

NORTH CAROLINA:

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10-CVS- 361

VANCE COUNTY:

THOMAS S. HESTER, JR.,
Plaintiff,

v.

JANE OR JOHN DOE a/k/a
"BEAUTIFUL DREAMER" AND/OR
"CONFUSED," "FATBOY", et al.,
Defendants.

10-01-20 PM 12:49
VANCE COUNTY, C.S.C.
JUN 28 2010

ORDER Re: MOTION TO QUASH SUBPOENA

THIS MATTER came on for hearing before the undersigned Judge of Superior Court on Friday, June 4, 2010 at a mixed criminal/civil session of the Franklin County Superior Court Rule 2.1, General Rules of Practice upon Jason A. Feingold's ("Feingold") motion to quash a subpoena issued by plaintiff ("Hester") to Feingold seeking to require Feingold to produce the identities of the various John and Jane Doe defendants in this lawsuit.

This lawsuit arises out of allegedly defamatory blogs about Hester posted on a website, www.homeinhenderson.com, operated by Feingold and Home In Henderson, Inc. The bloggers who posted the allegedly defamatory blogs about Hester are anonymous and used blog monikers such as "Fatboy" or "Confused".

The unfavorable blogs arose after a "thread" posted by Feingold on August 14, 2009, entitled "Arrest made in elder abuse case." The elder abuse case focused on the conduct of Esther Thompson, a tenant of Hester who owned the real property leased by Thompson at 212 Charles Street, Henderson, N.C.

Thompson, without knowledge or approval of Hester, had subleased the property as a "boarding house" to various individuals who were apparently unable to take care of themselves or the property. When the authorities investigated the house they found horrendous living conditions for the "renters" inside, including no running water and abject filth throughout the house. Thompson was charged with exploitation of an elder/disabled person, felony larceny, possession of a stolen electrical meter and arrested on August 13, 2009. The "thread" posted by Feingold did not identify Hester as the owner of the property at 212 Charles Street

Following the posting of the article about the 212 Charles Street house and Thompson, on August 14, 2009, there was a stream of blogs about the incident on the homeinhenderson web site lasting through August 18, 2009. Apparently some of the bloggers learned independently that Hester was the owner of the property at 212 Charles Street. Many of the blogs were very critical of Hester and other landlords in Henderson. Hester had served as a member of the Vance County Board of Commissioners from December 2002 until December 2006 and is presently a candidate for the Vance County Board of Commissioners.

This lawsuit followed. The lawsuit was initiated by the filing of a twenty (20) day summons and the issuance of an order permitting discovery on a shortened schedule. Feingold was the subject of a subpoena requiring him to produce the true names of the anonymous bloggers named in the complaint.

The motion to quash was made pursuant to Rule 45(c)(5), North Carolina Rules of Civil Procedure. A hearing on the motion was continued until after Hester filed his complaint in the case which was done on April 21, 2010. At the hearing on June 4, 2010, C. Amanda Martin appeared on behalf of Feingold and Michael E. Satterwhite and Conrad B. Sturges, III appeared on behalf of Hester.

The Court was provided with memoranda of law and authorities. At the hearing, the Court heard arguments from counsel relative to each of the John Doe and Jane Doe defendants' 20 plus individual blog comments which Hester contends are libelous per se or libelous per quod.

The Court took the matter under advisement. The Court has now had time to consider the arguments and materials submitted in connection with the motion to quash and this matter is now ripe for disposition.

