IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FIX WILSON YARD, INC., et al. Plaintiff, vs. CITY OF CHICAGO, et al. Defendants.	)))))))))))	2008-CH-45023

ANONYMOUS SPEAKERS' MOTION TO QUASH DEFENDANTS' SUBPOENAS OF JANUARY 12, 2009

NOW COMES NON-PARTIES "ANONYMOUS SPEAKERS," by and through their attorneys, Mudd Law Offices, who hereby move to quash the Defendants' subpoenas of January 12, 2009, seeking (among other things) information to identify those anonymous speakers. In support of their application, the Anonymous Speakers state as follows:

I. INTRODUCTION

On January 12, 2009, the Defendants in the above-captioned action issued three subpoenas seeking the identities of anonymous critics of their Wilson Yard development project. Despite the serious First Amendment problems inherent in these subpoenas – subpoenas that identity their targets solely based on the content of their protected speech – the Defendants have refused to withdraw or narrow them. And despite numerous conversations in which the unenforceability of the subpoenas was discussed, Defendants' counsel has refused to withdraw them but has instead merely authorized temporary extensions to the subpoena deadlines. Counsel for the anonymous speakers has now been forced to repeatedly secure such extensions with Internet corporation Google (from whom much of the subpoenaed information is sought) – six times over five months – while milestones identified by the Defendants' counsel as possible points at which the subpoenas might be withdrawn (e.g., the return of Plaintiffs' discovery responses, the Court's ruling on the Defendants' motion to dismiss (attached as Exhibit A to Zimmerman Decl.), etc.) have come and gone. As they have no obligation to further tolerate Defendants' overreaching discovery practices, the anonymous speakers ask that the Defendants' subpoenas finally be quashed.

While the subpoenas seeking to unmask them must ultimately be quashed for a variety of constitutional as well as federal statutory reasons (see, infra, footnote 2) – reasons that they will fully brief in a second motion to quash in the event that Plaintiffs amend their complaint and Defendants again issue unenforceable subpoenas – the anonymous speakers hereby move to quash the subpoenas for a single elementary and indisputable reason: as the Plaintiffs' complaint has been dismissed, Defendants are not authorized to pursue discovery. Accordingly, the non-party speakers must be freed from the perpetual threat of these pending yet unenforceable subpoenas.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

On December 3, 2008, Plaintiffs community organization Fix Wilson Yard, Inc., and several individual Chicago residents – Judith A. Pier, D. Richard Quigley, Judy Glazebrook, Katherine Boyda, Lukas Ceha, and Pat Reuter – filed a complaint against Defendants City of Chicago and six firms affiliated with Holsten Real Estate Development Corp. challenging Chicago ordinances that created the Wilson Yard development project in the Uptown neighborhood of Chicago. On January 12, 2009, Defendants issued sweeping subpoenas seeking the identities of Wilson Yard development critics to Internet corporation Google (operator of the blogger.com service used by two of the targeted anonymous speakers), the Buena Park Neighbors ("BPN") neighborhood association (which links to a message board on which users can anonymously post messages on a variety of subjects), and to the Uptown Neighborhood Council, a "grassroots organization of Uptown residents" that operates a blog commenting on news regarding the Uptown area of Chicago. The operators of the two blogs whose information is sought pursuant the subpoena to Google ("What the Helen" and "Uptown Update," discussed below) and the Buena Park Neighbors (collectively, the "Anonymous Speakers"[1]) bring this motion to quash.

The subpoena issued to Google requires it to produce "[a]ll documents . . . related to the identity of the person or persons who created and/or control 'What the Helen.com' and 'Uptown Update' blogs and websites." The "What the Helen" blog, now defunct, provided commentary on the 2007 election campaign of Alderman Helen Shiller who presided over the planning process for the Wilson Yard development. Subpoena of January 12, 2009, to Google, Inc., Exhibit B to Zimmerman Decl. The "Uptown Update" blog, which was launched in May of 2007, presents discussion on a range of local political issues of particular interest to the Uptown neighborhood, including the Wilson Yard development.

The subpoena issued to Buena Park Neighbors requires that organization to produce:

1. All documents showing posts on [BPN's] web site [sic], whether in the form of a blog, chat room comment, website post or any other form that relates to the Wilson Yard development, Adlerman Shiller, or Uptown development;
2. All documents identifying information [sic] on persons who have posted, in any form, on [BPN's] website involving the Wilson Yard development, Alderman Shiller, or Uptown development;
3. All documents pertaining to the following persons: Judith A. Pier, D. Richard Quigley, Judy Glazebrook, Katherine Boyda, Lukas Ceha or Pat Reuter;
4. All documents pertaining to the Wilson Yard development.

