

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

09 OCT -9 AM 8:56

LISA STONE, a mother and next)
Friend of Jed Stone, a minor,)
)
Petitioner,)
v.)
)
PADDOCK PUBLICATIONS, INC., d/b/a)
THE DAILY HERALD, INC.)
)
Respondent.)

No. 09 L 5636

MOTION IN OPPOSITION TO TURNOVER OF IDENTITY

NOW COMES John Doe, user of I.P. address 24.1.3.203, and for his Motion to In Opposition to Turnover of Identity, states as follows:

I. Introduction

1. John Doe, user of I.P. address 24.1.3.203, respectfully requests that this Court deny Petitioner Lisa Stone's request for the turnover of information produced to the Court pursuant to the July 22, 2009 subpoena to Comcast. Lisa Stone's Amended Petition pursuant to Supreme Court Rule 224 ("Petition") requests information concerning the identity of John Doe as a result of a comment, on information and belief, posted by John Doe in a web forum hosted by Respondent herein, Paddock Publications, Inc., d/b/a The Daily Herald, Inc. Also on information and belief, the Daily Herald piece under which the subject comment appeared was a Daily Herald endorsement of Petitioner Lisa Stone, supporting her bid for a seat on the Village of Buffalo Grove Board of Trustees. Because John Doe posted a number of comments in the Daily Herald's web forum, neither he nor his counsel know which of his posted comments is the

allegedly defamatory comment. Petitioner Lisa Stone has refused to reveal the allegedly defamatory comment despite requests from counsel for John Doe.

2. John Doe's right to anonymous political speech is protected by the First Amendment of the United States Constitution, as set forth in United States Supreme Court opinion in *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 357 (1995). Because John Doe's First Amendment rights are jeopardized by Lisa Stone's Petition, this Court's decision relative to the disclosure of John Doe's identity must be guided by the Illinois Citizen Participation Act at 735 ILCS 110/1 *et seq.* ("CPA"). The CPA immunizes acts in furtherance of constitutional rights of speech and association, regardless of intent or purpose, where such acts are genuinely aimed at achieving "government action, result or outcome." 735 ILCS 110/15. Here, Petitioner Lisa Stone requests John Doe's identity as a result of a comment posted in a forum specifically provided for the exchange of political speech and ideas. Because the First Amendment and the CPA immunize such comments, John Doe's identity should remain concealed and Lisa Stone's Amended Petition should be dismissed.

3. In the alternative, even if this Court cannot determine if John Doe is immune from liability at this stage in the proceedings, Stone should be required to allege with specificity the allegedly defamatory comment published by John Doe. Because Stone's Petition rests solely upon the conclusory allegation that John Doe posted a defamatory comment, without providing a quote or description of the comment, it is impossible for this Court to determine whether John Doe's statutory and constitutional rights to protected speech will be violated by the turnover of his identity.

II. Points and Authorities

A. The Citizen Participation Act Bars the Turnover of Doe's Identity and Mandates Dismissal of Stone's Rule 224 Petition

1. Stone's Petition is subject to dismissal under The Citizen Participation Act ("CPA") because it fails to establish, by clear and convincing evidence, that John Doe's comments are not immunized by the Act. The CPA states that it is the public policy of Illinois to encourage and safeguard the "constitutional rights of citizens and organizations to be involved and participate freely in the process of government." 735 ILCS 110/5. The CPA further provides that "information, reports, opinions, claims, arguments, and other expressions provided by citizens" are vital to ensure the effective operation of Illinois government. *Id.* The CPA requires the "laws, courts, and other agencies of this State" to "provide the utmost protection for the free exercise of [the] rights of petition, speech, association, and government participation." *Id.*

2. The CPA applies to any "motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15. Because the CPA broadly defines a claim within its scope as any "lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury", Stone's Petition is subject to the CPA.

