Attorney No. 45901

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

LISA STONE, mother and next friend of Jed Stone, a minor,	)	
Petitioner,	)	No. 09 L 5636
v.	)	Calendar D
PADDOCK PUBLICATIONS, INC., d/b/a/ The Daily Herald, Inc.	)	Hon. Jeffrey Lawrence
Respondent.	)	

PETITIONER'S MEMORANDUM RESPONSE IN OPPOSITION TO JOHN DOE'S MOTION TO QUASH

Petitioner Lisa Stone, as mother and next friend of Jed Stone, a minor, through her attorneys, hereby submits this Memorandum of Law in opposition to John Doe's Motion to Quash ("Motion") the subpoena duces tecum which Petitioner has served on Comcast Cable Communications, L.L.C. ("Comcast") and, in opposing the Motion, represents as follows:

Introductory Statement

As is set out in detail below, Doe's Motion is improperly made for three reasons, two of which are related. Doe has no standing to challenge the discovery sought, as the subpoena was served on another non-party, and the federal statute on which Doe relies is not applicable to the subpoena to Comcast. In addition, the argument that this Rule 224 concluded before the subpoena was issued is also incorrect, both legally and factually. None of the authorities which Doe cites supports any of his arguments.

Factual Background

Petitioner commenced this Rule 224 proceeding to obtain information about the identity of

the person or persons using the designation "Hipcheck16" in posting defamatory and injurious statements about Petitioner's minor son on a weblog or "blog" maintained by Respondent Paddock Publications, Inc. ("Paddock"). Paddock ultimately responded to the petition by supplying what it asserted was the only information which it had about the identity of the person posting. This information included an e-mail address, "hipcheck16@yahoo.com" and an internet protocol or "I.P." address. The information provided by Paddock did not include a traditional given name and surname sufficient for Petitioner to ascertain who might have been responsible for the postings.

The I.P. address which Paddock provided, 24.1.3.203, was ultimately traced to a location in or near Buffalo Grove, Illinois, which is where Petitioner and her son live. Further investigation revealed that the I.P. address is controlled by Comcast and is used by one of its subscribers. Petitioner then sent a subpoena to Comcast which sought

> any and all information for IP address 24.1.3.203 from February 1, 2009 to the present including but not limited to the name, address, location and any and all information identifying the subscriber, user, and/or owner of said IP address and anyone associated with said IP address.

The subpoena also asked for the foregoing information for the date of April 9, 2009, which is the date which offensive postings were made to Paddock's blog. No part of the subpoena asked for any information about any form of electronic communication, which by definition would include e-mail.

Because Comcast believed that the subpoena was covered by a provision in the federal criminal code, 18 U.S.C. § 2702, it informed Petitioner that it would not respond to the subpoena unless an order were entered compelling its compliance and unless it gave Doe what it believed was a required notice of its receipt of the subpoena so that Doe could decide whether or not he wanted to intervene in the proceeding.

Argument

I. No Part of the Subpoena Is Subject to the Federal Statute Cited by Doe.

Citing 18 U.S.C. § 2702-03, Doe maintains that the statute, which is commonly known as the Electronic Communication Privacy Act ("ECPA"), "prohibits an entity that provides electronic communications services from divulging the contents of a communication while in electronic storage" and that the subpoena violates this prohibition. Motion, ¶ 2. He maintains that 18 U.S.C. § 2702(a)(1) "only allows disclosure of customer information or records to a governmental entity pursuant to the specifically enumerated exceptions listed at § 2703, none of which apply here." This is neither a correct construction nor an appropriate application of the statute in question.

The statute which Doe cites imposes criminal penalties on "a person or entity providing an electronic communication service to the public" for making an impermissible disclosure of "the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). The definitions found in 18 U.S.C. § 2510 are to be used in construing and applying the ECPA. 18 U.S.C. § 2711. Those definitions show that Doe's application of the ECPA to this subpoena is incorrect.

