

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VOICENET COMMUNICATIONS, : CIVIL ACTION
INC., et al., :
Plaintiffs :
v. :
GERALD J. PAPPERT, et al., :
Defendants : No. 04-1318

MEMORANDUM AND ORDER

McLaughlin, J.

August 5, 2004

The Court decides here the question of whether a pending Pennsylvania investigating grand jury is an "ongoing proceeding" under Younger v. Harris, 401 U.S. 37 (1971), obligating the Court to abstain. The Court finds that it is not.

I. Background

The plaintiffs, Voicenet Communications, Inc. ("Voicenet") and Omni Telecom, Inc. ("OTI"), have sued various law enforcement representatives,¹ alleging violations of their constitutional and statutory rights by the defendants' seizure of Quikvue's computer equipment, pursuant to a search warrant.

¹ The defendants are Attorney General Gerald J. Pappert, Special Agent Michele L. Deery, Delaware County District Attorney G. Michael Green, Bucks County District Attorney Diane E. Gibbons, and Bucks County Detectives Martin McDonough and Thomas Thiel.

The plaintiffs provide computer access to Usenet, an internet discussion and posting forum, for their subscribers.² Usenet consists of newsgroups that contain articles posted daily on many different topics. Compl. ¶¶ 19, 21-23. OTI and Voicenet designed, maintained, and made Quikvue, a Usenet newsreader service, available to its customers in September of 2003.³ Quikvue is a web-based newsreader that allows its users to access and view Usenet content. Compl. ¶¶ 31-32.

The Affidavit of Probable Cause alleges that the defendant Deery received a complaint in November of 2003 regarding the possible distribution and possession of child pornography on Quikvue. See Aff. of Probable Cause for Search Warrant, at 2-4. The Bucks County District Attorney's Office obtained a search warrant on January 20, 2004. On January 21, 2004, the defendants seized equipment used for the operation of Quikvue. See Compl. ¶ 41.

The plaintiffs filed a complaint and motion for a temporary restraining order and a preliminary injunction against the defendants on March 26, 2004. The complaint alleges that the defendants' seizure of the plaintiffs' servers was illegal and

² The Court incorporates its July 15, 2004 Memorandum and Order into this opinion.

³ The plaintiffs contend that Voicenet and OTI worked together to establish Quikvue, but OTI is the proprietor of Quikvue. Apr. 12, 2004 Hr'g Tr. at 24.

that the defendants' actions were an impermissible prior restraint on free speech.⁴ In the complaint, the plaintiffs request money damages and injunctive and declaratory relief.⁵

⁴ The plaintiffs specifically argue that: (1) the enforcement of 18 Pa. Cons. Stat. § 6312 is precluded, because they are protected by the Communications Decency Act, 47 U.S.C. § 230 ("CDA"), as interactive computer services; (2) subscriber information protected by the Electronic Communications Privacy Act, 18 U.S.C. § 2510, et seq. ("ECPA") was seized by the defendants; (3) they are internet service providers ("ISPs") and are protected by the Internet Child Pornography Law, 18 Pa. Cons. Stat. § 7621, et seq. ("ICPL") from prosecution or seizures unless the Attorney General notifies them of the existence of alleged child pornography and affords them an opportunity to remove or block that material; and (4) the Attorney General lacks jurisdiction to investigate or prosecute alleged violations of 18 Pa. Cons. Stat. §§ 6312, 7512.

⁵ The plaintiffs specifically request the following relief: (1) that all defendants be ordered to immediately return the items seized incident to the search and that the Court further declare that the search of the plaintiffs' premises and seizure of plaintiffs' computer servers and other materials, merely as a result of plaintiffs' activities as an ISP as defined by the ICPL, as well as an "interactive computer service" as defined by the CDA and as an "electronic communication service" within the meaning of the ECPA, violates the plaintiffs' rights as guaranteed by the federal Constitution; (2) that all defendants be permanently enjoined from prosecuting plaintiffs pursuant to 18 Pa. Cons. Stat. § 6312, 7415, merely as a result of plaintiffs' activities as an ISP as defined by the ICPL, as well as an "interactive computer service" as defined by the CDA and as an "electronic communication service" within the meaning of the ECPA; (3) that damages be awarded to plaintiffs against all defendants, except the defendant Pappert, to compensate the plaintiffs for the damages suffered as a result of the deprivations of their constitutional rights; (4) that punitive damages be awarded to punish all defendants for their intentional and reckless conduct; and (5) that the Court award reasonable counsel fees and costs and such other relief as the Court deems appropriate.

