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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2819-10T3

SOMERSET DEVELOPMENT, LLC,
and RALPH ZUCKER,

Plaintiffs-Appellants,

v.

"CLEANER LAKEWOOD,"[1] JOHN DOE,
and JOHN DOE NOS. 1-10,
fictitious persons and entities,

Defendants-Respondents.

Submitted October 13, 2011 - Decided September 26, 2012

Before Judges Axelrad, Sapp-Peterson and Ostrer.

On appeal from the Superior Court of New Jersey, Chancery Division, General Equity, Ocean County, Docket No. C-119-10.

Giordano, Halleran & Ciesla, attorneys for appellants (Robert J. Feinberg, of counsel and on the brief; Matthew N. Fiorovanti, on the brief).

Hartman & Winnicki, P.C., attorneys for respondent (Richard L. Ravin, of counsel and on the brief; Shifra Apter, on the brief).

PER CURIAM

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[1] "Cleaner Lakewood" appears in quotation marks in the verified complaint filed June 21, 2010.

Plaintiffs appeal from the trial court order quashing a subpoena served upon Google, Inc., an internet service provider (ISP). Plaintiffs also appeal from the denial of their cross-motion seeking to compel defense counsel to disclose the identity of the anonymous defendants counsel represents. We affirm.

Plaintiff, Ralph Zucker, is a real estate developer and the president of plaintiff, Somerset Development, LLC (Somerset), which has purchased and developed real estate in the Township of Lakewood. In June 2010, plaintiffs learned, through discussions with members of the Lakewood community, that defendants, Cleaner Lakewood, John Doe, and John Doe Nos. 1-10, posted statements on a website blog[2] hosted by Google. Defendants moderated a blog through Google's blogspot service.[3]

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[2] A blog is "'a type of personal column posted on the Internet. . . . Some blogs are like an individual's diary while others have a focused topic, such as recipes or political news.'" Too Much Media, LLC v. Hale, 206 N.J. 209, 219 n.1 (quoting Douglas Downing, Dictionary of Computer and Internet Terms at 48 (10th ed. 2009) (defining online "bulletin board systems")).

[3] The blog was hosted by Google, which provides the blog site free of charge, subject to Google's terms. The blog is located at Universal Resource Locator ("URL"): http://www.blogspot.com ("Blogspot"). Blogspot allows individuals to create and moderate online forums. The moderator posts statements to the website, and the public is then allowed to post comments on the blog. Blogspot allows a blog moderator to accept or remove comments but does not allow editing or modification by the moderator.

Plaintiffs filed a complaint against Cleaner Lakewood and the anonymous individuals who posted blogs as well as comments (collectively referred to as "posters") on Cleaner Lakewood's website (posters), seeking both damages and injunctive relief, but they could not serve the complaint on any defendants because their identities were unknown. Plaintiffs served a subpoena on Google, seeking the production of data leading to the identification of defendants. The blog operators and an unknown number of anonymous posters filed a motion to quash the Google subpoena, and plaintiffs filed opposition to the motion as well as a cross-motion to compel defense counsel to identify the anonymous defendants whom counsel represented. Relying upon Dendrite International, Inc. v. John Doe No.3, 342 N.J. Super. 134 (App. Div. 2001), Judge Buczynski found the subpoena was overbroad, and the offending postings were "more or less opinion[.]" He "did not find there was any suggestion that a crime had been committed. There was some objection as to what may have been done or may not have been done." The court stated further:

> So when one looks at those statements and looks at the facts[,] . . . there's a great deal of cultural slang being used here and arguments that are being made in the community, when the [c]ourt is balancing the First Amendment versus whether or not these comments are actually actionable, I find

> that most of them are actually not actionable at all.

The motion judge also denied plaintiffs' cross-motion seeking to compel defense counsel to identify the anonymous persons he represented, finding that it was premature to compel such disclosure.

On appeal, plaintiffs raise the following points for our consideration.

