

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Peter Freeman and James D' Angelo,

Plaintiffs,

vs.

Janette J. Swift,

Defendant.

**ORDER DENYING MOTION
TO DISMISS**

Court File No. 27-CV-08-9585

The above-entitled matter came on before the Honorable Marilyn Brown Rosenbaum for hearing on January 23, 2009, pursuant to the Motion of Defendant to Dismiss Complaint and the Alternative Motion of Plaintiffs to Compel Discovery.

Victor E. Lund, Esq. appeared on behalf of Plaintiffs.

Marshall H. Tanick, Esq. and Stephen H. Parsons, Esq. appeared on behalf of Defendant.

Based on the files, records, and proceedings herein, and being fully informed in the premises, the Court makes the following:

ORDER

1. The Motion of Defendant to Dismiss Plaintiffs' Complaint is denied.
2. The Motion of Plaintiffs to Compel Discovery is moot. The parties shall comply with the Scheduling Order/Referral to Mediation, dated October 30, 2008.
3. The attached Memorandum is incorporated herein.

Dated: March 5, 2009



The Honorable Marilyn Brown Rosenbaum
Judge of District Court

MEMORANDUM

FACTS

Defendant Janette J. Swift (“Swift”) made comments about Plaintiff Peter Freeman (“Freeman”) and Plaintiff James D’Angelo (“D’Angelo”) concerning the relocation of a juvenile sex offender treatment facility operated by Nexus, a Minnesota nonprofit corporation. Nexus operated the juvenile sex offender treatment facility in Onamia, Minnesota beginning in the 1990s, and sought to relocate its operations to another site near Onamia rather than remodel its current facility. In 2007, Nexus planned to replace the existing Nexus Onamia facility by erecting a new building two miles away from the existing facility. The project involved the purchase of thirty-eight acres in Bradbury Township, rezoning the property to permit the construction of the facility, extending service lines to the property, and construction of the new facility.

Public hearings were held and on June 13, 2007, the Onamia City Council voted to annex the property on which the proposed Nexus facility would be located. On January 30, 2008, the City of Onamia rezoned the property and, after Nexus purchased the land in an arms-length transaction, construction began.

Freeman is a volunteer member of the Nexus Board of Directors, a former faculty member at the University of St. Thomas, and a faculty member at the College of St. Catherine. D’Angelo was the Chief Executive Officer of Nexus during the pertinent events, but has recently retired from that position.

Swift is a resident of Bradbury Township, the site of the new Nexus facility. Swift organized and led a group opposing the new Nexus facility, attended the public hearings to express her views against the Nexus proposal, and made numerous appearances and presentations to local government bodies to argue against the project. Swift maintains two blogs, the *Bradbury Buzzz* and the *Mille Lacs News*. The record is replete with comments and statements made by Swift regarding both Freeman and D’Angelo, and that record is incorporated herein. However, a few statements must be specifically referenced as to each Plaintiff.

On October 1, 2007, Swift sent an email to Barbara Shank (“Shank”), Freeman’s dean at the University of St. Thomas. Swift’s email read, in pertinent part:

Dear Dean Shank,

I am writing to you concerning one of your faculty members who is engaging in unethical, immoral, and possibly even illegal behavior – which reflects directly upon your social work department of St. Thomas University.

Peter D. Freeman sits on the Board of Directors for NEXUS, a large corporation which owns and operates Mille Lacs Academy, a facility for juvenile sex offenders. For the past six months, my neighborhood has been fighting to keep NEXUS from building a huge new facility in our rural residential (R1) neighborhood. Although the proposed location is absolutely inappropriate, the NEXUS board is determined to bully its way into our neighborhood regardless of our objections.

...

Not only is this the wrong location for the sex offender facility, the methods of acquiring this property are suspect, with NEXUS in league with our corrupt small town government. Our research has shown that NEXUS itself is a questionable organization. It is quite complex and I'll spare you all the details here, but please visit our website for more information. [Addresses omitted.]

