

At an IAS Term, Part 52 of the
Supreme Court of the State of New York, held in and for the County of Kings, at the
Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of August, 2014¹

HONORABLE FRANCOIS A. RIVERA

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LEMON JUICE,

Petitioner,

DECISION & ORDER

Index No. 502898/14

- against -

TWITTER, INC., BLACKBERRY, LTD. a/k/a
RESEARCH IN MOTION LIMITED, and MOSES KLEIN

Respondents.

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By order to show cause and petition filed on April 16, 2014, petitioner Lemon Juice
seeks an order pursuant to CPLR 3102 (c) granting disclosure as against respondents
Twitter, Inc.² (hereinafter Twitter) and Blackberry Limited³ to aid in bringing an action and
to preserve evidence.

BACKGROUND

On April 16, 2014, Lemon Juice commenced the instant special proceeding
pursuant to CPLR 3102 (c) by filing an order to show cause, verified petition and
accompanying exhibits with the Kings County Clerk's office. The petition seeks an order
pursuant to CPLR 3102 (c) directing Twitter to preserve certain evidence and to disclose

¹This is also the date the decision was mailed to the parties.

²"Twitter is a vast social media network with over 230 million monthly active users.
About Twitter, Inc., Twitter, (Nov. 26, 2013), [https:// about. twitter. com/ company](https://about.twitter.com/company). It allows users
to read and send "tweets," (140 character text messages), which post to users' public profiles in
real time" (*State v. Polk*, 415 S.W.3d 692 fn.1 [Mo.App. E.D. 2013]).

³Lemon Juice discontinued the petition against Blackberry, Ltd. by stipulation.
Consequently, Twitter's request for disclosure from Blackberry is deemed withdrawn.

certain information. Lemon Juice is an individual and a resident of Kings County, New York. Twitter is a California corporation registered to do business in the State of New York.

The following chain of events allegedly occurred prior to the commencement of the instant special proceeding. In 2007, Nechemya Weberman (hereinafter Weberman), a rabbi and the reported leader of the Satmar Hasidic community, was acting as an unlicensed therapist when he was called upon to provide counseling to a twelve year old girl. During the private counseling sessions, he committed multiple criminal sexual acts against the vulnerable child (hereinafter the injured infant). The predatory criminal activity continued for three years until the injured infant finally reported it to the police. Thereafter, Weberman was arrested, indicted under indictment number 1589/2011 and eventually brought to trial before the Honorable John Ingram in the Part 21 of New York State Supreme Court of Kings County. Weberman was ultimately convicted after trial of multiple counts of sexually related crimes and was sentenced to over twenty years in prison.

It was against the backdrop of Weberman's trial that the events leading to Lemon Juice's legal problems began. During the weeks between November 26, 2012 through December 10, 2012, Judge John Ingram made several announcement notifying the audience that the taking of photographs in the courthouse and in the courtroom was strictly forbidden. There were also signs prominently posted around the courthouse advising the public of the prohibition of using cameras or other recording devices in the courtroom. Despite the verbal and written warnings, spectators surreptitiously took

pictures of the infant victim while she was testifying against Weberman in violation of Judge Ingram's court order.

Supreme Court Officer Robert Brusco was on duty in Part 21 during Weberman's trial. Based in part on Officer Brusco's observations, Lemon Juice and two others were arrested for violating Judge Ingram's order. On November 28, 2012, Officer Brusco saw Joseph Fried and Yona Weissman sitting together and acting suspiciously in the courtroom. He did not see Lemon Juice sitting near them, but he did see a cellular telephone in Yona Weissman's hand. As he approached them, Fried and Weissman nudged each other. Presumably at his request, Joseph Fried then handed Officer Brusco the telephone. When he examined it, Officer Brusco found an image of the infant victim on the witness stand.

