

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

THOMAS J. DEROSA,

CIVIL DIVISION

Plaintiff,

No. GD-09-21507

v.

HOWARD DOE and ROBIN DOE,

Defendants.

MOTION FOR PROTECTIVE ORDER

Richard S. Rattanni, by his attorneys, respectfully moves this Honorable Court to grant, pursuant to Pennsylvania Rules of Civil Procedure 4011 and 4012, a Protective Order barring the plaintiff from obtaining any information from Mr. Rattanni relating to the identities of the anonymous speakers who posted statements on the Elizabeth Discussion Board. This Protective Order is necessary to safeguard Mr. Rattanni's rights under the United States and Pennsylvania Constitutions to host an Internet discussion board that provides a forum for anonymous speech regarding local politics and other matters. Alternatively, Mr. Rattanni requests that this Honorable Court enter an Order staying all discovery directed by plaintiff to Mr. Rattanni until this Motion is ruled upon. In support of this Motion, Mr. Rattanni states as follows:

1. This case was commenced on November 19, 2009, against two allegedly unknown defendants, Howard Doe and Robin Doe, claiming that the defendants made defamatory comments about the plaintiff on an Internet discussion board known as the "Elizabeth Discussion Board."

2. Plaintiff is a township supervisor — an elected position — in Forward Township, Pennsylvania, who has endeavored to use court process to discover the identities of a number of anonymous speakers on the Elizabeth Discussion Board.

3. The Elizabeth Discussion Board is a website operated by Richard S. Rattanni, the owner of an Elizabeth Borough-based business that provides computer and web-hosting services. Mr. Rattanni has operated the Elizabeth Discussion Board for more than ten years in order to provide a forum to community members to discuss local politics and disseminate information about their community.

4. The Elizabeth Discussion Board is a free service. There is no requirement that users log in or create an account in order to post messages on the discussion board or read messages posted by others. When posting a message, a user is asked to provide a name. If the user does not provide a name, the user will be listed as "Guest."

5. On November 20, 2009, plaintiff's attorney filed a motion with this Court requesting permission to serve a subpoena to attend and produce on Mr. Rattanni, who is not a party to the case, for the purpose of ascertaining defendants' identity.

6. The Court granted the plaintiff's motion, but ordered Mr. Rattanni to give a copy of the Court's Order to the Doe defendants at least 20 days prior to revealing their identities to the plaintiff.

7. Counsel for plaintiff sent a subpoena to appear and testify to Mr. Rattanni via certified mail on November 20, 2009. The subpoena specified the date of the deposition as December 29, 2009.

8. Mr. Rattanni does not know the identities of the people who post comments to the Elizabeth Discussion Board. The only identifying information he has about the posters is their Internet Protocol ("IP") addresses. In order to comply with the Court's Order, Mr. Rattanni posted a copy of the Order and the subpoena on the Elizabeth Discussion Board.

9. Counsel for Mr. Rattanni subsequently contacted Mr. Heminger, counsel for plaintiff, to arrange an alternate date for the deposition, and Mr. Heminger agreed to postpone the deposition to January 11, 2010.

10. Mr. Rattanni objects to the subpoena compelling his attendance and production of documents related to anonymous posters to the Elizabeth Discussion Board because requiring him to disclose identifying information about the posters would violate the posters' right to anonymous speech under the First Amendment to the U.S. Constitution and Article I, Section 7 of the Pennsylvania Constitution as well as Mr. Rattanni's independent free-speech right under the United States and Pennsylvania Constitutions to host an Internet discussion board that provides a forum for anonymous speech regarding local politics and other matters.¹

¹ Hosts of Internet discussion boards, especially those who host forums like the one in this case that are devoted to discussions of local politics, have an independent First Amendment interest in protecting the speech of people who contribute information to the site. If posters' speech is chilled by the fear of exposure of the speaker's identity, the public value of the site is lessened and the site's contribution to public discourse is negatively affected. Thus, chill of posters' speech is a constraint on the overall reach of the speech of the forum.

At least one state appellate court has quashed a subpoena directed to a website forum host requesting that it reveal the identities of anonymous posters to the forum. See *Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 966 A.2d 432, 447 (2009) (holding that lower court abused its discretion in denying an Internet forum host's motion

11. Accordingly, Mr. Rattanni seeks a protective order prohibiting plaintiff from compelling Mr. Rattanni to provide any information related to the identities of anonymous posters to the Elizabeth Discussion Board.

