No. A157891

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

YELP INC.,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO,
Respondent.

THOMAS P. KELLY III,
Real Party in Interest.

Superior Court of California, County of San Francisco, No. CGC-19-573821
Honorable Ethan P. Schulman, Dept. 302, (415) 551-3723

INFORMAL REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE

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August 12, 2019

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Introduction

This informal reply brief is filed pursuant to the Court's July 29, 2019 order staying the order compelling disclosure of Doe's identity despite her First Amendment right to speak anonymously about her adverse experience with plaintiff, attorney Thomas P. Kelly III, and setting a schedule for informal briefing to enable the Court to decide whether to give plenary consideration of this case. Yelp's opening brief showed that the trial court had failed to analyze the review at issue in sufficient detail to ensure **both** that plaintiff's defamation claim contained actionable factual statements rather than mere expressions of discontent, **and** that plaintiff had offered probative evidence that such factual statements were false, hence establishing the prima facie case demanded by *ZL Technologies v. Does 1-7* (Cal. App. 1st Dist. 2017) 13 Cal. App.5th 603, 220 Cal. Rptr. 3d 569, 596, and *Krinsky v. Doe 6* (Cal. App. 6th Dist. 2008) 159 Cal. App.4th 1154, 72 Cal. Rptr.3d 231.

In his Opposition ("Opp.") to Yelp's petition, Kelly offers a variety of objections to the petition for a writ of mandate. As explained below, none of these contentions has merit. Accordingly, the Court should either set the case down for plenary review, or grant the petition outright and send the case back for further proceedings.

1. The Petition for Mandate Is Properly Before the Court, Which Should Review De Novo.

Kelly argues that the petition is not properly before the Court because Yelp is seeking review of a discovery order, has not shown irreparable injury to its own business interests, and has set forth the wrong standard of review. Opp. 6-8, 10-11. These arguments are incorrect.

It is the very fact that discovery rulings are not subject to appeal that makes Yelp's petition for mandate the proper mechanism in situations such as this one, where a discovery order imperils legally protected confidential information. Here, the Yelp user's First Amendment right to speak anonymously is at risk, and can only be overcome by a sufficient showing of need. Kelly wrongly contends that only absolute "privileges"—like the attorney-client privilege—can be vindicated through writ proceedings; his error is shown by a number of his own cases. *See Los Angeles Gay & Lesbian Ctr. v. Superior Court* (Cal. App. 2d Dist. 2011) 194 Cal. App. 4th 288, 299-300, 125 Cal. Rptr. 3d 169, 177 (protecting against disclosure implicating the right of privacy); *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 736-740, 101 Cal. Rptr.3d 758 (discussing work-product protection and procedures for adjudicating qualified privileges); *People ex rel. Lockyer v. Superior Court* (Cal. App. 4th Dist. 2004) 122 Cal. App.4th 1060, 9 Cal. Rptr. 3d 324, 336 (protecting against discovery compelled from state agencies other than the party to the

specific litigation, and against disclosure in possible breach of a protective order from a different court). Indeed, several of the cases cited in Yelp's Petition addressed petitions for a writ of mandate filed to protect the right of online critics to remain anonymous; not all of the petitioners secured a writ, but the appellate courts in those cases considered the petitions on the merits.

Kelly is also wrong to contend that a writ of mandate may only be sought to protect the personal interests of the petitioner. One of the four cases he cited on that subject, the only case from this district, has nothing to say on that subject. *See City of Half Moon Bay v. Superior Court* (Cal. App. 1st Dist. 2003) 106 Cal. App.4th 795, 131 Cal. Rptr. 2d 213; each of the other three says only that a party seeking a writ of mandate must have standing to seek that relief. Yelp showed in its opening brief (at 19-20) that it has standing to protect the anonymity rights of its users, and Kelly has made no effort to rebut that argument. Moreover, one of Kelly's three cases supports Yelp on this point: in *Los Angeles Gay & Lesbian Center*, the petitioner obtained a writ of mandate to protect the privacy interests of its patients. Indeed, the very case whose dicta Kelly repeatedly cites, *Yelp v. Superior Court of Orange County (Montagna)* (Cal. App. 4th Dist. 2017) 17 Cal. App.5th 1, definitively held that "a website host such as Yelp has standing to assert the First Amendment rights of persons who post reviews anonymously on its site, as against an effort to compel Yelp to

identify those persons." *Id.* at 13. Finally, Yelp's petition showed (at page 16, ¶ 18) that the order at which Yelp's petition is aimed affects Yelp's interests as well as the interests of its user; again, Kelly has not rebutted this point.

