IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

DONALD R. SWARTZ and TERRY KELLER SWARTZ	)	
Plaintiffs,	)	**No. 08C431**
vs.	)	
JOHN DOE #1, JOHN DOE #2, and JOHN DOE #3	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR RESPONSE IN OPPOSITION TO DEFENDANT JOHN DOE #1'S MOTION TO DISMISS

The Plaintiffs, through counsel, submit their Memorandum in Opposition to Defendant John Doe #1's Motion to Dismiss and would show this Honorable Court the following:

PROCEDURAL HISTORY

This is an internet case involving an issue of first impression in Tennessee. As such, citizens of this State could for generations be affected by its eventual outcome. Given the ubiquity of anonymous website authors and postings, tension between rights of persons allegedly libeled in this manner versus free speech protections provided by the First Amendments of the Tennessee and United States Constitutions is inherent and inevitable. Equally inevitable is a case such as this finding its way to the courts.

Stated more specifically, the issue is this: How are the courts of the State to determine when or whether an anonymous internet author must reveal himself and defend his actions. This Court is now called upon to decide how best to resolve this issue. As explained below the Court

has to a large degree provided a roadmap by which the parties will now navigate some rather intricate terrain. Therefore, how we got here is no less important than where we are.

Plaintiffs filed suit in tort on February 11, 2008 alleging libel by the author or authors of the website "stopswartz.blogspot.com." The author or authors of this site are referred to in the complaint as "John Doe #1."

Plaintiffs' attorney eventually issued a subpoena to Google, Inc. requesting the identity of John Doe #1 (hereinafter "Doe"). Google, in accordance with its policy, informed Doe of this subpoena. Doe's attorney, by special appearance, filed a Motion to Quash this Subpoena and for Protective Order in September, 2008.

This Motion came on for hearing on March 13, 2009 in the Sixth Circuit Court for Davidson County, Tennessee, the Honorable Thomas J. Brothers presiding. Based upon the record and arguments of counsel, Judge Brothers is persuaded that the most prudent approach to resolving the issue is to be found in the case of Dendrite International, Inc. v. John Doe et al., 775 A.2d 756 (N.J. Super. Ct., App. Div. 2001).

In Dendrite, the court held that among the factors in determining whether an anonymous author should be required to disclose his identity is whether the complaint can withstand a motion to dismiss. (Dendrite International, Inc. at 760.) Because the court in Dendrite also raised the bar with respect to the specificity of pleading (id), Plaintiffs' counsel moved for leave to amend his Complaint. The Court granted this request with the caveat that the amended complaint be filed within fourteen (14) days of the date of the hearing.

This seemingly straightforward ruling from the Court became unnecessarily complicated when an order reflecting the Court's directive was not entered, despite Plaintiffs' counsel's

understanding that defense counsel would draft and file the order. Therefore, on April 14, 2009, counsel for the Plaintiffs filed an order setting forth the Court's ruling from the bench and allowing the Plaintiffs fourteen (14) days *from the entry of the order* to amend their Complaint.

The Court, having been quite explicit in the deadlines set forth in its ruling, initially declined to accept the order. Plaintiffs' counsel then filed a Motion to Amend Complaint on grounds that the deadline imposed upon the Plaintiffs by the Court could not be met due to Plaintiffs' counsel's reliance upon assurances by Doe's lawyer that he would file the order. Therefore, had the Plaintiffs filed *their* Amended Complaint within the Court's deadline absent an order from the Court allowing this amendment the pleading, even if accepted by the Clerk, would have been a nullity.

Taking all this into consideration the Court graciously reconsidered its earlier position and signed the order submitted by Plaintiffs' counsel. The Plaintiffs timely filed their Amended Complaint on April 27, 2009, whereupon Defendant Doe timely filed his Motion to Dismiss as required by Dendrite and ordered by this Court.

LAW AND ARGUMENT

In Dendrite International, Inc. v. John Doe et al., 775 A.2d 756 (N.J. Super. Ct., App. Div. 2001), the trial court denied Dendrite's request for limited, expedited discovery to ascertain the identity of the unknown, John Doe defendant. (Dendrite International, Inc. at 760.)

