**SUPREME COURT OF THE STATE OF NEW YORK** **Index No.:80240/09**
**COUNTY OF RICHMOND DCM PART 3** **Motion No.:001**

**In the Matter Of The Application Of**
**AFFILIATED COMPUTER SERVICES, INC.,**

***Plaintiff***

***against***

**DECISION & ORDER**

**TIMOTHY DUBNAU,**

**HON. JOSEPH J. MALTESE**

***Defendant***

**The following items were considered in the review of this motion for pre action disclosure**

| Papers | Numbered |
|---|---|
| **Notice of Motion and Affidavits Annexed** | **1** |
| **Answering Affidavits** | **3, 4** |
| **Replying Affidavits** | **6** |
| **Memoranda of Law** | **2, 5** |
| **Exhibits** | **Attached to Papers** |

Petitioner Affiliated Computer Services, Inc ("ACS")'s motion seeking pre action discovery pursuant to the New York Civil Practice and Law Rules ("CPLR") § 3102(c) is denied in its entirety.

**Facts**

ACS operates a facility in Staten Island, New York that provides back office support for the E-Z Pass electronic toll collection program. In or about 1996, ACS decided to adopt a new compensation plan known as the Activity Based Compensation ("ABC"). Helen Barton, ACS Vice President of Operations, maintains in her affidavit that ABC is designed to pay employees on the "quality of work and output, rather than an hourly rate."[1] On July 11, 2009, ACS launched in Staten Island the process of changing their wages from hourly pay to the ABC plan.

[1] Affidavit of Helen Barton ¶ 2.

The Communications Workers of America ("CWA") is a labor organization selected by ACS employees to represent them for purposes of collective bargaining. Respondent Timothy Dubnau is CWA's organizing coordinator for District One.

On July 13, 2009, CWA filed an unfair labor practice charge against ACS, alleging that ACS had violated Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act by unilaterally changing the terms and conditions of employment of ACS employees without the representation of CWA through collective bargaining.[2] By correspondence dated July 24, 2009, the Director of the National Labor Relations Board ("NLRB") for Region 29 notified ACS of the charge alleging ACS's unfair labor practices. The form, submitted to the NLRB, which accompanies this notice provides,

> On or about July 11, 2009, and continuing, the Employer, through its agents, officers, and/or representatives, has unilaterally changed the terms and conditions of employment of the employees without giving the Union an opportunity to bargain in violation of the Act.[3]

**Discussion**

ACS petitions this court pursuant to CPLR § 3102(c) for pre action discovery. This statute provides:

> Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The Court may appoint a referee to take testimony.

The Appellate Division, Second Department analyzed this statute in *Matter of Stewart v. New York City Transit Authority*. In that case, the Appellate Court which has jurisdiction over

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[2] Respondent's exhibit A.

[3] *Id.*

this trial court said that CPLR § 3102 (c) " . . . authorizes discovery to allow a plaintiff to frame a complaint and to obtain the identity of the prospective defendants."[4] However, the court recognized an important caveat. The court held that ". . . pre action disclosure under CPLR § 3102 (c) is not available to the would-be plaintiff to determine *if* he has a cause of action."[5] The court went on to reason that " . . .[t]his limitation is designed to prevent the initiation of troublesome and expensive procedures, based upon a mere suspicion, which may annoy and intrude upon an innocent party."[6] "[W]hile a pre action examination may be appropriate to facilitate accurate pleading, it is not permissible as a fishing expedition to ascertain whether a cause of action exists."[7]

To protect potential defendants from the "troublesome and expensive procedures" that accompany pre action disclosure, the petitioning party must allege facts that demonstrate a prima facie case.[8] "[I]t is only available where the moving party demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong."[9] The court has the sound discretion to grant or deny a pre action discovery motion.[10]

ACS purports to bring an action based on defamation claims. It alleges that respondent told ACS clients that certain ACS employees wanted to take a militant approach in opposition to the implementation of the ABC program. As such, ACS seeks to: (1) depose the respondent, and (2) compel discovery of any and all communications the respondent has made to ACS' clients or

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[4] 112 A.D.2d 939 [1985]. (internal citations omitted)

[5] *Id.* (Emphasis original)

[6] *Id.* (Internal citations omitted)

[7] *Liberty Imports v. Bourguet*, 146 AD2d 53 [1st Dept 1989].

[8] 112 A.D.2d 939 [1985].

[9] *Matter of Jules J. Stump v. 209 East 56th St., Corp.*, 212 AD2d 410 [1995].

[10] *Mediavilla v. Guzman*, 272 AD2d 146 [1st Dept 2000].

employees concerning ACS.