Finally, the fact that discovery orders are generally reviewed for abuse of discretion does not gainsay Yelp's contention that the errors committed below are subject to de novo review. "Abuse of discretion" is a standard of review that comprehends a series of more specific standards of review, pertaining, for example, to errors of law, errors of fact, and the like, each subject to a discrete standard of review. For example, "a trial court's decision that rests on an error of law is itself an abuse of discretion." *Shuts v. Covenant Holdco* (Cal. App. 1st Dist. 2012) 208 Cal. App.4th 609, 145 Cal. Rptr. 3d 709, 715. And when an appellate court is examining factual determinations that affect the determination whether the First Amendment protects certain speech against encroachment by a court order, the Court is required to conduct an independent examination of the record rather than deferring to the trial court's determination. *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 727 P.2d 711, 715, citing *Bose Corp. v. Consumers Union of United States* (1984) 466 U.S. 485. In *McCoy*, the California Supreme Court characterized *Bose* review as de novo, stating that "First Amendment questions of 'constitutional fact' compel this Court's de novo review." *Id.*

Moreover, the well-accepted standard of review of summary judgment rulings, which rest on determinations whether the party resisting summary judgment has provided enough evidence to make out a prima facie case, is de novo review. *Saelzler v. Adv. Group 400* (Cal. 2001) 25 Cal.4th 763, 23 P.3d 1143, 1145-1146; *Romero v. Am. Pres. Lines* (Cal. App. 1st Dist. 1995) 38 Cal. App.4th 1199, 45 Cal. Rptr. 2d 421, 423. Because *Krinsky* and *ZL Technologies* provide that a plaintiff can secure enforcement of a subpoena to compel identification of an anonymous defendant only by presenting a prima facie case, it stands to reason that review of the trial court's decision on these issues would **also** be de novo. Indeed, after reciting the abuse of discretion standard in the opening of its discussion, 13 Cal. App.5th at 620, this Court in *ZL Technologies* reviewed de novo the trial court's decision about whether the plaintiff there had made a sufficient showing to overcome the anonymous reviewers' right to speak anonymously.

To be sure, *Krinsky* said that review is narrower "to the limited extent that the court below resolved evidentiary disputes, made credibility determinations, or made findings of fact that are not relevant to the First Amendment issue." 72 Cal. Rptr. 3d at 237. *ZL Technologies* cited the same principle. But the trial court here did not do any of that, and Yelp's petition does not challenge such determinations. Consequently, review here is de novo.

2. Plaintiff's Failure to Present Admissible Evidence of Falsity About Any Factual Statements Warrants a Writ of Mandate.

Kelly next argues that he was entitled to have his subpoena enforced because "[w]hen vigorous criticism descends into defamation . . . constitutional protection is no longer available." Opp. 12, 13. And it is true that when a plaintiff has proved that the defendant made false statements of fact about the plaintiff without meeting the requisite standard of care, the First Amendment does not protect that speech and a court may impose remedies. But as the Supreme Court made clear in *United States v. Alvarez* (2012) 567 U.S. 709, 717, First Amendment protection for false speech that injures reputation is removed only when the constitutionally required elements for a defamation claim have been established. In this case, defamation has only been alleged, not proved, and hence Doe's speech remains protected.