On interlocutory appeal, the trial court's ruling was upheld on grounds that "Dendrite failed to establish harm resulting from [the anonymous defendant's] statements as an element of its defamation claim." (Dendrite International, Inc. v. John Doe et al., 775 A.2d 756, 760.

More significantly, the appellate court in Dendrite set forth various criteria to be

considered in making the determination of whether a John Doe defendant's identity should be disclosed.

1. The trial court should first require the plaintiff to 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. Dendrite International, Inc. 775 A2d at 760.

This requirement has been mooted in the case before this Court. Obviously, Doe was informed of the subpoena that is the subject of these proceedings and has filed and served opposition. Plaintiffs' counsel, at the time of the issuance of the subpoena, was at a loss as to how Doe could be notified when Doe's identity was unknown.

The Dendrite court squares this circle by requiring a posting of a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board. (Id.) This did not occur to Plaintiffs' counsel; however, Plaintiffs' counsel was informed by Google, Inc. shortly after the issuance of the subject subpoena that its policy was to inform the anonymous poster of the subpoena, in effect accomplishing precisely what the Dendrite court requires. Doe's filings in opposition to the subpoena confirm this.

Doe therefore had the opportunity to oppose the issuance the information requested by the subpoena - and in fact has done so. While future cases may require an order from the court informing a John Doe defendant in the manner prescribed of the issuance of a subpoena, this is unnecessary here. Therefore, albeit more by happenstance than design, Plaintiffs have met this requirement.

2. The court shall require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech. Dendrite International, Inc. 775 A.2d at 760.

In their Amended Complaint, filed on April 27, 2009, Plaintiffs allege the following actionable statements by Doe:

> "You didn't ask for my opinion but here's my theory: I think the boys were responsible for setting a fire the night of the Shopping Center fire, but I don't believe they were responsible for THE fire that destroyed the building. I also think the boys might have been responsible for a couple of the trash fires but certainly not all of them. **I believe that Don and/or Terry are responsible for many of the small fires around the Village, especially the vehicle fires. I believe that it was coincidence that Don spotted the teens lighting the trash and he took advantage of the opportunity to get rid of a failing business.**
> "The mystery of the Shopping Center fire will never be resolved until someone comes forward and discloses what they witnessed."

(Pls.' Compl. at 3, # 8; emphasis supplied.)

At paragraph 9 of their Complaint, Plaintiffs further allege these actionable statements by Doe:

> What she [Terry Swartz] and Don [Swartz] does is run recovery house's [sic]. They will buy a house and make it into multiple apartments for people who are in recovery and trying to rebuild their lives. The first moment that these people make a mistake they are kicked out immediately, no second chance period. If you lose your job and cannot pay the rent, they will kick you out immediately. They can do this without giving you thirty days notice because you sign a contract with them stating that you are living in a recovery house. I am sure they violating [sic] many federal regulations regarding recovery houses. They need to be investigated. They use their position in the recovery circles to fill these houses. In other words **they take advantage of people who are just trying to get back on their feet,** and the minute as they make a mistake [sic] they pull the proverbial rug out from under them.
> "I was in Nashville at the time and many people who know them believe they set the fire at Old Hickory.
> "They do business with another member of the recovery community by the name of Chuch Paetz. This is a general contractor, yes money can buy everything. This guy has zero skills. If you live in a house remodeled by Chuck, MOVE! It will fall down. He used to sell hair products and one day decided to become a contractor.

> "Both Terry and Chuck live life according to recovery principles. Well, they think they do. They actually have no morals or scruples. They will cheat any chance they get."

(Pls.' Compl. at 3.)

Further, Plaintiffs allege at paragraph 10 that Doe published false and actionable allegations in stating that the Plaintiffs have had a negative impact on home prices in the area, specifically: "Home prices in the Village have risen in recent years but it is despite the Swartzs [sic]. In fact, one could argue that the Swartzs have had a negative impact on home prices." (Pls.' Compl. at 4.)

