

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

LUCAS MARCHANT,

Plaintiff,

v.

**JOHN DOE and JOHN DOE d/b/a
DEMOCRATS FOR MARCHANT,**

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL
CIRCUIT

Case No. 2018-CP-23-05309

ORDER ON MOTIONS

RECEIVED
SEP 23 2019
SC Court of Appeals

PROCEDURAL HISTORY

Plaintiff Lucas Marchant, on October 16, 2018, filed a summons and complaint against John Doe and John Doe d/b/a Democrats for Marchant asking for injunctive and declaratory relief related to violations of South Carolina campaign finance law. There was no response until John Doe, through counsel, filed a motion to quash subpoenas to Facebook on January 2, 2019.

On January 18, 2019, Plaintiff amended his Complaint, dropping his request for injunctive relief and adding a cause of action for defamation. Because there had been no responsive pleadings served at the time of the amendment, Plaintiff's amendment was properly filed without leave of Court, pursuant to Rule 15 of the South Carolina Rules of Civil Procedure.

The January motion to quash raised the following grounds in support of the motion: (1) the First Amendment right to publish anonymously; (2) the lack of false or fraudulent statements made by the Defendants; and (3) the lack of electioneering communication or campaign contributions.

A hearing was held on January 24, 2019, in front of Judge Gravely. Judge Gravely denied the motion to quash. He specifically found there was no constitutional right to make statements on Facebook such as those at issue in this case.

On February 25, 2019, John Doe filed an Answer in the case, denying all allegations and asserting no affirmative defenses. John Doe also filed a notice of appeal, intending to appeal Judge Gravely's order. The South Carolina Court of Appeals found the order from which Doe sought to appeal was not a final order and an appeal was improper. The matter was remanded to this Court.

On May 10, 2019, there was an answer, motion to dismiss, motion to quash, and motion for a protective order filed by John Doe. The filings were from a John Doe who claimed to be a different John Doe than had previously appeared and filed an answer and motion in this case. The second John Doe self describes himself in his Answer and legal documents as John Doe 2 to differentiate himself from the first John Doe since both Defendants are named John Doe in the caption/complaint. To avoid confusion, the Court will refer to the second John Doe to file an Answer as John Doe 2 in this Order.

The Court held a hearing on June 25, 2019 and heard argument by the Plaintiff and John Doe 2. The following is ordered.

DEFENDANT'S MOTION TO DISMISS IS DENIED.

The Court has jurisdiction over a case prior to its service.

The Defendant claims the case does not commence until it is served, and the Court has no jurisdiction. This ground for dismissal is denied. Under the Defendant's interpretation of the Rules, this Court would have no authority at all until a case was served. The Court declines to make such a finding.

As an additional matter, John Doe answered the Complaint pro se on February 25, 2019 and raised no defect in service. The Court finds this general appearance and pro se answer operated as a waiver of any defects in service. *Strickland v. Consolidated Energy Products Co.*, 274 S.C. 554, 556 (1980). John Doe answered the complaint pro se, filed a pro se notice of appeal, and

agreed to his counsel's withdrawal. All these actions subject the Defendant to the jurisdiction of the Court.

John Doe 2's motion to dismiss the complaint is based on Rule 12(b)(2), SCRPC (lack of jurisdiction over the person), Rule 12(b)(4), SCRPC (insufficiency of process), and Rule 12(b)(5), SCRPC (insufficiency of service of process). John Doe 2 argues that pursuant to Rule 3(a)(1) a civil action is not commenced until the complaint is filed with the clerk of court and the summons and complaint are served within the statute of limitations. He argues that since John Doe 2 (nor John Doe) has not been served with the summons and complaint (nor the amended summons and complaint) no civil action has been commenced. John Doe 2's answer alleges in the sixth defense that the court lacks personal jurisdiction over John Doe 2 and that John Doe 2 has not been served with the summons and complaint. The court has considered all of John Doe 2's arguments and denies John Doe 2's motion to dismiss.