Yelp's petition showed in some detail the ways in which Kelly's evidence below failed to show the falsity of even a single discrete fact alleged in Doe's review, as well as how the trial court failed to take note of the absence of such proof in granting enforcement of the subpoena. Pet. at 21-33. Kelly completely bypasses those arguments in his opposition. Kelly's two-and-a-half page section entitled "C. Plaintiff presented a prima facie case for defamation," Opp. at 13-15, does not contain even a single citation to the record, identifying the evidence that supposedly made out the prima facie case justifying the order. Indeed, the

Court will look in vain to find in Kelly's opposition brief even a single citation to the declarations that Kelly filed below. He has offered the Court no probative evidence about the falsity of any discrete fact that was asserted in Doe's review. Instead, he cites (at 8-10) only emails and letters that he sent to Yelp, making statements that were not under oath and were not repeated in his declarations.

Instead of citing evidence, Kelly retreats into the same vague generalities that characterized his briefs below. Those generalities swayed the trial judge below, but they should not succeed on appeal.

Yelp takes particular issue with the assertion, "Plaintiff is adamant that Defendant is no client of his, and if that proves true, this case is over." Opp. at 15. No evidence is cited to support plaintiff's claimed belief that Doe was never his client, and no evidence was provided below to that effect. In fact, Kelly's declaration never said, in so many words, "The author of this review was never my client." Had the declarations below said this, the Court would have to assess whether the averment was too conclusory, and whether the declaration showed affirmatively that Kelly had a sufficient basis for making such an averment on personal knowledge. Instead, the declaration took a different tack, saying instead that the set of statements in Doe's review, including the opinions as well as the facts, did not match what happened in any of his cases. That was not, for the reasons argued in the petition, and unrebutted in the opposition, a sufficient

basis for stripping Doe of her constitutional right to speak anonymously.

Kelly's opposition, rather than citing evidence showing that what Doe said was false, focuses on Kelly's hope that, **if** he is able to identify Doe, he **might** be able to show that Doe made false statements. The following remarkable set of hypotheticals appears on a single page of Kelly's brief (page 15): "If Plaintiff proves that to be true"; "[i]f Plaintiff was successful with Defendant's case"; "if that proves true"; "allegations of fact which can be proven false. And if proven false . . . ."

If wishes were horses, then beggars would ride. Kelly wishes that Doe were a non-client, because that would enable him to argue that Doe's statements are false and hence defamatory. So, he assumes away the issue in this petition: whether he presented any **evidence** that Doe was not a client. Kelly apparently contends that he presents a prima facie case of defamation if he can identify statements that are capable of defamatory meaning and hence are actionable. But Kelly is wrong about that. Even assuming that statements are capable of a defamatory meaning, that means only that his complaint can withstand a motion to dismiss. But *Krinsky* and *ZL Technologies* demand **evidence** of falsity before Kelly can identify his detractor. Under those cases, he does not get to identify his detractor first and only later provide evidence of falsity.

3. The Court Should Not Follow Dicta in *Yelp v. Superior Court of Orange County (Montagna)* or *Wong v. Jing*.

The final section of Kelly's brief (Opp. at 16-18) is captioned "The question at issue here was decided in *Yelp v. Superior Court*," a case that Kelly's brief characterizes as "controlling precedent" (Opp. at 5). Even if it addressed the issues in this case, *Yelp v. Superior Court (Montagna)* would not be controlling; it was decided in the Fourth Appellate District, a fact not apparent from Kelly's brief, which does not include the appellate district in any of its citations.

In any event, Kelly fails to address the arguments in Yelp's opening brief explaining the several reasons why *Montagna* does not help Kelly here, Pet. at 33-37, and Kelly ignores those arguments. Not least of the differences is the fact that the plaintiff in the Fourth District case did not claim that the anonymous reviewer was not really a former client. Rather, the plaintiff alleged that the Doe was a former client who was lying about what happened. In contrast, Kelly rests his argument here on his suspicion, unsupported by evidence, that Doe is not a former client. Consequently, the issue here could not have been decided in *Montagna*.