The Court held a conference with counsel on March 29, 2004, at which time the plaintiffs agreed to withdraw their motion for a temporary restraining order. Counsel then agreed to a hearing to discuss the legal issues raised in the motion for a preliminary injunction, including Younger abstention issues. The Court held oral argument on April 12, 2004.

The Court next held conferences with counsel on April 20, 2004 and April 23, 2004. The Court told counsel its view at that time that abstention was not appropriate because there was no ongoing state proceeding. The Court urged the defendants to return the equipment, based on concern about possible First Amendment violations. The defendants agreed to the return. The defendants also agreed not to review any subscriber information that was seized without giving advance notice to the plaintiffs.

The Court sent a letter to counsel on June 21, 2004 explaining that the Court was planning to issue a decision by July 2, 2004 on the plaintiffs' motion for preliminary injunction. On July 2, 2004, however, the Court received a letter from the defendants explaining that an investigating grand jury had been convened in Bucks County and renewing its request that the Court abstain under Younger.

The Court scheduled a hearing for July 13, 2004 to discuss the defendants' renewed motion to abstain. On July 12,

2004, the defendants Pappert and Deery filed a motion to quash subpoenas of Special Agent Deery and Senior Supervisor Special Agent Arter of the Computer Forensics Unit. On the same day, the defendants Gibbons, McDonough, and Thiel filed a motion to vacate this Court's Order of July 7, 2004, or, in the alternative, to quash subpoenas.⁶ The Court issued an Order stating that the motions to quash, as well as the Younger abstention issues, would be argued at the hearing the next day, but no witnesses need attend at that time.

At the hearing on July 13, 2004, counsel made arguments about the new developments and whether abstention is now appropriate. Counsel informed the Court that the plaintiffs' counsel had entered their appearance on behalf of Voicenet and OTI before the Honorable Kenneth G. Biehn of the Bucks County Court of Common Pleas on June 17, 2004. On June 22, 2004, Judge Biehn, as the supervising judge of the grand jury, granted the plaintiffs' Petition for a Continuance of Grand Jury Appearance and Access to Documents Relating to Grand Jury Administration. On June 30, 2004, the plaintiffs filed an Omnibus Motion to Quash Grand Jury Investigation. The supervising judge denied that motion and issued an opinion denying the appeal of that decision

⁶ The Court's Order of July 7, 2004 simply scheduled the July 13, 2004 hearing to discuss abstention. The subpoenas discussed in the motion required the appearance of certain witnesses, with documents, at the July 13, 2004 hearing.

on July 7, 2004. The plaintiffs filed an emergency application for review on July 9, 2004 with the Pennsylvania Supreme Court.

At the July 13, 2004 hearing before this Court, the parties agreed that the Court could not dismiss the entire case even if Younger is applicable, because the plaintiffs seek money damages in addition to injunctive and declaratory relief.⁷ The Court then issued a Memorandum and Order denying the motion for a preliminary injunction on July 15, 2004. The plaintiffs have appealed the denial of the preliminary injunction. The Court now turns to the Younger abstention issues for the rest of the case.

II. Analysis

The defendants ask the Court to abstain from deciding this case under Younger. The Third Circuit has stated, "Abstention under Younger is appropriate only where: (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise the federal claims." Lui v. Comm'n on Adult Entm't Establishments of Del., 369 F.3d 319, 326 (3d Cir. 2004) (citing

⁷ The defendants conceded that the plaintiffs' claim for money damages cannot be dismissed, and it should be stayed if Younger is applicable. See Deakins v. Monaghan, 484 U.S. 193, 202-03 (1988); July 13, 2004 Hr'g Tr. at 51.

Gwynedd Props., Inc. v. Lower Gwynedd Township, 970 F.2d 1195, 1200 (3d Cir. 1992)).

