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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5060-08T3

A.Z. (a minor) and B.Z. (on behalf of A.Z. as parent),

Plaintiffs-Appellants,

v.

JOHN DOE and JANE DOE,

Defendants-Respondents.

Argued November 9, 2009 - Decided March 8, 2010

Before Judges Lisa, Baxter & Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6469-08.

Carl J. Soranno argued the cause for appellants (Brach Eichler, L.L.C., attorneys; Mr. Soranno of counsel; Mr. Soranno and Bobby Kasolas, on the briefs).

Shifra Apter argued the cause for respondents (Hartman & Winnicki, P.C., attorneys; Richard L. Ravin, of counsel; Mr. Ravin and Ms. Apter, on the brief).

PER CURIAM

Plaintiff A.Z. appeals from a Law Division order that quashed a subpoena she issued to an Internet Service Provider to learn the identity of the person who sent an anonymous email

that allegedly defamed her. Relying on Dendrite International, Inc. v. John Doe, No. 3, 342 N.J. Super. 134 (App. Div. 2001), which imposes a considerable barrier to discovering the identity of a person who anonymously posts defamatory material on the Internet, the trial judge quashed the subpoena.

In Dendrite, we held that where an anonymous person posted defamatory speech on broadly-available Internet message boards, a plaintiff would be entitled to an order divulging the identity of the anonymous author only if the plaintiff: provides sufficient information to demonstrate that his or her cause of action could withstand a motion to dismiss for failure to state a claim, supported by prima facie evidence to support each element of such cause of action (third prong); and establishes, through a balancing test, that the necessity for the disclosure of the anonymous defendant's identity outweighs the defendant's First Amendment right of anonymous free speech (fourth prong). Id. at 141-42.

The judge concluded plaintiff had established that her cause of action for defamation could withstand a motion to dismiss for failure to state a claim upon which relief can be granted, Rule 4:6-2(e), and that plaintiff had produced prima facie evidence supporting each element of her cause of action, as required by Dendrite's third prong, Dendrite, supra, 342 N.J.

Super. at 141. Nonetheless, the judge granted Doe's motion to quash the subpoena because, applying the balancing test set forth in Dendrite's fourth prong, id. at 142, he concluded that Doe's cause of action suffered from so many weaknesses that disclosure of Doe's identity was unwarranted when balanced against Doe's First Amendment right of anonymous free speech.

Plaintiff's principal claim on appeal is that the judge's application of the Dendrite fourth prong balancing test was flawed, thereby requiring reversal. We do not reach that claim because we are satisfied, based upon our de novo review of the record, that the judge erred when he concluded that plaintiff had established a prima facie cause of action for defamation. That failure of proof entitled Doe to an order quashing plaintiff's subpoena. We thus affirm the order that so provided, but do so upon different grounds from those expressed by the trial judge.

I.

Plaintiff A.Z.[1] was a high school student, and was a member of the school's "Heroes & Cool Kids" program. The club was

[1] A.Z.'s mother, B.Z., is also named as a plaintiff on behalf of her minor daughter. All further references in this opinion to plaintiff shall signify A.Z.

comprised of students of high academic achievement, who pledged to maintain standards of exemplary personal conduct.

On May 29, 2008, Dominick Gliatta, the faculty adviser, received an anonymous email signed "A concerned parent."[2] Referencing the "Heroes & Cool Kids" club, the writer stated:

> Dear Mr. Gliatta[,]
>
> I am, well, a concerned parent. I wish not to have my or my child's identity known.
>
> My child has informed me about a Heroes and Cool Kids program at school. I am aware of the prestige honor [sic] of being a member. I am also aware of the contract that each member has signed. However, I would like to inform you that several [sic] of your Heroes and Cool Kids are infact [sic] breaking their contracts, and breaking the law. Attached are a few pictures taken by the students themselves. All are found on www.facebook.com and open to the public.
>
> I support the Heroes and Cool Kids program. But I think the name and focus of the group should be maintained by all members.
>
> Sincerely,
> A concerned parent

The email concluded with a list of the names of seven students who were depicted in the photographs attached to the email, of whom plaintiff was one.