Kelly's brief also invokes the Sixth Appellate District's ruling in *Wong v. Jing* (Cal. App. 6th Dist. 2010) 189 Cal. App.4th 1354, 117 Cal. Rptr. 3d 747, which Kelly characterizes as "involving an anonymous review on [Yelp]'s website." *Wong* does not say whether or not the review was anonymous, and it

does not address the issue of Internet anonymity or the standards for enforcing subpoenas seeking to identify anonymous reviewers.[1] Nor did *Wong* involve a claim about a statement whose alleged falsity was predicated on the assertion that the defendant was not a client. The defendants in that case were the parents of a boy whom a dentist, the plaintiff, had previously treated, and those **named** defendants filed an anti-SLAPP motion that was largely denied, on the ground that the Yelp review contained several false statements about the plaintiff's treatment of their son. The cited parts of the opinion go to the issue of whether certain statements were capable of a defamatory meaning, but do not help Kelly show that he had sufficient evidence of falsity to warrant enforcement of the subpoena.

4. Uncontroverted Facts in the MacBean Declaration May Be Considered in Support of the Writ Petition.

As the Petition explains, Yelp's Appendix of Exhibits included a Declaration of Ian MacBean, which had not been submitted below, in order to "place in evidentiary form facts about Yelp's operations that were contained in the record [below] but not under oath." Pet. at 5. Kelly's Opposition does not mention that declaration. However, he has filed a separate document styled as an Objection and Motion to Strike ("Motion to Strike"), urging the Court not to

[1] To the best of counsel's knowledge, that case was originally filed against two named defendants, and Yelp did not receive any subpoena seeking their identifying information.

consider the Declaration because it was not submitted below. However, this is not a sufficient reason to ignore the Declaration.

The Motion to Strike cites several decisions, issued in cases deciding appeals, for the propositions that "the record on review is limited to the record of matters which were before the trial court for its consideration" and that "[d]ocuments, statements, and facts that were not presented to the trial court cannot be considered on review." Motion to Strike, page 1. Unlike appeals, however, writ petitions are original proceedings, *see Mooney v. Pickett* (Cal. App. 1st Dist. 1972) 26 Cal. App.3d 431, 102 Cal. Rptr. 708, 712 (*citing Mooney v. Pickett* (1971) 4 Cal.3d 669, 94 Cal. Rptr. 279, 483 P.2d 1231); *Curtin v. Dept. of Motor Vehicles* (Cal. App. 1st Dist. 1981) 123 Cal. App.3d 481, 176 Cal. Rptr. 690, 692, which must be verified pursuant to Rule 8.486(a)(4) of the California Rules of Court. This verification itself is evidence that was, necessarily, not filed in the court below. Moreover, writ petitions are governed by equitable principles. A writ petition may necessitate new evidence if for no other reason than to address issues of equitable balancing and irreparable injury that may not have been relevant at the trial court level.

Consequently, the cases consistently hold that, in mandate proceedings, appellate courts may consider new information in the form of documents or declarations. *See Cooke v. Superior Court* (Cal. App. 3d Dist. 1989) 213 Cal.

App.3d 401, 261 Cal. Rptr. 706, 709; *McCarthy v. Superior Court* (Cal. App. 1 Dist. 1987) 191 Cal. App. 3d 1023, 1030 n.3, 236 Cal. Rptr. 833. Indeed, when Kelly finally gets around to citing decisions in writ cases, he gets the rule right: "A reviewing court cannot consider evidence involving controverted facts that were not placed in issue in or resolved by the trial court." Motion to Strike, at 1.

The MacBean Declaration meets that standard. The declaration places in evidentiary form relevant facts, none of which were contested below, that were contained in unsworn documents provided to the superior court (for example, correspondence from Yelp's counsel, and statements in briefs that were not cited to the record), and nothing in the declaration is controverted in this proceeding. The facts from the Declaration that are cited in the Petition, at ¶¶ 4 and 5, pages 7 to 9, and on page 32, are undisputed and uncontroversial. The Court has discretion to consider the declaration in deciding whether equity supports issuance of a writ of mandate, and Yelp urges the Court to consider it insofar as it deems the declaration's content useful to its determination.

CONCLUSION

The Petition for a Writ of Mandate should be granted.

Respectfully submitted,

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August 12, 2019

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that this Reply contains 3,527 words, including footnotes and excluding tables, certificates and attachments, as counted by the word-processing program used to prepare this Reply.

Dated: August 12, 2019

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