SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Marilyn Shafer Justice PART 8

Index Number : 100089/2008
KUERSTEINER, ERIC VON
VS
SCHRADER, ERIC
Sequence Number : 001
COMPEL DISCLOSURE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — ~~Affidavits~~ — Exhibits ... Affirmation, Memorandum of Law, Notice of Cross Motion	1, 2, 3
~~Answering~~ Affidavits — Exhibits	4, 5
~~Replying Affidavits~~ Memo of Law	6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is denied and the cross-motion is granted in accord with the annexed Memorandum.

FILED
OCT 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/14/08

MARILYN SHAFER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER *Justice* PART 8

ERIC VON KUERSTEINER,

Plaintiff,

-against-

ERIC SCHRADER,"JUSTIN," "JIMMY', "JOE", "SEABREEZE," CYDSTRR," JOHN AND JANE ROE 1-100,

Defendants.

INDEX NO. 100089/08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 6, were read on this petition under Article 78 of the Civil Practice Law and Rules:

	PAPERS NUMBERED
Notice of Motion – Affirmation – Exhibits	1,2
Memorandum of Law	3
Notice of Cross-Motion – Affidavit – Exhibits	4,5
Memorandum of Law	6

FILED
OCT 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that the cross motion, pursuant to CPLR § 3211, to dismiss the complaint is granted and the motion, pursuant to CPLR §§ 3108 and 3111, for issuance of an open commission is denied.

Plaintiff Von Kuersteiner moves for an open commission, seeking to depose a foreign corporation to ascertain the identity of the authors of anonymous postings on a blog. Defendant Schrader, the administrator of the blog, cross moves to dismiss the complaint.

Background

The record shows that, a few years ago, Von Kuersteiner purchased most of the commercial real estate in the Pines, a predominantly gay beach resort community located on Fire Island, New York. He owns and operates, *inter alia*, restaurants, bars, a grocery store, a clothing store, a hotel, a landscaping business and a construction company, employing in excess of 80 people during the summer months.

In the Spring of 2007, defendant Schrader registered a blog called "pavillion.blog", named after one of Van Kuersteiner's clubs, with Blog.com, a website hosting company. Schrader owns one of the few commercial properties not owned by Von Kuersteiner and operates a competing grocery store. The blog is described in the complaint as "an Internet discussion board/blog on which participants [could] post comments about social life in the Fire Island Pines community." Schrader similarly describes it as an "on-line journal that [allowed] multiple internet users to post their thoughts, opinions, and comments." Schrader deleted the blog entries from Spring, 2007 to September 1, 2007 attempting to remove an inappropriate posting. He deleted the entire blog on December 15, 2007 and it has not operated since.

Review of the over 300 posts, dated September 1 to December 2007, which discuss Von Kuersteiner and his partner, shows that their activities were controversial. There were boycotts of his businesses and the grocery store was picketed. While the bulk of the postings are critical of Von Kuersteiner, there are postings which defend him. All the postings were submitted anonymously or pseudonymously.

Von Kuersteiner complains of approximately 35 of the negative postings which attack his businesses and 10 which attack him personally. These postings accuse him of, *inter alia*,

watering down the drinks served in his bars; having an illegal septic system which created a bad smell; being unsuccessful and losing money; treating employees badly;[1] not having a women's restroom; selling spoiled food; "screwing" a former commercial tenant out of his gym equipment; interfering with a charitable fund raiser; doing poor construction; and having as a "stated goal" to "get rid of all straights, all women, all children and all folks over 40." Schrader submits an affidavit in which he states that, while he administered the blog, he did not alter any statements submitted by third parties but read all the posts and blocked those he believed were inappropriate or obscene. He states that he neither authored nor edited the postings complained of.

Von Kuersteiner moves for an open commission to take the deposition of Blog.com, a Delaware corporation, in order to learn the names, addresses and internet addresses of the authors of the objected posts. He asserts that this information is unavailable through any other means, although no depositions have been taken.

Schrader objects to the granting of an open commission without first posting notices in the Pines and in the Fire Island newspapers, giving the anonymous posters an opportunity to seek counsel. Schrader cross-moves to dismiss the complaint on the ground that the posts are not defamatory and that he is, at any rate, protected from liability by the Communications Decency Act.