3. The CPA immunizes from liability "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government" except when the act is not "genuinely aimed at procuring favorable government action, result or outcome." *Id.* The CPA must be "construed liberally to effectuate its purposes and intent fully." 735 ILCS 110/30.

4. Here, John Doe moves the Court to dismiss Stone's Petition under the CPA. The Court must conduct a hearing on a motion under the CPA within 90 days of notice given to the respondent. 735 ILCS 110/20. A Court is required to dismiss claims subject to the CPA "unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or not in furtherance of acts immunized from, liability by this Act." *Id.* A moving party who prevails under the CPA is entitled to an award of reasonable attorneys' fees and costs incurred in connection with the moving party's motion. 735 ILCS 110/25.

5. Here, it cannot be disputed that the Petition directly implicates John Doe's anonymous free speech rights guaranteed by the First Amendment of United States Constitution. The Petition here regards, on information and belief, a comment allegedly posted by John Doe in a Daily Herald web forum under a candidate endorsement by the Daily Herald editorial board. (Amended Petition, ¶¶ 1-3). Without quoting or describing the comments of John Doe, Stone simply alleges that one of John Doe's comments was "directed to the minor Petitioner that was defamatory in nature." *Id.* On information and belief, Lisa Stone is a trustee on the Village of Buffalo Grove Board of Trustees and was the subject of the candidate endorsement under which the subject post by John Doe was made. Because the comment at issue here was made in a forum specifically provided for the expression of political speech and the expression of ideas relative to government action, the comment and commenter at issue here must be afforded full constitutional protection.

6. John Doe's constitutional right to engage in anonymous political speech is firmly established under the jurisprudence of the United States Supreme Court and the Illinois Supreme Court. In *McIntyre v. Ohio Election Commission*, the United States Supreme Court recognized

that “[a]nonymity is a shield from the tyranny of the majority” and that it “exemplifies the purpose behind the Bill of Rights, and the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression - at the hand of an intolerant society.” 514 U.S. 334, 357 (1995). The *McIntyre* court also recognized that “political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.” *Id.* In considering the constitutionality of an Ohio regulation prohibiting the distribution of anonymous leaflets designed to influence an election, the Supreme Court determined that the regulation on anonymous political speech was “subject to exacting scrutiny” and held that the regulation was facially unconstitutional. *Id.* at 346-357; *see also People v. White*, 116 Ill.2d 171, 186 (holding that “the right to engage in political advocacy anonymously is an important one which can only be infringed upon by a statute carefully limited to serve compelling state goals”); *see also Illinois Constitution, Art. I, Sec. 4* (providing that “[a]ll persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.”)

7. The fact that John Doe’s alleged defamatory comment was posted on the Internet, and was not distributed in the form of an anonymous political leaflet, does not deprive him or his words of constitutional protection. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997)(there is “no basis for qualifying the level of First Amendment protect scrutiny that should be applied to” the Internet.); *see also Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1093 (W.D. Wash 2001)(“The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas.”)

8. Because the CPA places the burden on a responding party to produce “clear and convincing evidence” that the acts of John Doe “are not immunized, or not in furtherance of acts immunized from, liability” under the CPA, and because Stone’s Petition fails to allege clear and convincing facts to show that John Doe is not immune under the CPA, this Court should refuse to provide the identity of John Doe to Stone. 735 ILCS 110/20. Moreover, this Court should dismiss Stone’s Petition pursuant to the CPA and award John Doe his attorneys’ fees incurred in bringing this Motion pursuant to 735 ILCS 110/25.

B. Alternatively, the Court Must Require Stone to Demonstrate that Doe’s Comments are Not Protected Speech Prior to Ruling on the Turnover of His Identity

1. Counsel for Doe is not aware of any Illinois authority relative to the revelation of identities pursuant to so-called “John Doe subpoenas”. However, courts in other jurisdictions have restricted a litigant’s ability to compel an internet service provider to reveal an anonymous person’s identity. In *Dendrite Int’l, Inc. v. Doe No. 3*, the court highlighted the importance of protecting the First Amendment right to speak anonymously as follows:

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an 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.