Officer Brusco later discovered that an image of the infant victim, resembling the image he saw on the cellular telephone, had been posted to a Twitter account. The twitter account in question was in the name of Lemon Juice and is the subject of the instant petition. Thereafter, Lemon Juice was arrested and charged with acting in concert with Fried and Weissman to violate Penal Law § 215.50 (3). They were charged with Criminal Contempt in the Second degree, under index number 2012KN095504 (hereinafter the contempt complaint), for allegedly taking a photograph of the infant victim while she was in the courtroom and posting it on a Twitter account known as "LemonJuice@moseh718" (hereinafter the subject account) in direct violation of Judge Ingram's order.⁴ Lemon Juice made at least fourteen court appearances to defend himself against the contempt

⁴The information is taken from the contempt complaint annexed as exhibit C to the petition.

complaint. Eventually the Kings County District Attorney dismissed the charges against him after an investigation revealed that he had no connection to the subject account.⁵

Lemon Juice seeks a court order directing Twitter to disclose basic subscriber information, records, internet protocol addresses or similar information sufficient to identify the individual or individuals who owned or operated the subject account and logged into or tweeted on the subject account (hereinafter the creator) during November 26th through December 10, 2012. Lemon Juice also seeks an order directing Twitter to preserve the documents containing the information sought to be disclosed and the image of the infant victim that was posted to the subject account.

Lemon Juice contends that he needs disclosure of the identity of the creator to name potential defendants in an action for damages for personal injuries based on claims of prima facie tort, intentional infliction of emotional distress, fraud and malicious prosecution.

Lemon Juice seeks an order directing Twitter to preserve relevant documents and the photograph of the infant victim that was posted on the account so that he may use it as evidence in the contemplated action against the creator.

MOTION PAPERS

Lemon Juice's commencement papers in the instant special proceeding consist of an a order to show cause, a verified petition, an affirmation of an eyewitness to Lemon Juice's arraignment on the contempt complaint, an affirmation of Lemon Juice's counsel

⁵The background summary is taken from the petitioner's submissions. It is only set forth to provide context for the petitioner's instant special proceeding and does not constitute findings of fact by the Court.

and thirteen annexed exhibits labeled A through M. Exhibit A is a document from the New York State Department of State web site pertaining to the filing status of respondent Twitter. Exhibit B is an email sent by Lemon Juice's counsel to Blackberry. Exhibit C is a copy of the contempt complaint. Exhibit D is a copy of a motion to dismiss filed by Lemon Juice in the contempt complaint. Exhibit E is a copy of the Kings County District Attorney's opposition papers to Lemon Juice's motion to dismiss the contempt complaint. Exhibit F is the decision and order of Criminal Court Judge Desmond A. Green dated June 28, 2013, denying Lemon Juice's motion to dismiss the contempt complaint. Exhibit G is described as the results of a search conducted on a publicly available internet site called Whois. Exhibit H are copies of discovery documents provided by the Kings County District Attorney's office to Lemon Juice for the contempt complaint. Exhibit I contains, among other things, a printout from the New York Daily News web site pertaining to the Weberman trial. Exhibit J is described as tweet posted on the subject Twitter account. Exhibit K is a printout from the New York Daily News web site pertaining to Lemon Juice and the contempt complaint. Exhibit L is described as the results of another internet search conducted through the Whois search site. Exhibit M is a copy of a motion by Lemon Juice in the contempt complaint for further discovery.

Twitter has opposed the motion with an affirmation of its counsel.

Blackberry, Ltd. also submitted opposition papers before Lemon Juice discontinued the petition against it.

LAW AND APPLICATION

Twitter objects to providing pre-action disclosure in the absence of a court order

and finding that Lemon Juice is entitled to same. However, Twitter cannot and does not refute the allegations of fact in the verified petition. Accordingly, Twitter does not take a position as to whether Lemon Juice's verified petition and supporting documents, standing alone, support such an order in accordance with CPLR 3102 (c).

Before an action is commenced, "disclosure to aid in bringing an action" may be obtained by court order (CPLR 3102 [c]), including "discovery in order to obtain information relevant to determining who should be named as a defendant" (*Konig v CSC Holdings, LLC*, 112 AD3d 934, 935 [2nd Dept 2013]). Such pre-action disclosure is not available to a would-be plaintiff to determine if he or she has a cause of action (*see Stewart v. New York City Transit Authority*, 112 AD2d 939 [2nd Dept 1985]). Pre-action discovery "is not permissible as a fishing expedition to ascertain whether a cause of action exists" (*Bishop v Stevenson Commons Assoc., L.P.*, 74 AD3d 640, 641 [1st Dept 2010] *citing Liberty Imports v Bourguet*, 146 AD2d 535, 536 [1st Dept 1989]) and is only available where a petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong (*Id.*). Generally, the determination of whether a party has demonstrated merit lies in the sound discretion of the trial court (*Bishop v Stevenson Commons Assoc., L.P.*, 74 AD3d 640, 641 [1st Dept 2010] *citing Matter of Peters v Sotheby's Inc.*, 34 AD3d 29 [1st Dept 2006], *lv denied* 8 NY3d 809 [2007]).

