Doe v. Hewitt, No. 504-8-16 Wncv (Teachout, J., Dec. 6, 2016).
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STATE OF VERMONT

SUPERIOR COURT	**CIVIL DIVISION**
Washington Unit	**Docket No. 504-8-16 Wncv**

JANE DOE
Plaintiff

v.

ELIZABETH HEWITT, ANNE GALLOWAY, and
VERMONT JOURNALISM TRUST, LTD (d/b/a VERMONT DIGGER)
Defendants

DECISION
Defendants' Motion to Dismiss

Plaintiff, who filed this case under the pseudonym *Jane Doe* without permission, has asserted defamation and related claims against Defendants Elizabeth Hewitt, Anne Galloway, and the Vermont Journalism Trust, which operates VTDigger, a news website. The claim arises out of an article allegedly posted online. Defendants have filed a Rule 12(b)(5) motion to dismiss due to insufficiency of service of process on the grounds that (1) the complaint references two attached exhibits that were not included in the documents served, and (2) Plaintiff misnamed the Vermont Journalism Trust as the Vermont Journalism Trust, LTD, and misnamed VTDigger as Vermont Digger.[1] All parties have filed documents pro se (without an attorney).

Service of Process

Plaintiff initiated this case as "Confidential Plaintiff" under a pseudonym and did not file with the court or serve on Defendants two exhibits to her complaint that are described as "attached" in the text of the complaint itself. The exhibits, at least Exhibit 1, are crucial to any reasonable understanding of the complaint because the claims all are related to defamation and the allegedly defamatory statements all appear exclusively in Exhibit 1.[2] The alleged defamatory statements are not recited within the text of the complaint.

[1] Defendants filed their motion under both Rule 12(b)(4) (insufficiency of *process*) and Rule 12(b)(5) (insufficiency of *service of process*). As noted by a prominent treatise, technically, Rule 12(b)(4) is directed to the form of the summons only. "Rule 12(b)(5) motion is the proper vehicle for challenging the mode of delivery or the lack of delivery of the summons and complaint." 5B Wright & Miller, et al., Federal Practice & Procedure: Civil 3d § 1353. Defendants' motion, predicated principally on the failure to serve the whole complaint, is a better fit for Rule 12(b)(5).

[2] Plaintiff asserts that the objectionable article remains posted on the VTDigger website but, along with not providing the printout of the article (ostensibly Exhibit 1), she did not provide a link to it online. In other words, she relies on it, claims it is attached, and gives the reader no reliable way to see what it is.

Rule 4 clearly required Plaintiff to serve both the summons and the complaint on each defendant. V.R.C.P. 4(d). "The primary function of Rule 4 is to provide the mechanism for bringing notice of the commencement of an action to the defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit." 4 Wright & Miller, et al., Federal Practice & Procedure: Civil 4th § 1063. Plaintiff served on Defendants only one part of a multtipart complaint, since the referenced exhibits were identified as part of the complaint. This is insufficient service. It is also insufficient to later assert, as she does, that the missing documents were sent to Defendants in the mail and that they know what she is talking about anyway.[3] Plaintiff initiated this case with the filing of the complaint and had 60 days to effect service. V.R.C.P. 3. She has not done so properly and now is out of time. Defendants are entitled to dismissal for insufficiency of service of process.

The case is dismissed without prejudice to the filing of a new lawsuit. Because there are numerous procedural deficiencies in the filings of all parties, the most serious are identified to avoid having to address them in the event the case is refiled.

Plaintiff's Failure to Identify Herself

Plaintiff has revealed herself only under the pseudonym *Jane Doe*. She has never requested permission to conceal her identity. This is improper. Rule 17(a) expressly requires that "[e]very action shall be prosecuted in the name of the real party in interest." In limited circumstances, courts sometimes permit parties to proceed under pseudonyms. As one court has explained:

> Judicial proceedings are supposed to be open . . . in order to enable the proceedings to be monitored by the public. The concealment of a party's name impedes public access to the facts of the case, which include the parties' identity. Not that concealment of a party's name is always improper. The presumption that parties' identities are public information, and the possible prejudice to the opposing party from concealment, can be rebutted by showing that the harm to the plaintiff . . . exceeds the likely harm from concealment.

Doe v. City of Chicago, 360 F.3d 667, 669 (7th Cir. 2004); accord *Raiser v. Brigham Young Univ.*, 127 F. App'x 409, 411 (10th Cir. 2005) ("The risk that a plaintiff may suffer some embarrassment is insufficient to permit anonymity.").

Anonymity requires the court's permission, however, and the showing necessary to warrant it is weighty and affects the public interest. Plaintiff will not be able to file a new case under a pseudonym without seeking permission and presenting facts to rebut the presumption that her identity is properly public information.

