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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

JOHN DOE 1, an individual,

Petitioner,

v.

CLOUDFLARE, INC.,

Respondent.

PATRICK S. TOMLINSON,

Plaintiff,

v.

JOHN DOES 1–60, NAMES UNKNOWN,

Defendants.

Case No. CPF-21-517455

DISCOVERY

PETITIONER JOHN DOE 1'S REPLY IN SUPPORT OF PETITION TO QUASH SUBPOENA TO CLOUDFLARE, INC. ISSUED FOR CASE PENDING IN FOREIGN JURISDICTION PURSUANT TO CCP §2029.600 AND REQUEST FOR SANCTIONS

In re out-of-state action:
Patrick S. Tomlinson v. John Does 1–60, Names Unknown, Case No. 2021CV000500
State of Wisconsin Circuit Court, Milwaukee County

Filed by John Doe 1

Date: June 29, 2021
Time: 9:00 a.m.
Ctrm.: 302
Before: The Hon. Ethan P. Schulman

INTRODUCTION[1]

In his Opposition, Plaintiff Patrick Tomlinson ("Tomlinson") argues that Petitioner John Doe 1 ("Petitioner") was not just the operator of OnA Forums, but a participant in the misconduct that occurred within that forum. However, Tomlinson's evidence does not show that Petitioner was involved in any of the misconduct at issue, and Tomlinson's efforts to impute others' online misconduct to Petitioner runs afoul of the Communications Decency Act, 47 U.S.C. §230 ("CDA").

Petitioner is not unsympathetic to Tomlinson's situation. Tomlinson has alleged that Defendants John Does 2–60 engaged in a years-long campaign to defame and harass him. As a result, Tomlinson now fears for his own safety and the safety of his family. While the alleged behavior of the other Defendants is disturbing, the fact remains that Tomlinson has no valid legal claim against Petitioner for the other Defendants' actions.

Despite Tomlinson's descriptions of the defamation and harassment that he has endured, the First Amendment and the interpretive authority recognize the intrinsic value of websites where people can discuss taboo matters without fear of their identities being revealed. When those users cross the line and engage in unlawful conduct, then yes, their identities can be unmasked through legal process. But that is not the case here with respect to Petitioner. Petitioner's only role in the misconduct alleged in Tomlinson's Complaint is his operation of OnA Forums. Tomlinson has not identified or submitted evidence of any specific statement or action by Petitioner that has defamed, harassed, or threatened Tomlinson. Thus, the Court should quash Tomlinson's Subpoena to Cloudflare (the "Subpoena").

ANALYSIS OF TOMLINSON'S EVIDENCE

As summarized below, Tomlinson's evidence does not support his claim that Petitioner engaged in the misconduct described in the Complaint.

- Tomlinson submits evidence of a January 10, 2020 post by Quasi101/Petitioner, wherein Petitioner explained that he started OnA Forums after receiving complaints

[1] Capitalized terms have the same definitions set forth in Petitioner's opening brief.

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about failures of a European-hosted website, *i.e.* <opieandanthonyarchives.com>, to adhere to European privacy laws and the posting of doxing information on that website. (Resto Decl. ¶7 & Ex. 7.) Nothing about this exhibit shows that Petitioner engaged in any defamation, harassment, or threats of Tomlinson.

- Tomlinson submits evidence of a separate January 10, 2020 post by Quasi101/Petitioner, which states that Petitioner is "'more relaxed' than other websites when it comes to what constitutes 'harassment.'" (Resto Decl. ¶8 & Ex. 8.) Significantly, Tomlinson ignores the portion of that post where Petitioner states, "Like I said you cant post harassment shit there and you cant do it here either." [sic all] (Resto Decl. ¶8 & Ex. 8.) But, even if Petitioner were more relaxed about what constitutes harassment on OnA Forums, he is still within the purview of the CDA's protection as discussed in more detail below.
- Tomlinson submits evidence that Petitioner wrote an online review about Tomlinson's books. (Resto Decl. ¶9a & Ex. 9.) However, Petitioner has never denied authoring bona fide reviews of Tomlinson's works. More importantly, Tomlinson has not produced any evidence that Petitioner authored any defamatory, harassing, or otherwise unlawful review. Moreover, the fact that Petitioner explained that newer reviews might avoid automated filters on the Goodreads app is irrelevant to Tomlinson's claim that Petitioner defamed, threatened, and harassed him.
- Tomlinson submits evidence of a March 6, 2020 post by Quasi101/Petitioner and argues that this post shows that Petitioner provided "detailed advice on how to disable Plaintiff's legitimate social media profiles by providing his users with specific instructions on how to abuse the reporting functions available on social media while remaining anonymous, noting that he had done this himself." (Resto Decl. ¶9b & Ex. 10.) Tomlinson ignores the portions of this post that explain that users were brainstorming about how to report Tomlinson's evasion of Twitter's ban of his profile. Tomlinson also ignores the portion of this post that explains that Petitioner