[2] The e-mail address that was displayed was registered with Google's e-mail service.

Of the nine attached www.facebook.com[3] photographs, only one showed plaintiff. It depicted her standing at a ping pong table about to throw a ping pong ball. On the table in front of her are several red plastic disposable beverage cups and approximately seven beer cans. The photograph of plaintiff bore a file name of A.[]Z.[].jpg. From the information in the record, it is impossible to determine who posted the photograph on Facebook. Unlike the photograph of plaintiff, which did not depict her expressly engaging in any illegal activity, the other eight photos depicted students holding beer cans or bottles of alcohol, holding a beer funnel, or appearing to inhale some form of illicit drug.

Upon receipt, Gliatta forwarded the email and attachments to the school principal. Ultimately, the email was disseminated to the school superintendent and to two local police departments. The school and police department investigated the circumstances depicted in the photographs and chose not to prosecute plaintiff.

On August 26, 2008, plaintiff filed a complaint alleging defamation, and named as defendant only the anonymous author, whom she designated as John Doe and Jane Doe. To discover the

[3] Facebook is a social networking Internet website on which users routinely post photographs of themselves.

identity of the anonymous author of the email, plaintiff sought, and obtained, an order to reveal Doe's identity. Google notified plaintiff that the email in question was sent from an IP address assigned to Cablevision, which meant that defendant Doe's Internet service provider was Optimum Online. Optimum Online notified its customer that it had been ordered to reveal his or her identify, whereupon defendant Doe moved to quash the subpoena.

In support of her motion to quash the subpoena, Doe relied on Dendrite, supra, and asserted that anonymous speech is protected by the First Amendment, and that the email in question had not defamed plaintiff because it merely expressed the author's opinion and did not expressly accuse plaintiff of any violation of law. Doe also argued that the email sent to Gliatta was accurate, because by engaging in underage consumption of alcohol, plaintiff had indeed broken the law and had violated her Heroes and Cool Kids contract.

In opposition to Doe's motion, plaintiff argued that she had established a prima facie case of defamation and that her interest in obtaining Doe's identity outweighed any First Amendment concerns Doe had advanced. Plaintiff further maintained that Dendrite was distinguishable because it dealt

with an Internet message board, rather than an email sent only to one person.

In a written opinion, although the judge ultimately concluded that plaintiff had provided sufficient evidence to establish a prima facie case of defamation, he commented that it was a "difficult question." The judge was troubled by "the absence of any certification or affidavit from plaintiff asserting that she has not engaged in underage drinking." Consequently, according to the judge, "there is no evidence that the statement is false." The judge nonetheless found that plaintiff had presented sufficient evidence to establish a prima facie case of defamation. The judge reasoned:

> Evaluating the entire content of the e-mail, the natural inference is that the photographs serve as factual support for the written e-mail. Allegedly they show minors partaking in underage drinking. However, the photograph of the plaintiff does not show her drinking. Rather it shows her holding a ping pong ball appearing to be in the act of throwing it. On the ping pong table are some plastic cups. There is nothing in the photograph which would clearly and distinctly indicate that the plaintiff was drinking alcoholic beverages. Nonetheless, the [c]ourt is cognizant, as expressed by both parties, that this could be a depiction of plaintiff taking part in a drinking game. While the statement could very well turn out to be true and therefore, not defamatory, plaintiff argues that the photograph and e-mail accuse the plaintiff of . . . [violating] N.J.S.A. 2C:33-15 which makes it a misdemeanor for someone under the

> legal age to consume alcoholic beverages. The e-mail lists plaintiff's name along with the other students depicted in the photographs. It is, therefore, not unreasonable to infer that the defendant is accusing the plaintiff of engaging in underage drinking. The [c]ourt concludes for the purpose of evaluating the third prong that there is sufficient evidence to support the cause of action on a prima facie basis.

Turning to the fourth Dendrite prong, id. at 142, the judge concluded that plaintiff failed to establish that the strength of her prima facie case and the necessity for disclosure outweighed Doe's First Amendment right to anonymous free speech. For that reason, the judge concluded that plaintiff was not entitled to an order disclosing Doe's identity.