> POINT I
> THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' CROSS-MOTION TO COMPEL COUNSEL FOR DEFENDANTS TO IDENTIFY WHICH ANONYMOUS POSTERS WERE REPRESENTED AND IN DENYING [THE] CROSS-MOTION TO COMPEL GOOGLE TO COMPLY WITH THE GOOGLE SUBPOENA AS TO THOSE DEFENDANTS WHO WERE NOT REPRESENTED AND HAD NOT JOINED IN THE MOTION TO QUASH.
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> POINT II
> THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS HAD NOT PRESENTED PRIMA FACIE CLAIMS OF DEFAMATION AS REQUIRED UNDER THE DENDRITE TEST.
>
> A. THE STATEMENTS PUBLISHED BY CLEANER LAKEWOOD AND THE ANONYMOUS POSTERS ARE DEFAMATORY.
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> B. THE TRIAL COURT ERRED IN FINDING PLAINTIFFS FAILED TO DEMONSTRATE ACTUAL MALICE ON THE PART OF CLEANER LAKEWOOD AND THE ANONYMOUS POSTERS IN PUBLISHING DEFAMATORY STATEMENTS BASED ON [ITS] FINDING OF "QUASI-PUBLIC FIGURE" STATUS OF PLAINTIFFS.
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> POINT III
> THE TRIAL COURT INCORRECTLY FOUND THAT THE GOOGLE SUBPOENA WAS OVERBROAD.

POINT IV

THE TRIAL COURT FAILED TO APPRECIATE THE APPLICATION OF THE PRESUMED DAMAGES DOCTRINE.

The trial court's determination that no actionable defamation was established, triggering an obligation by the ISP to disclose the identity of the bloggers, was a conclusion of law, which we review de novo, and we owe no special deference to the motion judge's legal conclusions. Juzwiak v. Doe, 415 N.J. Super. 442, 447 (App. Div. 2010) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Anonymous speech is generally protected by the United States Constitution. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 198-200, 119 S. Ct. 636, 645-46, 142 L. Ed. 2d 599, 613-14 (1999). "The right to speak anonymously is protected by the First Amendment and 'derives from the principle that to ensure a vibrant marketplace of ideas, some speakers must be allowed to withhold their identities to protect themselves from harassment and persecution.'" Juzwiak v. Doe, 415 N.J. Super. 442, 447 (App. Div. 2010) (quoting Matthew Mazzotta, Note, Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers (Balancing Act), 51 B.C.L. Rev. 833, 833 (2010) (footnote omitted)). However, people do not have an absolute right to speak anonymously, as "[p]laintiffs have the right to seek redress for legally

cognizable speech and speakers cannot escape liability simply by publishing anonymously." Ibid. (quoting Balancing Act, supra, 51 B.C.L. Rev. at 833-34).

With respect to website operators and ISPs, the Communication Decency Act, 47 U.S.C.A. §§ 223 to -231, generally provides immunity to website operators who republish comments of others or block certain offensive materials. 47 U.S.C.A. § 230(c)(1) and (2). In Dendrite, supra, 342 N.J. Super. at 141, we stated that

> [w]hen faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses[,] [t]he trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

In Dendrite, *we* recognized that protecting the anonymity of online posters helps prevent embarrassment and harassment. We relied upon a federal court case from California, which reasoned that "'[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and

thereby gain the power of the court's order to discover their identity.'" Id. at 151 (quoting Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999)).

Based on the conflicting needs to prevent defamation while concurrently protecting internet users' free speech rights, we set forth a four-prong test that plaintiffs must satisfy when ISPs or other entities/individuals are subpoenaed for the purpose of identifying anonymous posters. We address each prong.

First, a plaintiff must "undertake 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 the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application." Id. at 141. The "notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board." Ibid.

Defendants contend that simply posting the Google subpoena under each disputed post and comment was insufficient because the anonymous persons had to log into the website in order to learn about the lawsuit and subpoena. In Columbia, the court required the plaintiffs to "identify all previous steps taken to locate the elusive defendant." Columbia, supra, 185 F.R.D. at

579. We did not adopt this approach in Dendrite. Rather, we stated the plaintiffs must "demonstrate that [they] have made a good-faith effort to comply with the requirements of service of process." Dendrite, supra, 342 N.J. Super. at 151-52.