At paragraph 11, Plaintiffs allege actionable statements by Doe in publishing that Plaintiffs' properties are not recorded in the Multiple Listing Service and this will financially harm the purchaser's resale because there would be no record of these sales for appraisers and real estate agents to consider in evaluation the market price of these properties:

> "Their sales are not recorded in the MLS system. If you want to sell your home and you sign on with a licensed agent the first thing your agent is going to do is to run comps on sales throughout the neighborhood in order to establish a market value. The Swartz properties won't show up on these comps. It doesn't matter if the Swarts [sic] sold the Haskell down the street for a million dollars last month; it has no real bearing on the Haskell that you want to list with Crye-Leike. No agent, whether they represent a buyer or seller is going to consider that million dollar sale. They won't see it. It is out of their system. The same goes for property appraisers. They won't see the sale either when they are appraising your property."

(Pls.' Compl. at 5.)

At paragraph 12 of their Complaint, Plaintiffs allege actionable statements by Doe in publishing the assertion that Plaintiff Terry Keller Swartz "came to Old Hickory after being run

East Nashville where she was flipping properties and running her halfway house and generally pissing people off." (Pls.' Compl. at 5.)

Finally, Plaintiffs allege at paragraph 13 that their privacy was invaded by Doe by his re publishing from Cragslist.org the allegation that "Terry Keller [Swartz] is an ex-addict." And at paragraph 14, Plaintiffs allege that Doe further invades the Plaintiffs' privacy by encouraging others in effect to stalk the Plaintiffs; to wit, "When you see a Swartz, no matter how trivial it may seem, leave a comment. Extra points if you observe them outside the Village. This serves two purposes: First, it helps us all to keep tabs on Don and Terry and to know what they are up to. Second, it sends a clear message to Don and Terry that their actions are not being ignored. . . . We will tolerate their crap no longer."

(Pls.' Compl. at 6.)

Plaintiffs, by setting forth the exact statements made and/or republished by Doe have fully met this requirement as set forth in Dendrite.

3. *The court should review the complaint and all information provided to the court to determine whether plaintiff has set forth a prima facie cause of action and can survive a motion to dismiss.* Dendrite International, Inc. 775 A.2d at 760.

A. Personal Jurisdiction

In ruling on a defendant's motion to dismiss for lack of personal jurisdiction the trial court is required to construe the pleadings and affidavits in the light most favorable to the plaintiff. Humphreys v. Selvey, 154 S.W.3d 544, 549 (Tenn. App., 2004). If the defendant challenges jurisdiction by filing affidavits, the plaintiff must establish a prima facie showing of jurisdiction by responding with its own affidavits and, if useful, other written evidence. Humphreys v. Selvey, 154 S.W.3d at 550.

In this case, the Plaintiffs cannot respond to affidavits because none exist. Further, Doe makes too much of the trial court opinion in Columbia Insurance Co. v. Seescandy.Com, 185 F.R.D. 573 (N.D. Cal. 1999). As mentioned above, the plaintiff in Dendrite had its case dismissed due to a lack of a showing of harm, Dendrite International, Inc., 775 A2d at 768; personal jurisdiction was not an issue.

Further, as stated in Humphreys at 549, "[o]ften a complete resolution of the jurisdictional issue is not possible at the beginning of litigation because not enough evidence has been developed; indeed, discovery will not have yet begun." Humphreys sets forth the mechanism by which this issue is to be decided, and this does not involve, as suggested by Doe, "allowing a court to decide whether jurisdiction exists based entirely on the pleadings." Humphreys at 549. The mechanism is triggered by the defendant's filing of affidavits (id.), which, again, has not happened in this case.

Plaintiffs have alleged in paragraph # 1 that Doe is the author of the website at issue in this case. (Pls' Compl. at 1.) Plaintiffs further allege in paragraph 5 that Doe's actionable conduct occurred in Davidson County, Tennessee. (Pls.' Compl. at 2.)

Finally, Tennessee Code Annotated § 20-2-214 addresses this very issue, providing that even if Doe is outside the state and cannot be personally served with process within the state, Doe is nevertheless subject to the jurisdiction of this Court for "[a]ny tortious act or omission within this state." Tenn. Code Ann. §20-2-214 (a)(1).

Plaintiffs' allegations in their Amended Complaint therefore set forth a basis for personal jurisdiction of this Court with regard to Doe, and of course this basis will be amplified by

evidence at the hearing before this Court.