Recently I telephoned board member Peter Freeman hoping to discuss our neighborhood's concerns. . . . As soon as I told him I was calling about NEXUS, he hung up on me. Click. Extremely unprofessional. Exceptionally rude.

I realize that we are not part of the immediate St. Thomas community. We hope that the values stated in your mission statement would apply to our community as well. Your faculty member – Peter Freeman – is making decisions down in St. Paul which are greatly impacting on the lives of many people in Bradbury Township. He will not even honor us by listening to us. His actions are responsible for so much suffering, yet he will not take responsibility for the harm he is causing. He is like the fellow who – in between sips of coffee – pushes the button that launches the missile which destroys the village, then holds up his hands, saying, "See? No blood on MY hands."

What he and NEXUS are doing is wrong. . . .

On October 16, 2007, Swift sent an email to Shank and twenty-four of Freeman's faculty colleagues at the University of St. Thomas and the College of St. Catherine, which included a copy of the October 1, 2007 email. Swift admits that the "purpose of those e-mails was to point out the problems associated with relocation and how it deviates from the goals and mission statements of those educational institutions where Freeman works."

On July 7, 2007, Swift used her blog to post a statement concerning D'Angelo, calling him "a predator. One who preys on the elderly and infirmed." On September 1, 2007 and December 29, 2007, Swift used her blog to post statements concerning D'Angelo, which included:

He's dishonest. He's a liar. He lacks character. That can lead to trouble. Maybe he'd mis-managed his finances and was deep in debt. And when Nexus fired him recently, (we like to think he was fired,) and his wife probably left him (we think he's kinky) and the FBI investigated him (we think he's running a crooked company), and he was on his way to jail for racketeering (one can dream). . . .

On November 10, 2007, Swift used her blog to post the following:

Hannabelle [Swift] doesn't take bribes. But imagine how different I might feel if Poopsie [D'Angelo] and Company had wined and dined me, spoken sweet and low, courted my favor, and sent me flowers and candy. . . .

instead of death threats and the law suits???

In their Complaint, Freeman and D'Angelo allege: (1) Defamation—that Swift's statements published about Freeman to the faculty members at the University of the St. Thomas and the College of St. Catherine are false and defamatory and that Freeman is not a public figure; (2) Defamation—that Swift's statements about D'Angelo published on the blog are false and defamatory and were made with malice and reckless disregard. Swift filed a Motion to Dismiss Plaintiffs' Complaint pursuant to Minn. Stat. § 554.01, *et seq.* ("the anti-SLAPP statute"), which suspended discovery.

Swift seeks dismissal of Plaintiffs' Complaint, claiming: (1) the statements complained of by Freeman and D'Angelo were made with the goal of procuring favorable government action and are immune from liability under the anti-SLAPP statute; (2) the statements she made are Constitutionally-protected opinions, and do not constitute actionable defamation as a matter of law; and (3) an award of attorney fees pursuant to Minn. Stat. § 554.04.

Freeman and D'Angelo oppose the Motion to Dismiss, claiming (1) Swift's objectionable statements are not protected by the anti-SLAPP statute; (2) they have presented clear and convincing evidence that Swift's statements were defamatory; and (3) the anti-SLAPP statute is unconstitutional. In addition, they seek an Order compelling discovery if the Court requires further information to decide this Motion.

The parties agree that the Nexus project is a matter of public interest and that Swift's statements to the City of Onamia or other governmental agencies were aimed at procuring favorable governmental action. The issue before the Court is the determination of the extent of the statutory immunity and if such immunity extends to Swift's statements in email and blogs directed at nongovernmental participants and/or to the world in general.

STANDARD FOR REVIEW UNDER MINN. STAT. 554.01, ET SEQ.

Minnesota's anti-SLAPP statute creates a statutory immunity designed to "protect citizens and organizations from lawsuits that would chill their right to publicly participate in government." *Marchant Inv. & Mgmt. Co., Inc. v. St. Anthony W. Neigh. Org.*, 694 N.W.2d 92, 94 (Minn. Ct. App. 2005). The pertinent provisions are:

Minn. Stat. § 554.01.

