La Societe **Metro Cash** & Carry France

V.

Time Warner Cable, a division of Time Warner Entertainment Company, L.P.

CV030197400S

Superior Court of Connecticut.

File Date: December 2, 2003

Tobin, J.

Memorandum of Decision

This action, for a bill of discovery, arises out of the following facts. The plaintiff operates warehouse distribution centers throughout France. In March 2003 several of the plaintiffs regional directors received a e-mail communication accusing the plaintiff of underhanded and deceptive business practices including issuing false financial statements and acting improperly with respect to the compensation and working conditions of its regional directors. The e-mail was addressed to the regional directors on plaintiffs internal communication network. The author of the e-mail was purportedly Robed Dupont, a false name. The plaintiff was able to trace the e-mail back through several Internet service providers to an Internet account of a subscriber of the defendant, Time Warner Cable.

The plaintiff sought and obtained an order from a French court requiring disclosure of the name, address and telephone number of the subscriber who opened the Internet account. Defendant Time Warner notified its subscriber of the order. Thereafter, counsel for the subscriber wrote to defendant Time Warner disputing the validity of the order of the French court and demanding that Time Warner not disclose the information requested without an order from a court in the United States.

Following this refusal, the plaintiff filed this action seeking the desired information through a bill of discovery which it served on Time Warner. Time Warner, pursuant to its obligations under §551, notified the subscriber of the application. That law provides, in relevant part:

> (c) Disclosure of personally identifiable information
>
> (1) Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.
>
> (2) A cable operator may disclose such information if such disclosure is—
> ...

(B) ... made pursuant to a court order authorizing such disclosure, if the subscribed is notified of such order by the person to whom the order is directed; ...

Counsel for the subscriber filed two motions with the court. The first motion was to appear and proceed under the fictitious name of Jane Doe. There was no objection to that motion and the court determined that it was appropriate to allow the subscriber to appear anonymously in order to permit her a meaningful hearing regarding her privacy claims. A second motion, to intervene as a party defendant, was granted without objection.

Defendant, Time Warner Cable, failed to appear at the hearing on plaintiffs application for a bill of discovery. Defendant, Jane Doe, appeared by counsel and opposed the application. At the hearing, plaintiffs in-house counsel, Alain Jourdan, testified regarding the untruthfulness of many statements in the e-mail and the disruption to its business caused by the dissemination of such statements to key employees. He further testified that he believed that it was likely that the author of the e-mail was an employee of plaintiff's, but that under French law an employer's ability to seek information directly from employees under such circumstances was severely limited.

Defendant Doe opposes the application on several grounds. First, she questions whether the plaintiff has demonstrated that there is probable cause that it has a potential cause of action against her either under Connecticut law or French law. Second, she claims that if the communications were defamatory under French law, they also constitute a crime and reasons that her constitutional privilege against self-incrimination allows her to prevent disclosure. Third, she invokes a claimed First Amendment right to privacy of anonymous communications over the Internet. She also claims that the French court order obtained by plaintiff has not been proven in this court and that the plaintiff is "forum-shopping."

Bills of discovery have long been recognized in Connecticut. In a recent case, *Journal Publishing Co. v. Hartford Courant Co.,* 261 Conn. 673, 804 A.2d 856 (2002), the Connecticut Supreme court provided a concise, yet through, explanation of the action.

The bill of discovery is an independent action in equity for discovery a, and is designed to obtain evidence for use in an action other than the one in which discovery is sought ... As a power to enforce discovery, the bill is within the inherent power of a court of equity that has been a procedural tool in use for centuries ... The bill is well recognized and may be entertained notwithstanding the statutes and rules of court relative to discovery ... Furthermore, because a pure bill of discovery is favored in equity, it should be granted unless there is some well founded objection against the exercise of the court's discretion ...

To sustain the bill, the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought ... Although the petitioner must also show that he has no other adequate means of enforcing discovery of the desired material, [t]he availability of other remedies ... for obtaining information [does] not require the denial of the equitable relief ... sought ... This is because a remedy is adequate only if it is one which is specific and adapted to securing the relief sought conveniently, effectively and completely ... The remedy is designed to give facility to proof ...

Discovery is confined to facts material to the plaintiffs cause of action and does not afford an open invitation to delve into the defendant's affairs ... A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action ... A plaintiff should describe with such details as may be reasonably available the material he seeks ... and should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess would turn up evidence helpful to [his] case ... What is reasonably necessary and what the terms of the judgment require call for the exercise of the trial court's discretion.

The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for presenting an action ... Its existence or nonexistence is determined by the court on the facts found ... Moreover, the plaintiff who seeks discovery in equity must demonstrate more than a mere suspicion; he must also show that there is some describable sense of wrong.

