CIV 537384 JASON CROSS, ET AL. VS. FACEBOOK, INC., ET AL.

JASON CROSS MARK PUNZALAN
FACEBOOK, INC. JULIE E. SCHWARTZ

These matters came on for hearing in the Law and Motion Department on May 12, 2016. After argument of counsel before Judge Donald Ayoob, the Court took the matter under submission. The Court having reviewed all relevant pleadings, the oral arguments of counsel, and the authorities cited therein, has revised its tentative ruling and now issues its ruling.

SPECIAL MOTION TO STRIKE AND FOR ATTORNEYS' FEES AND COSTS BY FACEBOOK, INC.

Defendant FACEBOOK, INC.'s Special Motion to Strike is GRANTED IN PART, and DENIED IN PART, as follows:

The motion is GRANTED as to Plaintiffs' First cause of action for breach of written contract; Second cause of action for negligent misrepresentation; and Third cause of action for negligent interference with prospective economic relations. The motion is DENIED as to Plaintiffs' Fourth cause of action for breach of Civil Code § 3344, Fifth cause of action for violation of rights of publicity, which are exempt from the Communications Decency Act (47 U.S.C. § 230(e)(2)); and Sixth cause of action for unfair business practices .

Code of Civil Procedure § 425.16(b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Section 425.16(b)(2) further states, "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."

A defendant specially moving to strike has the initial burden to show that the conduct underlying a cause of action arises from protected activity. *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79. Once this has been established, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965. To do so, the plaintiff must

show that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence is credited. Id.

Does the conduct underlying Plaintiffs' claims arise from protected activity?

Plaintiffs' causes of action for breach of written contract; negligent misrepresentation and negligent interference with prospective economic relations all arise from Facebook's decision not to remove speech of its users that is critical of Plaintiffs. See Complaint at p. 5 ("Facebook Refuses to Disable the Unauthorized Mikel Knight Page in Violation of its Terms of Service").

Plaintiffs insist that they are not trying to hold Facebook liable for statements made by third-party users on the unauthorized pages, but rather, to hold Facebook liable for failing to follow through on its alleged promise to remove all content that poses a "genuine risk of physical harm or direct threats to public safety". (Complaint ¶¶ 23-26.) However, where an action "directly targets the way a content provider chooses to deliver, present, or publish news content on matters of public interest, that action is based on conduct in furtherance of free speech rights and must withstand scrutiny under California's anti-SLAPP statute." *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.* (2014) 742 F.3d 414, 424-45 (CNN's decision to display videos on its website without closed captioning constitutes conduct in furtherance of CNN's protected right to report the news).

It cannot be disputed that Facebook's website and the Facebook pages at issue are "public forums", as they are accessible to anyone who consents to Facebook's Terms. Code Civ. Proc. § 425.16(e)(3); *Wong v. Tai Jin* (2010) 189 Cal.App.4th 1354, 1366 ("It is well settled that web sites accessible to the public...are public forums for purposes of the anti-SLAPP statute.").

Moreover, the content of the subject Facebook pages concern public issues or issues of public interest, which is broadly defined as "any issue in which the public is interested." *Maloney v. T3Media, Inc.* (2015) 94 F.Supp.3d 1128, 1134. As admitted by Plaintiffs in their Complaint, the original "Families Against Mikel Knight" page was created by persons related to the injured and deceased independent contractors hired by Plaintiffs to sell Knight's CDs. (Complaint ¶ 12.) Plaintiffs allege that two of their drivers fell asleep behind the wheel in two separate incidents, resulting in fatal collisions. (Complaint ¶¶8-9.) It is not a far stretch to say that such incidents, and the circumstances leading to them, are matters in which the public would be interested.

This lawsuit clearly targets Facebook's ability to maintain a forum for discussion of these issues, including its discretion to remove content that Plaintiffs find objectionable. Plaintiffs argue otherwise, contending that their claims are based on Facebook's duty to adhere to the promises made to Knight when he signed up for his own Facebook page. Plaintiffs rely on *Barnes v. Yahoo!, Inc.* (2009) 570 F.3d 1096 for the proposition that contract liability can arise from a website host's "manifest intention to be legally obligated to do something, which happens to be removal of material from publication." Id. at 1107.