To obtain leave for pre action discovery, ACS must demonstrate a prima facie case for defamation. The elements of a defamation claim are the following: (1) a false statement, (2) publication, (3) knowledge of the falsity of the statement or reckless disregard for its truth, and (4) special damages to the plaintiff or defamation per se.[11]

New York law, however, grants special privileges or protection to certain statements that advance the public interest. The New York Court of Appeals has established that when certain communications, though possibly defamatory, serve the public interest, they should be shielded from litigation.[12]

It is well settled that communications made within the context of a union matter or labor dispute enjoys such shield or qualified privilege.[13] The courts have reasoned that unions and their members share the common interest of preventing mistreatment in the workplace.[14] The U.S. Supreme Court in *Old Dominion Branch No. 496* also acknowledged that "unions have a legitimate and substantial interest in continuing organizational efforts after recognition."[15] Furthermore, the U.S. Supreme Court has held that defamatory actions under state law are preempted by federal law if they are made in the course of a labor dispute.[16] A labor dispute is a broad concept that comprises

> any controversy concerning terms, tenure or conditions of

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[11] *Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999].

[12] *Liberman v. Gelstein*, 80 NY2d 429 [1979].

[13] *Santiago v. United Federation of Teachers, Local 2, American Federation of Teachers AFL-CIO*, 39 AD3d 284 [1st Dept 2007].

[14] *Id.*

[15] *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 US 264 [1974].

[16] *Id.*

> employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee."[17]

It is uncontroverted that respondent's employer and ACS are in the middle of a dispute before the National Labor Relations Board on a subject matter concerning ACS's conditions of employment. Hence, the respondent's alleged statement in his capacity as a union representative falls within this broad definition of a labor dispute.

Federal and state courts have repeatedly ruled that only upon a showing of actual malice may a plaintiff have a prima facie case of defamation against a labor union.[18] The definition of malice can derive from constitutional standards or the common law. Under the constitutional standard, the plaintiff must demonstrate that the statements were made with knowledge that they were false or with reckless disregard of their falsity.[19] "In other words, there 'must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication."[20] Under New York common law, malice means spite or ill will.[21] The Court of Appeals explained:

> [S]pite or ill will refers not to defendant's general feelings about

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[17] 29 USC § 152; *See also Hoesten v. Best*, 34 AD3d 143 [1st Dept 2006] (noting that the concept of labor dispute is very broad).

[18] *New York Times v. Sullivan*, 376 US 254 [1964]; *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 US 264 [1974]; *Gateway Theatrical of Bellport, Inc. v. Associated Musicians of Greater New York, Local 802, American Federation of Musicians*, 240 AD2d 538 [2d Dept 1997]; *Park Knoll Assoc. v. Schmidt*, 59 NY2d 205 [1983]; *Liberman v. Gelstein*, 80 NY2d 429 [1992].

[19] *New York Times v. Sullivan*, 376 US 254 [1964].

[20] *Liberman v. Gelstein*, 80 NY2d 429 [1992] quoting *Garrison v. Louisiana*, 379 US 64 [1964].

[21] *Id.*

> plaintiff, but to the speaker's motivation for making the defamatory statements. If the defendant's statements were made to further the interest protected by the privilege, it matters not that defendant also despised plaintiff.[22]

The malice exception is inapplicable in the instant matter. Respondent's alleged comments were made in his capacity as a union representative within the course of a labor dispute. Nothing in the contents of the statement suggest that they were false or that the respondent has a reckless disregard for their falsity. Assuming that the Respondent made those comments, the contents are not far fetched from the truth since CWA has filed a complaint against ACS based on the implementation of the ABC program. The motivation behind those alleged comments is to further CWA's efforts in the labor dispute. As such, any ill will by the respondent against ACS is irrelevant.

**Conclusion**

Given that the communications allegedly made by the respondent are protected by the public interest, specifically the qualified privilege of labor disputes, ACS cannot demonstrate a prima facie case in a defamation claim. ACS should not use this court as a tool to obtain improper and disproportionate discovery relevant in another judicial proceeding. Further, the discovery sought is not limited to obtaining the identities of prospective defendants. It is clear that ACS's accusations relate to comments allegedly made by CWA's employees. As such, should it want to file a cause of action, ACS knows who to sue. This court finds that ACS has failed to demonstrate that it has a meritorious cause of action as required under CPLR § 3102 (c).

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[22] *Liberman v. Gelstein*, 80 NY2d 429 [1992] quoting *Stukus v. State of New York*, 42 NY2d 272 [1977].

Accordingly it is hereby,

ORDERED, that Petitioner Affiliated Computer Services, Inc ("ACS")'s motion seeking pre action discovery pursuant to CPLR § 3102(c) is denied in its entirety.

ENTER,

DATED: October 27, 2009

Joseph J. Maltese
Justice of the Supreme Court