

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

BOSTON MUNICIPAL COURT
CENTRAL DIVISION

ANA CARPENTER,
Plaintiff,

v.

FACEBOOK, INC.
Defendant,

and

STOP THE POWER,
Intervenor as Defendant/Party-In-Interest

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) Civil Action
) No. 1501CV001785
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**ORDER ON FACEBOOK, INC.’S MOTION TO DISMISS COMPLAINT
AND QUASH SUBPOENA, STOP THE POWER’S MOTION TO INTERVENE AS OF
RIGHT PURSUANT TO MASS. R. CIV. P. 24(a)(2) AND STOP THE POWER’S
MOTION TO QUASH DEPOSITION SUBPOENA AND FOR
A PROTECTIVE ORDER PURSUANT TO MASS. R. CIV. P. 45(b) AND 26(c)**

Background

Plaintiff Ana Carpenter (“Plaintiff”) filed this action on October 8, 2015 by filing a Complaint in Equity for Discovery Only, Pursuant to Mass. R. Civ. P. 34(c) (“Complaint”). In her Complaint, Plaintiff sought discovery from Facebook, Inc. (“Facebook”) about the identity of a Facebook user who identifies himself or herself on Facebook as “Amy Willis.” Shortly after filing her Complaint, Plaintiff served a subpoena on Facebook requesting subscriber and identifying information for Facebook user “Amy Willis” and for the creator/owner of the “Stop the Power” Facebook page. See Affidavit of Amanda Andrade In Support of Facebook, Inc.’s Motion to Dismiss dated December 3, 2015 (“Andrade Affidavit”) at ¶ 3. On December 7, 2015, Facebook filed a Motion to Dismiss Complaint and Quash Subpoena, objecting to Plaintiff’s

subpoena on the grounds that the subpoena was invalid because Facebook, located in California, could not be compelled to respond to a Massachusetts subpoena, and that the subpoena sought information in violation of the First Amendment, and specifically the right to engage in anonymous political speech. *See* Facebook's Motion to Dismiss Complaint and Quash Subpoena at 1-2. On December 11, 2015, "Stop the Power" ("STP")¹ filed a Motion to Intervene as of Right Pursuant to Mass. R. Civ. P. 24(a)(2) and a Motion to Quash Deposition Subpoena and for a Protective Order Pursuant to Mass. R. Civ. P. 45(b) and 26(c).² Plaintiff opposed all motions filed by Facebook and STP. The Court held a hearing on all motions on January 8, 2016.

After argument by both parties, reservation and review of the law, and for reasons which include but are not limited to those set forth below, (1) Facebook's Motion to Dismiss the Complaint is allowed; (2) Facebook's Motion to Quash the Subpoena is allowed; (3) STP's Motion to Intervene as of Right Pursuant to Mass. R. Civ. P. 24(a)(2) is denied; (4) STP's Motion to Quash Deposition Subpoena is denied; and (5) Stop the Power's Motion for a Protective Order Pursuant to Mass. R. Civ. P. 45(b) and 26(c) is denied.

Discussion

This case comes before the Court in a rather unique procedural posture. Plaintiff's Complaint is a bill for discovery filed against Facebook pursuant to Rule 34(c) of the Massachusetts Rules of Civil Procedure ("Mass. R. Civ. P."), and the only relief sought is "judgment against Facebook as follows: to grant discovery to the Plaintiff to determine the identity of the third party defendant to her claims relative to the incidents as described [in the

¹ Notwithstanding STP's characterization of its status in this case as a defendant, STP is not a defendant or a party in this action.

² Although STP captions its second pleading as "Motion to Quash Deposition Subpoena and for a Protective Order Pursuant to Mass. R. Civ. P. 45(b) and 26(c)," the Plaintiff does not appear to request any depositions in its Complaint.

Complaint].” Complaint at 4. While it appears clear that Mass. R. Civ. P. 34(c) “does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land,”³ the Rule “does not provide a mechanism for requesting documents from nonparties, and a nonparty cannot be required to produce documents under this rule.”⁴ While Facebook is named by Plaintiff as the only defendant in the instant action, Plaintiff admits that it has “not alleged any wrongdoing by Facebook and is not suing Facebook for any damages.” Plaintiff’s Supplemental Memorandum at 4. Plaintiff’s only goal appears to be to obtain the requested information from Facebook and then initiate a new and separate litigation against the party or parties identified by Facebook in response to Plaintiff’s subpoena in this action. Plaintiff appears to concede that Facebook would not be a party to that subsequent litigation.