Discussion:

This case involves allegedly defamatory statements posted on the internet by anonymous bloggers. This is not a case of first impression by any stretch of the imagination. The following principles of law apply:

The right of free speech provided by the First Amendment is protected when the speech is anonymous. ***Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 197-199 (1999); Talley v. California, 362 U.S. 60 (1960).***

First Amendment Protections apply to speech posted on the Internet. ***Reno v. American Civil Liberties, 521 U.S. 844 (1997).***

The right to speak anonymously, on the internet or anywhere, is not absolute and there is no right to freely defame other persons. ***McMann v. Doe, 460 F. Supp. 2d 259,266, Buckley, supra. at 199.***

Courts confronted with demands for stripping away the protective shield of anonymous speech in defamation cases are required to balance the rights of anonymous speakers under the First Amendment and the plaintiff to protect his reputation and business from defamatory speech and publication. ***Dendrite International Inc., v. John Doe, No. 3, et al.* 342 N.J.Super. 134 (2001); *McMann v. Doe, supra.*, 2*TheMart.com*, 140 F. Supp 2d 1095.**

In this case, the Court has determined several preliminary factors at the outset that should be considered in its inquiry based on the foregoing decisions:

First, the Court has to determine that the subpoena was issued in good faith and not for an improper purpose. Second, that the information sought (the identity of the anonymous bloggers) relates directly to the core claims of defamation; Third, that the identification of the bloggers so that they can be named defendants is material to the claims against them and Fourth, that unless their identities are disclosed, that information is not available from any other source.

However, before getting to the foregoing preliminary factors, the complaint must be examined to determine if it **passes muster in terms of alleging a case of defamatory conduct in the first instance.** Feingold contends that none of the blogs complained of by Hester constitute actionable defamation as a matter of law. Hester contends otherwise.

The Court believes that the ***Dendrite*** decision provides a reasoned step by step test of the complaint, some of which this Court will use in its determination.

The complaint in this case has specifically set out each blog which Hester contends is defamatory and has attached a copy of the web site publication setting out the blogs, including the alleged defamatory ones, which covered the news item that set off the unflattering comments at issue here. This complies with the ***Dendrite*** requirement that the plaintiff identify the exact statements made by each blogger that is contended to be defamatory.

The ***Dendrite*** court also required a review of the complaint and accompanying information to determine if the plaintiff has put forth a prima facie case against the anonymous defendants, or any one of them, and conduct that review in a manner similar to a Rule 12(b)(6) motion to dismiss analysis. Some courts have required Rule 56 analysis, but this Court considers that test way too stringent and premature, especially where there is no dispute that the blogs were posted and that the blogs content are out there for all the world to read.

The ***Dendrite*** court then determined that if the legal analysis of the complaint and materials established a prima facie case, that the court must then balance the anonymous speaker/writer/blogger's First Amendment right to anonymous free speech against the prima facie case presented and the necessity for disclosure of the identity of the blogger to permit the plaintiff's case to proceed.

In conducting this balancing test, this Court will use a Rule 12(b)(6) motion to dismiss standard to analyze the complaint to determine if the complaint, on its face, states a claim for defamation. In this case, the Court has had to review more than 20 individual blogs that are set out in the complaint and alleged to be defamatory of Hester and his business.

The law of defamation in North Carolina clearly applies and will be used by the Court in its analysis of the alleged defamatory blogs.

North Carolina has three recognized categories of libel. The first is libel per se which is a publication (blogs are publications) that is defamatory on its face. The second is a publication which is susceptible of two reasonable interpretations, one of which is defamatory and the other is not. The third is a publication which is not obviously defamatory, but which becomes so when considered in connection with innuendo, colloquium and explanatory circumstances. This type of libel is libel per quod. ***Flake v. News Co.* 212 N.C. 780, 785 (1938); *Ellis v. Northern Star Company*, 326 N.C. 219, 223 (1990)**

A publication is libelous per se or actionable per se if, when considered alone without innuendo: (1) it charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt or disgrace, or (4) it tends to impeach one in his trade or profession. Whether a publication is libel per se is a question of law for the court. ***Ellis v. Northern Star*, supra at 224.**

In examining the alleged defamatory statement, the court must view the words within their full context and interpret them as "ordinary people would understand" them. ***Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312,319, (1984).**

