

Procedural Chickens and Eggs: Obtaining Pre-Suit Disclosure To Identify Necessary Parties

by Steve Kramarsky

For better or worse, anonymity has long been a fundamental feature of Internet communication, particularly in large-scale Internet communities and on websites that permit public comments. The ability to provide unvarnished opinions in an open forum without fear of reprisal can be valuable, but it can also (unsurprisingly) lead to some very bad behavior. Different online communities deal with that undesirable behavior in different ways, such as moderation policies, membership or commenting restrictions, or online “social” pressures or norms. Some even choose not to deal with it at all. As a general matter, the providers and users of online services are shielded from liability for content posted by others by §230 of the Communications Decency Act (47 U.S.C. §230(c)). But the anonymous posters themselves are not immune from liability for their own fraudulent, defamatory, or otherwise actionable comments.

That, of course, presents a problem. In many cases, as users of these services or consumers of online information posted anonymously (or pseudonymously), aggrieved parties have no way of knowing anything about the person on the other side of the net. If, say, a company wants to address a false statement made about it on a review site, it may have the legal means to do so under certain circumstances, for example, through an action for defamation. But it cannot bring that action against the review site itself—the site is protected under §230. It must first determine who made the defamatory posting and bring an action against that user individually. And while some large, commercial websites include policies and procedures for addressing that kind of problem, either through “take-down” notices or other non-judicial proceedings, many do not. Further, in the absence of a judicial order, such services may be reluctant to disclose confidential information about their users or even to identify them.

Fortunately, at least in New York, there is a procedural rule, CPLR §3102, that can be used to circumvent some of those issues and provide early judicial intervention to pierce the veil of anonymity where a court deems it necessary and appropriate.

Background

In an “ordinary” New York state court action, parties are forced to wait until after the filing of a complaint and any motion to dismiss practice before obtaining discovery from adversaries or non-parties. However, in certain limited circumstances, the CPLR allows litigants to circumvent those requirements and obtain “pre-action discovery.” Pursuant to CPLR §3102, a litigant may obtain “disclosure to aid in bringing an action, to preserve information or to aid in arbitration” “before an action is commenced” if

so-ordered by a court. The most common circumstances under which litigants seek pre-action discovery is to obtain information necessary to ascertain the identity of the party they seek to sue. Often, at least in recent years, such requests have arisen in the context of allegedly defamatory or otherwise actionable anonymous online posts.

The precise scope of the phrase “disclosure to aid in bringing an action” is a frequent subject of litigation. All kinds of information could “aid” a litigant seeking to bring an action, but courts have interpreted the statutory language fairly narrowly, through categorical exclusions. Thus, certain limiting principles have been set forth by courts: Pre-action disclosure is not warranted if the plaintiff already has sufficient information to bring an action, e.g., *Kussman v. GiveAnything.com*, 33 A.D.3d 1004, 1004 (2d Dept. 2006) (reversing order granting pre-action disclosure because “petitioner had sufficient information to frame a complaint without the discovery requested), and cannot be used by prospective plaintiffs to determine whether they might be able to assert a meritorious cause of action. *Stump v. 209 E. 56th St.*, 212 A.D.2d 410, 410 (1st Dept. 1995). While precise boundaries are unclear, what is clear is that courts appear to be loath to allow CPLR §3102 to reach too far, thereby upsetting the “traditional” discovery process.

A recent New York state case further examined the scope of CPLR §3102 and pointed out an additional limitation that practitioners should keep in mind. *In re Legal Aid Society of Suffolk County (Indeed Inc.)*, 2020 WL 399189 (Sup. Ct. Suffolk Cnty. Jan 22, 2020).

The Litigation

In late 2019, the Legal Aid Society of Suffolk County (LAS) petitioned the Supreme Court, Suffolk County, for pre-action discovery from the website operator Indeed, Inc. (“Indeed”). LAS sought to compel Indeed to reveal the identity of a user who had posted an allegedly defamatory review on Indeed’s website, Indeed.com. Shortly thereafter, the anonymous poster, referred to as “John Doe,” intervened through counsel to oppose LAS’s request.

