THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2009 Term
August Session

Docket No. 2009-0262

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

RULE 7 MANDATORY APPEAL FROM ROCKINGHAM COUNTY SUPERIOR COURT

REPLY BRIEF OF RESPONDENT-APPELLANT IMPLODE-EXPLODE HEAVY INDUSTRIES, INC.

By their Attorneys

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I. REPOSTING OF THE 2007 LOAN CHART FALLS SQUARELY WITHIN THE PROTECTION OF THE FIRST AMENDMENT

Mortgage Specialists, Inc. ("MSI") argues that the trial court's injunction against reposting of the 2007 Loan Chart on Implode Explode Heavy Industries, Inc.'s (the "Appellant's") website is not a prior restraint in violation of the First Amendment. But the First Amendment protects the publication of information lawfully obtained by the press, regardless of whether the sanction is prior or post-publication. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-02 (1979); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996); *Ford Motor Co. v. Lane*, 67 F.Supp.2d 745 (E.D.Mich. 1999).

MSI misstates the law when it asserts that the confidentiality of the 2007 Loan Chart makes publication *per se* unlawful. In case after case, the United States Supreme Court has affirmed that the lawfulness of the publication does not depend on the nature of the information itself, but rather whether the information was *obtained* lawfully by the publisher—even when the information in question is deemed confidential, privileged, or protected from publicity by statute. *See, e.g., Cox v. Cohn*, 420 U.S. 469, 496-97 (1975); *Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989); *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001). MSI has offered not a single case in which a court has upheld an injunction prohibiting a news organization from publishing documents in its possession that it has obtained lawfully.[1] The trial court in this case found that Appellant obtained the 2007 Loan Chart lawfully, and MSI has not challenged the trial court's finding. *See* Order at 2.

[1] Of equal note is the fact that, despite the door left open by the Supreme Court to enjoin or sanction a news organization for the publication of proscribed information that it has obtained *unlawfully*, *see Florida Star*, 491 U.S. at 535 n.8, there appears to be no case where this has occurred.

MSI's reliance on *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) is misplaced. Unlike the speech in this case, the speech in *Pittsburgh Press*—discriminatory help-wanted advertisements—was found by the Supreme Court to be a "commercial proposal" where the proposed "commercial activity" was illegal. 413 U.S. at 388-89 ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."). Thus, the advertisements were not due the degree of First Amendment protection accorded to ordinary speech. The 2007 Loan Chart is not akin to the discriminatory advertisements at issue in *Pittsburgh Press*, and that case is no authority for the trial court's injunction.

MSI also offers no support for its argument that the trial court may permissibly enjoin Appellant from reposting the comments of Brianbattersby. MSI fails to counter the basic principle that "equity will not enjoin a libel," and that the remedy for defamation is an action for damages at law, not an injunction. *Metropolitan Opera Co. v. Local 100*, 239 F.3d 172, 177 (2nd Cir. 2001); *see* 42 Am.Jur.2d §96.

II. MSI'S CLAIMED CONFIDENTIALITY AND PRIVACY INTERESTS DO NOT OUTWEIGH APPELLANT'S RIGHT TO PUBLISH UNDER THE FIRST AMENDMENT AND THE NEW HAMPSHIRE CONSTITUTION.

A. The lack of a stenographic record of the in-chambers hearing in this case has no bearing on Appellant's ability to challenge the trial court's rulings.

MSI argues that Appellant's decision to proceed without an evidentiary hearing precludes a challenge to the trial court's ruling that the publication of the 2007 Loan Chart was unlawful and the Brianbattersby comments were defamatory. This is incorrect for two reasons. First, the trial court's Order was rendered on the pleadings submitted.

Order at 5 ("The parties have agreed that the court can resolve the issues raised in this litigation without the need of an evidentiary hearing. Both parties were given an opportunity to file whatever pleadings they were desirous of filing on these issues. Upon review of *those pleadings*, the Court enters the following Order") (emphasis added). The pleadings included the 2007 Loan Chart, the Brianbattersby comments, and extensive briefing on the legal questions involved. Order at 4, 5; *see, generally,* Appendix to Appellant's Brief ("App. ___"); Special Appendix. Therefore, the trial court had a paper record upon which to rule, and that record is before this Court on review. Second, the trial court's ruling that the publication of the 2007 Loan Chart was *unlawful* is a *legal conclusion*, subject to *de novo* review by this Court. *Blagbrough Family Realty Trust v. A & T Forest Products, Inc,*155 N.H. 29, 33 (2007); *cf. State v. Theriault*, 158 N.H. 123, 125 (2008) (constitutional issues reviewed *de novo*). Therefore, the fact that there was no stenographic record of the hearings in this case is immaterial.

