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Delaware Court Latest to Point the Twitter Finger: Tweets Can Constitute Actionable Expressions of Fact

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Whether social media posts can constitute statements of fact capable of supporting a claim for defamation is an issue that has split courts across the country for quite some time. Understandably so, given the First Amendment concerns entrenched in the issue, the lighting fast pace at which social media, the evolution of the way we use it, and the unique nature of such communication on social media platforms.

On January 5, 2022, the Delaware Court of Chancery became the latest court to weigh in on the issue, doing so by way of a letter opinion requiring Twitter, Inc. to comply with subpoenas seeking identifying information associated with four anonymous Twitter accounts relevant to BDO USA, LLP's ("BDO") defamation action against EverGlade Global, Inc. ("EverGlade). BDO USA, LLP v. EverGlade Global Inc., No. 2021-0244, 2022 WL 41416 (Del. Ch. Jan. 5, 2022). In green lighting compliance with the subpoenas, the court found that tweets could constitute actionable expressions of fact sufficient to support a claim for defamation.

Background

In March 2021, BDO sued EverGlade, alleging, among other things, that EverGlade "created and used accounts on various social media platforms to publish defamatory videos and statements accusing BDO of corruption, fraud, sexual harassment, audit rigging, racism and operation of a criminal enterprise." Am. Compl. ¶8. During discovery, BDO issued subpoenas to Twitter, Inc., which sought to unmask the identities behind four anonymous Twitter accounts—@boycottbdo, @boycottbdo1, @boycottbdo2, and @bdoboycott—which, according to BDO, EverGlade and its CEO used as part of this "smear campaign" against BDO.

EverGlade and its CEO denied any association with these accounts and Twitter objected to providing the information BDO sought absent a court order. As a result, BDO filed a Motion for Court Authorization for Twitter, Inc. to Comply with Subpoenas, which the court granted from the bench on November 4, 2021 following oral argument. The court supplemented its ruling by way of a letter opinion on January 5, 2022.

Court of Chancery Ruling

Because BDO sought to unveil the identity of anonymous Twitter users, a more stringent standard for disclosure applied to guard against countervailing First Amendment concerns. As laid out in a 2005 Delaware Supreme Court decision, *Doe v. Cahill*, a party seeking the identity of an anonymous internet poster of allegedly defamatory material through the discovery process "must (i) make reasonable

efforts to notify the speaker and allow the speaker an opportunity to respond and (ii) introduce facts sufficient to create a genuine issue of material fact that would defeat a motion for summary judgment." *BDO USA, LLP*, 2022 WL 41416, at *2 (citing *Doe v. Cahill*, 884 A.2d 451, 460-61 (Del. 2005)).

Applying that standard to the matter at hand, the Court of Chancery found that BDO satisfied both *Cahill* prongs. On the first, it found BDO had made reasonable efforts to notify the posters and allow each to respond because Twitter sent notice and a copy of the subpoenas to the email addresses associated with the four accounts. On the second, the court determined that BDO met its burden in showing it would overcome a motion for summary judgment on its claim for defamation. Under Delaware law, a cause of action for defamation traditionally has four elements: "1) the defendant made a defamatory statement; 2) concerning the plaintiff; 3) the statement was published; and 4) a third party would understand the character of the communication as defamatory." *Id.* at *3 (citing *Cahill*, 884 A.2d at 463). A public figure plaintiff must establish two additional elements: "that 5) the statement is false and 6) that the defendant made the statement with actual malice." *Id.* at *3 (citing *Cahill*, 884 A.2d at 463-64).

The court focused its analysis on the first element—whether the defendant made a defamatory statement—which has plagued many courts who have previously decided this issue. That element turns on whether the allegedly defamatory statement is one of fact or one of protected opinion and whether the statement is capable of a defamatory meaning. On this score, the court rejected EverGlade's argument that social media outlets like Twitter are informal forums for personal opinions and not reliable sources of information. Citing to academic research on how individuals obtain news, the court reasoned that social media has evolved from the blogs, forums, and chatrooms of the new millennium into platforms people use as a news source. Putting aside academic research, the court explained it was clear that individuals rely on social media to consume news. Take, for instance, the fact that when Elon Musk tweets about his own company—or even Dogecoin—the stock market moves. Recognizing that individuals get their news on social media, Congress has even introduced bills requiring platforms to expand their account verification practices. Viewed in this modern landscape, the court concluded that tweets are not *per se* opinions for purposes of a defamation claim, but instead could constitute actionable expressions of fact.

With that framework in mind, the court analyzed each tweet. Some, like those that generally accused BDO and its CEO of racism, fell into the category of opinion. On the other hand, those that accused BDO's CEO of having an affair or sending inappropriate sexual photos to employees were actionable statements of fact; they were more concrete and susceptible to proof that they did or did not occur. Thus, BDO satisfied its burden on the first element of its defamation claim. Finding that BDO had satisfied the remaining elements of its claim, the court granted BDO's motion and required Twitter to comply with the subpoenas.

Conclusion

The court reached a sensible result that strikes the right balance in the modern social media frontier, but should have taken the opportunity to devise a framework to guide future analyses on this issue. Social media has extended far beyond a platform for its users to air their grievances and express opinions to one where many flock for breaking news. At the same time, social media is unique in its free-flowing and freewheeling form of communication. Still, social media posts containing false statements about individuals have the potential to cause significant harm. For these reasons, it would have been wise for the court to establish certain parameters for distinguishing between actionable statements of fact and protected opinions to avoid future courts succumbing to a "I know it when I see it" test.

But creating a defamation framework in the realm of social media is no easy feat and prompts further consideration of how traditional defamation concepts might apply. For instance if traditional parameters of a defamation analysis are to apply to tweets, then beyond factual publications, are allegedly defamatory opinions based on undisclosed facts actionable as in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)? And if tweets are viewed as legitimate news sources, can the publishers of those tweets invoke the protection of the newspersons privilege?

What is clear is that any framework should reflect a balanced approach that recognizes social media's unique conversational nature along with its more recent role as a modern-day newsstand.

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