In applying the fourth Dendrite prong, the judge identified what he perceived as weaknesses in plaintiff's case that caused Doe's interests to outweigh plaintiff's: plaintiff had made no statement that the e-mail was false; the e-mail did not specify that plaintiff had engaged in underage drinking; Doe's e-mail could be considered not a defamatory statement, but rather an opinion sent to the guidance counselor running the program that "the Heroes and Cool Kids program is not working"; Doe sent the e-mail only to the guidance counselor and not to the public at large, creating an issue as to whether plaintiff was entitled to damages for harm to her reputation; because plaintiff could be

characterized as a limited public figure, by reason of her involvement in the Heroes and Cool Kids Program, an elevated standard of proof was applicable and she had not satisfied it; and the doctrine upon which plaintiff relied, slander per se, was a "tort law relic" held in disrepute. The judge's ruling was memorialized in a written order of February 24, 2009. The judge denied plaintiff's ensuing motion for reconsideration. Her appeal is before us on an interlocutory basis by leave granted.

On appeal, plaintiff argues the trial court erred because this case does not involve publication in a public forum, but rather a direct private telecommunication, and therefore Dendrite does not apply. She also maintains that if Dendrite does apply, the judge's application of Dendrite's fourth prong constitutes reversible error. Doe urges us to affirm the order under review, contending that the Dendrite standard applies and the trial judge applied it properly. As a threshold matter, Doe also argues before us, as she did in the trial court, that plaintiff failed to make out a prima facie case of defamation.

II.

We owe no deference to the judge's legal conclusions; our review is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We turn first to the judge's conclusion that plaintiff had produced prima facie evidence supporting each element of her cause of action for defamation, as required by Dendrite's third prong. Doe contends that because the information contained in his or her e-mail was true, plaintiff's defamation claim must fail. Plaintiff, on the other hand, contends that because Doe included plaintiff's photograph, in which plaintiff was doing nothing unlawful or illegal, and placed that photograph among a group of photographs of seven other students engaging in the use of narcotics and in underage drinking, Doe had falsely accused plaintiff of engaging in the same unlawful or illegal behavior as the others. Plaintiff maintains that the e-mail and photographs are "a false and defamatory attack upon [her] reputation and image since the statements made by [Doe] were false and . . . injured [her] reputation."

"A defamatory statement is one that is false and 'injurious to the reputation of another' or exposes another person to 'hatred, contempt or ridicule' or subjects another person to 'a loss of the good will and confidence' in which he or she is held by others." Romaine v. Kallinger, 109 N.J. 282, 289 (1988) (quoting Leers v. Green, 24 N.J. 239, 251 (1957)). To establish a prima facie case of defamation, a plaintiff must present proof tending to establish each of the following elements: 1)

defendant made a defamatory statement of fact about the plaintiff; 2) the statement was false; 3) the statement was communicated to a third party; and 4) defendant made the statement while either knowing that it was false, or while failing to exercise due care to ascertain the truth or falsity of the statement. Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009).

Turning to the first element of defamation, we are satisfied that the e-mail, which listed plaintiff's name among the students who allegedly were "breaking their contracts, and breaking the law" is defamatory. Such statement unquestionably has the capacity to injure plaintiff's reputation or subject her to the "loss of the good will and confidence" in which she is held by others. Romaine, supra, 109 N.J. at 289. Additionally, the remarks in question are a statement of fact, and not an immune expression of opinion, because they "'suggest[] specific factual assertions that could be proven true or false.'" Leang, supra, 198 N.J. at 585 (quoting DeAngelis v. Hill, 180 N.J. 1, 14 (2004)). Thus, we are satisfied that plaintiff presented prima facie proof satisfying the first element of a cause of action for defamation because the statements in the e-mail constituted a statement of fact that had the capacity to injure plaintiff's reputation.