The Court has subject matter jurisdiction.

John Doe 2 argues the Court only has jurisdiction over a violation of the South Carolina Ethics Act for ten days in the 55-day period prior to an election. The Court finds such an interpretation would disregard the plain language of the statute.

The Defendant relies on S.C. Code § 8-13-320(b)(1) in support of this position. That statute specifically refers to a complaint concerning a candidate for office. The Court finds the statute refers to complaints against candidates. Additionally, the Act does not apply to private entities. *Shah v. Richland Mem'l Hosp.*, 350 S.C. 139, 152 (Ct. App. 2002). Plaintiff asserts he has no information regarding the identity of Defendant and whether he was a candidate for office or a person to which the Act would apply.

On the other hand, the Court has broad power to resolve controversies and uncertainties.

S.C. Code § 15-53-60. Under that power, the Court has jurisdiction to resolve this matter.

There was an election held in South Carolina on November 6, 2018. The Plaintiff's complaint was filed within 55 days of that election. John Doe 2's motion to dismiss the complaint is based on Rule 12(b)(1), SCRCP (lack of jurisdiction over the subject matter). John Doe 2 argues that the original complaint alleged violations of the state's campaign finance and ethics laws, specifically S.C. Code § 8-13-1324, and that pursuant to S.C. Code § 8-13-320(b)(1) the court was required to hold a rule to show cause hearing within 10 days of the filing of the Plaintiff's complaint and either dismiss the petition or direct that a mandamus order or an injunction, or both, be issued.

John Doe 2 argues that since the complaint was filed on October 16, 2018, the Court had to dismiss the complaint on or before October 26, 2018 since no mandamus or injunction was issued on or before October 26, 2018. John Doe 2 argues that the dismissal is mandatory because the statute says the court "must" dismiss the petition. John Doe 2 argues that the Court lost subject matter jurisdiction over the Plaintiff's complaint on October 27, 2018, and that only the State Ethics Commission or an Appropriate Supervisory Office has jurisdiction over alleged campaign finance or ethics violations more than 55 days before an election - or after 10 days has passed after the filing of a petition in the circuit court within the 55 day window before an election.

The Court has considered all of John Doe 2's arguments and declines to dismiss the complaint. The Court declines to dismiss the original complaint on October 26, 2018 nunc pro tunc as requested by John Doe 2. This court has subject matter jurisdiction over the original complaint after the 10 days mentioned in S.C. Code § 8-13-320 so this court still has subject matter jurisdiction over the current amended complaint.

The Court will not dismiss the Request for Declaratory Relief in the Amended Complaint.

John Doe 2 asks the Court to dismiss the request for declaratory relief in the amended complaint pursuant to Rule 12(b)(6), SCRCF. The Court declines to dismiss the request for declaratory relief. John Doe 2 argues that the amended complaint was filed after October 26, 2018, that the Court did not have subject matter jurisdiction to accept the amended complaint at the time it was filed on January 8, 2018, and therefore the amended complaint is null and void. The Court holds that the amended complaint filed by the Plaintiff containing the request for declaratory relief is valid. The court declines to dismiss the original complaint dated October 26, 2018 nunc pro tunc to prevent the Plaintiff from amending the original complaint.

Next, John Doe 2 argues that there are two South Carolina federal district court cases that prevent this Circuit Court from granting the declaratory relief requested in the Plaintiff's amended complaint because the federal district courts have held that the definition of a committee in the campaign finance laws is unconstitutional and unenforceable. John Doe 2 argues that the Plaintiff's complaint should be understood to be asking this Court to declare that a committee (Democrats for Marchant) has violated a campaign finance law as there is no allegation in the complaint that John Doe or John Doe 2 is a candidate or political party.

