SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

SHAUN GOLDEN and **GOLDEN WEALTH MANAGEMENT INC,** Plaintiffs, -against- **PAIGE ROMANOWSKI,** Defendant.	INDEX NO: **2010-28167** MTN SEQ NO: 001 - MG ORIG MTN DATE: 10/15/10 MTN SEQ NO: 002 - Mot D ORIG MTN DATE: 10/15/10 MTN SEQ NO: 003 - MG ORIG MTN DATE: 10/15/10 FINAL MTN DATE: 11/17/10

UPON the following papers numbered 1 to 10 read on these Motions:
Plaintiffs' Motion (Papers 1-3);
Defendant's Notice of Cross Motion (Papers 4-5);
Plaintiff's Reply (Papers 6-8);
Defendant's Reply (Papers 9-10);
Plaintiff's Order to Show Cause (Papers 11-12);
it is,

ORDERED, the application of Plaintiff [001] is hereby granted, the application of Defendant [002] is hereby denied with leave to renew, and the unopposed application of Plaintiff [003] is hereby granted in all respects.

Plaintiff moves this Court [001] for an Order dismissing Defendant's Counterclaim (improperly termed "dismissing the complaint" by Plaintiff) pursuant to CPLR 3211(a)(7) and/or 3211(a)(1).

Defendant moves this Court [002] for an Order directing entry of summary judgment in favor of Defendant and against Plaintiff, dismissing Plaintiff's Complaint pursuant to CPLR 3212.

Plaintiff moves this Court [003] for an Order issuing a Subpoena Duces Tecum.

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(7), the court must accept the factual allegations of the Complaint and in any supporting affidavit as true, accord the pleader all favorable inferences which may be drawn therefrom, and determine only whether the facts as alleged fit within any cognizable legal theory (*see:* ***Leon v Martinez***, 84 NY2d 83). The criterion is whether the pleader has a cause of action, not whether he may ultimately succeed on the merits (*see:* ***Stukuls v State of New York***, 42 NY2d 272). Under CPLR 3211(a)(1), a dismissal is warranted only where

documentary evidence is "such that it resolves all factual issues as a matter of law, and conclusively disposes of the claim" (***Trade Source Inc v Westchester Wood Works Inc***, 290 AD2d 437).

In order to state a cause of action alleging the intentional infliction of emotional distress, the conduct alleged must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (***Murphy v American Home Products Corp***, 58 NY2d 293, quoting Restatement [Second] of Torts §46, comment d). This threshold of outrageousness is sufficiently difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, "every one has failed because the alleged conduct was not sufficiently outrageous" (***Howell v New York Post Co***, 81 NY2d 115). "Those few claims of intentional infliction of emotional distress that have been upheld by this Court were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment (***Seltzer v Bayer***, 272 AD2d 263; see, eg, ***Slatkin v Lander Litho Packaging Corp***, 33 AD3d 421 ["phone calls, including to the individual plaintiff's parents, threatening his arrest and criminal prosecution; instigation of the individual plaintiff's arrest by means of false statements to the police is not so outrageous as to be intolerable"]; ***Associates First Capital v Georgianne Crabill***, 51 AD3d 1186 ["phone calls placed to the workplace of one of the defendants that were embarrassing and upsetting, misrepresentations as to the amount owed, and stress resulting from the ongoing dispute. While such conduct was unfortunate and undoubtedly caused embarrassment and stress, it did not meet the 'rigorous . . . and difficult to satisfy' requirements for a viable cause of action for intentional infliction of emotional distress. ***Howell v New York Post Co***, 81 NY2d at 122, quoting Prosser and Keeton, Torts § 12, at 60-61 [5th ed]"].

Here, Plaintiff's Attorney sent a letter to Defendant requesting that she cease and desist from posting online defamatory statements about Plaintiff. This letter mentions that such conduct may be a violation of the temporary order of protection issued against Defendant in favor of Plaintiff. The letter was addressed to Defendant and sent to both her home address and to her husband's employer's address, in care of Defendant, under the mistaken belief that she worked there in addition to her husband. Defendant alleges, without more, that Plaintiff sent this letter with intent to cause severe emotional distress.

Even accepting these allegations as true, they do not constitute conduct within the rule. Such conduct cannot be considered to be so extreme and outrageous as to be intolerable in a civilized community (*see:* ***Brown v Sears Roebuck & Co***, 297 AD2d 205). Additionally, Defendant alleges only one instance of allegedly aggravating conduct, instead of the series of acts necessary to establish a viable action (*see:* ***Roberts v Pollack***, 92 AD2d 440). Consequently, Plaintiff's motion to dismiss Defendant's counterclaim for intentional infliction of emotional distress is granted.

