

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

**HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT**

In the Matter of the Petition of
ROBERT F. KENNEDY, JR.,

Petitioner(s),

DECISION & ORDER

Index No.: 65319/2020

For an Order pursuant to Section 3102 (c) of the Civil Practice Law and Rules to compel pre-action Disclosure from:

KOS MEDIA, LLC d/b/a, DAILY KOS,

Respondent(s),

of the identity of the defendants JOHN DOE(s) being unknown to the Petitioner, in an action to be commenced.

Petitioner commenced this proceeding (Motion #1) for an order, authorizing the issuance of a subpoena duces tecum pursuant to CPLR 3102 (c), compelling respondent: to disclose copies of all documents in its possession, custody or control evidencing the identity of the Doe defendant(s), including but not limited to the contact information, name, address, telephone number, electronic email address(es), any Internet Protocol (IP) address(es), Media Access Control (MAC), internet connection or activity logs, account history including date and time of account creation, alternative pseudonyms, and any other information relevant to identifying the person(s) who have who use or have created, posted, or authored content under the pseudonym DowneastDem on the website Daily Kos (<https://www.dailykos.com>).

Respondent moves for sanctions (Motion #2) and for a protective order (Motion #3).

Petitioner moves for a protective order (Motion #4).

Petitioner moves for a stay of proceedings (Motion #5).

The following papers were read:

Order to Show Cause (#1), Petition, Affirmation, and Exhibit	1-4
Notice of Motion (#2), Affirmation, Affidavit, Exhibits (11), and Memo of Law	5-19
Notice of Motion (#3), Affirmation, Affidavit, Exhibits (11), and Memo of Law	20-34
Notice of Motion (#4), Affirmation, Exhibits (3), and Memo of Law	35-40
Notice of Motion (#5), Affirmation, Exhibits (3), and Memo of Law	41-46

By way of background, on or about August 29, 2020, defendants published an article under the pseudonym DowneastDem on the website Daily Kos with the headline: “Anti-Vaxxer RFK JR. joins neo-Nazis in massive Berlin ‘Anti-Corona’ Protest” (the “Article”), which stated that “[t]he protest was organized by right-wing extremist organizations - including the AfD party and various anti-Semitic conspiracy groups as well as the neo-Nazi NPD party. Among the speakers was Robert F. Kennedy Jr., who warned against the ‘totalitarianism’ of Angela Merkel” (collectively, Statements).

On November 30, 2020, petitioner commenced this proceeding, seeking pre-action discovery; namely, the identity of DowneastDem. The petition alleges that the Statements were false. The petition alleges that petitioner did not join neo-Nazis at a protest in Berlin nor speak at a protest organized by right-wing extremist organizations. Rather, the petition alleges, petitioner gave a speech decrying Nazism and totalitarianism of all kinds at a protest, which was initiated by a democratic group that opposes all forms of fascism and extremism. The petition also alleges that the only source cited by the Article makes plain that there were several gatherings on this day, which were organized by different groups, and that the demonstrations took place at different times and at different locations. The petition further alleges that the Statements are defamatory *per se* and will continue to cause significant damage to petitioner as long as they remain online. Based hereon, petitioner contends that he has alleged sufficient facts to make out a claim for libel and seeks an order, pursuant to CPLR 3102 (c), permitting petitioner to serve respondent with a subpoena to identify the proper parties to any potential future lawsuit for libel regarding the Article.

In response, respondent contends that the Statements were true. Respondent proffers several news articles, which, respondent contends, demonstrate that there was a large protest on August 29, 2020, that neo-Nazis were in attendance, and that the protest was organized by right wing extremists, including the specific group that invited petitioner to speak. In addition, respondent contends that DowneastDem accurately reflected the information contained in the cited source.

In reply, petitioner notes that the outstanding dispute appears to be whether the Statements were false and made with actual malice. Petitioner asserts, when the Statements are read together, a reasonable reader would have understood DowneastDem to have accused petitioner of joining—that is, closely associating himself with—neo-Nazis and that petitioner spoke at a rally organized by anti-Semites and neo-Nazis. Petitioner contends that these were statements of fact and that they were false. Petitioner rejects

respondent's assertion that the Statements accurately reflect the information in the cited source, as previously explained.

The Second Department has explained that “[a] petition for pre-action discovery limited to obtaining the identity of prospective defendants should be granted where the petitioner has alleged facts fairly indicating that he or she has some cause of action” (*Matter of Konig v WordPress.com*, 112 AD3d 936, 936 [2d Dept 2013]). Thus, a petitioner is entitled to obtain the identity of prospective defendants where a petitioner has alleged facts, which state a cause of action (*see Matter of Toal v Staten Is. Univ. Hosp.*, 300 AD2d 592, 592 [2d Dept 2002]).¹

“The elements of a cause of action [to recover damages] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*” (*Gaccione v Scarpinato*, 137 AD3d 857, 859 [2d Dept 2016], internal quotation marks omitted). “In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff” (*Matter of Konig v WordPress.com*, 112 AD3d 936, 937 [2d Dept 2013], internal quotation marks omitted). In addition, where a plaintiff is a public figure,² the plaintiff is required to plead that the defamatory statements were published with actual malice, that is, “with either knowledge that it was false or reckless disregard for the truth” (*Huggins v Moore*, 94 NY2d 296, 301 [1999]; *Crime Victims Ctr., Inc. v Logue*, 181 AD3d 556, 557 [2d Dept 2020]).

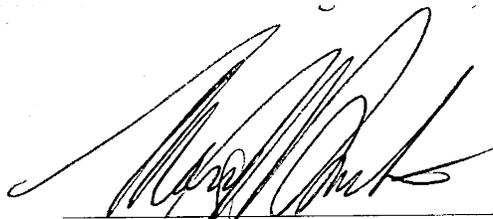
Here, the petition alleges sufficient facts, which fairly indicate that he has a claim for defamation and is thus entitled to pre-action discovery limited to obtaining the identity of prospective defendants. Respondent has raised a number of factual issues and legal arguments, which may provide a defense, in whole or in part, in any future litigation. These factual issues and legal arguments, however, do not provide a basis to deny the relief sought in the petition. To the extent not specifically addressed herein, the Court finds respondent's remaining arguments to be without merit.

¹ In the *Matter of Toal*, the Hon. Leo F. McGinity, J.S.C. dissented. Judge McGinity asserted that petitioner was required to establish a *prima facie* cause of action and that in determining whether the petitioner had made this showing, “the evidence presented must be considered in a light most favorable to the petitioner” (*Matt of Toal*, 300 AD2d at 593). Judge McGinity asserted that the petitioner had not submitted any evidence to support the petition, but merely the conclusory allegations of an attorney, which, he contended, was patently insufficient (*id.*).

² Petitioner concedes that he is a “limited purpose public figure,” which is an individual who is normally not a public figure, but becomes one for a limited range of issues by injecting her/himself or is drawn into a particular public controversy (*see O'Neil v Peekskill Faculty Ass'n*, 120 AD2d 36, 44 [2d Dept 1986]).

Based on the foregoing, the petition is granted; petitioner is directed to submit a proposed order within 20 days hereof. Given the foregoing, Motion ## 2, 3, 4, and 5 are denied as moot.

Dated: April 16, 2021
White Plains, New York



HON. MARY H. SMITH
Justice of the Supreme Court