Subd. 2. Government. "Government" includes a branch, department, agency, official, employee, agent, or other person with authority to act on behalf of the federal government, this state, or any political subdivision of this state, including municipalities and their boards, commissions, and departments, or other public authority.

...

Subd. 6. Public participation. "Public participation" means speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action.

Minn. Stat. § 554.02.

Subdivision 1. Applicability. This section applies to any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation.

Subd. 2. Procedure. On the filing of any motion described in subdivision 1: (1) discovery must be suspended pending the final disposition of the motion, including any appeal; provided that the court may, on motion and after a hearing and for good cause shown, order that specified and limited discovery be conducted;

(2) the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion;

(3) the court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03; and

(4) any governmental body to which the moving party's acts were directed

or the attorney general's office may intervene in, defend, or otherwise support the moving party.

Minn. Stat. § 554.03.

Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights.

A district court “must grant a motion to dismiss brought under the act unless the responding party demonstrates, by clear and convincing evidence, that the moving party’s conduct is not immune from liability because the conduct constitutes a tort or violation of a constitutional right.” *Marchant Inv.*, 694 N.W.2d at 95. “In order to prove a claim by clear and convincing evidence, a party's evidence should be unequivocal and uncontradicted, and intrinsically probable and credible.” *Deli v. University of Minnesota*, 511 N.W.2d 46, 52 (Minn. Ct. App. 1994) (citing *Kavanagh v. The Golden Rule*, 226 Minn. 510, 516-17, 33 N.W.2d 697, 700 (1948)).

DECISION

The anti-SLAPP statute is meant to be a shield, not a sword. Plaintiffs have sustained their burden of proof and have, by clear and convincing evidence, established that Swift’s statements contained in emails and on her blogs are not immune from liability by operation of the anti-SLAPP statute. Plaintiffs have sustained their burden of proof and have shown that many of the statements made by Swift, as to each Plaintiff, were not “genuinely aimed in whole or in part at procuring favorable government action.”

Plaintiffs did not commence this suit based on statements Swift made before the local governmental bodies about the public controversy. The statements of which Plaintiffs complain were not genuinely aimed at the decision-making government entities, but were instead intentionally aimed at audiences having no connection with the public project and controversy. Statements concerning Freeman, published in emails to Freeman’s colleagues and employer are not immunized. Swift’s complaints or opinions regarding Freeman’s actions made to Freeman’s colleagues cannot be construed as genuinely aimed in whole or in part at procuring favorable government action.

Statements concerning D'Angelo published in Swift's blogs are not immunized. These blog postings were not directed to anyone in particular, and were not directed to the appropriate governmental bodies.

Since Swift's published statements concerning Freeman and D'Angelo were not genuinely aimed at procuring favorable government action, the anti-SLAPP statute does not immunize those statements.

Based on the foregoing, the claim of Plaintiffs that the anti-SLAPP statute is unconstitutional will not be addressed. Taking the anti-SLAPP statute as constitutional, and based upon the facts as set forth herein, Plaintiffs have presented clear and convincing evidence that the statements at issue are not immune because Swift's conduct constitutes allegations of the tort of defamation, which should proceed to trial. Plaintiffs have established a *prima facie* claim supporting the tort of defamation, by showing: "(1) a false statement, (2) communicated to someone other than the plaintiff, and (3) tending to harm the plaintiff's reputation or lower him in the estimation of the community." *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789 (Minn. Ct. App. 1998) (citing *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996)).

In addition, the issue of whether either Plaintiff is a public or limited purpose public figure and the issue of proving actual malice will be addressed after full discovery at the time of trial.

The motion of Defendant to dismiss Plaintiffs' Complaint should be denied. Plaintiffs have sustained their burden of proof and have established, by clear and convincing evidence, that Defendant's statements are not to be accorded immunity.

MBR