Obtaining Identity of Prospective Defendants

A petition for pre-action discovery limited to obtaining the identity of prospective defendants should be granted where the petitioner has alleged facts fairly indicating that

he or she has some cause of action (*Konig v CSC Holdings, LLC*, 112 AD3d 934, 935 [2nd Dept 2013] citing, *Matter of Toal v Staten Island Univ. Hosp.*, 300 AD2d 592 [2nd Dept 2002]).

Lemon Juice contends that he has a meritorious cause of action for prima facie tort, intentional infliction of emotional distress, fraud and malicious prosecution. The court need not address the merits of every cause of action contemplated by Lemon Juice. If Lemon Juice can show facts fairly indicating that he has at least one prima facie cause of action, he may obtain disclosure pursuant to CPLR 3102 (c) to ascertain who should be named as a defendant (*Matter of Toal v Staten Island Univ. Hosp.*, 300 AD2d 592 [2nd Dept 2002]). In determining whether a prima facie cause of action exists, the evidence must be considered in the light most favorable to Lemon Juice giving him the benefit of every favorable inference which can reasonably be drawn (*see Matter of Ero v Graystone Materials*, 252 AD2d 812, 814 [3rd Dept 1998]).

In applying this standard and reasoning, the court will examine Lemon Juice's claim for intentional infliction of emotional distress. The elements of intentional infliction of emotional distress are the following: (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress (*see Howell v. New York Post Co.*, 81 NY2d 115, 121 [1993]; *see also Klein v Metropolitan Child Services, Inc.*, 100 AD3d 708, 710 [2nd Dept 2014]). The subject conduct 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" (*Klein v. Metropolitan Child*

Services, Inc., 100 AD3d 708, 710 [2nd Dept 2014] citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]).

Based on the sworn allegations of facts set forth in the verified petition, the affirmations of Marcos Masri and Leopold Gross, and the accompanying exhibits, the court finds that the behavior of the creator of the subject Twitter account was so extreme and outrageous, that it went beyond all possible bounds of decency.

In naming the account “LemonJuice@moseh718,” the creator gave the public the false impression that Lemon Juice was the owner and operator of the account. The creator then obtained a digital image of the infant victim while she was testifying against her rapist in direct violation of a court order not to take such photographs. The creator then posted the infant victim’s photograph to the subject account for the entire world to see. The creator’s conduct was especially heinous because it created the false appearance that Lemon Juice openly disregarded the privacy of an infant sex crime victim. It also created the false impression that Lemon Juice was attempting to expose, humiliate and intimidate the infant victim while she was in the process of testifying against her tormentor. It is a reasonable inference from these facts that the creator was seeking to humiliate Lemon Juice, tarnish his reputation and expose him to criminal prosecution by framing him. When Lemon Juice was arrested, he was stripped of his liberty and subjected to criminal prosecution. After Lemon Juice’s arrest, the creator exacerbated the matter by updating the subject account with a photograph of Lemon Juice as the profile picture. By adding Lemon Juice’s picture to the account, the creator strengthened the false impression that Lemon Juice was responsible for violating the court order and the infant victim’s privacy.

The creator of the false account acted with atrocious malice towards Lemon Juice and the infant victim. The conduct was extreme and outrageous, and not to be tolerated in a civilized community. It was meant to cause Lemon Juice damage and can be fairly presumed to have caused him severe emotional distress. The damage to his reputation, the temporary loss of his liberty, the unwarranted criminal prosecution were extremely disturbing experiences brought about by the creator's scheme to frame him.

Accordingly, Lemon Juice has met his burden of demonstrating that he has a meritorious cause of action for intentional infliction of emotional distress. He has further met his burden to show that the discovery sought from Twitter is needed in order to obtain information relevant to determining who should be named as a defendant (*see Konig v CSC Holdings, LLC*, 112 AD3d 934, 935 [2nd Dept 2013]).