Indeed.com is an “employment-related computer search engine for job listings.” According to its promotional materials, Indeed.com is the “#1 job site in the world with over 250 million unique visitors each month.” Indeed.com offers several different services, including aggregating and posting job listings and providing a space in which users can post anonymous “Company reviews.” On July 23, 2019, John Doe posted a review about LAS, asserting that he was a current LAS employee, which contained negative comments about his work experience at LAS. Upon a review of those statements, LAS believed them to be factually inaccurate and defamatory and sought to initiate proceedings against the anonymous poster. In fact, LAS filed a Nov. 29, 2019 action against an unidentified “John/Jane Doe” for defamation. Importantly, LAS did not sue (and, under §230, could not have sued) Indeed.com, so there was no way for it to obtain discovery from Indeed.com in the ordinary course.

Instead, seeking to avail itself of CPLR §3102, LAS listed in its petition the alleged falsehoods contained in the anonymous post and asserted that it had suffered injury, particularly in the form of a “loss of qualified candidates,” resulting from the review. Thus, LAS asserted that it had a cause of action against the unidentified poster and that the requested disclosure, identifying the poster so suit could be brought against him/her, was proper under CPLR §3102. Indeed countered that (1) the court did not have personal jurisdiction, because it was not properly served and, in any event, there was no proper basis to assert jurisdiction over Indeed in this matter and (2) the First Amendment prohibited the disclosure of the identity of the anonymous poster. The court agreed with Indeed on the personal jurisdiction issue and dismissed the petition without reaching the constitutional question.

As to service, the court noted that petitions for pre-action disclosure raise unique service issues and that LAS failed to properly serve Indeed. Because such petitions are effectively motions brought by special proceeding, “before jurisdiction of the plaintiff’s and defendant’s person” has been secured, the accompanying papers must be served “*by the same means and within the same territorial areas as would govern the service of a summons.*” The court found that LAS failed to do so. Instead, LAS simply mailed “the motion papers” to Indeed’s New York address for service of process. That procedure, the court found, did not “comport with any statutorily provided procedure to acquire jurisdiction over the respondent.”

Further, the court found there to be no basis to assert personal jurisdiction over Indeed. *First*, the court noted that Indeed is a Delaware corporation with principal place of business in Texas. Thus, it found, there was no basis for general personal jurisdiction over Indeed “merely by virtue of the fact that it has registered itself with NYS’s Secretary of State.” *Second*, the court considered whether, under *Daimler*, Indeed had “affiliations with [New York] so constant and pervasive such that the corporation is at home in [New York].” Following that heightened inquiry set forth by the Supreme Court, the court found no other basis upon which to assert general personal jurisdiction over Indeed in New York state.

Finding no general personal jurisdiction, the court next considered whether there was a basis to assert specific personal jurisdiction over Indeed. The court found New York’s long-arm statute inapplicable, and thus no basis for specific personal jurisdiction. The court found that the long-arm statute only conferred jurisdiction where a “*cause of action*” was to be stated against the respondent and that there was no evidence that LAS intended to, or could, bring a cause of action against Indeed after receiving the requested disclosure. Thus, without any statutory basis to assert specific personal jurisdiction, the court found it did not have personal jurisdiction over Indeed and dismissed the action.

A Procedural Impossibility

The court’s finding regarding the LAS petition leaves similarly situated litigants in a difficult position. LAS could not bring an action against or serve John Doe, because it did not have their identity. But it could not identify John Doe without Indeed’s records, which it could not obtain because it could not sue Indeed. This is a strange result in a case that seems otherwise tailor-made for CPLR §3102 relief, and in fact strikingly similar to numerous other cases in which that relief has been available. It is, in fact,

difficult to square the court's holding with similar cases finding that online platforms can be compelled to identify anonymous users who posted on their platforms. Absent some form of court-ordered service sufficient to confer jurisdiction for purposes of the petition, the courts analysis would seem to eliminate the availability CPLR §3102 relief in a wide variety of cases.

What is clear, in any case, is that courts are inclined to err on the side of too little pre-action disclosure rather than too much. Practitioners seeking to take advantage of CPLR §3102 would be wise to take note and ensure that the moving papers are procedurally pristine, including by bringing them as CPLR special proceedings and ensuring that they are properly served. While that may not have saved the LAS petition, which also failed on personal jurisdiction grounds, procedural care can go a long way towards obtaining the relief sought in this context.

This article first appeared in the *New York Law Journal* on March 23, 2020. Stephen M. Kramarsky, a member of Dewey Pegno & Kramarsky, focuses on complex commercial and intellectual property litigation. Jack Millson, an associate at the firm, provided substantial assistance with the preparation of this article.