The question is whether an investigative grand jury satisfies the requirement of Younger.⁸ The plaintiffs rely on a case from this circuit in which the Court of Appeals held that a New Jersey grand jury proceeding did not invoke Younger abstention. Monaghan v. Deakins, 798 F.2d 632 (3d Cir. 1986), aff'd in part and vacated in part, 484 U.S. 193 (1988). The court ruled that the grand jury does not have the power to adjudicate the merits of a federal claim and that it can only issue an indictment. Id. at 637. Until that indictment had been issued and the party had been charged, the federal courts need not abstain under Younger. Id.

The Supreme Court vacated as moot the relevant part of the Monaghan decision, because the parties agreed that the claims for equitable relief were withdrawn. 484 U.S. at 200. The defendants contend that the Supreme Court's opinion brings the

⁸ Prior to the defendants' notice to the Court that an investigating grand jury had been convened, the defendants had argued that Younger is triggered when there is an ongoing criminal investigation. They relied on a note in a Supreme Court case. In Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 n.1 (1992), the Supreme Court did not review whether Younger abstention was appropriate in that case, but the Court described the doctrine as "impos[ing] heightened requirements for an injunction to restrain an already-pending or an about-to-be-pending state criminal action" The Court did not further explain the reference to "about-to-be-pending" proceedings. The question here has changed as there now is an investigating grand jury.

Third Circuit's holding in Monaghan into question. They cite to the concurrence to show that the Supreme Court implied that Younger was applicable to a pending grand jury proceeding. See 484 U.S. at 205 (White, J., concurring).

The defendants also rely on dictum in Trone v. Preate, 770 F. Supp. 994 (M.D. Pa. 1991), to argue that Monaghan can be distinguished. The case focused on an ongoing investigative grand jury proceeding in Pennsylvania. The court distinguished the Pennsylvania grand jury from the New Jersey grand jury discussed in Monaghan. The court assumed that a Pennsylvania judge could hear constitutional objections as soon as the district attorney files a notice of submission of a matter to the grand jury. Id. at 998. The court stated that Younger may have been appropriate, but because of the uncertainty of the law, the court abstained under Pullman. Id. at 999.

The Investigating Grand Jury Act, 42 Pa. Cons. Stat. § 4541, et seq., sets out the powers of an investigating grand jury and the authority of the supervising judge. The focus of the Investigating Grand Jury Act is on investigation, not adjudication. Section 4548 sets out the powers of the investigating grand jury. It states:

The investigating grand jury shall have the power to inquire into offenses against the criminal laws of the Commonwealth alleged to have been committed within the county or counties in which it is summoned. Such power shall include the investigative resources of the grand jury which

shall include but not be limited to the power of subpoena, the power to obtain the initiation of civil and criminal contempt proceedings, and every investigative power of any grand jury of the Commonwealth. Such alleged offenses may be brought to the attention of such grand jury by the court or by the attorney for the Commonwealth, but in no case shall the investigating grand jury inquire into alleged offenses on its own motion.

42 Pa. Cons. Stat. § 4548(a). The investigating grand jury is also authorized to issue a presentment. 42 Pa. Cons. Stat. § 4548(b). Section 4542 defines the investigative resources of the grand jury.⁹ The Investigatory Grand Jury Act does not appear to authorize the grand jury or the supervising judge to reach the merits of federal claims such as the claims raised in this case.¹⁰

⁹ The full text of this section states:

The power to compel the attendance of investigating witnesses; the power to compel the testimony of investigating witnesses under oath; the power to take investigating testimony from witnesses who have been granted immunity; the power to require the production of documents, records and other evidence; the power to obtain the initiation of civil and criminal contempt proceedings; and every investigative power of any grand jury of the Commonwealth.

42 Pa. Cons. Stat. § 4542.

¹⁰ The Third Circuit has discussed the Investigating Grand Jury Act and the duties of the supervising judge, which include administering oaths, administering a charge to the grand jury, determining who may be present during the proceedings, and controlling the transcripts to maintain confidentiality. Camilo v. State Farm Fire & Cas. Co., 334 F.3d 345, 351 n.4 (3d Cir. 2003) (citing 42 Pa. Cons. Stat. § 4542; Pa. R. Crim. P. 223-227, 229, 231).