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used the Twitter reporting function on an unrelated profile—not Tomlinson's. Most significantly, Tomlinson has offered no evidence that Petitioner submitted a false complaint to Twitter about Tomlinson.

Tomlinson's remaining evidence suffers from the same defects—it simply does not show that Petitioner (as opposed to OnA Forums users) engaged in any defamation, harassment, or threatening of Tomlinson.

ARGUMENT

A. Petitioner's Petition to Quash was properly filed in San Francisco Superior Court.

Tomlinson argues that Petitioner should have filed his petition to quash in the Circuit Court of Milwaukee County, Wisconsin pursuant to CCP §1004. Tomlinson is incorrect. Tomlinson issued his Subpoena pursuant to California's Interstate Depositions and Discovery Act, CCP §§2029.100, *et seq.* (the "IDDA"). Section 2029.600(a) of the IDDA specifically provides: "[i]f a dispute arises relating to discovery under this article, any request for a protective order or to enforce, quash, or modify a subpoena…may be filed in the superior court in the county in which discovery is to be conducted…" (emphasis added). Tomlinson's Subpoena was directed to Cloudflare, Inc. in San Francisco, California.

The IDDA provides for the filing of motions in California because the issue is not, as Tomlinson claims, whether a California court has personal jurisdiction over Tomlinson; rather, the issue is of the Court's ability to safeguard the subpoenaed California witness. The objective of the IDDA is to ensure that if a dispute arises relating to discovery under this article, California is able to protect its policy interests and the interests of persons located in the state. *See* CCP §2029.600, Law Revision Commission Comment, 2008. Thus, Petitioner properly filed his Petition to Quash in San Francisco Superior Court.

B. Petitioner is immune from liability for the misconduct of third parties under the Communications Decency Act.

The Communications Decency Act, 47 U.S.C. §230, grants immunity to a provider

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or user of an interactive computer service whom a plaintiff seeks to treat as the publisher or speaker of information provided by another information content provider. *See Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 463 (2020). A defendant loses CDA protection if the defendant is "responsible, in whole or in part, for the creation or development of [the] information." *See Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 409 (6th Cir. 2014). By contrast, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 26 (2021). Only when a website operator materially contributes to the allegedly tortious information does it lose CDA protection. *See Jones*, 755 F.3d at 413. But if a party only passively displays content created entirely by third parties, then it is only a service provider with respect to that content, and thus shielded from liability under the CDA. *See id.* In close cases, the issue of liability must be resolved in favor of immunity, lest the court "cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008).

Importantly, it is well established that notice of the unlawful nature of information provided by a third-party publisher is not enough to impose liability on an ICS. *See Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1269 (D.C. Cir. 2019). Here, Tomlinson has not presented any evidence that Petitioner did anything other than perform his traditional editorial functions as a website operator. The extremely limited comments that Tomlinson attributes to Petitioner in his Opposition do not contribute in any material way to the statements of the other Defendants that Tomlinson contends are defamatory, harassing, and threatening. Put simply, Petitioner is not liable for hosting third parties' unlawful content, even if he is fully aware that it is false, harassing, or threatening.

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C. Tomlinson has not produced evidence supporting any claims against Petitioner.

As discussed above, Petitioner is immune from liability under the CDA for claims that seek to treat him as the author of content provided by third parties. Because all of Tomlinson's claims seek to treat Petitioner as the author of third-party content, Tomlinson's claims against Petitioner fail. *See Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 463 (Nov. 18, 2020).