The term "electronic communication service" is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(13). Subject to certain exclusions not relevant here, the term "electronic communication" means "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). Finally, the term "content . . . when used with respect to any wire, oral, or electronic communication, includes any

information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8). In 18 U.S.C. § 2702(c)(6)(C), identifying information is specifically acknowledged as separate from the "content" of electronic communications and exempted from the general prohibition against the disclosure by the "electronic communication service:"

> A provider described in subsection (a) [*i.e.*, an electronic communication service] may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))
>
> . . .
>
> (6) to any person other than a governmental entity.

18 U.S.C. § 2702(c)(6)(C). The statute thus provides greater access to customer records than is afforded to governmental entities, Doe's assertion to the contrary notwithstanding.[1]

The ECPA actually authorizes Comcast's disclosure, and the statutory section cited by Doe has no application whatsoever to "customer information or records" held by an "electronic communication service" with respect to its subscribers. It only applies to the contents of communications and to nothing else. *See Jessup-Morgan v. America Online, Inc.*, 20 F.Supp.2d 1105, 1108 (E.D. Mich. 1998) (Feikens, C.J.). Furthermore, the ECPA has no application to a request for information for identity of a subscriber which does not involve the contents of e-mails. *Id.* In *Jessup-Morgan*, an America Online ("AOL") subscriber who had been accused of sending

---

[1] It may seem counterintuitive that the government has more limited access to customer records than do private parties. This provision in the statute is intended to guard against what was felt to be a number of abusive agreements between providers and the government under which the providers voluntarily permitted the government to monitor their subscribers electronic communications, including e-mail, without the subscribers knowledge or consent. *See, e.g., Hepting v. AT & T Corp.*, 439 F.Supp.2d 974 (N.D. Cal. 2006), *vacated on other grounds* 539 F.3d 1157 (9th Cir. 2008).

harassing and defamatory e-mails sued AOL for breach of contract and invasion of privacy when AOL disclosed her identity in response to a subpoena obtained by a party who received the offensive e-mail. Judge Feikens gave judgment on the pleadings in favor of AOL, explicitly rejecting Jessup-Morgan's argument that AOL was prohibited from disclosing information about her identity by the ECPA.[2]

No aspect of the subpoena served on Comcast seeks anything related to the contents of any protected communication. The statute on which Doe relies protects only contents of communications and excepts from its scope customer information about a service subscriber. In fact, the content of any "communications" in this matter, if they can be called as much, is fully public. Doe posted the "communications" on Paddock's blog for all the world to see, and such posting would be a waiver of the right to keep the content of those communications from discovery. The subpoena is scrupulously limited to seeking information about the name, address and location of someone from whose location the offensive postings were made.

Doe's argument is actually contrary to law and is precluded by the very language of the statute he cites.

II. Doe Lacks Standing to Quash the Subpoena.

It follows from the application of the statute which Doe himself cites that he has no standing

---

[2] The opinion in *Jessup-Morgan* reflects citations to sections of the ECPA before the statute was substantially amended and reorganized. These amendments in no way affect the substance of the provisions as they are cited in Petitioner's arguments here. Thus, the section now known as 18 U.S.C. § 2702(c)(6)(C) was codified as 18 U.S.C. § 2703(c)(1)(C). *See* 20 F.Supp.2d at 1108.

The case relied on by Doe, *In re Subpoena Duces Tecum to AOL, LLC*, 550 F.Supp.2d 606, 611-12 (E.D. Va. 2008), which he claims stands for the proposition that the ECPA "does not permit disclosure in response to civil discovery subpoenas," is inapposite. The subpoena there explicitly sought the disclosure of the contents of electronic communications.

to challenge the subpoena in question. "Standing requires some injury in fact to a legally recognized interest." *Glazewski v. Coronet Insurance Co*, 108 Ill.2d 243, 254. (1985). Doe can point to no legally cognizable interest other than that which he claims under the ECPA. As demonstrated above, no such interest exists. Doe willingly gave Comcast his name, address and location when he subscribed for the service, and he can point to nothing which indicates that he could have any reasonable expectation that this information would be kept private.