Mass. R. Civ. P. 34 mirrors the 1970 version of Fed. R. Civ. P. 34.⁵ See Reporter’s Notes to Mass. R. Civ. P. 34 (1973) (Massachusetts “Rule 34 copies Federal Rule 34 . . .”). An examination of the application of the earlier version of Fed. R. Civ. P. 34(c) (from which the current version of Mass. R. Civ. P. 34(c) was derived) in other jurisdictions indicates that the use of equitable bills for discovery was permissible, apart from the Federal Rules of Civil Procedure, but that the earlier version of Fed. R. Civ. P. 34(c) did not authorize an independent cause of action for discovery. See *Austin v. Johnston Coca-Cola Bottling Group*, 891 P.2d 1143, 1146 (1995). In *Austin*, the Court of Appeals of Kansas held that a Kansas district court did not err in holding that Kansas Rule K.S.A. 60-234(c), which mirrored the earlier version of Fed. R. Civ. P. 34(c) (and the current version of Mass. R. Civ. P. 34(c)), did not recognize the equitable bill of

³ Mass. R. Civ. P. 34(c).

⁴ P.M. Lauriat, S.E. McChesney, W.H. Gordon, A.A. Rainer, *Discovery* (2d ed. 2008) at 439.

⁵ The current version of Fed. R. Civ. P. 34(c) states: “(c) **Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.” Fed. R. Civ. P. 34(c).

discovery. *See Austin* at 1146. The Kansas Court noted that “[t]he Advisory Committee Notes accompanying [Fed. R. Civ. P.] 34 make clear that the rule applies ‘only to parties’” and that the 1970 amendments to the rule did “not authorize an independent action for discovery.” *Id.* at 1145. The *Austin* court held that the plaintiff’s “argument that [the Kansas rule analogous to Mass. R. Civ. P. 34(c)] pronounces a right to bring an independent action is contrary to the language of the statute.” *Id.* The *Austin* court also noted that although Fed. R. Civ. P. 34(c) was modified in 1991 to provide for discovery against non-parties, Kansas had not adopted a similar rule change. *Id.* at 1146. Likewise, Massachusetts has not adopted a similar rule change (i.e., one that would permit Plaintiff here to obtain the relief she seeks in her Complaint).⁶

Although it does not appear that any Massachusetts court has engaged in a reported analysis of Mass. R. Civ. P. 34(c) alongside the earlier version of Fed. R. Civ. P. 34(c) as did the court in *Austin*, the Massachusetts Supreme Judicial Court in *American Sec. & Trust Co. v. Brooks*, 225 Mass. 500 (1917) stated that “[i]t is a general rule that a bill for discovery will not lie against one who is not a party to the contemplated litigation but is a stranger to it, or who is only a witness. *American Sec. & Trust Co.* at 502, citing *Post & Co. v. Toledo, Cincinnati & St. Louis R. R.*, 144 Mass. 341, 348 (1886).

Subsequent to *American Sec. & Trust Co.*, Massachusetts case law appears to have carved out two distinct exceptions to the disfavor of bills for discovery. First, “[d]iscovery has


⁶ Notably, the Supreme Judicial Court’s Standing Advisory Committee on the Rules of Civil and Appellate Procedure recently invited comments on proposed amendments to Mass. R. Civ. P. 34, including a proposed amendment to Mass. R. Civ. P. 34(c), adding subsection (2), which states: “As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.” Proposed Amendments to Mass. R. Civ. P. 34 (comment due date February 5, 2016). The reference to Mass. R. Civ. P. 45 in the proposed amended language of Mass. R. Civ. P. 34 is significant because Fed. R. Civ. P. 34(c) contains a similar reference to Fed. R. Civ. P. 45, and the Advisory Committee Notes that accompanied the addition of the reference to Fed. R. Civ. P. 45 in Fed. R. Civ. P. 34(c) acknowledge that although independent actions for production of documents or things or entry upon land are not precluded, there may no longer be a need for such independent actions in light of a party’s ability to compel a non-party to produce documents and things or permit entry upon land. *See* Advisory Committee Notes to Fed. R. Civ. P. 34 (1991).

been ordered against *corporate officers*, though the corporation itself and its shareholders were the only possible parties to the anticipated suit.” *Wolfe v. Massachusetts Port Authority*, 366 Mass. 417, 419 (1974) (emphasis added).⁷ The second exception is where “a *public* instrumentality, though not a party to anticipated litigation, may be compelled to make information available to a private plaintiff. *Id.* at 420 (emphasis added).

Conclusion

For all these reasons, and based on this Court’s ruling that Plaintiff’s Complaint does not find support in the law of the Commonwealth, Facebook’s Motion to Dismiss the Complaint and Quash Subpoena is allowed, and STP’s Motion to Intervene as of Right Pursuant to Mass. R. Civ. P. 24(a)(2) and Motion to Quash Deposition Subpoena and for a Protective Order Pursuant to Mass. R. Civ. P. 45(b) and 26(c) are therefore denied.

by the court,



Sally A. Kelly
Associate Justice
April 20, 2016

⁷ “Although *Wolfe* was issued in 1974, the case was not decided under the new Massachusetts Rules of Civil Procedure.” *Walker v. Daley Hotel Mgmt. Corp.*, 1994 Mass. Super. LEXIS 4 (Dec. 23, 1994).