1. Tomlinson has not submitted evidence that Petitioner published any defamatory statements about him.

Tomlinson argues that because Petitioner admitted he published a review about Tomlinson's books, and other Defendants supposedly admitted to publishing *fake* reviews about Tomlinson's books, this is clear and convincing evidence that Petitioner published defamatory statements. More specifically, Tomlinson appears to argue that Petitioner provided "detailed instructions" on how to "leave fake book reviews." (Opp. at 10:27–11:2.) However, Tomlinson's evidence only shows that Petitioner discussed his own experience leaving a review on the Goodreads app, where users were having difficulty posting reviews, for reasons which included, *e.g.*, the age of the account. (Resto Decl. Ex. 9.) In fact, many other responders in this thread indicated that they wanted to leave *honest* reviews. Tomlinson's evidence simply does not show that Petitioner published any fake review about Tomlinson's books, particularly given Petitioner's sworn declaration that he did not publish any of the reviews at issue in the Complaint.

Moreover, Tomlinson has not identified any allegedly defamatory statement made by Petitioner about Tomlinson at all (in a review or otherwise). While other Defendants may have published fake reviews about Tomlinson, this is not evidence that Petitioner published fake reviews about Tomlinson. *See Glassdoor, Inc. v. Superior Ct.*, 9 Cal. App. 5th 623, 637 (2017) (finding that vague and conclusory allegations were insufficient to make a prima facie case of a claim).

Because Tomlinson has produced no evidence that Petitioner published any

defamatory statements about Tomlinson, Tomlinson's defamation claim against Petitioner fails, and Tomlinson's Subpoena must be quashed.

2. Tomlinson has not submitted any evidence supporting his invasion of privacy claim against Petitioner.

To support his claim for invasion of privacy for intrusion upon seclusion, Tomlinson submits evidence that his home and motorcycle were vandalized on May 20, 2021. (Tomlinson Decl. ¶20.) This evidence does not support a claim against Petitioner. First, this claim is not present in Tomlinson's Complaint, nor could it be given that the alleged misconduct had not occurred when the Complaint was filed.

Second, Tomlinson has not presented any evidence that Petitioner was involved in vandalizing his home and motorcycle. While it is unfortunate that Tomlinson suffered this trespass and vandalism, and while that misconduct may be actionable against the actual perpetrators, Tomlinson has not produced any evidence that Petitioner was involved in this misconduct.

Finally, while not specifically addressed in his Opposition, Tomlinson has produced no evidence that Petitioner published Tomlinson's contact information or the contact information of his relatives. In fact, Tomlinson does not even attempt to substantiate this aspect of his claim. For these reasons, Tomlinson's claim for invasion of privacy against Petitioner fails, and the Court should quash his Subpoena.

3. Tomlinson has not submitted any evidence that Petitioner intentionally inflicted emotional distress on him.

To support his claim for intentional infliction of emotional distress ("IIED"), Tomlinson submits evidence that Defendants other than Petitioner barraged Tomlinson with unwanted communications, defaced the online obituaries of Tomlinson's relatives, and wrote about it on OnA Forums. (Opp. at 13:15–22.) However, Tomlinson has submitted no evidence that *Petitioner* participated in this conduct, other than stating that the matter was discussed on OnA Forums.

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4. Tomlinson has not submitted any evidence that Petitioner tortiously interfered with his prospective business relationships.

To support his claim for tortious interference with prospective business relations, Tomlinson argues that Petitioner abused Twitter's reporting function to get Tomlinson's Twitter account banned and provided other OnA Forums users with specific instructions on how to do the same. (Resto Decl. Ex. 10.) What Tomlinson fails to disclose is that Twitter had already suspended Tomlinson's Twitter accounts twice, and pursuant to Twitter's policies, users are not permitted to circumvent permanent suspensions by creating new accounts; this is known as Twitter's "ban evasion policy." (Declaration of Jeffrey M. Rosenfeld in Support of Petitioner's Reply to Petition to Quash Subpoena to Cloudflare ("Rosenfeld Decl.") ¶¶2–3 & Exs. A–B.)

Thus, as an initial matter, Petitioner's statements about flagging problematic accounts to Twitter were not intended to interfere with a legitimate contract between Tomlinson and Twitter, as Tomlinson's efforts to evade his permanent suspension violated Twitter's policies. Second, Petitioner was simply offering advice to OnA Forums users on how to *report ban evasion accounts generally*; Tomlinson has submitted no evidence that Petitioner reported Tomlinson's Twitter account, much less for the purpose of interfering with Tomlinson's ability to promote his work through Twitter. Finally, since Tomlinson has provided no evidence that Petitioner intentionally interfered with a contract with Twitter, he cannot establish any actual interference occurred or any causal connection to Tomlinson's purported damages (which he also has not established).