In considering Defendant's cross-motion for summary judgment dismissing the Complaint pursuant to CPLR 3212, the Court's function in deciding a motion for summary judgment is issue finding, not issue determination (*see:* ***Sillman v Twentieth Century Fox Film Corp***, 3 NY 2d 395). Summary judgment is a drastic remedy, and therefore should not be granted where there exists any doubt as to the existence of a triable issue (*see:* ***Rotuba Extruders v Ceppos***, 46 NY2d 223). When the

existence of an issue of fact is even arguable or debatable, a motion for summary judgment should be denied (*see:* ***Stone v Goodson***, 8 NY2d 8). It is the role of the Court to determine if *bonafide* issues of fact exist, not to resolve issues of credibility (*see:* ***Gaither v Saga Corp***, 203 AD2d 239; ***Black v Chittenden***, 69 NY2d 665).

Generally, in order to obtain a summary judgment it is necessary that the movant establish its claim by the tender of evidentiary proof in admissible form sufficient "to warrant the court as a matter of law in directing judgment in favor of any party". CPLR 3212(b); (*see also:* ***Olan v Farrell Lines***, 64 NY2d 1092).

If the moving party makes a *prima facie* showing, the burden then shifts to the non-moving party to provide evidentiary proof demonstrating the existence of a material issue of fact requiring a trial (*see:* ***GTF Marketing Inc v Colonial Aluminum Sales Inc***, 66 NY2d 965). However, CPLR 3212(f) allows the court to order a continuance if the party defending the motion has a defense but the facts cannot yet be stated (*see:* ***Juseinoski v New York Hosp Med Ctr Of Queens***, 29 AD3d 636).

Here, Plaintiff has established that essential facts regarding who authored the internet posts may exist but are currently unavailable to Plaintiff. Thus, the issue of whether Defendant has demonstrated a *prima facie* entitlement to summary judgment is premature. Accordingly, summary judgment on Plaintiff's cause of action is denied with leave to renew after discovery is complete.

Plaintiff has also submitted on Order to Show Cause seeking the issuance of a So-Ordered subpoena duces tecum directing Cablevision to produce all information associated with the IP addresses. Such information would identify the individual responsible for making the anonymous postings about plaintiff.

Courts in New York have only begun to address the issue of identifying an anonymous blogger posting defamatory statements on the internet. Although the Court of Appeals and the Appellate Division have yet to decide what standard to apply before ordering such a disclosure, the Supreme Court of New York, Westchester County has done so in the case of ***In re Ottinger v Non-Party The Journal News***, 2008 NY Misc LEXIS 4579. The court finds this decision helpful in reaching its decision in this matter.

After noting the lack of precedent on the issue, the ***Ottinger*** court adopted a test from the Superior Court of New Jersey in ***Dendrite International v Doe***, 342 NJ Super 134. When deciding whether to compel an internet service provider to disclose the identity of an anonymous blogger, the ***Dendrite*** court stated the following:

> [T]he trial court should 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, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity

discovery request to the anonymous user on the ISP's pertinent message board;

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster than plaintiff alleges constitutes actionable speech;

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a *prima facie* cause of action against the fictitiously-named defendants. In addition to establishing that its action can withstand a motion to dismiss...the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a *prima facie* basis; and

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 properly to proceed.

Here, the Court finds that the notice requirement has been superseded since Plaintiff has already served a copy of this Order to Show Cause on Defendant's counsel. Furthermore, the Court finds that Plaintiff has sufficiently identified and set forth the allegedly defamatory statements. The Complaint and all information provided to the Court has been carefully reviewed and it is determined that Plaintiff has sufficiently set forth a *prima facie* cause of action against Defendant and has done so for each element of the cause of action. Lastly, the Court has balanced Defendant's First Amendment right of anonymous free speech against the strength of the *prima facie* case and finds that the strength of Plaintiff's cause of action outweighs Defendant's right of anonymous free speech. The First Amendment protects a person's right to free speech but does not provide a safe haven for defamatory speech.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the above referenced application of Plaintiff [001] is hereby granted: and it is further

ORDERED, that the above referenced application of Defendant [002] is hereby denied with leave to renew upon completion of discovery: and it is further

ORDERED, that the above referenced application of Plaintiff [003] is hereby granted.

Dated: **Riverhead, New York**
May 10, 2011

HON. JEFFREY ARLEN SPINNER, JSC

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