775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001). The *Dendrite* court established the following procedures to be applied by courts when determining whether to allow the revelation of the identity of anonymous users of message boards on the Internet:

(a) The litigant should be required to “undertake reasonable 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 fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application.”

(b) “The court shall also require the [litigant] to identify and set forth the exact statements purportedly made by each anonymous poster that [litigant] alleges constitutes actionable speech.”

(c) The court should determine whether the litigant has “set forth a prima facie cause of action against the fictitiously-named defendants.” Additionally, the litigant must introduce sufficient evidence to withstand a motion for summary judgment.

(d) “Finally, assuming the court concludes that the [litigant] 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 [litigant] to properly proceed.” *Id.*

Because Stone’s Petition fails to set forth the allegedly defamatory comment, or the comments that would provide the context of the comment, and because John Doe’s First Amendment protections may be violated by the revelation of his identity, this Court should require Stone to satisfy the standard announced in *Dendrite* before revealing the identity of John Doe to Stone.

2. Moreover, the recent Illinois Supreme Court Opinion in *Green v. Rogers* supports the application of a heightened pleading standard in defamation cases where the litigant is asserting defamation *per se*. 2009 WL 3063399, *9 (Ill. Sept. 24, 2009). The *Green* opinion holds that claims of defamation *per se* must be pled with a “heightened level of precision and

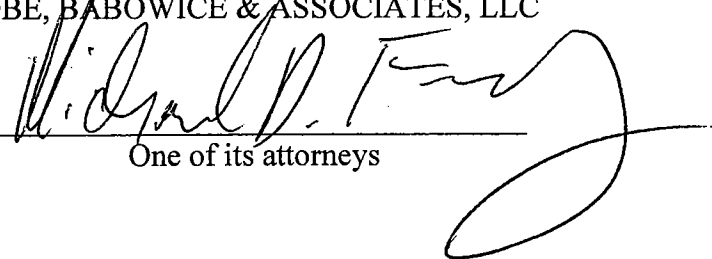
particularity.” *Id.* Because Stone’s claim may be subject to a heightened pleading standard under Illinois law, she should be required to allege with precision and particularity the allegedly actionable speech prior to this Court’s revelation of John Doe’s identity.

3. Additionally, Supreme Court Rule 224 permits discovery “for the sole purpose of ascertaining the identity of one who may be responsible in damages... .” Here, John Doe may be immune from liability under the CPA or enjoy qualified immunity under the “innocent-construction rule”. *See Green* at *11. “Under the ‘innocent-construction rule’, a court must consider the statement *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning.” *Id.* A statement that may be “innocently interpreted” is not actionable *per se*. *Id.* If John Doe’s comment, when considered in context, is immune under the CPA or is privileged under the “innocent-construction rule”, he cannot be a person “responsible for damages” under Supreme Court Rule 224. Thus, this Court should require Stone to allege with specificity the allegedly actionable comment, along with the context in which the comment was made, before John Doe’s identity is revealed.

WHEREFORE, John Doe respectfully requests that this Court grant his Motion, that this Court decline to reveal his identity to Petitioner pursuant to his right to anonymous speech under the United States and Illinois Constitutions, and that the Petition be dismissed pursuant to 735 ILCS 110/1 *et seq.* Further, John Doe requests that he be awarded his attorneys fees incurred under 735 ILCS 110/25. Alternatively, John Doe respectfully requests that this Court require Petitioner to establish with specificity the purported actionable speech before his identity is revealed.

Respectfully submitted,
John Doe, by and through his attorneys,
TROBE, BABOWICE & ASSOCIATES, LLC

By: _____



One of its attorneys

Michael D. Furlong 6289523
Peter M. Trobe 02857863
TROBE, BABOWICE & ASSOCIATES, LLC
404 W. Water Street
Waukegan, IL 60085
(847) 625-8700