Subpoena of January 12, 2009, to Buena Park Neighbors, Exhibit C to Zimmerman Decl.

On January 16, 2009, Defendants filed a motion to dismiss the complaint, and the Circuit Court granted Defendants' motion on May 19, 2009. Despite this dismissal, Defendants have refused to withdraw their subpoenas seeking the information listed above. While Plaintiffs have

[1] Uptown Neighborhood Council is not represented by the undersigned council and is not participating in this motion to quash.

expressed to this Court their intention to file an amended complaint, as of the filing of this Motion, no amended complaint has been filed.

III. LEGAL STANDARD

Pursuant to Illinois Supreme Court Rule 201(b)(1), "a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party[.]" This authorization to pursue relevant discovery is limited by (among other things) Rule 201(c) which states that a court may "make a protective order as justice requires, denying . . . discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." In order to protect against such undue and unreasonable outcomes, litigants' "right to discovery is limited to disclosure of matters that will be relevant to the case at hand[.]" Leeson v. State Farm Mut. Auto. Ins. Co., 190 Ill. App. 3d 359, 366 (Ill. App. 1989). For discovery purposes, "[r]elevancy is determined by reference to the issues, for generally, something is relevant if it tends to prove or disprove something in issue." Bauter v. Reding, 68 Ill. App. 3d 171, 175 (Ill. App. 1979).

IV. ARGUMENT

As there is no operative complaint on file, Defendants are not authorized to pursue discovery. Without a complaint on file, there are no matters at issue to be proven or disproven and no claims against which defenses may be presented. Accordingly, the subpoenas of January 12, 2009, seeking (among other things) the identities of online critics of the Wilson Yard development project must be quashed.

The Illinois Supreme Court confronted the issue of conducting discovery in the period between the dismissal of an initial complaint and the filing of an amended complaint in Owen v. Mann, 105 Ill. 2d 525 (Ill. 1985). On June 18, 1982, the plaintiff filed a defamation complaint against the defendant. On February 17, 1983, the plaintiff issued a discovery request to the defendant, seeking "the identity of all persons with whom [the defendant] conversed regarding [the plaintiff]." On May 24, 1984, the plaintiff's complaint was dismissed for failure to state a cause of action, and the defendant was granted leave to file an amended complaint. On July 19, 1984, prior to the filing of the amended complaint, the defendant was ordered to produce the documents requested by the plaintiffs in his February 1983 discovery request. The defendant sought a writ of mandamus to compel the trial court to vacate the order. The Illinois Supreme Court found that, because there was no complaint on file at the time of the trial court's order to compel discovery, there was no way, as per the requirements of Rule 201, to determine whether the "discovery request was relevant to any issue in the case" or "proper in scope." Id. at 530. "It was, therefore, error for the trial court to grant respondent's motion [to compel] before an amended complaint was filed." Id.

Illinois courts have consistently applied this self-evident proposition that discovery must be tied in some relevant way to the claims of an operative complaint. See, e.g., Sander v. Dow Chemical Co., 166 Ill.2d 48, 64 (Ill. 1995) ("In order to determine the appropriate scope of relevant discovery, it is necessary that the pleadings set forth the claims and defenses in the lawsuit."); Manns v. Briell, 349 Ill. App. 3d 358, 361 (Ill. App. 2004) ("[D]iscovery should only be utilized to 'illuminate the actual issues in the case.'") (quoting Owen, 105 Ill. 2d at 530). See also, e.g., 4A Illinois Civil Lit. Guide § 3:39 (2006 ed.) ("[I]t is error for a trial court to grant a party's discovery request if that party has not yet filed an amended complaint where the original complaint has been dismissed; without a complaint on file, the trial court cannot determine whether the party's request is relevant to any issue in the case."); 3 Nichols Ill. Civ. Prac. § 44:9 ("A discovery motion may not be granted where the complaint in the proceedings has been dismissed with leave to amend and no new complaint has been filed.").

