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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0312-14T1

DIANE TRAWINSKI,

Plaintiff-Appellant,

v.

JOHN DOE a/k/a "EPLIFER2",

Defendant.

Submitted May 27, 2015 – Decided June 3, 2015

Before Judges Reisner and Haas.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-8026-12.

Steven C. Schechter, attorney for appellant.

Robinson, Wettre & Miller LLC, attorneys for respondent New Jersey On-Line LLC, publisher of NJ.com (Keith J. Miller and Michael J. Gesualdo, on the brief).

PER CURIAM

This case returns to us after remand proceedings directed by our previous opinion. Trawinski v. John Doe a/k/a EPLifer2, No. A-3348-12 (App. Div. March 21, 2014). On August 8, 2014, the trial court issued an order denying plaintiff's request for a subpoena requiring NJ.com, an "online news provider," to

disclose the identity of an individual who had posted anonymous comments on the NJ.com website. We affirm.

Because the essential background facts were set forth in our earlier opinion, a brief summary will suffice here. Plaintiff lives in the Borough of Elmwood Park, where her husband was a borough council member. Trawinski, supra, (slip op. at 2). On October 15, 2012, plaintiff filed a complaint alleging that, in February 2012, an individual using the screen name "EPLifer2" "began posting false and defamatory statements of and concerning [p]laintiff on the NJ.com Elmwood forum blog falsely stating that [plaintiff had] posted statements on the [same blog] under the screen[]name 'IamEP[.]'" The complaint further alleged that "EPLifer2" and other unnamed "[d]efendants falsely attributed to [p]laintiff all statements made by someone using the screen[]name 'IamEP' on the . . . blog."

Plaintiff only attached one of "EPLifer2's" posts to her complaint. On February 2, 2012, an individual using the screen name "elmwoodoldtimer" posted a comment on the blog that read, "Its actually his wife who posts here." Later that same day, "EPLifer2" posted this comment:

> IamEP is 100% the Trawinskis. Whether it's Rich or Diane it doesn't matter. You are not going to fool the public with your silly riddles. Anyone that reads these forums knows this is the two of you. November can't come soon enough when team

> Trawinski is voted out of office. I know you are feeling the heat from the police merger you are fighting for. Pleading your case to anyone that will listen "wasn't me" "it was only a thought" crying to the mayor about facebook, crying at the beefsteak to people about it. The people that you think are your friends and supporters don't even know who you are anymore. You are drunk with this false sense of power. Get over yourself sir. For shame.

Two days after "EPLifer2" posted this comment, the individual using the screen name "IamEP" posted a comment that stated:

> Lady, I'm telling ya, I'm just a "poor black boy" living in your "hood". You still are making false ac[c]usations and the same mistakes. Time to pack your "old bags" and get out of our town! Just a little something more for you to chew on, many among us have seen your oldest one coming out of that sex toy shop on RT. 46. Not to say there is anything wrong with it, maybe you just don't know about it since you live in your cave. Let me know when you are ready to settle and call it quits. Once again, I am not who you think I am and that is called and considered "freedom of speach [sic] and privacy"!

Shortly thereafter, "IamEP" posted a second comment that read, "Sorry, I spelled speech wrong. And no, I was not smoking a bong[.] Another clue for you, I graduated in '77', not '72'! Have a great weekend and "Go, Big Blue"! Adue. [sic.]" These were the only two comments attributed to "IamEP" that were attached to plaintiff's complaint.

Plaintiff did not allege in her complaint that "EPLifer2" responded to these comments. Instead, the only other comment attached to her complaint was posted by "elmwoodoldtimer" three days after "IamEP's" February 4, 2012 comments. This comment stated:

> Please cut the act Mrs. T. You have spent last few weeks posting serious messages about a wide variety of topics and you always include very specific and accurate details.[] Now all of the sudden, you're trying to act as if you are loony and post ridiculous things so we don[']t think it coming from the family. Some of us are smarter than that[.]