B. The trial court's ruling that the publication of the 2007 Loan Chart was unlawful does not take into account the fundamental interests protected by the First Amendment and is not supported by law.

MSI's argument that the equitable relief it sought does not depend on a private cause of action under RSA 383:10-b ignores the requirement that the party seeking the injunction be likely to succeed on the merits of its claim. *ATV Watch v. New Hampshire Dept. of Resources and Economic Development*, 155 N.H. 434, 437-438 (2007). Relying on *Kowalski v. Cedars of Portsmouth Condo. Assoc.*, 146 N.H. 130, 134 (2001), MSI argues it is "entitled to equitable relief...regardless of whether the statute creates a private right of action." Brief of Mortgage Specialists at 13 ("MSI Brief ___"). *Kowalski* does not state so general a principle of law, however. In *Kowalski*, the plaintiff

had paid fees to his condominium association for the service of listing his property for sale or rent. He sought the recovery of these fees on the ground that the association was not a licensed real estate broker, and, under RSA 331-A, his agreement to pay those fees was void. 146 N.H. at 131-2 (citation omitted). The Court affirmed the trial court's award of those fees to Kowalski on the theory of unjust enrichment, because the association had no license and could not legally accept fees for its services. *Id.* at 134. Thus, Kowalski's claim for unjust enrichment was an independent cause of action arising from the unique circumstances of the case—circumstances not applicable here. *Id.* at 131-33.

Alternatively, relying upon *Mahan v. N.H. Dept. of Admin. Services*, 141 N.H. 747, 754 (1997), MSI argues that RSA 383:10-b confers a private right of action. *Mahan* does not support MSI, but rather establishes the duty required in a negligence *per se* action. Significantly, "[a]n implicit element of this test is 'whether the type of duty to which the statute speaks is similar to the type of duty on which the cause of action is based.'" *Id.* (citation omitted). In this case, the designation of confidentiality conferred by RSA 383:10-b creates a duty *on the part of the State* to maintain the confidentiality of the documents submitted;[2] but MSI's Verified Petition is predicated on there being a similar duty on the part of unassociated third parties. Thus, the "type of duty to which the statute speaks is [not] similar to the type of duty on which the cause of action is based." *Mahan*, 147 N.H. at 754. At most, *Mahan* sets forth the duty that applies to the Banking Commissioner under RSA 383:10-b, not to Appellant.

[2] *See* Addendum to MSI Brief at 13 (December 22, 2008 Letter from Banking Department stating: "The Banking Department takes confidentiality very seriously. Breach of our confidentiality rules is grounds for dismissal and all new employees receive confidentiality training.")

Furthermore, MSI's policy argument that regulated entities would be discouraged from participating in the examination process if they could not sue third parties for publishing confidential materials ignores the fact that MSI does not voluntarily submit its financial information to the Banking Department. In fact, MSI is subject to examination by statute, *see* RSA 383:9, RSA 383:10, and has an obligation to produce materials for the examination in an open and transparent manner. RSA 397-A:12; *cf. Goode v. New Hampshire Office of Legislative Budget Assistant*, 148 N.H. 551, 555-56 (2002) (rejecting argument that public disclosure of audit results will discourage auditors from being forthcoming about their impressions because statute creates obligation to be forthcoming).

MSI argues that Appellant confused the mode of the alleged invasion of privacy in this case and that the publication of the 2007 Loan Chart constitutes a "public disclosure of private facts." MSI Brief 16. But MSI has not offered a single case in which this particular cause of action has been used to protect the confidential information of a business entity as opposed to a real person. The *Restatement (Second) of Torts* §652D exhaustively explores the contours of this tort action and does not refer to any case in which it has been applied in this manner. The "public disclosure of private facts" tort protects only private information from the lives of real people, not corporations like MSI. *See id.*

Moreover, the only cases relied upon by MSI in support of its "invasion of privacy" claim by "public disclosure of private facts" involve deeply personal and intimate information, such as recorded bedroom conversations, and a person's social security number. *See Hamberger v. Eastman*, 106 N.H. 107, 110 (1964); *Remsberg v.*

Docusearch, 149 N.H. 148 (2003); Brief of Appellant at 10 ("Appellant's Brief ___") (discussing and distinguishing this line of cases). Thus, MSI's argument that Implode confused the form of invasion of privacy in question, and did not apply the correct legal test, is unsupported.[3]

MSI's argument that the public has no legitimate interest in the 2007 Loan Chart is incorrect, because the cease and desist order issued by the New Hampshire Banking Department placed MSI at the center of a public controversy, in the midst of a national melt-down of the mortgage industry. *See Lassonde v. Stanton*, 157 N.H. 582, 591 (2008) ("If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy.")