Defendants may assert (as they have to counsel for the Anonymous Speakers) that the information sought by the subpoenas might[2] be relevant if the Plaintiffs amend their complaint

[2] Even if the Plaintiffs file an amended Complaint, and if Defendants' discovery theory is similar to the one they articulated to counsel for the Anonymous Speakers, they will still be unable to obtain the information they seek through the civil discovery process. (Again, in the event that the Defendants issue similar subpoenas after the filing of an amended complaint, the Anonymous Speakers will fully brief these issues as appropriate in a renewed motion to quash.) First, the First Amendment establishes a clear barrier to attempts to obtain the identities of anonymous

and if Defendants determine that the identity of the Anonymous Speakers might be relevant to a yet-to-be-determined defense. While Defendants are free to engage in this type of speculation, they must do so on their own time. No authority exists to support any contention that such unauthorized discovery should, instead of being quashed, be extended because the issuing party might come up with a justification for them in the future if the posture of the case changes. The Anonymous Speakers, who have been dragged into this case solely on the basis of exercising their First Amendment rights, deserve to be left alone. See, e.g., Rule 201 (c) (authorizing the Court to quash a discovery subpoena to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression."). See also, e.g., U.S. v. Nixon, 418 U.S. 683, 699 (1974) ("[I]n order to require production prior to trial, the moving party must show . . . that the application is made in good faith and is not intended as a general 'fishing expedition.'"); People v. Rodriguez, 119 Ill. App. 3d 575 (Ill. App. 1983) (quashing a subpoena proper in order to prevent the "use of the discovery process" as a "mere 'fishing expedition[.]'").

V. CONCLUSION

The right to speak out against government action and state-sponsored activities – and the right to do so anonymously – lies at the heart of the First Amendment. See, e.g., New York

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speakers – and here, speakers engaged in political expression – where the information is not relevant to a central claim or defense and in any case where the issuing party (as here) cannot show that it cannot obtain the information it seeks elsewhere. See, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("Anonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society."); Doe v. 2theMart.com, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001) ("When the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity. Therefore, non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker."). Second, the Defendants are absolutely barred by the federal Stored Communications Act from obtaining the content of online communications pursuant to a discovery subpoena, such as the communications sought in their subpoena to Buena Park Neighbors. See, e.g., 18 U.S.C. 2701-2703; In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 611 (E.D. Va. 2008) ("Applying the clear and unambiguous language of § 2702 to this case, AOL ... may not divulge the contents of ... electronic communications ... because the statutory language of the [Stored Communications Act] does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas.").

Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting that the country has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("[A]n 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."). See also, e.g., 2theMart.com, 140 F. Supp. 2d at 1093 ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."). Notwithstanding these clear limitations, and without any effort to narrow their clearly overbroad scope, the Defendants issued subpoenas targeting non-party speakers solely based on the content of their critical speech.

Defendants may (improperly) choose to continue burdening these non-party speakers in the event that the Plaintiffs file an amended complaint, and the Anonymous Speakers will challenge them if they do, but Defendants' existing subpoenas must be quashed now because Defendants are not currently authorized to conduct discovery. Defendants suggest that, despite this lack of authority, the Anonymous Speakers should nonetheless passively wait for the parties to work out their differences before moving to quash the illegal subpoena. As Defendants are no doubt aware, however, responding to subpoenas – even if in the short term "only" to repeatedly negotiate extensions – is not without cost. See, e.g., Theofel v. Farey-Jones, 359 F.3d 1066, 1074-75 (9th Cir. 2004) ("Fighting a subpoena in court is not cheap, and many may be cowed into compliance with even overbroad subpoenas[.]"). It is up to the parties, not innocent bystanders, to bear the cost of their current fight.

As the Defendants' subpoenas are not authorized under Rule 201, and moreover as the unauthorized subpoenas continue to constitute "unreasonable annoyance, expense, embarrassment, disadvantage, or oppression" (see Rule 26(c)(1)), the Anonymous Speakers respectfully as this Court to quash Defendants' subpoenas of January 12, 2009.

Respectfully submitted,

Dated: June 22, 2009

By ______________________

Charles Lee Mudd Jr.
Mudd Law Offices
3114 West Irving Park Road, Suite 1W
Chicago, Illinois 60618
(773) 588-5410
Cook County Attorney No.: 38666
ARDC: 6257957
cmudd@muddlawoffices.com

Matt Zimmerman (pro hac vice application forthcoming)
Electronic Frontier Foundation
454 Shotwell St.
San Francisco, CA 94110
(415) 436-9333 x127
mattz@eff.org

Attorneys for Anonymous Speakers