NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0004-15T2

JOHN MAURO and DAVINA MAZZUCKIS, husband and wife, and ARCESIO PEREIRA and SINDY QUINTERO, husband and wife,

Plaintiffs-Respondents,

v.

INTELLECTUAL FREEDOM FOUNDATION, INC.,

Defendant,

and

CARLOS DOE,

Defendant-Appellant.

Argued December 7, 2015 – Decided February 26, 2016

Before Judges Messano and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9736-13.

Thomas J. Giblin argued the cause for appellant (Giblin & Lynch, attorneys; Mr. Giblin, on the brief).

Steven L. Procaccini argued the cause for respondents (Nissenbaum Law Group, L.L.C., attorneys; Gary D. Nissenbaum and Mr. Procaccini, of counsel; Judith N. Soto, on the brief).

PER CURIAM

By our leave, Carlos Doe (Doe), a fictitiously-name defendant, appeals from the Law Division's denial of his motion for a protective order. We provide some necessary context to the dispute.

On December 16, 2013, plaintiffs Davina Mazzuckis, and her husband John Mauro, and Arcesio Pereira, and his wife, Sindy Quintero, filed a complaint naming the Intellectual Freedom Foundation, Inc. (IFF), and several fictitiously-named individuals, including Doe, as defendants. Plaintiffs alleged that they were members of the World Mission Society Church of God (WMS), and IFF was "devoted to defaming" the organization.

The complaint alleged in particular that defendants had defamed plaintiffs, cast them in a false light, and intentionally and negligently caused them emotional distress through postings that appeared on a website operated by IFF (the website). The complaint cited two postings from Doe that intimated plaintiffs Mazzuckis and Pereira were engaged in an extramarital affair, and that Mazzuckis used "'sexual innuendo'" to recruit new members to join WMS.

On April 27, 2015, plaintiffs posted their first notice on the website pursuant to Dendrite International, Inc. v. Doe No. 3, 342 N.J. Super. 134 (App. Div. 2001). On May 27, Doe moved

for a protective order, attaching to the motion the subpoenas duces tecum that had been served seeking, among other things, information as to Doe's identity. On June 4, 2015, plaintiffs posted a second Dendrite notice on the website.

On June 26, the Law Division judge heard oral argument from the parties. He subsequently issued a written opinion and conforming order that denied Doe's motion. The judge granted a stay with conditions, and we, in turn, granted Doe's motion for leave to appeal.[1]

Doe contends that plaintiffs' Dendrite notices were untimely and ineffective under our holding in that case, that plaintiffs have failed to set forth a prima facie case of defamation, one of the predicates to requiring disclosure of Doe's identity, and that disclosure would chill his free speech rights and those of other internet users. We disagree and affirm the order.

Initially, we accept Doe's argument that our standard of review is de novo. Traditionally, "[a]n appellate court applies 'an abuse of discretion standard to decisions made by [the] trial courts relating to matters of discovery.'" C.A. ex rel.

[1] We confine our opinion to consideration of the issues as they relate only to Carlos Doe, since all other defendants have been dismissed from the litigation.

Applegrad v. Bentolila, 219 N.J. 449, 459 (2014) (alteration in original) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). As a result, "[w]e generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div.) (emphasis added), certif. denied, 185 N.J. 296 (2005); see also Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997) ("[D]eference is inappropriate if the court's determination in drafting its order is based on a mistaken understanding of the applicable law.").

Here, our review focuses on whether plaintiffs have complied with the standards set forth in Dendrite. As we explain, those standards require consideration of purely legal issues. We review the judge's interpretation of the law de novo. Barlyn v. Dow, 436 N.J. Super. 161, 170 (App. Div. 2014). Therefore, we conduct a plenary review of the arguments Doe now raises.

In Dendrite, we delineated a four part test applicable whenever "trial courts [are] faced with an application by a plaintiff for . . . an order compelling an [Internet Service Provider (ISP)] to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating

the rights of individuals, corporations or businesses." Dendrite, supra, 342 N.J. Super. at 141. The trial court must "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." Ibid.

