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Cohen v Google Inc.

Index No. 100012/09, New York State Supreme Court, 17 August 2009

The New York State Supreme Court issues a pre-action order requiring Google to disclose the identity of a blogger who had previously posted defamatory statements about a model on a blog entitled 'Skanks in NYC'.

On 17 August 2009, Judge Joan Madden, a trial judge in the Supreme Court of New York State in New York County[1], issued a pre-action order ('the Order') requiring Google or Blogger.com ('Google') to identify the person or persons (the 'Anonymous Blogger') who had posted allegedly defamatory statements about model Liskula Cohen on the blog 'Skanks in NYC'[2].

The Order required Google to make the pre-action disclosure because Ms. Cohen:

- had 'sufficiently established' the merits of a proposed cause of action for defamation; and
- the information sought was 'material and necessary' to identify the potential defendant[3].

This Order and its 'sufficiently established' standard for unmasking an anonymous online speaker are unique to New York State's civil procedure rules. They use a less rigorous standard than that used by other courts to unmask anonymous speakers in similar circumstances.

Because of the Order's basis in state civil procedure rules and its limited discussion of free speech and privacy concerns, Cohen is more about the applicability of state civil procedure rules in defamation cases than it is about privacy and free speech, despite the obvious implication that New York State courts may become a favored forum for litigants in the future.

The Order is unique to New York State - it allows a potential plaintiff to obtain an anonymous speaker's identity before bringing an action as opposed to filing a 'Doe' suit and commencing discovery. Ms. Cohen sought to compel disclosure so she could use the defendant's identity to draft her complaint[4]. She had tried to obtain the information from Google, but consistent with Google's policies, the company resisted, saying it would disclose the Anonymous Blogger's identity only pursuant to a court order or other legal process[5].

Judge Madden issued the Order pursuant to New York State Civil Practice Law and Rules 3102(c), which allows a court to issue an order compelling disclosure of information 'before an action is commenced...to aid in bringing an action[6]'. Under this rule, New York courts 'require a strong showing that a cause of action exists[7]'. This limits the granting of pre-action orders to cases where a petitioner demonstrates that

- she has 'sufficiently established' a meritorious cause of action and
- the information sought is 'material and necessary' to the actionable wrong[8]. The discretion to make these two determinations rests with the court[9].

Most of Judge Madden's Order focused on evaluating the first issue: whether Ms. Cohen had 'sufficiently established' a meritorious cause of action for defamation.

In New York, the elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by a negligence standard and that either causes special harm or constitutes defamation *per se*[10]. Although a cause of action for defamation requires the petitioner to prove each of these four elements, the Anonymous Blogger apparently challenged Ms. Cohen's allegations only on the first element - whether the statements on the blog were false - so Judge Madden evaluated only this one issue[11].

Ms. Cohen had alleged that five posts on the blog 'Skanks in NYC' contained defamatory statements about her[12]. These statements included the words 'skank', 'skanky', 'ho' and 'whoring', which she characterized as malicious and untrue[13]. Ms. Cohen argued that these statements constituted defamation *per se* because they impugned her chastity and negatively reflected on her business as a professional full-time model[14].

In response, the Anonymous Blogger first argued that the words were not statements of objective fact that could be proven true or false but were instead opinion or hyperbole[15]. Second, the Anonymous Blogger said that, even if the words were capable of a defamatory meaning, the context of the words on a blog - the 'modern day soapbox for...affording the less outspoken, [sic] a protected forum for voicing gripes, leveling invective, and ranting about anything at all' - negated the impression that the words asserted were facts[16].

Judge Madden agreed with Ms. Cohen. First, based on definitions of the words 'skank', 'ho' and 'whoring' in the American Heritage Dictionary, Judge Madden found that these words could be understood to describe Ms. Cohen as 'sexually promiscuous', a fact capable of being proven true or false[17]. The context of the blog, where the words were captions to photographs of Ms. Cohen, confirmed that the words were used to convey facts and were not opinion or hyperbole[18].

Next, Judge Madden dismissed the Anonymous Blogger's 'blogs as soapbox' argument, stating that blogs do not inherently negate a finding that the statements were not factual[19]. Judge Madden held that Ms. Cohen had 'sufficiently established' the merits of an action for defamation, since the statements were facts and since the context did not negate their factual nature.

On the issue of whether the information sought was 'material and necessary', Judge Madden

simply noted that it was and ordered Google to disclose the Anonymous Blogger's name, address, email address, IP address, telephone number, and 'all other information that would assist in ascertaining the identity of that person[20]'. By doing so in such a summary manner, Judge Madden seemed to find that, where a meritorious claim for defamation has been 'sufficiently established', the identity of the speaker is clearly 'material and necessary'.