Whatever MSI's privacy interest might be in the 2007 Loan Chart, this interest is insufficient to justify prohibiting its publication. The implications for the freedom of the press if the Court were to agree with MSI's argument are clear: "[T]he media [would have] the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Florida Star*, 491 U.S. at 536 (citations omitted). Because this would unduly chill protected speech, the remedy lies with better control by the government of its own handling of information, not with a private right of action against the press.

> The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. *Where*

[3] In *Remsberg*, 149 N.H. 148, relied upon by MSI for the proposition that the law protects private facts from public disclosure, the Court applied the test advanced by Appellant in this case (whether a publication would be "offensive to persons of ordinary sensibilities"). This, then, is the test for whether the publication of the 2007 Loan Chart would be an invasion of privacy even under its preferred form of invasion of privacy. The 2007 Loan Chart, *see* Special Appendix, has none of the unique attributes and express statutory and contractual protections granted to the social security number and relied upon by this Court in *Remsberg*. 149 N.H. at 156; *Douglas v. Douglas*, 146 N.H. 205, 208 (2001).

information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.

Id. at 534 (emphasis added).[4]

III. THE NEW HAMPSHIRE NEWSGATHERING PRIVILEGE PROTECTS THE INFORMATION THAT THE TRIAL COURT ORDERED TO BE DISCLOSED IN THIS CASE.

MSI's argument that Appellant is not entitled to the protections of the New Hampshire newsgathering privilege because it is not an "established media entity" ignores the trial court's own findings and betrays the basic principle behind the newsgathering privilege. The trial court found that Appellant operated as a "legitimate publisher of information." Order at 3. MSI did not appeal that finding. In addition, MSI ignores the admonition of *Branzburg v. Hayes*, 408 U.S. 665, 703-04 (1972), that courts must be cautious when decreeing which speakers are "legitimate" and which are not, because the "liberty of the press is the right of the lonely pamphleteer just as much as the large, metropolitan publisher." *Id.* Accordingly, when applying the test from *In re Madden*, 151 F.3d 125, 129-30 (3rd Cir. 1998) (citing *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2nd Cir. 1987)), and relied upon by MSI, the presumption should favor extending the protections of the reporter's privilege, not limiting them. In any case, the evidence describing Appellant's activities demonstrates that Appellant fulfills the test. Compare *Madden*, 151 F.3d at 129-30 (professional wrestling host not protected by newsgathering privilege under *Von Bulow* test) with the activities of Appellant as described in the Order at 1-2 (describing Appellant's activities), App. 31-32 (same), and

[4] This logic applies with equal force to MSI. MSI's argument that RSA 383:10-b's confidentiality provision gives it a right to enforce the confidentiality of documents submitted to the Banking Department would insulate it even from one of its own employees (present or past) releasing the 2007 Loan Chart to third parties. Just as the attorney client relationship cannot be used to privilege information that has been made available to third parties, *see* N.H. Rules of Professional Conduct, R. 1.6, so RSA 383:10-b cannot be used to collaterally insulate information that has fallen into the hands of third parties.

Addendum to MSI Brief 3-4, 7-9 (Order on Motion to Dismiss for Lack of Personal Jurisdiction).

MSI also argues that Appellant failed to discuss *Downing v. Monitor Publishing Co.*, 120 N.H. 383 (1980). *Downing* is factually distinct from this case; but the principles set forth in *Downing* actually support Appellant's argument. Specifically, Appellant argued that in order to justify piercing the newsgathering privilege, MSI would have to show that the identity of the anonymous source was relevant to a right that MSI sought to enforce. Appellant's Brief 23. In *Downing*, this condition was fulfilled because the plaintiff had a substantive libel claim against the defendant, the Concord Monitor, from whom it sought disclosure. Contrast the Monitor in *Downing* with Appellant here—Appellant is only a party to this litigation in the sense that it has been named in a suit for injunctive relief; MSI has admitted from the start that it has no substantive claim against Appellant. Order at 2. If MSI's argument were to be embraced by this Court, it would eviscerate the newsgathering privilege, because any party could simply name a news organization in the suit to seek injunctive relief and thereby thwart the privilege.

IV. THE *DENDRITE* STANDARD FOR UNMASKING AN ANONYMOUS ONLINE POSTER IS FULLY CONSISTENT WITH THE APPROACH TO ANONYMOUS SPEECH UNDER NEW HAMPSHIRE LAW.