We turn to the second Leang factor, which requires prima facie evidence that the statement was false. "A truthful statement will not support a cause of action based on defamation, and the truth of the statement is an absolute defense to a claim of defamation." G.D. v. Kenny, 411 N.J. Super. 176, 187 (App. Div. 2009). "True statements are absolutely protected under the First Amendment." Ward v. Zelikovsky, 136 N.J. 516, 530 (1994). Significantly, "[a] statement can be 'fairly accurate' and still be considered the truth as a defense to a defamation claim." G.D., supra, 411 N.J. Super. at 193 (quoting LoBiondo v. Schwartz, 323 N.J. Super. 391, 407 (App. Div.), certif. denied, 162 N.J. 488 (1999)). Thus, to satisfy her obligation of presenting prima facie proof to satisfy the second prong of Leang, plaintiff must demonstrate that Doe's accusation that she was "breaking [her]contract[], and breaking the law" was false.

Although the judge recognized that plaintiff had presented "no evidence that the statement is false," the judge nonetheless concluded that plaintiff had presented sufficient evidence of each element of a cause of action for defamation. To the extent that the judge concluded that plaintiff had presented prima facie evidence that Doe's statement was false, such conclusion was faulty for several reasons.

First, as the judge recognized, plaintiff has never submitted any proof that Doe's statement was false.[4] For example, she has never provided a sworn statement that she was not consuming alcohol while underage, that the photograph was a forgery, that the photograph had been altered, or that she was not the person who was depicted in the photograph Doe sent to Gliatta. Nor did plaintiff submit an affidavit from any of the other teenagers at the party stating that plaintiff did not consume any of the alcoholic beverages that are shown in the photographs.

Second, although plaintiff argues that the two police departments that investigated Doe's allegation of underage drinking determined that plaintiff had not engaged in such conduct, plaintiff has presented no proof of any such conclusion by law enforcement. Her own statement to that effect is clearly hearsay, which is not competent evidence. See N.J.R.E. 801(c), 802.

Third, even if police did not decide to charge plaintiff with underage drinking, as plaintiff claims, we reject plaintiff's argument that a decision by law enforcement authorities not to charge her with a violation of N.J.S.A.

[4] Although plaintiff's complaint alleged falsity, we note that the complaint was not a verified complaint and was therefore not signed by plaintiff.

2C:33-15[5] establishes the falsity of Doe's allegation that she engaged in underage drinking. Unquestionably, law enforcement authorities are afforded broad discretion in deciding whether to initiate a prosecution. State v. Kraft, 265 N.J. Super. 106, 111 (App. Div. 1993). Thus, law enforcement's decision to refrain from charging plaintiff with a violation of N.J.S.A. 2C:33-15 does not establish that plaintiff was innocent of engaging in underage drinking. It merely establishes that for whatever reason, police chose not to charge her.

Fourth, the photograph of plaintiff that Doe attached to her e-mail appears to corroborate Doe's statement that plaintiff was "breaking the law." As we have noted, N.J.S.A. 2C:33-15 makes it a violation of law for a person under the age of twenty-one to consume or possess an alcoholic beverage. While the photograph does not depict plaintiff consuming alcohol, a reasonable interpretation of the photograph demonstrates that plaintiff was in possession of the beer stacked on the ping pong table next to her.

A person possesses an item if he "knowingly procured or received the [item] possessed or was aware of his control

[5] N.J.S.A. 2C:33-15(a) provides that any person who "knowingly possesses" or "knowingly consumes" an alcoholic beverage when under the legal age to purchase alcoholic beverages is guilty of a disorderly persons offense.

thereof for a sufficient period to have been able to terminate his possession." N.J.S.A. 2C:2-1(c). While plaintiff was not in actual possession of the beer because she did not have physical or manual control of it, State v. Spivey, 179 N.J. 229, 236 (2004), her proximity to the beer and her presence at a party where beer and other alcoholic beverages were being consumed by high school students is consistent with her ability to exercise immediate control and dominion over the beer, which would establish constructive possession of an item she was prohibited by law from possessing. See State v. Schmidt, 110 N.J. 258, 268 (1988). That being so, plaintiff cannot demonstrate the falsity of Doe's statement that plaintiff was "breaking the law."

