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Greenbaum v. Google, Inc.
N.Y.Sup.,2007.

Supreme Court, New York County, New York.
In the Matter of the Application Pursuant to CPLR 3102 of Pamela GREENBAUM, Petitioner,
v.
GOOGLE, INC. d/b/a Blogger and Blogspot.com, Respondent.
No. 102063/07.

Oct. 23, 2007.

Background: Elected school board member brought proceeding for pre-action discovery against internet service provider (ISP) that maintained internet website for hosting of internet blogs, contending that she was defamed by comments made by anonymous operator of blog on website and by anonymous commentators who posted statements on that blog, and seeking disclosure from ISP of data identifying operator and commentators. Operator intervened anonymously through pro bono counsel.

Holdings: The Supreme Court, New York County, Marcy S. Friedman, J., held that:

(1) operator's challenged statements about board member were not reasonably susceptible of defamatory connotation;

(2) statements of operator and commentators about board member were protected opinion; and

(3) pre-trial discovery was not warranted.

Petition dismissed.

[1] Pretrial Procedure 307A 0

307A Pretrial Procedure
In determining application for disclosure of identities of anonymous internet speakers, in proceeding for pre-action discovery brought by elected school board member who allegedly was defamed by speakers' comments, court would require that anonymous speakers be given notice of application for discovery of their identities and opportunity to be heard in opposition, and also that board member specify particular statements alleged to be defamatory.

[2] Pretrial Procedure 307A 0

307A Pretrial Procedure
Even when constitutional interests are not at stake, the proponent of pre-action disclosure must demonstrate that it has a meritorious cause of action. McKinney's CPLR 3102(c).

[3] Pretrial Procedure 307A 0

307A Pretrial Procedure
Disclosure in advance of service of a summons and complaint is available only when there is a demonstration that the party bringing petition for disclosure has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong. McKinney's CPLR 3102(c).

[4] Libel and Slander 237 0

237 Libel and Slander
It is for the court in the first instance to resolve the legal question of whether particular words are defamatory.

[5] Libel and Slander 237 0

237 Libel and Slander
Statement about elected school board member made by anonymous operator of blog on internet website, in which operator, after criticizing board member's position that public school teachers could teach non-public school students only if they were not being paid with public funds, remarked, “Way [for board member] to make it clear that you have no interest in helping the private school community,” was not reasonably susceptible of defamatory con-

notation, notwithstanding board member's assertion that operator implied that board member was anti-semite, based on operator's disagreement with board member's position on use of public funding for program possibly affecting Orthodox Jewish community.

[6] Libel and Slander 237 0

237 Libel and Slander
Statements that were made about elected school board member by anonymous operator of blog on internet website and anonymous commentators who posted statements on operator's blog were protected opinion, and thus not actionable as defamation, given that statements, which criticized board member's purported lack of support for private school community, indicated that board member was bigot who did not belong on board, and indicated that board member had support of significant group of voters who could not "get enough of her bigotry," were based upon board member's admitted opposition to use of public school funds for Yeshiva students and others who received their full-time education at private schools.

[7] Libel and Slander 237 0

237 Libel and Slander
Whether a purportedly defamatory statement expresses fact or opinion is a question of law for the court, to be answered on the basis of what the average person hearing or reading the communication would take it to mean.

[8] Libel and Slander 237 0

237 Libel and Slander
In determining whether a particular communication is actionable as defamation, rather than protected opinion, courts distinguish between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener, and a statement of opinion that is accompanied by a recitation of the facts on which it is based; the latter ordinarily are not actionable because a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture.

[9] Libel and Slander 237 0

237 Libel and Slander
Statements that were posted by anonymous operator of blog on internet website and asserted that elected school board member who had sought pre-action disclosure of operator's identity had falsely alleged that operator had called her bigot and anti-semite were true, in that operator did not state or imply that board member was bigot or anti-semite and did not use such words in blog, and therefore operator's statements were not actionable as defamation. McKinney's CPLR 3102(c).

[10] Libel and Slander 237 0

237 Libel and Slander
Claim of defamation may be based on an accusation that a person has committed the crime of perjury.

[11] Pretrial Procedure 307A 0

307A Pretrial Procedure
Pre-action discovery was not warranted in proceeding brought by elected school board member who alleged that she was defamed by anonymous operator of website blog and anonymous commentators on blog and who sought to learn operator's and commentators' identities, given that affected school district was arena for highly charged dispute between public school minority represented by board member and private school majority over extent to which public schools should serve Orthodox Jewish community, and that relief sought by board member, on eve of school board election, would have chilling effect on protected political speech. U.S.C.A. Const.Amend. 1; McKinney's CPLR 3102(c).