Hester was a Vance County Commissioner from December 2002 through December 2006 and Hester is currently a candidate for the same position for the 2010 election. Accordingly, Feingold argues that Hester is either a public official or limited public purpose figure for purposes of the Court's analysis of the defamation claims in this case. The public or private status of the plaintiff is an issue of law and not an issue for the jury. ***Hall v. Piedmont Publishing Co.*, 46 N.C. App. 760 (1980).**

Assuming, arguendo, for purposes of its analysis of the issues regarding defamation in this motion, that Hester is a public figure, Hester must prove that any defamatory statements made by the anonymous bloggers were made with actual malice. A statement is made with actual malice when the statement is published with the knowledge that the statement was (a) false or (b) with reckless

disregard of whether the statement was or was not false. *New York Times v. Sullivan*, 376 U.S. 254, 279-80(1964); *Gaunt v. Pittaway*, 139 N.C. App. 778,785 (2000).

In the interest of the shortness of life, the Court is not going to discuss each alleged defamatory blog as to whether it does or does not meet the test for libel per se or libel per quod as herein defined. The complaint sets out specific allegations of libel as to each blog complained of.

Decision:

The Court concludes that the following blogs are libelous per se as a matter of law:

Confused, post 150 – charges Hester with crime for which he should be jailed, tends to impeach Hester in his trade or profession

Heelshouse, post 93 – tends to impeach Hester in his trade or profession

Interesting, post 3, 14, 77 – tends to impeach Hester in his trade or profession, subjects him to ridicule and contempt and disgrace

Point Keeper, post 157 – tends to impeach Hester in his trade or profession

Underworld, post 96 – tends to impeach Hester in his trade or profession

Ziggy, post 156 - tends to impeach Hester in his trade or profession.

The Court concludes that the remaining blogs as set forth in the complaint are not libelous per se or per quod and despite their unflattering references, if any, to Hester, are protected by the First Amendment.

The Court further finds as to those blogs which it has found to be defamatory the subpoena **shall not be quashed** for the following reasons:

- First, that the subpoena was issued in good faith and not for an improper purpose.
- Second, that the information sought (the identity of the anonymous bloggers) relates directly to the core claims of defamation;
- Third, that the identification of the bloggers so that they can be made named defendants is material to the claims against them.
- Fourth, that unless their identities are disclosed, that information is not available from any other source.

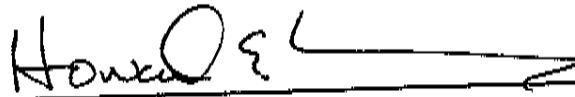
In making this determination, the Court has balanced the anonymous bloggers First Amendment right of anonymous free speech against the strength of

Hester's prima facie case of defamation and the necessity for the disclosure of the anonymous bloggers identity to allow Hester to proceed in his lawsuit and to determine, through discovery and depositions, the extent to which those publications which the Court has identified, were made with actual malice sufficient to meet the public figure element of a defamation claim.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That Feingold's Motion to Quash the Subpoena is allowed as to those anonymous bloggers set forth in the complaint that have not been determined to have defamed Hester and Feingold's Motion to Quash the Subpoena is denied as to those anonymous bloggers identified specifically in this Order as having defamed Hester as a matter of law.
2. That Feingold is to disclose the name(s) and true identities of those bloggers to counsel for Hester in writing and within 15 days of the date of this Order.
3. That Feingold is to provide a copy of this Order to all of those anonymous bloggers whose identities are to be disclosed within 5 days of the date of this Order.
4. That the parties shall bear their own costs in connection with the matters involved in the Motion to Quash the Subpoena.

This the 28th day of June, 2010.



Howard E. Manning, Jr.
Superior Court Judge

Certificate of Service

This is to certify that the foregoing Order Re: Motion to Quash was served on counsel for plaintiff and Feingold by facsimile transmission as follows this the 28 day of June, 2010:

Conrad B. Sturges, III & Michael E. Satterwhite at 252 438 6044

C. Amanda Martin at 755-0009

Debbie P. Whittemore
Office of the Clerk of Superior Court, Vance County