John Doe 2 argues that the Plaintiff is asking this Court to do something (declaratory relief) that the federal district courts have already ruled to be unconstitutional and unenforceable. The court has considered all of John Doe 2's arguments and declines to dismiss the request for declaratory relief. The Court holds that the South Carolina district court's opinions in *South Carolina Citizens for Life Inc. v. Krawcheck*, 759 F.Supp.2d 708 (D.S.C. 2010) and *S. Carolinians for Responsible Gov't v. Krawcheck*, 854 F.Supp.2d 336 (D.S.C. 2012), do not bind this Court for two reasons.

First, district court opinions have no precedential effect, even on the very same district

court in a different case. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011); *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 n.1 (4th Cir. 2017). This Court is not bound by such an opinion.

Second, Defendant has refused to cooperate regarding attempts to identify him or her. The Court does not find that Doe can claim a classification that will protect him or her from litigation yet refuse to identify itself in this Court.

The Court will not dismiss the Cause of Action for Defamation in the Amended Complaint.

John Doe 2 asks the Court to dismiss the cause of action for defamation in the amended complaint pursuant to Rule 12(b)(6), SCRCF. The Court declines to dismiss the cause of action for defamation.

John Doe 2 argues that the amended complaint was filed after October 26, 2018, the Court did not have subject matter jurisdiction to accept the amended complaint at the time it was filed on January 8, 2018, and therefore the amended complaint is null and void. The Court holds that the amended complaint filed by the Plaintiff adding a cause of action for defamation is valid.

The court declines to dismiss the original complaint dated October 26, 2018 nunc pro tunc to prevent the Plaintiff from amending the original complaint. The Court rejects John Doe 2's argument that a purpose of the 10-day window for the circuit court to make a final decision on a campaign finance violation is to prevent the Plaintiff from continuing a lawsuit of a political nature for more than 10 days.

Defendant's anonymous speech is not protected by the Constitution.

John Doe 2 also asks the Court to dismiss the cause of action for defamation in the amended complaint pursuant to Rule 12(b)(6), SCRCF based on the United States Constitution. This matter was previously decided, in this same case, by Judge Gravely. The Court has reviewed Judge Gravely's order and agrees with it. The Defendant does not have a constitutional right to the speech

at issue in this case. This issue has been previously raised and ruled upon in the same case and the Court is not inclined to disturb Judge Gravelly's ruling.

The court holds that John Doe 2 does not have a federal constitutional right to anonymous political speech or a federal constitutional right to anonymous distribution of political speech. The Court declines to dismiss the cause of action for defamation pursuant to Rule 12(b)(6) because of the First Amendment to the U.S. Constitution.

Defendant's anonymous speech is not protected by the South Carolina Constitution.

The state constitutional provision cited by Defendant John Doe 2 is identical to the First Amendment of the United States Constitution. There is no additional protection based on a state constitutional claim under S.C. Const. Art. 1, Sec. 2 (Religious freedom; freedom of speech; right of assembly and petition). The court holds that John Doe 2 does not have a state constitutional right to anonymous political speech, or a state constitutional right to anonymous distribution of political speech, and that S.C. Const. Art. 1, Sec. 2 does not protect the speech of John Doe 2 in this case. The Court declines to dismiss the cause of action for defamation pursuant to Rule 12(b)(6) because of the freedom of speech or press protections in the South Carolina Constitution.

The Court will not dismiss the defamation cause of action based on the actual malice standard.

John Doe 2 argues that the defamation cause of action should be dismissed pursuant to Rule 12(b)(6), SCRCP because of the United States Supreme Court's decision in New York Times Company v. Sullivan, 376 U.S. 254 (1964) and the subsequent case law. John Doe 2 argues that the Plaintiff fails to plead "actual" malice in the complaint and/or plead that the Defendants knew the allegedly defamatory statements were false or acted in reckless disregard of the statement's truth or falsity. John Doe 2 argues that the Plaintiff's cause of action should be dismissed because

it is not properly pled in the complaint since the Plaintiff's complaint states the Plaintiff ran for public office, and therefore, he is a public figure, and the burden is on the Plaintiff to prove actual malice and to plead that in the complaint. The Court denies John Doe 2's request to dismiss and holds the defamation action is properly plead in the complaint.