On November 9, 2012, the trial court entered an ex parte order granting plaintiff's request for permission to issue a subpoena to NJ.com. Trawinski, supra, (slip op. at 2). This subpoena required the website to provide any documents within its possession "identifying and/or describing the name, address and/or e-mail address of the Defendant John Doe a/k/a EPLIFER2 . . . ." Id. at 2-3. NJ.com challenged the subpoena but, on February 8, 2013, the court granted plaintiff's motion to enforce the subpoena and ordered NJ.com to identify "EPLifer2" within fourteen days or pay sanctions of $1000 per day. Id. at 3-4.

We granted NJ.com's motion for leave to appeal and stayed the trial court's February 8, 2013 order. Id. at 4. In our

March 21, 2014 opinion, we held that the trial court failed to conduct the analysis required by Dendrite International, Inc. v. Doe, 342 N.J. Super. 134 (App. Div. 2001) before ordering the disclosure of "EPLifer2's" identifying information. Id. at 6-7. Therefore, we remanded the matter and directed the trial court to make findings concerning the Dendrite analysis and NJ.com's standing to oppose plaintiff's subpoena. Id. at 7.

In our prior opinion, we described the Dendrite analysis as follows:

> In Dendrite, we recognized that protecting the anonymity of online posters helps prevent embarrassment and harassment. We relied upon a federal court case from California, which reasoned that "'[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.'" Id. at 151 (quoting Columbia Ins. Co. v. Seescandy.Com, 185 F.R.D. 573, 578 (N.D. Cal. 1999)).
>
> Based on the conflicting needs to prevent defamation while concurrently protecting internet users' free speech rights, we set forth a four-prong test that a plaintiff must satisfy when internet service providers or other entities are subpoenaed for the purpose of identifying anonymous posters on the websites they maintain. Id. at 141-42. First, a plaintiff must "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." Id. at 141. The "notification efforts should include posting a message of notification of the identity discovery request to anonymous user on the [internet service provider's] pertinent message board." Ibid. Second, a plaintiff must "identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech." Ibid.

The third prong directs the court to determine whether or not the plaintiff has established a prima facie cause of action that forms the basis for the relief sought against the anonymous defendants. Ibid. Here, plaintiff alleged that she was defamed by EPLifer2. A prima facie case of defamation requires a plaintiff to establish the following: "[I]n addition to damages, the elements of a defamation claim are: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher." DeAngelis v. Hill, 180 N.J. 1, 12-13 (2004).

Finally, "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." Dendrite, supra, 342 N.J. Super. at 142. We further held that "[t]he application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." Ibid.

[Id. at 4-6.]

On remand, the matter was assigned to a different judge who, after conducting the required Dendrite analysis, issued a thoughtful written opinion denying plaintiff's request for a subpoena requiring NJ.com to identify "EPLifer2." Plaintiff satisfied the first prong of the analysis because her attorney attempted to contact "EPLifer2" through the website to notify him or her that a subpoena was being sought. Dendrite, supra, 342 N.J. Super. at 141. Moreover, plaintiff identified the single statement purportedly made by "EPLifer2" that she alleged constituted "actionable speech" as required by the second Dendrite prong. Ibid.

However, the judge found that plaintiff failed to satisfy the third Dendrite prong because she did not establish a prima facie cause of action for the relief sought against EPLifer2. Ibid. After reviewing plaintiff's complaint, the judge stated:

> Here, the [c]omplaint does not specifically identify any defamatory statements. The [c]ourt does not find any direct aspersions on the character of [p]laintiff. The [c]omplaint only includes general allegations about false and defamatory statements, including "derogatory statements toward the Borough of Elmwood Park's Council member[s], included but not limited to plaintiff's husband, Councilman Richard Trawinski." . . . The Court does not find that the defamatory allegations in the [c]omplaint satisfy a prima facie case for defamation.

> Therefore, in the current matter, the [c]ourt cannot glean actual defamatory statements that would satisfy the Dendrite test.

This appeal followed.

