

2009

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IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

FILED
Facsimile Rec'd 5/21/09 7:45pm

DONALD R. SWARTZ and TERRY)
KELLER SWARTZ)
)
Plaintiffs,)
)
v.)
)
JOHN DOE #1, JOHN DOE #2, and)
JOHN DOE #3)
)
Defendants.)

MAY 27 2009

RICHARD R. ROCKER, Clerk
By *[Signature]* Deputy

DOCKET NO. 08C431

MOTION TO DISMISS AND, ALTERNATIVELY, TO BALANCE
FIRST AMENDMENT RIGHTS

COMES NOW the Defendant, John Doe #1 (hereinafter "Doe"), by and through special appearance of counsel for the limited purpose of this motion, and moves this Honorable Court to Dismiss the Plaintiff's action; or in the alternative, to deny Plaintiff's attempts to determine the identity of John Doe #1 based on Doe's Constitutional right to anonymous speech. Pursuant to the Order of the Court entered April 20, 2009, this Court adopts the standard promulgated in the case of *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct., App. Div. 2001).

MOTION TO DISMISS

Defendant Doe moves this Court to Dismiss the Plaintiffs' action, and in support thereof submits the following:

PERSONAL JURISDICTION

1. Pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure, this action should be dismissed for failure of the Amended Complaint to allege that Doe is subject to the personal jurisdiction of this Court.

2. The *Dendrite* Court recognized the importance of this in its analysis when it incorporated the reasoning from *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573 (N.D.Cal. 1999), which stated as a crucial element "First, the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court." *Seescandy.Com* at 578.

3. The Amended Complaint alleges that the acts occurred in Davidson County, Tennessee, but there is no evidence that this is true. Numerous cases have held that, despite an interactive nature, internet content that is available in a community is not deemed to have originated there and does not amount to purposeful availment that would subject a person to personal jurisdiction.

4. Plaintiffs in the instant case have failed to show that Doe is a real person or entity who could be sued in state court, failed in the Complaint to allege jurisdiction, and have failed to show that the events complained of occurred in Davidson County.

5. The Plaintiffs have therefore failed to sufficiently plead that this Court has personal jurisdiction over Doe, and the action should be dismissed on those grounds.

FAILURE TO STATE A CLAIM

6. The Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted.

7. Plaintiffs would have the Court believe that the Amended Complaint presents a prima facie case against Doe, but upon examination it fails due to many factors.

8. The Amended Complaint, in ¶ 2, submits that Doe is the author of the website "stopswartz.blogspot.com", and in ¶ 6 states its purpose is to "share... what we have learned... and allow others to share their stories as well."

9. The website at issue is, by its very name, a blog; which the case of *Independent Newspapers, Inc. v. Brodie*, 2009 Md. LEXIS 18. (Md. 2009), cited with approval by this Court, defines as:

“Blogs, chatrooms and discussion forums constitute a different category of Internet communications, in which users often post statements to the world at large without specification. The word blog, used as a noun, is a contraction of the words Web and Log and generally describes a site that “contains dated text entries in reverse chronological order (most recent first) about a particular topic. A blog can serve as an online newsletter or as a personal journal --where an individual can post concerns, ideas, opinions, etc. --and it can contain links to web sites or can use images or video. More recently, the noun blog has been used as a verb, to blog, which means to publish an entry on a website that uses the reverse chronological “blog” format.” *Independent Newspapers* at 9.

10. This creates a situation analogous to *Independent Newspapers*, whereby Doe, if actually the “author” of the website as the Amended Complaint alleges, is an “interactive computer service”, as Doe’s blog allowed users to post independently authored comments, and therefore cannot be sued due to immunity under the federal Communications and Decency Act, 47 U.S.C. § 230(c)(1); which states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

11. Plaintiffs fail to allege with particularity which statements, if any, are actually attributable to Doe as opposed to John Doe #2, or to any other possible person.

12. Plaintiffs have presented no basis for their claim that Doe is the author of the alleged defamatory statements, rather than merely acting in a capacity as the interactive computer service.

13. Plaintiffs also attempt to link Doe and John Doe #2 by a vague claim of "conspiracy", Amended Complaint ¶ 3, but fail to allege any agreement to defame or any other elements thereof.

14. Additionally, the *Dendrite* Court implemented a standard that relied on more than a motion-to-dismiss standard, engaging in a more probing review of the complaint and pleadings than is usually required: to wit, requiring specific proof establishing the actual harm as an element of its defamation claim.

15. In this vein, the Plaintiffs have failed to allege any facts supporting a claim of actual injury to reputation and/or the specific damages resulting therefrom.

16. As such, there is no causal link between the statements and any damages, which is required under Tennessee law. "Damages from false or inaccurate statements cannot be presumed; actual damage must be sustained and proved." *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 416, 419 (Tenn. 1978).

17. Also, libel requires a reading by a person other than the Plaintiffs, and an understanding by that person of its libelous nature and that it referred to the Plaintiffs. Plaintiffs have failed to allege that any person read or understood the statements in question in this manner.

18. Further, Doe submits that the Plaintiffs are public figures, as previously fully briefed in Doe's Memorandum in Support of Motion to Quash Subpoena, based on their position as business owners in the community, their history of service on various community boards, participation in community activities, and their own history of web-blogging against other public figures.

19. As public figures, a showing of actual malice is required as an additional element to libel. Plaintiffs have failed to show or even allege any facts supporting actual malice on the part of Doe.

20. Next, even should the Court determine that the Plaintiffs are not public figures, their case for defamation fails as the statements are either non-actionable opinion, permissible hyperbole, or simply non-defamatory in nature.

21. Plaintiffs' claims for invasion of privacy fail on their face, as they fail to plead either the elements or any facts that would constitute the tort in question.

APPLICATION OF THE DENDRITE TEST

22. Doe submits that the Plaintiffs have failed to meet their burden under the analysis of the Dendrite Test.

23. The failure of Plaintiffs to satisfy the first prong of Dendrite in that no notice was given to Doe and no other attempts were made to identify Doe, specifically either emailing the website or posting upon the blog itself.

24. Additionally the Plaintiffs have failed to sufficiently plead the elements of the torts so alleged so as to defeat a motion to dismiss.

25. Finally, the Plaintiffs have failed to present facts sufficient with supporting evidence to establish a prima facie case against Doe for the torts so alleged.

BALANCING TEST

26. Finally, assuming arguendo that the Court finds the Plaintiffs have satisfied the first three prongs of Dendrite, it must then balance the defendant's First Amendment rights against the strength of the plaintiffs' prima facie case.

27. Doe submits that his Constitutional right to anonymous free speech far outweighs the strength of Plaintiffs' case and the necessity of disclosure.

WHEREFORE, PREMISES CONSIDERED, Defendant Doe moves that, for the foregoing reasons, the Plaintiffs' action against Doe should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certified that on the 27th day of May 2009, a copy of the preceding document has been served upon:

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Attorney for Plaintiffs

and

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By the method identified as follows:

- U.S. Mail, postage prepaid
- Hand Delivered
- Facsimile
- Electronic Mail
to 600214


STEPHEN E. GRAUBERGER