Although the Order compelled Google to disclose the identity of an anonymous online speaker, there is little in the Order discussing its privacy or free speech implications.

Judge Madden used most of the Order to evaluate whether terms like 'skank', 'skanky', 'ho' and 'whoring' were factual statements that could 'sufficiently establish' - as required by Rule 3102(c) - a meritorious claim of defamation or whether they were mere opinion or hyperbole and therefore insufficient to support a defamation claim. In that sense, the Order was more about New York State civil procedure and the pleading requirements for claims of defamation and less about the Order's implications for anonymous speech on the Internet.

In a section of the Order that did discuss its free speech and privacy implications, Judge Madden relied on a case that found that 'the right to communicate anonymously [online] must be balanced against the need to assure that those persons who choose to abuse [it] can be made to answer for such transgressions[21]'. This citation recognized the need to balance the competing interests at stake, but Judge Madden did not perform that balancing test. Instead, she was satisfied that Ms. Cohen's ability to 'sufficiently establish' a meritorious claim for defamation outweighed the Anonymous Blogger's right to anonymous speech.

Judge Madden included a similar discussion on the issues of privacy and free speech in footnote number five. There, she noted that the Anonymous Blogger had identified another court with 'specific guidelines for determining when the identity of an anonymous Internet speaker should be disclosed to a potential plaintiff seeking to assert a defamation claim[22]'. The Anonymous Blogger argued that the other court's 'heightened' summary judgment standard should apply when deciding whether to compel disclosure of the identity of an anonymous online speaker[23].

Rather than directly addressing the Anonymous Blogger's argument or balancing the right to speak anonymously against the right of a plaintiff to protect her reputation, Judge Madden found that the New York laws generally applicable to pre-action discovery 'appear[ed] to address the constitutional concerns raised in this context[24]'. To support her assertion, she cited several factually similar cases and then moved on, again finding that a plaintiff's ability to 'sufficiently establish' a defamation claim outweighed any right to anonymous speech on the internet.

Because of the case's prominent plaintiff, allegedly defamatory statements that easily translate to catchy headlines, and potential lawsuits against Google and other online service providers in the future, the Cohen case has received extensive media attention.

Going forward, it will be interesting to see whether Ms. Cohen actually succeeds in her claim for defamation against the Anonymous Blogger - now no longer anonymous - and how New York's pre-action discovery rules and the 'sufficiently established' standard evolve as other courts use more stringent standards to balance the right to anonymous speech on the internet against the rights of potential plaintiffs to protect their proprietary interests and reputation.

Ryan T. Mrazik Associate
Perkins Coie LLP
rmrazik@perkinscoie.com

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1. In New York, the Supreme Court is the state's trial court. It is not, as its name might suggest, the highest appellate court in the state. New York's highest appellate court is the Court of Appeals.
2. www.reputationdefenderblog.com/wp-content/uploads/2009/08/liskula-cohen-google-lawsuit.pdf
3. Id. at 5.
4. Id. at 3.
5. Id. at 2.
6. N.Y.S. C.P.L.R. § 3102(c).
7. Cohen, supra n. 3 at 3 citing Siegel, Supplementary Practice Commentaries, McKinney's Consolidated Laws of New York, Book 7B, C.P.L.R. 3102:5 at 92.
8. Id. at 4 citing Matter of Uddin v. New York City Transit Authority, 27 A.D.3d 265, 266 (1st Dept. 2006).
9. Id. at 4 citing Matter of Peters v. Southeby's Inc., 34 A.D.3d 29, 34 (1st Dept. 2006).
10. Id. at 5 citing Dillon v. City of New York, 261 A.D.2d 34, 38 (1st Dept. 1999).
11. The Anonymous Blogger, who was a non-party to the matter between Ms. Cohen and Google, appeared anonymously through counsel and submitted opposition papers.
13. Id. at 2.
14. Id.
15. Id.
16. Id. at 3.
17. Id.
18. Id. at 7.
19. Id.
20. Id. at 8.
21. Id. at 9.
22. Id. at 8 citing In re Subpoena Duces Tecum to America Online, Inc., 2000 WL 121372 (Va. Cir. Ct.) rev'd on other grounds 542 S.E.2d 377 (Va. Sup. Ct. 2001).
23. Id at 4, fn. 5 citing Dendrite International, Inc. v. Doe No. 3, 342 N.J. Super. 134, 141 (App. Div. 2001).
24. Id.
25. Id. at 5, fn. 5

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