Doe’s information **is** valid, in the sense that it should be enforced on the facts of this situation. It begs that question to simply require AOL to provide the information because of the self-protection that AOL has built into its subscriber agreement. Both AOL and its subscribers have the ability to challenge the validity of a subpoena **before** it may be enforced. *In re Subpoena Duces Tecum to America Online, supra.*

Nor does the not-for-publication decision in *United States v. Hambrick*, 2000 US App LEXIS 18665 (4th Cir.), provide otherwise. In that case, a subpoena was served on AOL after a police detective, in a series of conversations with Hambrick (using the pseudonym “BlowUinVa”), received several requests that a twelve year old boy be brought to Hambrick to engage in sexual activities with Hambrick. AOL complied with the law enforcement subpoena without waiting for any court proceeding to be invoked, and later a search warrant was executed at Hambrick’s premises. The

question in the case was whether the evidence obtained in the search should be suppressed as the “fruit of the poisonous tree” on the theory that AOL’s voluntary compliance with the subpoena violated Hambrick’s “reasonable expectation of privacy” under the Fourth Amendment. The court held that because only identifying information, such as Hambrick’s name and address, was subpoenaed, and not the contents of Hambrick’s speech, the Fourth Amendment was not violated, applying the content/non-content distinction that has emerged in Fourth Amendment analysis. Not only was no argument made under the First Amendment, but First Amendment doctrine takes the opposite tack from the Fourth Amendment, providing much greater protection against the compelled identification of anonymous speakers than against compelled disclosure of the content of their speech. Moreover, there was no question of whether the court should enforce the subpoena; the issue was AOL’s voluntary action. In sum, *Hambrick’s* privacy analysis provides no support for Hritz here.

3. In our opening brief, we showed that the First Amendment creates a qualified privilege to speak anonymously. Hritz misstates the law in denying the existence of any direct precedent establishing the right to post anonymously.³ He fails, however, to contest Doe’s position on the standard that should govern such a privilege but issue with that standard. Instead, he argues that Doe’s messages on the Yahoo! message board are not protected by the First Amendment. Despite this claim, Hritz provides no support for the proposition that Doe libeled him, but now says

³ Opposition at 9. *But see* cases cited in Doe’s opening memorandum at 10, as well as *In re Subpoena Duces Tecum to America Online*, *supra* (“To fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require this Court to ignore either the United States Supreme Court precedent or the realities of speech in the twenty-first century.”).

only that Doe's postings were "arguably" defamatory. Opp. at 12. This is a far cry from his argument to the Ohio state court, when he had the freedom to argue ex parte, that Doe's postings were "libelous." Petition for Discovery at 2-3.

In this Court, he places his primary reliance on the contention that Doe's words were "threatening." In that regard, Hritz attaches the full text of two long messages as Exhibit K to his opposition, and quotes two snippets from the messages in his brief that he finds "threatening."

But these quotations are taken completely out of context – in context, they refer simply to Doe's expectation (amply confirmed by the initiation of this proceeding) that he was about to face a rough court battle with Hritz for having had the temerity to criticize him. Rather than quote the messages in full here, we simply invite the Court to read them in Hritz' Exhibit K, in the chronological order in which they were posted on two consecutive days in June 2000.

In the first message, # 6584, Doe mounts a critique of AK Steel's posture vis a vis several litigation opponents, arguing that the policy of "suing everything that moves" is a bad policy, and that Hritz' is to blame for this policy of suing people to make them miserable. Doe then predicts that he "will soon be experiencing" these methods (that is, that she expects Hritz to try to sue her), but that she will fight back and, in the first excerpt quoted by respondent, "All hell will be breaking loose." In the next message posted that date, #6585, which Hritz does not attach to his Opposition, but did attach to his original papers, Doe again complains that Hritz "will litigate the time of day," and that he expects to be sued. Finally, in a message the following day, # 6615, Doe returns to the theme that Hritz' litigiousness has encouraged the federal government to take legal action against AK Steel that it might not otherwise pursue, and then returns to the theme that he too will be sued

and plans to fight back “I will be meeting up with Hritz in the future ---- Which is the best part, one of the few times he doesn’t know what’s coming. I will treat Mr. Hritz like he treats everybody else ---- like dirt. No holds barred match -- The DEP, EPA, ACLU and all the alphabet soup.” Hritz now claims that these statements made him afraid for the safety of his family.

With due respect to Hritz, this language is not a threat of a physical confrontation, and it cannot be read that way. It is, at most, hyperbolic language in the context of a discussion of the way in which her employer violates public policy and angers federal and state regulators. The entire set of messages is addressed to a matter of public concern, and the excerpts about which Hritz complains cannot be construed as “threats” that are unprotected by the First Amendment. *E.g., Watts v. United States*, 394 U.S. 705, 706-708 (1969) (per curiam) (statement “ if they ever make me carry a rifle the first man I want in my sights is L.B.J.” is protected political hyperbole, not a threat); *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976) (threat must be “unequivocal, unconditional, immediate, and specific as to the person threatened”). Nor, for that matter, does Ohio provide a tort cause of action for written communications of this kind. Quite to the contrary, as the Ohio Supreme Court said in *Machinists Local 129 v. Allen*, 22 Ohio St. 3d 228; 490 N.E.2d 865 (1986), *quoting Yeager v. Teamsters Local 20*, 6 Ohio St. 3d 369, 375 (1983):

“[L]iability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. . . .”

Finally, Hritz argues that this Court is obligated to assume, in deciding whether to enforce his subpoena, that his tort claims against Doe are valid; according to Hritz, if Doe wants to contest

those claims, she must file a motion to dismiss in the Ohio courts. However, having come to Virginia to pursue his quest for Doe's identity, Hritz cannot complain about having to litigate Doe's First Amendment defenses to his discovery, and one factor in the First Amendment test is whether the discovery sought is "necessary" in that Doe has otherwise valid claims that he cannot pursue without obtaining Doe's name. Moreover, as Hritz acknowledges elsewhere in his papers, there is no complaint on file in the Ohio courts that Doe could move to dismiss, because Hritz has avoided filing a complaint, choosing instead to pursue pre-complaint discovery. Indeed, the First Amendment and Ohio law cited in this reply brief and in our opening memorandum make quite clear why it is that Hritz did not want to have to file a complaint – in the Ohio courts, as in the federal courts, frivolous claims are sanctionable.

There is no non-frivolous complaint that can be filed on these facts, and without a complaint, not to speak of an evidentiary basis for meeting the First Amendment qualified privilege to speak anonymously for which our opening brief argued, there is no basis for depriving Doe of her right to speak anonymously. Accordingly, the motion to quash the subpoena should be granted.

Respectfully submitted,

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