

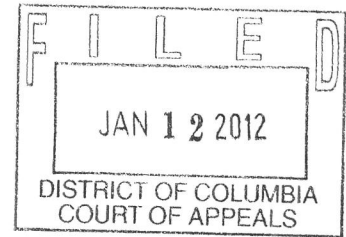
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10-CV-1523

SOFTWARE & INFORMATION INDUSTRY ASSOCIATION,
APPELLANT,
CAB3779-05

v.

SOLERS, INC.,
APPELLEE.



Appeal from the Superior Court
of the District of Columbia
Civil Division

(Hon. Judith N. Macaluso, Trial Judge)

(Argued November 17, 2011)

Decided January 12, 2012)

Before FISHER, *Associate Judge*, and FARRELL and REID, *Senior Judges*.*

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: This case is before the court again following a remand. *See Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009) (“*Solers I*”). In brief, Solers, Inc. (“Solers”), seeks to enforce a subpoena requiring the Software & Information Industry Association (“SIIA”) to reveal the identity of John Doe, an anonymous person who allegedly sent defamatory information about Solers to the association. In the earlier appeal, this court held that Solers must “present *evidence* supporting its claim of defamation” in order to overcome John Doe’s First Amendment right to anonymous speech. *Solers I*, 977 A.2d at 959. Because Solers has failed to present sufficient evidence of harm, we reverse the trial court’s decision ordering enforcement of the subpoena.

I. Factual and Procedural History

SIIA, a software industry trade association, manages a “Corporate Anti-Piracy program” that invites anonymous tipsters to report the unauthorized use of copyrighted

* Judge Reid was an Associate Judge, Retired, at the time of argument. Her status changed to Senior Judge on December 12, 2011.

software. In March 2005, SIIA received such a report via the internet from John Doe, an unidentified individual. Doe alleged that Solers, a software development company, was using unlicensed software. SIIA sent a private letter to Solers, threatening litigation for copyright infringement and demanding that Solers conduct an audit of its computers to detect any unlicensed software. After complying with SIIA's instructions for conducting a self-audit, Solers asserted that it "possessed no unlicensed software" and that the accusation was "absolutely false." Shortly thereafter, Solers filed a complaint against John Doe, alleging defamation and tortious interference with "prospective advantageous business opportunities." The next day, Solers issued a subpoena requiring SIIA to disclose all information it had regarding John Doe's identity. SIIA refused, citing, among other things, John Doe's First Amendment right to anonymous speech, and filed a motion to quash Solers' subpoena.

At a hearing on the motion to quash, the trial court cautioned Solers that it saw "no financial or economic harm demonstrated in the pleadings," nor any "actual harm" caused by John Doe's statement. Solers amended its complaint against Doe to allege that it had been "deprived of its good commercial reputation" and that "others within [Solers'] industry [have been deterred] from dealing with it." Nevertheless, the court granted SIIA's motion to quash the subpoena and later dismissed Solers' amended complaint for failure to state a claim.

In *Solers I* we "conclude[d] that [Solers'] amended complaint sufficiently states claims for defamation and tortious interference under the fairly minimal pleading requirements of Super. Ct. Civ. R. 8 (a)." 977 A.2d at 948. However, we also made clear that the existing record did not justify enforcing Solers' subpoena because "in this context, a plaintiff must do more than simply plead his case." *Id.* at 958. Acknowledging that we had established a new test for this jurisdiction, we remanded "to give Solers an opportunity to present *evidence* supporting its claim of defamation." *Id.* at 959 (emphasis in original).

On remand, Solers was given the opportunity to come forward with "affidavits, deposition transcripts, [] courtroom testimony under oath," or other forms of evidence to prove harm. *Id.* at 955. But, after that effort, the trial court remarked that "the company to this day has never articulated how its reputation has been damaged" Solers admits it was unable to "identify evidence proving departed customers and additional lost business opportunities" caused by John Doe's statement to SIIA.

Nevertheless, the trial court "fe[lt] constrained from failing to enforce the subpoena here at issue because the Court of Appeals found, on a record it well understood, that Solers suffered a cognizable injury." The court reluctantly enforced the subpoena, expressing the hope that "the Court of Appeals will reverse this judge's order and quash the subpoena, based upon the currently augmented record establishing that Doe's . . . report has seemingly caused no damage to Solers' reputation. . . . If the parties are not wise enough to end this case,

perhaps the Court of Appeals will do it for them.” The court also imposed sanctions for failure to comply with the subpoena, permitting SIIA to pursue this appeal.

II. Legal Analysis

In *Solers I*, we held that “[b]efore enforcing a subpoena for identifying information, a court must conduct a preliminary screening to ensure that there is a viable claim that justifies overriding an asserted right to anonymity.” 977 A.2d at 951. Striking 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,” we required a defamation plaintiff to “proffer evidence creating a genuine issue of material fact on each element of the claim that is within its control.” *Id.* at 951, 954 (quotation marks and emphasis omitted). “Requiring the requesting party to satisfy this step furthers the goal of compelling identification of anonymous internet speakers only as a means to redress misuses of speech” *Id.* at 955 (internal editing omitted). Here we focus on the element of damage, an undeniably weak part of Solers’ claim.