261 Conn. at 680-82

In its application the plaintiff alleges that it sought and obtained an order from a French court requiring the disclosure of the identity of the subscriber who sent the subject e-mail using defendant Time Warner's Internet service provider. Defendant Doe correctly points out in her brief that she was not a party to the proceedings in France and that the plaintiff haws not submitted the order to this court or requested that it be enforced. However, it is clear that the plaintiff is not seeking to enforce the French court order. Plaintiff has brought this application as an independent proceeding under Connecticut law. The only role that the order of the French court plays in this proceeding is as evidence of plaintiff's good faith efforts to obtain the requested information prior to the filing of this bill of discovery. Defendant Doe's allegations of "forum shopping" are unsubstantiated. She has failed to demonstrate that there is another jurisdiction in which plaintiff could obtain the information which it seeks by this bill of discovery.

The court has reviewed the e-mail sent to plaintiff managers from defendant Doe's IP address. There is no question but that the document is intended to portray the plaintiff and its senior managers in an unsavory light. They are accused of "milking operating accounts using methods that approach intellectual dishonesty," of disregarding the financial interests and welfare of "Directors" (key managers in subordinate positions), and of dealing with their employees in bad faith. These accusations were e-mailed to a number of Directors and, without doubt, were intended to disrupt the plaintiffs relationships with these employees The plaintiffs in-house counsel, Alain Jourdan, testified that such disruptions did, in fact, occur and that the plaintiff suffered financial damage as a result.

Defendant Doe argues that the communication could not be defamatory because of lack of publication. She claims that Connecticut law requires publication of defamatory material outside of a corporation. This argument must fail for two reasons. First, although Alain Jourdan stated his belief that the author of the e-mail was most likely an employee of plaintiff, it has by no means been established that such is the case. Second, and more importantly, contrary to defendant Doe's assertions, Connecticut law no longer requires publication outside of a corporate entity as an element of the tort of defamation. *Torosyan v. Boehringer Ingelheim*

Pharmaceuticals, Inc., 234 Conn. 1, 662 A.2d 89 (1995). The Supreme Court's holding is clear and unambiguous.

Although intracorporate communications once were considered by many courts not to constitute "publication" of a defamatory statement, that view has been almost entirely abandoned, and we reject it here.

Id., at 27, 28

The court concludes that the plaintiff has established probable cause that it has a cause of action against defendant Jane Doe under Connecticut law.

However, it is by no means clear that Connecticut law is applicable. Defendant Doe claims that the plaintiffs evidence suggested that it is more likely that the defamatory e-mail originated in France. Indeed, Alain Jourdan testified as to his belief that such was the case. In her post-hearing memorandum, defendant Doe submitted an affidavit from a French Attorney, Isabelle Smith Monnerville, regarding the French law which Doe asserts is applicable to this matter. The affidavit is written quite narrowly. It states that under French law defamation is defined by statute and does not include private communications. The affidavit further states that in a January 2003 decision, a French court determined that e-mails are such private communications. In that case the court denied an application to order the disclosure of the identity of a subscriber who allegedly sent a defamatory e- mail under the cover of a Lycos address.

Attorney Monnerville's affidavit does not explicitly state that under French law no tort or civil wrong can be committed by sending false or defamatory materials over the Internet. Elsewhere in her brief defendant Doe argues that this court should give no weight to the order which plaintiff obtained from a French court. As previously discussed, the court has determined that the plaintiff is not requesting this court to give full faith and credit to that decision or asking that it be recognized as binding upon this court or the parties. However, the plaintiffs ability to obtain such an order from a French court undermines defendant Doe's claims regarding French law. While the date of that order is not in evidence, it is clear that it entered subsequent to both the April 2003 e-mail and the January 2003 decision referred to in attorney Monnerville's affidavit. It would appear that either the French court which granted plaintiffs order took a different view of the law than the court which entered the January 2003 decision or French law is not as settled as attorney Monnerville suggests. In any event, the court is not persuaded that the e-mail in question would not be actionable as a civil matter under French law.

"[T]he court need not take judicial notice of the law of a foreign jurisdiction, whether common law or statutory ... unless authoritative sources of the foreign law, subject to inspection or verification by opposing counsel, are made available to the court by reference or otherwise, under the usual rules for judicial notice ... Matter which it is claimed the court should judicially notice should be called to its attention by the party seeking to take advantage of the matter so that, if there is ground upon which it may be contradicted or explained, the adverse party will be afforded an opportunity to do so." (Citations omitted; internal quotation marks omitted.) *Wood v. Wood,* 165 Conn. 777, 780-81, 345 A.2d 5 (1974).

Defendant Doe's claim of constitutional privilege against self-incrimination must fail. It is not defendant Doe that is being asked to reveal any information, whether incriminatory or not. The

bill of discovery is directed to a third party, defendant Time Warner. In any event, defendant Doe does not have a constitutional right to prevent the disclosure of non-testimonial evidence. *State v. Asherman,* 193 Conn. 695, 712-15 (1984), cert. denied, 470 U.S. 1050 (1985).