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[3] Plaintiff has never filed the exhibits with the court, even if she sent them to Defendants. The complaint filed with the court must be the full document, including attachments.

Plaintiff's Failure to File a Complete Complaint

Plaintiff filed a complaint that referenced exhibits that she did not file. A party may choose to simply not file a document with the court, but must file it if it is referenced in the complaint and relied on as the basis for the claim. As described above, judicial proceedings are public so that the public can monitor the work of the judiciary. Public access to all filings in a court case is permitted unless an exception to the Rules for Public Access to Court Records applies to a particular filing or the court has ordered it sealed. V.R.P.A.C.R. 6 (exceptions to access), 7 (authority to seal). A party cannot unilaterally choose to file with the court only a part of a pleading. When a party desires to rely on a document but believes that it should be sealed or redacted to some extent, she must seek permission from the court by filing a motion to seal and demonstrate grounds for sealing with reference to the standards in the Rules for Public Access to Court Records.

Signing of Court Filings

As noted above, Plaintiff filed and signed using a pseudonym. She has not signed a complaint with her real name. Her identity is unknown. Rule 11(a) of the Vermont Rules of Civil Procedure requires the signature on a filing of the party offering it or that party's attorney. If Plaintiff refiles the case, even if she seeks permission to use a pseudonym, she must sign, in her own name, pleadings and motions and a motion to seal both.

Defendant Anne Galloway has signed several filings on behalf of Elizabeth Hewitt (i.e., "Elizabeth Hewitt signed by Anne Galloway with her permission"). Ms. Galloway appears not to be a licensed attorney who has entered an appearance on behalf of Ms. Hewitt pursuant to court rules, and therefore cannot sign court documents on behalf of Ms. Hewitt, even with Ms. Hewitt's permission. Again, Rule 11(a) requires the signature on a filing of the party offering it or that party's attorney. It does not permit one pro se party (a party without an attorney) to sign on behalf of another. See 5A Wright & Miller, et al., Federal Practice & Procedure: Civil 3d § 1333 ("If a party is unrepresented by counsel, Rule 11 requires the party himself or herself to sign the pleading, motion, or other paper before submitting it to the district court."). The Rule provides that any attorney or any party who is pro se, by signing, is certifying to the content of the filing in several important ways. See V.R.C.P. 11(b). The signature requirement is no mere formality. Such persons are required to take personal responsibility for representations in court filings, and there are sanctions for violations of Rule 11 in order to protect the integrity of the court process.

Elizabeth Hewitt has also filed a notice of appearance and has signed some documents filed with the court on her behalf, but not others. If she appears in a case as a pro se party, she must sign all documents filed on her behalf.

Representation of the Vermont Journalism Trust

Ms. Galloway asserts that she is the executive director of the Vermont Journalism Trust and purports to act as its legal representative based on that role. Nothing in the record shows what kind of legal entity the Vermont Journalism Trust is. The court is aware from another court

case that the Vermont Journalism Trust has described itself as a non-profit corporation.

The general rule is that a corporation, unlike an individual, must be represented in court by a licensed attorney. An executive director is not authorized to act on behalf of a corporation.

> The primary purpose of the "lawyer-representation rule" is the protection of the public, not the creation of any private advantage for attorneys. Courts have generally refused to permit nonattorneys to represent organizations because they do not have the ethical responsibilities of attorneys and are not subject to the disciplinary control of the courts. The lawyer-representation rule also ensures that the courts have control over the management and administration of cases. . . . "[T]he conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court. The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative." Courts have also refused to allow representation by nonlawyers who did not have the legal ability to present their case.

Vermont Agency of Nat. Res. v. Upper Valley Reg'l Landfill Corp., 159 Vt. 454, 454–56 (1992) (citations omitted). That decision also describes the standards by which a court may exempt an organizational party from the lawyer-representation rule and permit it to be represented by a lay-person. *Id.* There also are two statutory exceptions to the lawyer-representation rule that would not apply to a non-profit corporation. See 11 V.S.A. § 3012(d)(1) (when a limited liability company may appear through a nonattorney representative); 11A V.S.A. § 3.02 (when a business corporation may appear through a nonattorney representative). In all events, it is the court, not an agent of the corporation, that makes the determination about whether the legal standards are met so that an organizational party may participate in a court case through a nonattorney representative.

As stated above, this ruling identifies only the most significant of the procedural deficiencies in the parties' filings. Therefore, the parties should not assume that all other filings were done correctly. Because the motion to dismiss is granted, there is no need to address other issues.

ORDER

Defendants' motion to dismiss is *granted* without prejudice, meaning that Plaintiff may file a new complaint in her own name.

Dated at Montpelier, Vermont this ____ day of December 2016.

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Mary Miles Teachout
Superior Judge