The Pennsylvania Supreme Court's analysis of the Investigating Grand Jury Act, in In re Investigating Grand Jury, Appeal of Krakower, 459 A.2d 304, 306 (Pa. 1983), further supports this conclusion. The court stated that it knew "of no authority to suggest" that an investigating grand jury could "go beyond that which the legislature explicitly and carefully delineated." Id.

The Krakower court determined that the Investigating Grand Jury Act did not authorize the use of a successive investigating grand jury in an attempt to "cure the error" of the first grand jury which had considered misleading evidence before making its presentment. Id. at 305-06. The court held that "[c]entral to the Act's purpose is the necessity of the grand jury's resources in order to adequately investigate and uncover criminal activity." Id. at 307 (emphasis in original). The decision in Krakower does not suggest any authority of the grand jury or supervising judge to decide arguments unrelated to submissions to and the operations of the grand jury.

The decision of the supervising judge of the grand jury in the case at hand was consistent with the Investigating Grand Jury Act and Krakower. The supervising judge did not consider the validity of the search warrant. The supervising judge also did not consider Voicenet's argument that the investigation is preempted by the ICPL, CDA, or the Constitution. The court

reasoned that any determination regarding these matters would be premature, as there has been no presentment yet and no charges have been filed against the plaintiffs. See In re Bucks County Investigating Grand Jury, Appeal of Voicenet, Inc., No. 12 Misc. Misc. 2002, slip op. at 11 (Bucks County Ct. Com. Pl. July 7, 2004), attached to Pls.' Supplemental Reply to Bucks County Defs.' Letter Brief (hereinafter "Pls.' Supp. Reply"), ex. A; Investigative Grand Jury, July 13, 2004 Hr'g Tr. at 13-15, attached to Pls.' Supp. Reply, ex. B; see also July 13, 2004 Hr'g Tr. at 13-14.

The supervising judge of the grand jury did hear the plaintiffs' argument alleging bad faith by the defendants, which the plaintiffs also raise in this case. The plaintiffs argued that the defendants used the investigating grand jury to impede the case before this Court. The supervising judge held that there was no support for this allegation, but there was otherwise no other discussion of the issue. See In re Bucks County Investigating Grand Jury, slip op. at 8; see also July 13, 2004 Hr'g Tr. at 13.

Although the plaintiffs raised the same or similar arguments in both the state court and this Court, the supervising judge could not, and did not, address any arguments raised by the plaintiffs at this stage because no criminal charges have been filed. There is no indication whether criminal charges will ever

be filed against Voicenet or OTI. See Apr. 12, 2004 Hr'g Tr. at 9. The investigating grand jury proceedings did not provide the plaintiffs with an adequate opportunity to the relief requested in this Court.

After considering the language of the Investigatory Grand Jury Act and the actions of the supervising judge in this case, the Court finds that the supervising judge of the investigating grand jury cannot adjudicate the merits of this federal claim. In addition, it is important to note that "[a]bstention . . . is the exception and not the rule. 'The federal courts' obligation to adjudicate claims within their jurisdiction [is] virtually unflagging.'" Marks v. Stinson, 19 F.3d 873, 881 (3d Cir. 1994) (citing New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989) (citations omitted)). The Court therefore holds that Younger abstention is not appropriate.¹¹

An appropriate Order follows.

¹¹ The plaintiffs argue that even if the grand jury proceedings trigger Younger, the Court still should not abstain. They argue that this case falls under an exception to Younger and allege that the defendants have acted in bad faith. See Younger, 401 U.S. at 47-49; Dombrowski v. Pfister, 380 U.S. 479, 485-86 (1965). The Court does not address this question, as abstention is not appropriate here.

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ORDER

AND NOW, this 5th day of August, 2004, upon consideration of the plaintiffs' Renewed Motion to Abstain, and all responses thereto, and following a hearing held on July 13, 2004, IT IS HEREBY ORDERED that the motion is DENIED for the reasons stated in a memorandum of today's date. IT IS FURTHER ORDERED that the defendants Deery and Papperts' Motion to Quash Subpoenas (Docket No. 46) and the defendants Gibbons, McDonough, and Thiel's Motion to Vacate this Court's Order of July 7, 2004, or, in the Alternative, Quash Subpoenas (Docket No. 47) are DENIED as moot.

BY THE COURT:

MARY A. MCLAUGHLIN, J.