Adam B. Feder, Esq., Feder and Rodney, P.L.L.C., Brooklyn, for Petitioner.
Tonia Ouellette Klausner, Esq., Wilson Sonsini Goodrich & Rosati, New York, for Respondent Google.
Paul Alan Levy, Esq., Public Citizen Litigation Group, Washington, DC (Donald Rosenthal, Har-

man & Craven LLP), for Respondent "Orthomom".
MARCY S. FRIEDMAN, J.

***1** This is a proceeding for pre-action discovery brought by petitioner Pamela Greenbaum against respondent Google, Inc. ("Google"), pursuant to CPLR 3102(c). Google is an internet service provider that maintains an internet website known as Blogger and Blogspot.com for the hosting of internet blogs. Petitioner, an elected member of the school board of Lawrence, Long Island, alleges that she was defamed by comments made by an anonymous operator on Google's website of a blog known as "Orthomom" and by anonymous commentators who posted statements on the Orthomom blog. Petitioner seeks disclosure from Google of data identifying Orthomom and the anonymous commentators. On the initial appearance date, the parties entered into a stipulation in which Google agreed to produce the requested information "unless a third party appears and objects to such production and unless otherwise ordered by the Court."The stipulation further provided for Google to provide a copy of the order to the person operating the blog known as Orthomom. On its own motion, the court issued an order notifying the operator of the blog that failure to appear on the scheduled adjourned date "may result in relief against him/her by default," and directing service of the order to the operator of the blog by regular and certified mail or by email. On the adjourned date, Orthomom appeared anonymously by pro bono counsel, and moved for leave to intervene. By order on the record on April 19, 2007, the court granted Orthomom's motion, subject to disclosure to the court of Orthomom's identity by production for in camera review of the retainer agreement between Orthomom and her counsel. That condition was complied with.

Google confirmed at the oral argument of the motion to intervene that because many people seek information from Google, "Google leaves it to those people to come in and protect their own interests. However, Google always requests that they be given notice * * * so they can appear."(Apr. 19, 2007 Transcript at 9.) It is thus clear that Google does not represent the interests of people who anonymously operate blogs or anonymously make comments on blogs maintained on Google's website. As discussed more fully below, these bloggers' interests in speaking anonymously implicate the First Amendment. (*See McIntyre v. Ohio Elections Commn.*, 514 U.S. 334 [1995].) Intervention was therefore warranted.[FN1] (*See*CPLR 1002.)

The appellate courts of this State have not articulated the standards that should govern applications for the disclosure of the identities of anonymous internet speakers. Courts elsewhere have repeatedly recognized that the First Amendment protects the right to participate in online forums anonymously or under a pseudonym, and that anonymous speech can foster the free and diverse exchange of ideas. (*See e.g. Sony Music Entertainment Inc. v. Does,* 326 F Supp 2d 556 [US Dist Ct, SD N.Y.2004]; *Best Western Intl., Inc. v. Doe,* 2006 U.S. Dist Lexis 56014 [US Dist Ct, Ariz 2006].) The cases also recognize, however, that the right of anonymous speech is not absolute and cannot shield tortious acts such as defamation. In determining applications for the disclosure of the identities of anonymous internet speakers, the courts therefore perform a balancing test between the interest of the plaintiff in seeking redress for grievances (in the case of defamation, protection of the plaintiff's reputation) and the First Amendment interest of the speaker in anonymity. (*See e.g. Columbia Ins. Co. v. Seescandy.com,* 185 F.R.D. 573, 578 [ND Cal 1999]), *Dendrite Intl., Inc. v. Doe,* 342 N.J.Super. 134, 775 A.2d 756 [App.Div.2001] ["*Dendrite* "]; *Matter of Baxter,* 2001 U.S. Dist Lexis 26001 [WD La 2001].)

***2** [1] Intervenor urges that this court follow *Dendrite* in deciding Greenbaum's disclosure request. *Dendrite* requires that the anonymous internet speakers be given notice of the application for discovery of their identities and an opportunity to be heard in opposition, and that the plaintiff specify the particular statements that are alleged to be defamatory. (342 N.J.Super. at 141, 775 A.2d 756). The court agrees with these requirements and has followed them here. *Dendrite* also conditions disclosure of the speakers' identities on an evidentiary

showing of the merits of the plaintiff's proposed defamation cause of action.[FN2] While *Dendrite* is persuasive authority, the court need not reach the issue of the quantum of proof that should be required on the merits because, here, the statements on which petitioner seeks to base her defamation claim are plainly inactionable as a matter of law.