Fifth, and perhaps most compelling, are the additional photographs Doe submitted in support of his or her motion to quash the subpoena. As Doe explained in the certification that he/she filed in support of the motion, Doe had seen several other photographs of plaintiff on www.facebook.com, all of which showed plaintiff "holding and drinking alcoholic beverages." Doe certified that he/she "had seen pictures like these prior to sending the e-mail. It is obvious to anyone looking at these photos that [plaintiff] is consuming alcohol with her friends,

and therefore, because of her age (under 21 years of age), is breaking the law."

The photographs in question, which Doe attached to her certification in support of her motion to quash the subpoena, show plaintiff: holding a bottle of Corona Light beer in her hand; holding a bottle of Corona Light beer up to, and touching her mouth; in the act of twisting off the cap on a bottle of Smirnoff Vodka; holding a mixed drink in each hand; and standing next to friends while holding a beverage cup in one hand, while the friend holds the bottle of Smirnoff Vodka against plaintiff's abdomen. All of these photos were uploaded to the www.facebook.com website either by plaintiff or by her sister.

Although the judge chose not to consider these additional photographs when he decided Doe's motion to quash the subpoena, they are part of the record on appeal, as they were filed with the trial court and are contained in Doe's appendix. Plaintiff has never sought to suppress them or in any other way remove them from our consideration. Each of these additional photos was in existence, and had been viewed by Doe, before he/she sent his/her e-mail to Gliatta. These additional photographs make it abundantly clear that if there was any doubt about the truth of Doe's assertion that plaintiff was "breaking [her] contract[],

and breaking the law," these additional photographs lay any such doubt to rest.

Thus, we consider all of the photographs in conjunction with plaintiff's failure to present any certification of her own, or from any other witness, certifying that she was not consuming alcoholic beverages on the occasion that is depicted in the original photograph Doe attached to the e-mail. Having done so, only one conclusion can be drawn: plaintiff has not presented prima facie proof that Doe's statement was false. To refute Doe's numerous photographs of plaintiff consuming alcoholic beverages -- all of which support the truth of Doe's statement in her e-mail that plaintiff was "breaking [her] contract[], and breaking the law" -- plaintiff has presented the most tenuous and insubstantial proof imaginable, the mere fact that police chose not to charge her with underage drinking. No reasonable factfinder, when presented with plaintiff's proofs on the one hand, and Doe's on the other, could conclude that Doe's statement was false.

Therefore, we conclude the judge erred when he held that plaintiff had established a prima facie case of defamation. The only reasonable conclusion to be drawn is that Doe's statements were the truth. As we have already observed, "[a] truthful statement will not support a cause of action based on

defamation, and the truth of the statement is an absolute defense to a claim of defamation." G.D., supra, 411 N.J. Super. at 187. Consequently, we reverse the Law Division's finding that plaintiff established a prima facie case of defamation.

In light of that determination, we need not decide the other arguments advanced by plaintiff, which include her claim that the judge made numerous errors of law when he engaged in the balancing test required by Dendrite's fourth prong. Nor is it necessary for us to decide whether Dendrite should even be applied in circumstances such as this where Doe did not avail himself or herself of the form of worldwide internet communication that the defendant in Dendrite had used. Dendrite, supra, 342 N.J. Super. at 151.

We are satisfied that regardless of whether the balancing test embodied in Dendrite's fourth prong is applied or not, no plaintiff is entitled to an order unmasking an anonymous author when the statements in question cannot support a cause of action for defamation. Although the judge reached the correct result when he quashed the subpoena that would have required Optimum Online to reveal Doe's identity, we disagree with his reasoning. Nonetheless, we are satisfied that, because plaintiff cannot establish that Doe's statements were false, plaintiff has not established a prima facie cause of action for defamation and is

therefore not entitled to learn Doe's identity. We thus affirm the order quashing the subpoena.[6]

Affirmed.

[6] See Isko v. Planning Bd. of Twp. of Livingston, 51 N.J. 162, 175 (1968) (holding that an order or judgment will be affirmed on appeal if it is correct, even though the court gave the wrong reasons for it).