DEFENDANT'S MOTION FOR A PROTECTIVE ORDER IS DENIED

The motion for a protective order is based on the jurisdictional arguments addressed earlier. For the same reasons, the motion on those grounds is denied. Defendant also asserts there was no certificate of service included with the discovery requests. Unless untimely responses become an issue, the Court finds this ground moot.

John Doe 2 argues that the Court should issue a protective order in this case because the summons and complaint have not been served on the defendants, and no discovery can be issued by the plaintiff prior to the commencement of the action, pursuant to Rule 33(a), SCRPC (interrogatories), Rule 34(b), SCRPC (requests for production), and Rule 36(a), SCRPC (requests for admissions). The Court holds that the action has commenced against John Doe 2 and denies John Doe 2's motion for a protective order to prevent discovery with John Doe 2 until the action is commenced against John Doe 2.

John Doe 2 argues that Plaintiff's discovery seeks information that would reveal the identity of John Doe 2, and John Doe 2's anonymity in his political speech and distribution of political speech is protected by rights granted in the U.S. Constitution and the South Carolina Constitution. John Doe 2 seeks a protective order for any discovery that would reveal the identity of John Doe 2. The Court holds that John Doe 2's anonymity or speech is not protected by rights granted in the U.S. Constitution or the South Carolina Constitution and denies John Doe 2's request for a protective order to protect his identity.

John Doe 2 argues that the Circuit Court lacks subject matter jurisdiction over the Plaintiff's claims and no discovery requests can therefore be issued in the name of the Court. Again, the Court holds that this Court has subject matter jurisdiction over the Plaintiff's original and amended complaint and denies John Doe 2's request for a protective order.

DEFENDANT'S MOTION TO QUASH SUBPOENA TO FACEBOOK IS DENIED

The Defendant raises multiple issues with the technical form of the subpoena issued by the Plaintiff to Facebook, Inc.

The subpoena does not request disclosure of a protected matter.

The Court has ruled Doe's identity is not protected. John Doe 2 argues that pursuant to Rule 45(C)(3)(A): "On timely motion, the court ... shall quash or modify the subpoena if it: ... (iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies." John Doe 2 argues the Plaintiff seeks information from Facebook that would reveal or unmask the identity of John Doe 2 and asks that the subpoena be quashed to protect the anonymity of John Doe 2 pursuant to an alleged right to anonymous political speech and/or anonymous distribution of political speech found in the U.S. Constitution or South Carolina Constitution. The Court denies John Doe 2's motion to quash the subpoena to Facebook because John Doe 2 does not have a constitutional right to anonymous political speech and/or anonymous distribution of political speech under either the U.S. Constitution or South Carolina Constitution.

There are no defects in the subpoena that warrant quashing it.

John Doe 2 raises several alleged defects with the subpoena issued to Facebook, Inc. and requests that the subpoena be quashed by this Court. Specifically, John Doe 2 argues that: 1) the subpoena was issued and signed on October 17, 2018 (one day after the filing of the lawsuit) and there was no pending/commenced action on October 17, 2018 because no defendant had been

served by October 17, 2018, in alleged violation of Rule 45(a), SCRPC; 2) that there is no pending action in California that could domesticate the subpoena in California because the cause of action number box states "Not Yet Assigned;" 3) the subpoena was not served on any Defendant by October 19, 2019 (3 days after the filing of lawsuit) - 10 days before production was due on October 29, 2018, pursuant to Rule 45(b), SCRPC; 4) the subpoena does not indicate if it was issued by an attorney representing a Plaintiff or a Defendant; 5) the subpoena was issued by the Court for the wrong county since Facebook, Inc. is a non-party; 6) the subpoena does not command any person, as required by Rule 45(a)(1)(C), SCRPC, to do anything since none of the 4 command boxes on the subpoena are checked, and therefore, Facebook is not required to do anything in response to the subpoena - and that it is impossible to tell if the subpoena is for the production of documents, an appearance at a hearing, an appearance at a trial, or for entry onto land (or a combination of them); 7) the subpoena requires Facebook to travel more than 50 miles to produce the documents, in violation of Rule 45(C)(3)(A); 8) the subpoena issued in California to Facebook does not incorporate the terms used in the South Carolina subpoena because the California subpoena asks for different information, and is broader, than the subpoena issued in South Carolina. The Court has considered all of John Doe 2's arguments to quash and holds that none of the arguments individually or collectively convince the Court to quash the subpoena. Therefore, John Doe 2's motion to quash the subpoena is denied for the reasons explained more fully below.