III. The Granting of the Rule 224 Petition Did Not Terminate the Proceeding.

Citing *Beale v. Edgemark Financial Corp.*, 297 Ill. App.3d 999 (1st Dist. 1996),[3] Doe argues that "[a] proceeding brought pursuant to Supreme Court Rule 224 is final when a court enters a discovery order adjudicating the rights of the parties." This is a gross mischaracterization the case. In *Beale*, issues related to a Rule 224 petition were before the appellate court on questions certified by the trial court. Under Ill. Sup. Ct. Rule 308, the appellate court had discretion as to whether it would consider those questions on an interlocutory basis. *Beale* has absolutely no holding as Doe describes.

Such a rule as suggested by Doe is counterintuitive and contrary to the purposes which Rule 224 serves. Rule 224 provides that "[a] person or entity who wishes to engage in discovery *for the sole purpose of ascertaining the identity* of one who may be responsible in damages may file an independent action for such discovery." (Emphasis supplied). It also provides explicitly for the "life" of the proceeding initiated to learn the identity of responsible persons:

> Unless extended for good cause, the order automatically expires 60 days after issuance. The sanctions available under Supreme Court Rule 219 may be utilized by

[3] Doe gave the citation for the case as "297 Ill. App.3d 242, 245." A petition for leave to appeal in the case was denied, a fact of which Doe fails to make note. 168 Ill.2d 582.

> a party initiating an action for discovery under this rule or by a respondent who is the subject of discovery under this rule.

Ill. Sup. Ct. Rule 224(b). The rule explicitly provides for an automatic termination date if the proceeding is not concluded otherwise, but it also permits the trial court to extend the life of the proceeding beyond that otherwise automatic termination. By referring to the sanctions provision in Ill. Sup. Ct. Rule 219, Rule 224 indicates that the trial court retains jurisdiction after it grants the Rule 224 petition to enforce the respondent's compliance with the discovery requests promulgated when the petition is granted. Rule 224 by its own terms shows that Doe's argument is not correct.

Even if the sixty day provision would otherwise have been triggered under Rule 224(b), Petitioner sought, and was given, leave to issue the subpoena to Comcast, and the Court entered an order compelling Comcast's compliance with that subpoena, thereby continuing the proceeding beyond the sixty day limit. Such an extension was warranted: while Paddock complied with the discovery requests served on it initially, Paddock's responses did not satisfy the purposes for which Rule 224 petitions are permitted. Paddock could not give enough information for Petitioner to establish the identity of the person who made the offensive postings on Paddock's blog, and so Petitioner should have been permitted to continue the proceeding after Paddock responded. The subpoena to Comcast is narrow, as it is limited only to information about identity of a responsible person. The subpoena falls squarely within the limits set by Rule 224(a).

The rule suggested by Doe is also inefficient and contrary to the interests of justice. Even if the rule were as Doe suggests, and Petitioner submits that it clearly is not, Petitioner would have been permitted to initiate a new and separate Rule 224 proceeding directed to Comcast. The subpoena in this instance avoids duplication of effort and makes more efficient use of existing

resources.

Conclusion

There is no basis on which Doe's Motion can be sustained. The statute which he cites in support of his motion actually provides that the discovery requested by Petitioner through the subpoena to Comcast is explicitly authorized by that very statute. The subpoena only seeks identity and address information about Doe and does not reach the contents of any protected communication. Doe has no standing to bring the Motion itself. Finally, the argument that Doe makes regarding the termination of the Rule 224 proceeding not only is not supported by the case he cites but is also explicitly precluded by the language of the rule itself. Petitioner Lisa Stone therefore asks that John Doe's Motion to Quash her subpoena to Comcast be denied.

Dated: September 4, 2009

LISA STONE, as mother and next friend of Jed Stone, a minor

By: _____
One of her attorneys

S:\Client Files\Current\Litigation\Stone\ResMotQuash.wpd
09042009-0514PM