Thereafter,

> Dendrite requires that a plaintiff . . . must: (1) identify the fictitious defendant with "sufficient specificity" to allow for a determination as to whether the defendant "is a real person or entity" who may be sued; (2) demonstrate a "good-faith effort to comply with the requirements of service of process"; (3) present sufficient facts from which it may be concluded that the suit can withstand a motion to dismiss; and (4) provide "a request for discovery with the [c]ourt, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible."
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> [Warren Hosp. v. Does 1-10, 430 N.J. Super. 225, 231 (App. Div. 2013) (quoting Dendrite, supra, 342 N.J. Super. at 151-52).]

If the court determines that a plaintiff has "presented a prima facie cause of action, [it] must balance the defendant's First Amendment right of anonymous 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.

Doe first argues that plaintiffs failed to seek his identity in a timely fashion. He notes that the allegedly defamatory statements were posted on December 16, 2013, but plaintiffs did not serve subpoenas until more than one year later, beyond the applicable statute of limitations for a defamation action. See N.J.S.A. 2A:14-3; Nuwave Inv. Corp. v. Hyman Beck & Co., Inc., 221 N.J. 495, 500 (2015) (reaffirming the applicable one-year statute of limitations). He further contends that plaintiffs failed to act diligently and therefore are no longer entitled to use our Rules governing fictitious parties. See, e.g., R. 4:26-4. These arguments lack sufficient merit to warrant extensive discussion. R. 2:11-3(e)(1)(E).

It suffices to say that Dendrite applies to a discovery procedure to be utilized in a particular, unique setting. It was not intended, nor did it, alter the substantive law regarding the statute of limitations governing defamation actions, or, for that matter, any cause of action. We also reject Doe's assertion that plaintiffs failed to diligently pursue information that might have disclosed his identity, and should thereby be estopped from utilizing Rule 4:26-4. See, e.g., Mears v. Sandoz Pharm., Inc., 300 N.J. Super. 622, 629

(App. Div. 1997) ("[E]ven if a plaintiff does not know the identity of a defendant, he or she will still be precluded from using R. 4:26-4, if, through the use of diligence, he or she should have known the defendant's identity prior to running of the statute of limitations."). In January 2014, one month after initiating suit, plaintiffs served subpoenas duces tecum on the IFF seeking the identity of Doe and other posters on the website. Although plaintiffs were unsuccessful, it cannot be said that they slept on their rights.

Doe next argues that plaintiffs failed to set forth a prima facie case of defamation. He contends that the two posts are, as a matter of law, not defamatory. He also argues that because plaintiffs are "public figures," even if the posts are defamatory, plaintiffs must demonstrate they were made with "actual malice." Again we disagree.

Our Court has "identified the elements of the cause of action for defamation to be: '(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.'" Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009) (quoting DeAngelis v. Hill, 180 N.J. 1, 13 (2004)). "To determine if a statement has a defamatory meaning, a court must consider three

factors: '(1) the content, (2) the verifiability, and (3) the context of the challenged statement.'" Ibid. (quoting DeAngelis, supra, 180 N.J. at 14).

Evaluating the "content" of a statement requires consideration of "'the fair and natural meaning that will be given [to the statement] by reasonable persons of ordinary intelligence.'" DeAngelis, supra, 180 N.J. at 14 (quoting Romaine v. Kallinger, 109 N.J. 282, 290 (1988)). Verifiability turns on whether the statement is one of fact or opinion. Ibid. As to context, "[i]n general, 'words that subject a person to ridicule or contempt, or that clearly sound to the disreputation of an individual are defamatory on their face.'" Leang, supra, 198 N.J. at 585 (quoting DeAngelis, supra, 180 N.J. at 13-14).