However, *Barnes* does not aid Plaintiffs here. In *Barnes*, Yahoo's Director of Communications made a specific promise to the plaintiff to "personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it." Despite this very specific promise, Yahoo! failed to disable the profiles for two months, prompting the plaintiff to file a lawsuit. Only then were the profiles taken down. *Id.* at 1098.

After a lengthy discussion of the applicability of the Communications Decency Act, the *Barnes* court found that this case was an exception, since "contract liability here would come not from Yahoo's publishing conduct [which was protected activity], but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication." *Id.* at 1107. However, the court held that a promise to de-publish must "be as clear and well defined as a promise that could serve as an offer...Thus a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo does not suffice for contract liability. This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound." *Id.* at 1108 (emphasis added), citing *Workman v. United Parcel Serv. Inc.* (2000) 234 F.3d 998, 1001.

Here, Facebook made no explicit promise to Plaintiffs to remove the offending content from its website. Indeed, the Terms and Community Standards that Plaintiffs seek to hold Facebook to specifically disclaim any intention to be required to remove content. Accordingly, *Barnes* is simply distinguishable, rather it supports Facebook's position that its general monitoring policy does not rise to the level of contract liability as Plaintiffs argue.

Plaintiffs next contend that their claims satisfy the commercial speech exemption of Code Civ. Proc. § 425.17, relying on *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294. Plaintiffs argue that by making statements such as "We want people to feel safe when using Facebook" (see Community Standards, Exhibit B to Decl. Cross), Facebook sought to induce users like Knight to sign up for an account. Thus, this qualifies as commercial speech which is not protected.

However, *Demetriades* likewise does not aid Plaintiffs. In that case, the plaintiff, a restaurant operator, sued Yelp under the Unfair Competition Law and False Advertising Law based on Yelp's assertions that each of its user reviews passed through a proprietary "filter" that gave consumers "the most trusted reviews". Plaintiff had purchased advertising on Yelp, but quickly noticed that false reviews were appearing on the main page of his restaurants' profiles, while legitimate positive reviews were being erroneously filtered. *Id.* at 300-301.

On Yelp's anti-SLAPP motion, the trial court found that Yelp met its initial burden of establishing that its statements arose from protected activity because statements regarding the filtering of reviews on a social media site were matters of public interest. The plaintiff failed to establish the commercial speech exemption applied, because the statements regarding Yelp's filter were mere

puffery and opinion. *Id.* at 304. However, the Court of Appeal reversed, finding that Yelp had made factual statements about the superiority and reliability of its review filter, which therefore constituted commercial speech about the quality of its product. These statements were intended to reach third parties to induce them to engage in a commercial transaction (e.g. patronizing Yelp's website and purchasing advertising). *Id.* at 310. "Thus, a statement that is quantifiable, that makes a claim as to the 'specific or absolute characteristics of a product,' may be an actionable statement of fact, while a general, subjective claim about a product is non-actionable puffery." *Id.* at 311.

Here, Plaintiffs have not alleged any representations of fact about Facebook itself, its operations, goods, or services. Accordingly, the commercial speech exemption of Code Civ. Proc. § 425.17(c) does not apply.

Facebook has met its initial burden of demonstrating that Plaintiffs' claims arise out of protected activity.

Can Plaintiffs demonstrate a probability of prevailing on their claims?

Plaintiffs' First, Second, and Third causes of action are all barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1), because (1) Facebook is an "interactive computer service"; (2) Plaintiffs' claims treat Facebook as the "publisher" or "speaker" of the offending content; and (3) the offending content was "provided by another information content provider." See *Klayman v. Zuckerberg* (2014) 753 F.3d 1354, 1357.