[2][3] Under the well settled law of New York, even where constitutional interests are not at stake, the proponent of pre-action disclosure must demonstrate that it has a meritorious cause of action. CPLR 3102(c) authorizes disclosure before an action is commenced "to aid in bringing an action * * * but only by court order."Such disclosure may be appropriate to identify potential defendants. (*Holzman v. Manhattan Bronx Surface Tr. Operating Auth.*, 271 A.D.2d 346, 347, 707 N.Y.S.2d 159 [1st Dept 2000].) However, "disclosure in advance of service of a summons and complaint is available only where there is a demonstration that the party bringing such a petition has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong."(*Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d 535, 536, 536 N.Y.S.2d 784 [1st Dept 1989]; *Matter of Stewart v. New York City Tr. Auth.*, 112 A.D.2d 939, 492 N.Y.S.2d 459 [1st Dept 1985].)

The Orthomom blog "is devoted to issues within both the Five Towns community on Long Island and the larger community of Orthodox Jewry. * * * The blog's main author is Orthomom, who identifies herself as an Orthodox Jewish parent of school-age children in the Five Towns."(Intervenor Memo. In Opp. at 3.) Orthomom posts the main articles and others may post comments in their own names or anonymously, at their option. This case involves statements on the blog concerning Pamela Greenbaum, an elected member of the school board of the Lawrence, Long Island public schools, who has opposed the use of public school funds for educational programs for private school children within the district. In the January 11, 2007 article which is the basis for Greenbaum's defamation claim, Orthomom criticized Greenbaum's position that public school teachers may teach non-public school students only if they are not being paid with public funds. Orthomom concluded with the following statement that petitioner claims is actionable: "Way [for Greenbaum] to make it clear that you have no interest in helping the private school community."Various anonymous commentators responded with the following statements which petitioner claims are also actionable: "Pam Greenbaum is a bigot and really should not be on the board," and "Greenbaum is smarter than she seems. Unfortunately, there is a significant group of voters who can't get enough of her bigotry."

***3** In her petition for pre-action disclosure, Greenbaum, who identifies herself as Jewish, contends that Orthomom made defamatory statements that Greenbaum is "a bigot' and an anti-semite' for my positions advocating against the use of public school district funds for private school interests." (Petition, ¶ 6.) Greenbaum's petition alleges that "Orthomom' wrote that my concern [about the legality of using school district funds for private school students] revealed an anti-semitic agenda, given that over fifty percent of our district's students attend private school, and the vast majority of those attend Yeshivas." (*Id.*, ¶ 7, 492 N.Y.S.2d 459.) However, as subsequently clarified by Greenbaum's papers in this proceeding, the specific statements that petitioner claims are defamatory are those quoted above. (Feder Aff. In Opp., ¶ 37.) In fact, none of Orthomom's own statements uses the words bigot or anti-semite to characterize Greenbaum's position. The anonymous commentators' statements use the word bigot not anti-semite.

[4][5] It is for the court in the first instance to resolve the legal question of whether particular words are defamatory. (*Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074 [1997];*Aronson v. Wiersma*, 65 N.Y.2d 592 [1985].) The court finds that Orthomom's own statements comment on a matter of interest to her religious community and the public generally. Examining "the content of the whole communication as well as its tone and its apparent purpose" (*see Steinhilber v. Alphonse*, 68 N.Y.2d 283, 293 [1986]), as the court must do, the court

further finds that Orthomom's statements are not reasonably susceptible of a defamatory connotation. Greenbaum's defamation claim against Orthomom reduces to the insupportable assertion that Orthomom implied that Greenbaum is an anti-semite merely because Orthomom disagreed with Greenbaum's position on the use of public funding for a program that could have affected the Orthodox Jewish community.

[6][7][8] Significantly, also, Orthomom's statements, as well as those of the anonymous commentators, are protected opinion. Whether a statement expresses fact or opinion is a question of law for the court, to "be answered on the basis of what the average person hearing or reading the communication would take it to mean."(*Id*. at 290, 508 N.Y.S.2d 901, 501 N.E.2d 550.) "[I]n determining whether a particular communication is actionable, [the courts] continue to recognize and utilize the important distinction between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener, and a statement of opinion that is accompanied by a recitation of the facts on which it is based."(*Gross v. New York Times Co.*, 82 N.Y.2d 146, 153 [1993].) The latter ordinarily are not actionable because "a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture."(*Id.* at 154, 603 N.Y.S.2d 813, 623 N.E.2d 1163.)