In the same vein, Tomlinson has submitted no evidence that Petitioner interfered with Tomlinson's contracts with Amazon, Barnes and Noble, and Goodreads, aside from vague allegations in the Complaint that his social media accounts were suspended. Such vague allegations are insufficient to support a claim under California law. *See Glassdoor*, 9 Cal. App. 5th at 637. Thus, the Court should quash Tomlinson's Subpoena.

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5. Tomlinson has not submitted any evidence that Petitioner participated in a conspiracy against him.

To support his conspiracy claim against Petitioner, Tomlinson points to a comment made by Petitioner where Petitioner stated, "We've refined the autism to a fine point, and this all ends when you say it does." (Resto Decl. Ex. 11.) This one statement does not come close to establishing the elements of a conspiracy.

As an initial matter, "[m]ere knowledge, acquiescence or approval of a plan, without cooperation or agreement to cooperate, is not enough to make a person a party to a conspiracy." *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523, 567 (2005) (quoting *Edwardson v. American Family Mut. Ins.* Co*., 589* N.W.2d 436 (Wis. Ct. App. 1998)). Rather, to form a conspiracy there must be an agreement to violate or disregard the law. *See Bruner v. Heritage Companies*, 225 Wis. 2d 728, 736, 593 N.W.2d 814, 818 (Ct. App. 1999). Tomlinson has produced no evidence that Petitioner agreed to violate or disregard the law; to the contrary, Tomlinson's evidence indicates that Petitioner would not tolerate unlawful harassment on OnA forums. (Resto Decl. ¶8 & Ex. 8.)

Moreover, Tomlinson has produced no evidence that Petitioner engaged in any wrongful acts pursuant to the purported conspiracy. *See N. Highland Inc. v. Jefferson Mach. & Tool Inc.*, 898 N.W.2d 741, 747 (Wis. 2017). In order to establish a conspiracy claim against Tomlinson under Wisconsin law, Tomlinson must establish Petitioner's participation in the predicate torts.

> "The gravamen of a civil action for damages resulting from an alleged conspiracy is thus not the conspiracy itself but rather the civil wrong which has been committed pursuant to the conspiracy and which results in damage to the plaintiff [¶] The wrongful acts, done in pursuance of the conspiracy, which constitute the grounds or gravamen of the action, whether single or several, must be set out with the same certainty and particularity as in an ordinary civil action, against a single defendant, growing out of tortious acts of the same general character, primarily, so that the opposite party or parties will be apprised of what they will be called on to answer, and for the further reason that, if the facts well pleaded should be admitted, the court would be enabled to draw the proper legal conclusions therefrom."

Onderdonk v. Lamb, 255 N.W.2d 507, 509 (Wis. 1977) (emphasis added). Because

Tomlinson has not shown that Petitioner himself committed any wrongful act, he has not established a claim for conspiracy against Petitioner.

D. While Tomlinson may be entitled to discovery about the other Defendants, this argument is a pretext.

Tomlinson alternatively argues that he has a right to discovery from Cloudflare so that he may depose Petitioner to learn the identities of other Defendants. This argument is a pretext. Tomlinson has named Petitioner as a Defendant. In his Opposition (as in his Complaint) Tomlinson expressly claims that Petitioner was involved in the misconduct at issue. Finally, Petitioner has already provided the readily-accessible identifying information he has about the other Defendants to Tomlinson, and Petitioner has verified the same in his sworn declaration filed with the Court.

Thus, the Court should quash Tomlinson's Subpoena to Cloudflare.[2]

CONCLUSION

For the foregoing reasons, the Court should quash Tomlinson's Subpoena to Cloudflare and award Petitioner his attorney's fees and costs incurred in bringing the instant petition to quash.

Respectfully Submitted,

DATED: June 22, 2021

KRONENBERGER ROSENFELD, LLP

By: _____
Ruben Peña

Attorneys for Petitioner John Doe 1

[2] Tomlinson also fails to address the overbreadth of the Subpoena. As discussed in Petitioner's opening brief, the Subpoena not only seeks identifying information about Petitioner, but also asks for Petitioner's bank account and payment information, IP address information, login history, other websites that Petitioner operates through Cloudflare, and "[a]ny other information routinely kept in the ordinary course of business for each" by Cloudflare for Petitioner. Such information is not relevant to the identification of Petitioner or John Does 2-60.