B. Failure to State A Claim

Doe's reading of Independent Newspapers, Inc. v. Brodie, 966 A2d 432 (Md. Ct. App. 2009) misses several key points. The Plaintiffs' lawsuit against Doe is not based upon what others may have posted on stopswartz.blogspot.com. Rather, the allegations concern what Doe authored and/or took it upon himself to republish from another provider. In order for Independent Newspapers, Inc. to be analogous, the Plaintiffs would be bringing an action against Doe for what others have posted. They are not. Further, for the analogy to hold, Plaintiffs would be subpoenaing Doe for the names of those who posted on his site. They are not.

Plaintiffs are not attempting to hold Doe responsible for others' actions. Plaintiffs' Amended Complaint merely sets forth actionable conduct on the part of Doe and is in no manner at odds with protections given to internet providers for the actions of others.

John Doe #2's role in this matter is set forth in paragraph 2 of their Complaint and in no way contradicts Plaintiffs' assertions of actionable conduct on the part of Doe.

Independent Newspapers, Inc. is instructive in that it demonstrates an application of the Dendrite test and may very well signal a movement in this direction by courts across this country. Apart from this, however, that case is so factually dissimilar that any reliance upon it by Doe is misplaced.

The assertion by Doe that the Plaintiffs have not presented evidence is difficult to fathom. This case is still in the pleading stage. Doe's Motion to Dismiss includes no competent evidence that requires a response. This Court has set forth the remedy in the form of a required evidentiary

hearing as contemplated by Dendrite and which will be held in conjunction with Doe's Motion.

4. *Balancing Test*

This aspect of the Dendrite test is perhaps the most difficult. There are no bright lines and the guidance such as it is leaves much to a court's discretion. One presumes that after consideration of the previous factors and along with the evidence set forth in the hearing, more light will be shed on the strength of the Plaintiffs' evidence. Ideally, the proper decision will become readily apparent.

Dendrite contemplates a balancing of the anonymous posters free speech rights against the strength of the prima facie case presented by the Plaintiffs. Independent Newspapers, Inc. v. Brodie, 966 A2d 432, 457. Because a large part of what this Court will consider is absent from the record pending the hearing, it is premature for the Plaintiffs to state that this test clearly weighs in their favor. Nevertheless, the Plaintiffs remain confident that when the evidence is heard this Court will determine that this case should go forward.

Finally, after giving this a fair amount of thought and understanding that this is a public record, I feel that I must for the sake of my clients bring a matter to this Court's attention. I am not well and haven't been for quite some time. If in my most recent appearance before this Court I appeared to be complacent, uninterested, or even disrespectful, this was not my intent. I simply could not hold my eyes open. I realized at the time that my demeanor was not acceptable, but I couldn't do anything about it. I have apologized to opposing counsel and do the same here to this Court.

Second, I do understand that argument from personal incredulity is not argument but instead

is a logical fallacy. Still, there are days when I think that my credibility is about all I have. So if I appeared to be a bit thin-skinned when this was questioned by defense counsel, perhaps I came by this honestly.

Finally, what follows may be pertinent to the "balancing test" and this is the only reason I mention it here. To say the least, financial considerations played no role in my taking of this case. I also had no idea that this could be the case that makes the law in Tennessee regarding the issue involved. Knowing that this would be an expensive case for my clients to pursue, that they otherwise may not be able to bring it, I took the case because of a chronic inability to say "no."

From the beginning my clients were aware of my situation and I could assure them only that I would do the best I could given my circumstances. I therefore would ask the Court to consider this for my clients' sake if the Court incorporates the tardy issuance of the subpoena into its balancing of factors.

CONCLUSION

The Plaintiffs in this case have met three of the four prongs set forth in Dendrite International, Inc. The remaining criterion, the balancing of factors, is yet to be decided given that the evidence has not been presented. At the conclusion of the hearing to be held in conjunction with Defendant John Doe #1's Motion to Dismiss, the Plaintiffs respectfully submit that the evidence will show that the Defendant's Motion to Quash the subject subpoena should be denied and this case should proceed upon its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing was served upon the following via U.S. Mail, postage prepaid on the 13th day of August, 2009:

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