The statements of both Orthomom and the anonymous commentators are based on the single disclosed fact, the truth of which Greenbaum does not contest, that Greenbaum opposes the use of public school funds for programs for Yeshiva students and others who receive their full-time education at private schools. As such, the statements are readily identifiable as protected opinion. (*See e.g. Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235 [1991],*cert denied*500 U.S. 954, 111 S.Ct. 2261, 114 L.Ed.2d 713.) FN3

***4** [9] Nor does petitioner state an actionable claim for defamation based on articles posted by Orthomom on the blog subsequent to the January 11, 2007 article which precipitated this proceeding. These postings charge Greenbaum with falsely alleging in the instant action that Orthomom called her a bigot and an anti-semite. (*See* Feder Aff. In Opp., ¶ 37.) In a posting on February 16, 2007, Orthomom states she never called Greenbaum these names and points out that Greenbaum "might be referring to something that a commenter on my site said."In a posting on February 18, Orthomom quotes the allegations of the instant petition that Orthomom slandered Greenbaum by calling her a bigot and anti-semite, notes that the allegations were made in a "sworn affidavit," and characterizes the allegations as a "flat-out lie." In a statement that Greenbaum claims is also defamatory, Orthomom concludes: "How in the world does an elected official who expects to command the respect of her constituents put these falsehoods and blatant fabrications in a legal document, where disproving them in a court of law will be about as easy as it was here in this post? Is this the type of school board member we expect to present as a representative and role model to our students? Someone who would not hesitate to perpetuate falsehoods in a legal setting?"(*Id.*)

[10] A claim of defamation may be based on an accusation that a person has committed the crime of perjury. (*See Immuno A.G.*, 77 N.Y.2d at 244, 566 N.Y.S.2d 906, 567 N.E.2d 1270.) However, the statements in these postings about the allegations of the petition are incontrovertibly true, as Orthomom never defamed Greenbaum by stating or implying that she was a bigot or anti-semite and, in fact, never used the words. This claim therefore is clearly not actionable.

[11] As the parties to this proceeding acknowledge, the Lawrence school district has been the arena for a highly charged dispute between the public school minority, which Greenbaum represents, and the private school majority, over the extent to which the Lawrence public schools should serve the Orthodox Jewish community. The relief sought by Greenbaum, on the eve of a school board election, would have a chilling effect on protected political speech. Greenbaum's request for disclosure of the

identities of the anonymous internet speakers must therefore be denied.

It is accordingly hereby ORDERED that the petition is dismissed.

This constitutes the decision, order, and judgment of the court.

FN1. The anonymous commentators have not sought leave to intervene. Orthomom has represented that she voluntarily posted notice of the adjourned date on the blog, thus giving the commentators notice. The preferable procedure would have been for Google to have requested, and the court to have ordered, that notice of the proceeding be given not only to Orthomom but also to the anonymous commentators by email to Orthomom as well as posting on the Orthomom blog.

FN2. Under *Dendrite,* the court must not only review the proposed claims under a motion to dismiss standard to determine whether the plaintiff has a prima facie cause of action, but must also require the plaintiff to produce evidence sufficient to make a prima facie showing in support of each of the elements of the cause of action. (342 N.J.Super. at 141, 775 A.2d 756.) If the court concludes that the plaintiff has a prima facie cause of action, the court must then "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."(*Id.* at 142, 775 A.2d 756.) *Accord Best Western Intl., Inc. v. Doe,* 2006 U.S. Dist Lexis 56014, *supra* [applying summary judgment standard].) Other cases apply a lesser standard but require a showing of the merits of the proposed cause of action before ordering disclosure of the identity of an anonymous internet speaker. (*See Sony,* 326 F Supp 2d at 565 ["concrete showing of a prima facie claim"]; *Columbia Ins.,* 15 F.R.D. at 579 [motion to dismiss standard]; *Baxter,* 2001 U.S. Dist Lexis 26001 * 38 ["a reasonable probability or a reasonable possibility of recovery" on the claim].)

FN3. In view of this holding, the court need not reach the issue of whether, if the commentator's statements were actionable, Orthomom could be held liable as the publisher. The applicability of the Communications Decency Act (47 USC § 230[c][1]) to the operator of a blog has not been adequately briefed on this record.

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