Because the creator's conduct may arguably be covered by the First Amendment protections of free speech, an additional layer of review is appropriate. The Supreme Court of the United States has recognized that First Amendment protection extends to some anonymous speech (*McIntyre v Ohio Elections Comm'n*, 514 U.S. 334, 341–342 [1995]). “It [also] is clear that speech over the internet is entitled to First Amendment protection [and that] [t]his protection extends to anonymous internet speech” (*Solers, Inc v Doe*, 977 A2d 941, 951 [D.C. 2009]). However, the right of free speech is not absolute at all times and under all circumstances (*see Chaplinsky v State of New Hampshire*, 315 US 568, 571 [1942]). Certain classes of speech, including defamatory and libelous speech, are entitled to no Constitutional protection (*Id.*). When faced with the clash of such valued interests, the court must strike a balance “between the well-established First

Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendant” (*Solers, Inc v Doe*, 977 A2d 941 [D.C. 2009]). “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” (*In re Subpoena Duces Tecum to America Online, Inc., No. 40570, 2000 WL 1210372* at 6, 52 Va. Cir. 26 [2000] rev'd on other grounds *America Online, Inc. v Anonymous Publicly Traded Co.*, 261 Va. 350 [2001]).

In conducting this balancing test, the court finds that the anonymous Twitter account creator’s behavior constitutes an actionable tort and is not speech covered by First Amendment protection. Furthermore, the identity of the creator of the subject account is necessary for Lemon Juice to seek appropriate redress. Accordingly, the anonymity of the creator must yield to Lemon Juice’s need to redress the actionable wrong perpetrated against him.

Preservation of Evidence

Lemon Juice also seeks an order directing Twitter to preserve the photograph of the infant victim that was posted to the subject account. Lemon Juice has also requested that Twitter preserve the documents containing information regarding the creator’s identity.

Prior to the commencement of an action, disclosure to preserve information may be obtained by court order pursuant to CPLR 3102 (c). Preservation need not be limited to testimony, but may be directed at enjoining a potential defendant or other person from

disposing of physical evidence (*see O'Grady v City of New York*, 164 Misc 2d 171 [N.Y. Sup 1995]). When a potential plaintiff invokes CPLR 3102 (c) for the purpose of preserving information, the existence of a claim need not be demonstrated with certainty (*see Matter of Davis*, 178 Misc. 2d 65 [Ct Cl. 1998]). In *Matter of Davis*, the court applied CPLR 3102 (c) to permit an inmate with serious health problems to depose himself on notice to potential adverse parties. The court allowed the deposition so that in the event that it was later determined that he had a claim for damages, his testimony would be preserved as evidence.

Lemon Juice has already met the higher burden of demonstrating that he has a meritorious cause of action. The documents possessed by Twitter which identify the creator should be preserved for Lemon Juice's contemplated action. The photograph of the infant victim posted to the subject account should also be preserved. The image purportedly shows the infant victim inside the courtroom, when she was testifying against Weberman at his trial. It is crucial evidence of the creator's intent to wilfully violate Judge Ingram's order and to frame Lemon Juice for it.

The court is and remains mindful of the privacy interest of the infant victim. Ordering Twitter to preserve the posted image of the infant victim for Lemon Juice's contemplated action does not by itself pose any harm to the infant victim's privacy. Furthermore, the circumstances of the release and use of the image for Lemon Juice's contemplated action will be the subject of discovery practice and will be under the control of the court through its supervision of the conduct of disclosure.

CONCLUSION

Lemon Juice's motion for pre-action disclosure as against Twitter is granted.

Twitter is directed to disclose to Lemon Juice the basic subscriber information, records, internet protocol addresses and other similar information sufficient to identify the owner or operator of the Twitter account known as "LemonJuice@moseh718" who logged or tweeted on the account during November 26 to December 10, 2012.

Twitter is also directed to preserve the documents which contain this information.

Twitter is also directed to preserve the photograph of the infant victim that was posted to that account during November 26 to December 10, 2012.

Twitter is further directed not to reproduce, share, or release the photograph of the infant victim unless and until it is directed to do so by further order of this court.

The foregoing constitutes the decision and order of this court

Enter

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J.S.C.

(Researched and drafted with the assistance of Steven F. Rivera, 1L at Brooklyn Law School)