Defendant Doe's claims of privacy rights with respect to Internet communications are worth considering at length. It does not appear that any Connecticut courts have addressed the issue of the rights of individuals .in the context of civil litigation. In *State v. Signore,* CR 00- 133453, 2001 Ct.Sup. 16476, 31 Conn. L. Rptr. 91 (2001), a superior court considered a defendant's privacy rights in the context of a criminal prosecution. The defendant was charged with sexual assault in the second degree, risk of injury to a minor and using a computer to entice a minor to engage in sexual activity. The defendant challenged the admission in evidence of information regarding the identity of the defendant obtained by warrant from an Internet service provider. The court reviewed the provisions of applicable federal legislation and found the state in full compliance. The court declined the defendant's request to suppress the evidence under the Fourth Amendment.

The courts that have addressed question of Internet privacy in a civil context have determined that there is a First Amendment right to anonymous speech that extends to speech on the Internet. *Doe v. 2TheMart.Com Inc.,* 140 F.Sup.2d 1088 (W.D.Wash 2001) In that case the officers and directors of a publicly held company were defendants in a shareholders derivative action alleging market fraud. In connection with their defense, a subpoena was issued to an Internet service provider seeking identification of twenty three anonymous speakers in an Internet chat room devoted to the public held company. The court recognized the implications of allowing disclosure of such information without limitation. "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Id.,* 1093. "Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts." *Id.* The court reviewed a number of prior cases involving anonymous communications and announced a four-part]standard for evaluating civil subpoenas seeking the identity of Internet users. First, the information must be sought in faith and not for any improper purpose. Second, the information sought must relate to a "core claim or defense." Third, the identifying information must be directly and materially relevant to that claim or defense. Fourth, the information must not be available from any other source. *Id.* 1095.

Applying these standards the court in *Doe* determined that, on balance, officers and directors had established good faith and that the information requested was not sought for an improper purpose. However, the court found that information sought did not relate to a core claim or defense; none of the anonymous speakers were parties to the underlying cause of action. The court found that while the unfavorable statements made by the anonymous speakers may have contributed to the decline in value of the company's stock, the identity of the speakers was not directly relevant to the defense of the officers and directors. As the standards which it had articulated had not been met, the court granted the motion to quash the subpoena.

Other courts have held that First Amendment rights attached to anonymous Internet communications are not absolute. *In re Subpoena Duces Tecum to America Online, Inc.,* 2000 WL 1210372, 6 (Va.Cir.Ct.2000), order reversed on other grounds, *America Online, Inc. v. Anonymous Publicly Traded Co.,* 542 S.E.2d 377 (2001). In that case an anonymous plaintiff in

an Indiana action had a subpoena issued in Virginia to discover from an Internet service provider the names of five individuals who posted defamatory statements on the Internet. The information was being sought so that the individuals could be named as defendants in the Indiana litigation replacing the "John Does" against whom the litigation had been commenced. America Online, the Internet service provider moved to quash the subpoena asserting its subscribers' First Amendment rights. The court recognized that the subpoena could have an oppressive effect on AOL and its subscribers and that substantial constitutional rights were involved. However, the court found that these rights were not absolute. "Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights." *Id.,* 6. The court held that discovery could be ordered "(1) when the court is satisfied by the pleadings or evidence supplied to the court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim." *Id.,* 8. The court's order denying a motion to quash the subpoena was reversed on the ground that the trial court should not have allowed the plaintiff to proceed anonymously. *America Online, Inc. v. Anonymous Publicly Traded Co., Supra.*

It does not appear that courts of other jurisdictions have reached a consensus with respect to the tests or standards which must be met before a court allows discovery of the identity of an anonymous speaker utilizing the Internet. The standards articulated-in *re Subpoena Duces Tecum to America Online, Inc., supra,* were appropriate to the issues confronting those courts. The standards set forth in *Journal Publishing Co., supra,* are based upon the fact that a bill of discovery is essentially an equitable_proceeding. As such those standards can be adapted to protect the diverse interests which may be involved in any discovery request initiated by way of a bill of discovery. This court concludes that the application of the *Journal* standards is appropriates to protect both the of a party seeking discovery as well as those speaking anonymously over the Internet.

Applying those standards to this case, the court finds that the plaintiff has established that there is probable cause that it has suffered damages as the (result of the tortious acts of defendant Doe; that it is seeking information regarding her identity in good faith and not for any improper purpose. The court further finds that the information is limited in scope and is directly related to the plaintiffs cause of action and that the plaintiff has no other adequate means of obtaining such information. Accordingly, plaintiffs application for a bill of discovery is granted.

David R. Tobin, Judge