Contrary to Doe's argument, the anonymous posts are not opinions, but rather accusations, which to the reasonable person of ordinary intelligence, accuse Mazzuckis and Pereira of an adulterous relationship. They, in turn, have certified that the accusation is false.

Doe also argues that plaintiffs are public figures. Our Court has held that the third, or fault, element of a prima facie case of defamation is elevated if the plaintiff is a public figure or where the challenged statements are pertaining to an issue of public concern. Senna v. Florimont, 196 N.J.

469, 474 (2008). "In those cases, the plaintiff must prove actual malice, showing that the speaker made a false and defamatory statement either knowing it was false or in reckless disregard of the truth." Ibid.

Doe argues that Mazzuckis is a "Deaconess" in the WMS, and Pereira is a "Missionary." He cites to an unpublished Law Division case, in which a judge concluded that the WMS was a "public figure" that has invited controversy through proselytizing its tenets. Alternatively, Doe argues that Mazzuckis and Pereira are "limited purpose public figures." See Berkery v. Estate of Stuart, 412 N.J. Super. 76, 86 (App. Div. 2010) (quoting Berkery v. Kinney, 397 N.J. Super. 222, 227 (App. Div.), certif. denied, 194 N.J. 445 (2008)) (explaining that "an individual may become a limited-purpose public figure for First Amendment purposes if he 'voluntarily injects himself or is drawn into a particular public controversy.'").

Certainly, based upon the record before us, we cannot conclude that plaintiffs' association with the WMS made them public figures or limited public figures, or that statements about the WMS are of such public concern that the heightened actual malice standard applies. An opinion by a trial judge in another case in which the WMS was a named party is not persuasive and certainly not binding upon us.

Nor do we agree that, in order to comply with Dendrite's "prima facie cause of action" requirement, plaintiffs must demonstrate that the posts on the website were made with actual malice, as opposed to negligence. Concededly, in Dendrite, supra, 342 N.J. Super. at 155-56, we determined that satisfying the highly-deferential standard we apply to a motion to dismiss a pleading, see Rule 4:6-2(e), is insufficient. "[C]ourts may depart from traditionally-applied legal standards in analyzing the appropriateness of such disclosure in light of the First Amendment implications." Id. at 157.

In this case, plaintiffs do not concede that they are public figures or limited public figures, to which the heightened standard applies. Whether they are, and whether there is sufficient evidence of actual malice, are questions of law to be decided by the court. Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 168 (1999). The current record does not permit considered judgment of the question, and, since plaintiffs deny that the heightened standard applies, it is illogical to require they plead that it does and that defendants acted with actual malice. We conclude that plaintiffs have stated a prima facie case under Dendrite's more-flexible but more-rigorous analysis.

Finally, Doe contends his First Amendment rights and those of others would be substantially harmed if his identity is not

protected. He cites the number of lawsuits either pending or on appeal, and which plaintiffs acknowledge in their Case Information Statement, involving the WMS as indicative of a concerted effort to use our "discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet[,]" Dendrite, supra, 342 N.J. Super. at 156, as opposed to a legitimate complaint by individuals allegedly defamed.

In considering the Dendrite factors, "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." Id. at 142. Doe seeks to couch the posts on the website as legitimate comments on the governance of a religious entity, the WMS, thereby invoking another cherished First Amendment right. However, accusing individuals of adultery in a public forum is not the kind of robust, publicly-spirited debate entitled to the protections of the First Amendment. "Individuals choosing to harm another . . . through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment."

Immunomedics, Inc. v. Doe, 342 N.J. Super. 160, 167 (App. Div. 2001).

In short, plaintiffs have presented a valid claim and should be given the opportunity to pursue it. Id. at 168. The record demonstrates that despite Doe's protestations to the contrary, plaintiffs have not been able to identify him so as to serve him with process, and so the need for the discovery has been demonstrated. We conclude the motion judge properly considered the balancing of interests in this particular setting.

Affirmed. The matter is remanded to the Law Division for further proceedings.