The *Dendrite* standard is consistent with New Hampshire's approach to protecting anonymous speech[5]. Like the *Dendrite* standard, the New Hampshire newsgathering privilege seeks to balance the right of a petitioner for redress against the respondent's First Amendment and New Hampshire constitutional rights to free speech. *See* Appellant's Brief 21-24; *Downing*, 120 N.H. at 385. In urging the Court to apply the

[5] *See Dendrite International v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), as further modified by *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005) and *Independent Newspapers v. Brodie*, 966 A.2d 432, 440 (Md. 2009).

Dendrite standard in determining whether to unmask an anonymous poster, Appellant is only asking the Court to extend the principles of New Hampshire's approach to anonymous speech to the specific context of the anonymous online commenter.

In determining whether Brianbattersby's comment constitutes defamation, the comment must be read in its entirety. *Thomas v. Telegraph Publishing Co.*, 155 N.H. 314, 336 (2007); *see* Addendum to MSI Brief at 1. The comment was offered in response to the article about MSI, written by Appellant, that detailed a cease and desist order issued by the New Hampshire Banking Department, including the allegations and fines against MSI and Michael Gill that were described in the cease and desist order. *Id.* MSI has not contested the truth of the assertions in the Appellant's article. Order at 2-3. Thus, regarding the majority of the posting, Brianbattersby "was simply presented with a set of hypothetical facts which were disclosed in the article and [he] rendered an opinion limited to those facts." *Thomas*, 155 N.H. at 339.

Such opinion not being actionable, the only apparent basis for a claim of defamation is the statement by Brianbattersby that "[Michael Gill] was caught for FRAUD back in 2002 FOR SIGNING BORROWERS NAMES and bought his way out." App. 19; *see* Addendum to MSI Brief at 1. MSI argues that the context of the entire comment and the reference to the attached article give MSI a cause of action for libel for this post. That is not the law. A corporation does not have a cause of action for defamation when the statement is "of and concerning" an officer. *Rest. (2d) Torts* §561; *see Kirch v. Liberty Media Group*, 449 F.3d 388, 398 (2nd Cir. 2006); *Carlucci v. Poughkeepsie Newspapers, Inc.*, 442 N.E.2d 442 (N.Y. 1982). This is particularly the case here, where the trial court stated that the Brianbattersby comments were "allegations

about the petitioner's president," Order at 2, and the record does not show that Gill was MSI's president in 2002, the year in which Brianbattersby alleges that Gill committed fraud.

V. MSI OFFERS NO SUPPORT FOR THE ASSERTION THAT APPELLANT IS PRESUMPTIVELY THE AUTHOR OF COMMENTS POSTED BY ONLINE READERS, AND THUS IS NOT PROTECTED BY THE IMMUNITY GRANTED IN §230 OF THE COMMUNICATIONS DECENCY ACT[6]

Relying upon *Downing*, 120 N.H. at 387-88, MSI argues that unless Appellant discloses the identity of Brianbattersby, Appellant must be presumed to be the author.[7] However, the passage in question addresses statements *made by the news organization*, based upon anonymous sources. *Id.* Each of the cases relied upon by MSI suffers from the same defect: the allegedly tortious statements were, as a matter of record, made by the publisher itself. MSI cannot credibly argue—and indeed, has never made the assertion until now—that Appellant *is* Brianbattersby. But even if MSI had made that argument, accepting MSI's premise would completely eviscerate 47 U.S.C. §230, and make an end-run around the careful balancing of interests that courts have universally adopted in determining whether to unmask an anonymous online poster.

In conclusion, for the reasons set forth herein and in Appellant's Brief, Appellant requests that the Court vacate the trial court's order and dismiss the case.

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[6] 47 U.S.C. §230, the Communications Decency Act, does not immunize a website against liability arising from its own content. *Doe v. Friendfinder Network, Inc.*, 540 F.Supp.2d 288, 297 (D.N.H. 2008).

[7] MSI's reference to *Blumenthal v. Drudge*, 992 F.Supp. 44, 46 (D.D.C. 1998) is confusing. That opinion ruled upon two legal questions: defendant AOL's motion for summary judgment based upon 47 U.S.C. §230, and defendant Matt Drudge's Objection to Personal Jurisdiction. Nowhere in *Blumenthal* does the defendant, Drudge, make the argument that he is immunized by §230 from liability for allegedly libelous content he placed on his website, which was hosted by AOL. If anything, the court's ruling that AOL is immunized under §230 for content placed on its servers by Defendant Drudge supports Implode-Explode in this case.

Respectfully submitted,

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Certificate of Service

I, Jeremy D. Eggleton, certify that on this the 6th day of August, 2009, I forwarded two copies of this brief to Alexander Walker, counsel for the petitioner-appellee, at the law offices of Devine, Millimet and Branch, P.A., by first class and electronic mail.

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