Here, the motion judge was satisfied plaintiffs took every possible step to provide notice to the anonymous defendants and that the Google subpoena was issued to determine their identity. We are satisfied the judge properly concluded there was no more effective method to contact the anonymous posters because they provided no information other than their user names. As such, the first Dendrite prong was satisfied.

Second, a plaintiff must "identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech." Id. at 141. While plaintiff included blog posts that did not specifically reference plaintiffs, the specific comments that plaintiff claims were defamatory were highlighted, thus satisfying the second Dendrite prong.

The third prong directs the court to determine whether or not the plaintiff has established a prima facie cause of action that forms the basis for the relief sought against the anonymous defendants. Dendrite, supra, 342 N.J. Super. at 141. Plaintiffs alleged they were defamed by defendants. A prima

facie case of defamation requires a plaintiff to establish the following: "[I]n addition to damages, the elements of a defamation claim are: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher." DeAngelis v. Hill, 180 N.J. 1, 12-13 (2004).

False statements about public figures, public officials or matters of public interest are not actionable unless the statements are published with actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706-07 (1964); DeAngelis, supra, 180 N.J. at 13; Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 165 (1999). "To satisfy the actual malice standard, [a] plaintiff must establish by clear and convincing evidence . . . that [the] defendant published the statement with 'knowledge that it was false or with reckless disregard of whether it was false.'" DeAngelis, supra, 180 N.J. at 13 (quoting Sullivan, supra, 376 U.S. at 279-80, 285-86, 84 S. Ct. 726, 729, 11 L. Ed. 2d at 706-07, 710) (citation omitted); Gulrajaney v. Petricha, 381 N.J. Super. 241, 255 (App. Div. 2005). "A publisher's hostility or ill will is not dispositive of malice." DeAngelis, supra, 180 N.J. at 14.

"Whether the meaning of a statement is susceptible of a defamatory meaning is a question of law for the court." Ward v. Zelikovsky, 136 N.J. 516, 529 (1994). That determination requires a court to "consider the content, verifiability, and context of the challenged statements." Ibid. This means the court's analysis must focus upon the "'fair and natural meaning that will be given [to the statements] by reasonable persons of ordinary intelligence.'" DeAngelis, supra, 180 N.J. at 14 (quoting Ward, supra, 136 N.J. at 529, and Romaine v. Kallinger, 109 N.J. 282, 290 (1988)). In that regard, while the "use of epithets, insults, name-calling, profanity and hyperbole may be hurtful to the listener and are to be discouraged, . . . such comments are not actionable." Ibid. (citing Ward, supra, 136 N.J. at 529-30).

The "verifiability" analysis requires a court to determine whether the statement is "one of fact or opinion." Ibid. Expressions that clearly reflect opinion on matters of public concern are protected and are not actionable. Kotlikoff v. Cmty. News, 89 N.J. 62, 68-69 (1982). On the other hand, "[t]he more fact based the statement, the greater likelihood that it will be actionable." DeAngelis, supra, 180 N.J. at 14-15. Conversely, where the statement consists of "[l]oose, figurative or hyperbolic language, [it] will be . . . more likely to be

deemed non-actionable as rhetorical hyperbole or a vigorous epithet." Id. at 15 (citations omitted).

Here, Judge Buczynski concluded no reasonable person could read the statements and attribute criminal behavior to plaintiffs. We agree. The publications alleged that Zucker "short changed the tax payers with millions" and "cost the taxpayers when [he] took a piece of township land on County Line Road without paying for it." Anonymous commenters wrote that Zucker "is behind all the anti hh propaganda going around[,]" and that he "paved the way for the senior vote by stealing 6 million in tax dollars." Other commenters called him a "rip off artist" and an "under the table crook." These statements primarily reflect the opinions of the authors and at best are "rhetorical hyperbole" on matters of public concern involving a public figure. As such, the published statements were non-actionable, and disclosure of the identity of the anonymous defendants was not warranted.

Because the offending publications are not actionable, plaintiffs are not entitled to the identity of the anonymous defendants represented by defense counsel.

Affirmed.