Because Solers was unable to “identify evidence proving departed customers and additional lost business opportunities” or to “articulate[] how its reputation has been damaged,”¹ Solers now contends that it “established a triable issue on defamation injury by proffering evidence of special harm” in the form of costs “incurred . . . responding to SIIA’s litigation threats.” These costs “consisted of attorneys’ fees incurred in fashioning a response to SIIA[] and in employee expenses spent on performing work necessary to prepare Solers’ response,” totaling \$7,114.00.

In light of SIIA’s letter (threatening litigation for violations of federal law if Solers did not “promptly conduct an audit” of its computers), Solers’ expenditure of company resources to investigate SIIA’s claims may have been reasonable and prudent. However, to accept Solers’ argument (that these costs constitute special damages) would mean that a corporate plaintiff may overcome a speaker’s First Amendment right to anonymity with little more than an allegation of defamation and its own decision to expend money in response. The fundamental problem is that Solers still has not identified damages suffered as a direct

¹ In the single affidavit Solers produced to prove harm, the President and CEO of Solers averred that the company was “deprived of its good commercial reputation.” However, this statement simply parrots the language of Solers’ complaint and provides no more insight into the factual basis for the allegation. *See Musa v. Cont’l Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994) (“Mere conclusory allegations on the part of the non-moving party are insufficient to stave off the entry of summary judgment.”).

consequence of the alleged defamation – for example, lost profits or customers deterred from dealing with the company. Given the First Amendment context of this case, a plaintiff alleging defamation “may not pull himself up by his own boot straps, and by such expenditures create a cause of action for himself where one did not otherwise exist.” *Bigelow v. Brumley*, 37 N.E.2d 584, 594 (Ohio 1941); *see id.* (defamation plaintiff “has the right to try to mitigate damages, and, *if his cause of action can be independently established*, may recover for sums reasonably expended in this effort” (emphasis added)); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 8 (Minn. 1984) (“Efforts to mitigate damages in tort [including time and money expended attempting to counteract defendant’s propaganda] are not compensable unless plaintiff proves a tort, and where special damages are an essential element of plaintiff’s action, they must be proved before mitigation expenses may be considered.”). The allegations of damage Solers has presented here do not establish a “viable claim that justifies overriding an asserted right to anonymity.” *Solers I*, 977 A.2d at 951.

Solers claims, in the alternative, that it does not need to “present evidence to support its allegations of damage,” *id.* at 958, because it has “alleg[ed] damage to reputation that is actionable irrespective of special harm.” For this proposition, Solers relies on a comment to the Restatement (Second) of Torts opining that “a corporation may maintain an action for defamatory words that discredit it and tend to cause loss to it in the conduct of its business, without proof of special harm resulting to it.” RESTATEMENT (SECOND) OF TORTS § 561 cmt. a (1977).²

However, what Solers would have us do now is *presume* harm, without requiring proof of any harm at all. Solers has not shown lost profits, lost customers, or even a general impairment of its reputation. By attempting to proceed on a theory of presumed damages, Solers has presented nothing more than the same unsupported allegations we found insufficient in *Solers I*. *See* 977 A.2d at 954 (to support enforcement of its subpoena, Solers “must do more than simply plead [its] case”). As we previously held, this will not suffice to overcome John Doe’s right to speak anonymously.³

² The trial court quoted similar language from the Restatement in its order of February 23, 2010. It is not clear that our jurisdiction has adopted this portion of the Restatement. *Cf. Art Metal-U.S.A., Inc. v. United States*, 244 U.S. App. D.C. 1, 6, 753 F.2d 1151, 1156 (1985) (“a corporation suing for defamation . . . may only recover actual damages in the form of lost profits”).

³ The trial court should not have felt constrained by our opinion in *Solers I* when it was assessing proof of damages. Although we held that Solers had pleaded a claim for
(continued...)

III. Conclusion

Solers has failed to provide evidence sufficient to justify enforcing its subpoena against SIIA. We therefore reverse the judgment of the Superior Court and remand for further proceedings consistent with this opinion.⁴

So ordered.

ENTERED BY DIRECTION OF THE COURT



Julio A. Castillo
Clerk of the Court

³(...continued)

defamation sufficiently to withstand a motion to dismiss under Super. Ct. Civil Rule 12 (b)(6), we made clear that a proffer of evidence was required, including evidence of damages, before the court could be justified in enforcing the subpoena.

⁴ Because Solers has failed to identify John Doe and to serve him with a summons, perhaps the only logical step on remand is to dismiss the complaint. That issue was not briefed before us, however, so we do not foreclose other options that may seem advisable to the trial court.

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