Here, there is no dispute that Facebook is an "interactive computer service". *Klayman, supra* at 1357. Nor is there any dispute that the offensive content was posted by an "information content provider" other than Facebook, i.e. the families and friends of the injured and deceased independent contractors. (Complaint ¶12.) The only point of contention is whether Plaintiffs' claims treat Facebook as the "publisher" or "speaker" of the offending content.

The *Barnes* court held that "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes, supra* at 1102 (emphasis added), citing *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (2008) 521 F.3d 1157, 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."). "[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove." *Barnes, supra* at 1103.

Thus, since Plaintiffs seek to hold Facebook liable for failing to remove content that Plaintiffs found objectionable, their claims treat Facebook as a "publisher" of said content. The CDA operates to relieve Facebook for liability on the First, Second, and Third causes of action.

However, the CDA also explicitly states, "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). In California, rights of publicity claims are intellectual property laws. *Comedy III Products, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 399 ("The right of publicity protects a form of intellectual property."). Accordingly, Plaintiffs' Fourth, Fifth and Sixth causes of action are not barred by the CDA.

Plaintiffs are able to demonstrate a probability of prevailing on their Fourth, Fifth and Sixth causes of action. Under Civil Code § 3344, a party is liable where it "knowingly uses another's name...in any manner, on or in products, merchandise, or goods, or for the purposes of...selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent." Similarly, a common law cause of action for commercial misappropriation requires a showing of: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 679.

Here, it is alleged that Facebook had knowledge since October 2014 that pages using Knight's likeness and identity were being created on its site. (Decl. Hairston ¶3.) Knight states that he did not consent to these pages or the advertising Facebook placed on them. (Decl. Knight ¶ 2.) Facebook's financial performance is based on its user base; accordingly, Facebook's alleged use of Knight's image on the unauthorized pages generates advertising revenue for the company. (RJN Exhibit B.) Knight states that Facebook's unauthorized use of his image has resulted in substantial harm. (Decl. Knight ¶¶ 12-13.) Accordingly, Plaintiffs have shown a probability of prevailing on their rights of publicity claims. Because the Sixth Cause of Action is a derivative claim that may arise from either or both the Fourth and Fifth Causes of Action, here to Plaintiffs have shown a probability of prevailing.

Attorney's fees and costs

Typically, a prevailing defendant on an anti-SLAPP motion is entitled recover its attorney's fees and costs. Code Civ. Proc. § 425.16(c). Facebook opted to bring a subsequent motion for attorney's fees and costs should it prevail on its motion. If Facebook files such a motion where, as here, three of Plaintiffs' six causes of action were subject to being stricken, the Court directs the parties to provide authority as to whether there is a "prevailing party" under these circumstances and, if so, whether attorney's fees and costs should be apportioned to reflect the result.

DEMURRER TO COMPLAINT OF CROSS BY FACEBOOK, INC.

Defendant FACEBOOK, INC.'s Demurrer to Complaint is MOOT as to the First cause of action for breach of written contract; Second cause of action for negligent misrepresentation; and Third cause of action for negligent interference with prospective economic relations in light of the ruling on Facebook's anti-SLAPP motion.

The demurrer is OVERRULED as to Fourth cause of action for breach of Civil Code § 3344; Fifth cause of action for violation of rights of publicity; and Sixth cause of action for unfair business practices, which are exempt from the Communications Decency Act. 47 U.S.C. § 230(e)(2). These causes of action are sufficiently stated.

Facebook's Request for Judicial Notice is GRANTED as to Exhibits A, B, C, and D. Courts regularly take judicial notice of documents that are referenced and relied upon in a complaint. *Align Tech, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 956 n.6 ("[Plaintiff] referred to the Settlement Agreement in its complaint herein. As such, it was an appropriate matter of which the court could take judicial notice."). Courts may also take judicial notice of records in other court actions. Evid. Code § 452(d).

Plaintiffs' Request for Judicial Notice is DENIED as to Exhibits A, B and C.

Defendant Facebook shall file an Answer to the remaining claims on or before June 17, 2016.

IT IS SO ORDERED.

Dated: May 31, 2016

Donald J. Ayoob

Hon. Donald J. Ayoob, Judge
San Mateo County Superior Court