12. The United States Supreme Court has repeatedly affirmed that the First Amendment protects the right to speak anonymously. See *Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (1999) (invalidating a Colorado statute requiring initiative petition circulators to wear identification badges); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995) (overturning Ohio statute prohibiting distribution of anonymous campaign literature); *Talley v. California*, 362 U.S. 60 (1960) (overturning municipal ordinance forbidding distribution of unsigned handbills); see also *Melvin v. Doe*, 575 Pa. 264, 278, 836 A.2d 42, 50 (2003) (“[t]here is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy”).

13. Accordingly, the U.S. Supreme Court has subjected government restraints on anonymous speech to strict scrutiny, striking them down when not narrowly tailored to a compelling governmental interest. See *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-69 (2002); *Buckley*, 525 U.S. at 199-200; *McIntyre*, 514 U.S. at 347; *Talley*, 362 U.S. at 66-67 (Harlan, J., concurring); see also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463-66 (1958) (due process requires showing of a compelling interest where court-ordered disclosure of identity threatens fundamental rights).

for protective order because when court compelled host to identify anonymous posters to its forum, defendant had not pleaded a valid defamation claim against any of them).

14. These First Amendment protections extend to speech on the Internet. *See Reno v. ACLU*, 521 U.S. 844, 868-70 (1997).

15. The Pennsylvania Supreme Court has recognized that court-ordered disclosure of the identities of anonymous Internet speakers "presents a significant possibility of trespass upon their First Amendment rights." *Melvin*, 836 A.2d at 277-78.

16. And this Court has held that there is "a qualified privilege rooted in the First Amendment against compelled disclosure of anonymous sources in civil lawsuits." *Reunion Indus. Inc. v. Doe 1*, 80 Pa. D. & C.4th 449, 451 (2007).

17. Accordingly, this Court applies a "summary judgment standard" when deciding whether to grant a motion for a protective order barring discovery to learn the identity of an anonymous Internet speaker in a defamation case. *Id.* at 456. That standard is designed to "balanc[e] the First Amendment protections of anonymous speech against interests furthered through state libel laws." *Id.*

18. That summary judgment standard requires a plaintiff seeking to unmask an anonymous speaker in a defamation case to make a prima facie showing that (1) the allegedly defamatory statement was false; (2) the statement was defamatory; and (3) the plaintiff has sustained harm that would support a monetary award. *See Melvin v. Doe*, 149 Pitts. L.J. 12, 49 Pa. D. & C. 4th 449, 450 (2000); *see also Reunion Indus. Inc.*, 80 Pa. D. & C. 4th at 456 (requiring plaintiff to make prima facie showing of commercial disparagement before requesting that court rescind protective order barring plaintiff from conducting discovery to unmask anonymous defendant).

19. The reason for requiring a plaintiff to meet this summary judgment standard is that a "plaintiff should not be able to use the rules of discovery to obtain the

identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit.” *Id.* at 452, n.2 (citing Pa.R.C.P. no. 4011(b)).

20. The plaintiff in this case has not — and cannot — make out a prima facie case of defamation.

21. Plaintiff has identified approximately nine statements by at least three and possibly more speakers posted to the Elizabeth Discussion Board that he claims are defamatory. See Exhibit 1 to Complaint. Many of those statements are not susceptible to a true-or-false determination, such as the statement posted by Guest on October 26, 2009: “From what I read, it appears Officer is Fine will be the next Chief. A corrupt one for the matter if he is Tom’s little puppet.”

22. Similarly, many if not all of the statements are not defamatory. For example, even if another statement posted by Guest on October 26, 2009, were false, it would not constitute defamation, especially under the standard for criticism of public officials described by the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 84 S. Ct. 710 (1964): “LAST TIME I HEARD HE DOESN’T OWN THE LAND. RENTS IT OR SOMETHING. How did the township pay for it, and what did they pay for?”

The plaintiff is an elected official — township supervisor for Forward Township — and thus qualifies as a public official for the purposes of his defamation case.

23. Finally, it is unlikely that the plaintiff has sustained any economic harm as a result of the statements identified in his Complaint as constituting defamation.

24. A protective order barring discovery of defendants’ identities from Mr. Rattanni should be issued because the plaintiff has not made the prima facie showing of

defamation that is required by this Court before a plaintiff may compel disclosure of an anonymous Internet speaker.

25. Counsel for Mr. Rattanni contacted Mr. Heminger, counsel for plaintiff, on January 5, 2010, requesting that plaintiff either withdraw the subpoena directed to Mr. Rattanni or consent to a stay of discovery directed to Mr. Rattanni until this Motion is ruled upon by the Court. Mr. Heminger stated that plaintiff did not consent to either request.

WHEREFORE, Movant respectfully prays that a Protective Order be issued in the form attached hereto.

AMERICAN CIVIL LIBERTIES FOUNDATION
OF PENNSYLVANIA

By: 

Sara J. Rose, Esquire

Dated: January 6, 2010