On appeal, plaintiff argues that the judge erred in finding she failed to establish a prima facie case of defamation. Because the trial judge's conclusion was one of law, our review is de novo and we owe no deference to the judge's legal conclusion. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We have considered plaintiff's contentions in light of the record and applicable legal principles. We affirm substantially for the reasons expressed in the judge's August 8, 2014 written decision. However, we make the following brief comments.

"In any defamation action, the plaintiff bears the burden of establishing, in addition to damages, that the defendant '(1) made a defamatory statement of fact (2) concerning the plaintiff (3) which was false, and (4) which was communicated to a person or persons other than the plaintiff.'" Petersen v. Meggitt, 407 N.J. Super. 63, 74 (App. Div. 2009) (quoting Feggans v. Billington, 291 N.J. Super. 382, 390-91 (App. Div. 1996)). "Fault, either negligence or malice, must also be proven." Ibid.

Here, plaintiff cited only one comment posted by "EPLifer2" on the website and made vague, conclusory assertions that the comment falsely identified her as "IamEP," an individual who had made posts that she deemed offensive. However, the only comment plaintiff identified as having been made by "IamEP" was posted on February 4, 2012, two days after "EPLifer2" posted the single comment that was the subject of plaintiff's complaint. The "EPLifer2" comment also did not specifically identify plaintiff as "IamEP;" that comment was posted by "elmwoodoldtimer." Thus, we agree with the trial judge that plaintiff's unsupported allegations concerning "EPLifer2's" comments were insufficient to establish a prima facie case of defamation. Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 101 (App. Div.) (conclusory allegations are insufficient as a matter of law to establish defamation), certif. denied, 107 N.J. 32 (1986).

Moreover, expressions that clearly reflect opinion on matters of public concern are protected and are not actionable. Kotlikoff v. Cmty. News, 89 N.J. 62, 68-69 (1982). Where the statement consists of "[l]oose, figurative or hyperbolic language, [it] will be . . . more likely to be deemed non-actionable as rhetorical hyperbole or a vigorous epithet." DeAngelis, supra, 180 N.J. at 15 (citations omitted). Here, "EPLifer2's" comment represented criticism of a local politician

and his spouse for their involvement in political matters. The comments reflected "EPLifer2's" opinion of these two individuals and, at best, are "rhetorical hyperbole" on a matter of public concern. Ibid. Accordingly, we agree with the trial judge that the posted comment was non-actionable, and disclosure of the identity of "EPLifer2" was not warranted.

Finally, plaintiff contends the judge erred by failing to make findings concerning NJ.com's standing to challenge the subpoena seeking EPLifer2's identifying information. We infer that the judge found NJ.com had standing, but since our review of this legal issue is de novo in any event, we briefly address the issue.

The issue of an online news provider's standing to assert the constitutional rights of its users has not yet been addressed in a published decision in New Jersey. However, other jurisdictions have held "that entities such as newspapers, internet service providers, and website hosts may, under the principle of jus tertii ["third party rights"] standing, assert the rights of their readers and subscribers." See, e.g., McVicker v. King, 266 F.R.D. 92, 95 (W.D.Pa. 2010) (holding that an online news website had standing to assert the First Amendment rights of users of the site who posted anonymous comments); Indiana Newspapers, Inc. v. Miller, 980 N.E.2d 852,

859 (Ind. App. 2012) (holding that a newspaper had standing to act as a "third-party representative" in asserting the First Amendment rights of an anonymous user of its website).

These decisions have conferred standing upon online news providers to contest requests for user identifying information because:

> (1) anonymous commentators to the [newspaper] website face practical obstacles to asserting their own First Amendment rights because doing so would require revelation of their identities; (2) the newspaper itself displays the adequate injury-in-fact to satisfy . . . case or controversy requirements; and (3) the newspaper will zealously argue and frame the issues before the [c]ourt.
>
> [McVicker, supra, 266 F.R.D. at 96.]

These same considerations clearly apply in this case. We therefore conclude that NJ.com had standing to contest the subpoena it received seeking the disclosure of "EPLifer2's" identity.

Affirmed.