The Court has previously found it has jurisdiction over the case, regardless of whether it has been served. The Court finds the purpose of any notice requirement for a subpoena is the notice and opportunity to object to a specific subpoena by its target or the party. In this case, both have occurred. Counsel for the Plaintiff states he was aware the Facebook subscriber whose identity he seeks would be informed of the subpoena by Facebook and given the opportunity to object. Based

on the actions of Facebook and the Defendant, it appears the Defendant has had ample opportunity to assert an objection and has done so twice in this case.

As an additional matter, the Court finds Rule 27 does not apply to subpoenas, so ruling as the Defendant requests would essentially block any person from ever discovering the identity of an anonymous speaker. The Court finds it would have authorized an ex parte subpoena upon filing of this lawsuit and there is no prejudice to the Defendant by Plaintiff not making such a request. Defendant has had a full and fair opportunity to litigate the subpoena. To the extent it is necessary, the Court authorizes the issuance of a subpoena to Facebook for the identity of the Defendant and orders it *nunc pro tunc* to the date the subpoena was issued.

A pending action in California is not required for a subpoena

Defendant argues there must be a pending action in California to issue a subpoena. This is incorrect. Plaintiff retained a licensed California lawyer in San Diego to properly domesticate the subpoena to Facebook under California law. The subpoena was issued pursuant to the California Interstate and International Depositions and Discovery Act. *Cal. Civ. Proc. Code* § 2029.100, *et seq.* Plaintiff argues he has complied with California Code related to issuing an out-of-state subpoena and there has been no evidence to the contrary. The Court finds Plaintiff has complied with the California requirements for an out-of-state subpoena and it was properly issued.

For the same reason, the subpoena was issued from the correct county. Counsel was required to issue it from the County where the case is pending and domesticate it in the proper county in California. That was done. Additionally, because the subpoena was domesticated in California and returnable to a deposition agent in California hired by Plaintiff, there is no issue with the distance between the producer and the place to which records are to be produced.

Form defects referenced by the Defendant are scrivener's error and do not affect the validity

of the subpoena.

Defendant objects to the subpoena because the check box for “Plaintiff” or “Defendant” under the issuing attorney’s name is not checked and the specific action commanded is not checked. Neither are more than scrivener’s error and the subpoena clearly reflects this information.

Counsel delivered the subpoena with a copy of the Complaint, making it clear which party he represented. It is also clear from the domesticated version that the subpoena was issued on behalf of the Plaintiff.

While it appears counsel did not check the box commanding production of documents, he stated the information sought in bold beneath the appropriate box and described the information in his cover letter.

The Court declines to find a subpoena invalid for minor scrivener’s errors, especially when the subpoena clearly reflects what it seeks and who has issued it.

The subpoena as domesticated in California is not broader than the South Carolina version, nor would it matter.

Defendant argues the California version of the subpoena seeks more information than the South Carolina version. The Court finds the difference in language is mere clarification and not any real substantive difference in the information sought. In any event, the Defendant has had a full opportunity to object to the subpoena in its entirety. There would be no prejudice to Defendant under any circumstances.

CONCLUSION

For all these reasons, the Court denies the motions filed by the Defendant and orders this case to proceed.

IT IS SO ORDERED.



Greenville Common Pleas

Case Caption: Lucas Marchant vs. John Doe , defendant, et al

Case Number: 2018CP2305309

Type: Order/Other

So Ordered

s/ Edward W. Miller

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