Discussion

The United States Congress has made clear, in The Communications Decency Act, the

[1] Employee complaints against Von Kuersteiner were the subject of an article in *New York Magazine* in June, 2007. There appears to be no connection between the blog and the article although the allegations are similar.

nation's policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal and State regulation;" and "to encourage the development of technologies which maximize user control over what information is received..." (47 USC § 230(a)(b)

Subsection (c), of the statute, protection for "good samaritan" blocking and screening of offensive material, specifically protects Internet service providers from liability even where, as here, the provider exercises editorial control:

> (1) Treatment of publisher or speaker
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil Liability
> No provider or user of an interactive computer service shall be held liable on account of --
>
> (A) any action voluntarily taken in good faith to restrict access to or availability or material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. (47 USC § 230(c))

The limited case law on this developing area is nearly unanimous in holding that § 230(c) affords immunity to any "internet computer service," defined in the statute as "any information service system, or access software provider that provides or enables access by multiple users to a computer server." (47 USC §§ 230(f)(2), (f)(3); *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc v Craigslist, Inc*, 461 F Supp 681 [ND Illinois 2006], *citing, Zeran v American Online, Inc,* 129 F 3d 327 [4th Cir 1997]:

> By its plain language § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically § 230 precludes courts from entertaining claims

> that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, postpone or alter content – are barred. (*Zeran* @ 330)

Congress has, then, made a policy choice not to deter harmful online speech through the separate route of imposing tort liability on services that function as intermediaries for other parties' potentially injurious messages. (*Chicago* @ 689) That is precisely what Von Kuersteiner seeks to do. He argues that this Court

> need only find that these allegations [in the Complaint] support an inference that Schrader, in his capacity as blog operator, undertook some conduct that went beyond acting as a passive conduit for the defamatory statement of third parties and is therefore not entitled to immunity under the CDA.

The allegations of the complaint do not, however, create such an inference. The complaint is consistent with Schrader's own description of his role. He exercised a publisher's traditional editorial function and is entitled to immunity under the CDA. Therefore, the complaint must be dismissed as against Schrader.

The CDA distinguishes between internet service providers, such as Schrader, and internet content providers, for whom the statute does not provide immunity. Internet content providers are defined in the statute as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." (47 USC §§ 230(f)(2), (f)(3)) The authors of the posts, as content providers, are not entitled to immunity under the CDA if, in fact, the posts are defamatory.

A five factor test to weigh the propriety of discovery of Internet users' identities has been articulated: (i) existence of a *prime facie* case; (ii) specific discovery request; (iii) unavailability from other sources; (iv) need for information to pursue claim; and (v) lack of privacy expectation

by prospective defendant. (*Public Relations Society of America v Road Runner High Speed Internet*, 8 Misc 3d 820 [NY Cty 2005])

The threshold issue is whether the posts are defamatory. It is a settled rule that expressions of an opinion, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions. (*Steinhilber v Alphonse,* 68 NY2d 283 [1986]) Recognizing the difficulty of determining whether a given statement expresses a protected opinion or an actionable fact, the Court stated:

> The question is one of law for the court and one which must be answered on the basis of what the average person hearing or reading the communications would take it to mean. There is no definitive test or set of criteria. The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were ... written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion. (*Steinhilber* @ 292)

The Court has continued to stress consideration of context in distinguishing between opinion and fact:

> Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff ... the identity, role, and reputation of the author may be factors to the extent that they provide the reader with clues as to the article's import. (*Brian v Richardson,* 87 NY2d 46 [1995])

When the less than 40 statements complained of are read within the context of the entire 300 postings of the blog, it is clear that they could not be interpreted as anything other than the opinions of the authors. Von Kuersteiner himself describes the blog as an "Internet discussion board/blog on which participants [could] post comments about social life in the Fire Island Pines community." The blog is a forum of shared opinions on everything from Von Kuersteiner's

baseball cap to his architecture to the music played by the dj to the Bush administration to the passing of the "good old days." They form a dialogue in which there are rebuttals and refutations in response to previous posts. The complaint "sifts" through the posts in an attempt to "isolate" statements which seem to be assertions of fact. However, within the context of the blog, no reasonable person would interpret the comments as anything but the authors' opinion.

The law is clear that on a CPLR §3211 motion to dismiss, the factual allegations of the complaint are deemed true and the affidavits submitted on the motion are considered only for the limited purpose of determining whether the plaintiff has stated a claim, not whether plaintiff has one. (*Wall Street Associates v Brodsky*, 257 AD2d 526 [1st Dept 1999]) It is well settled that a pleading shall be liberally construed and will not be dismissed for insufficiency merely because it is inartistically drawn. (*Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]) The relevant inquiry is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from the four corners of the complaint (*Id.*). Since the statements complained of do not constitute defamation, the complaint fails to state a valid cause of action. The motion is denied and the complaint is dismissed.

We have considered the other arguments of the parties and find them to be without merit.

Conclusion

Accordingly, it is

ORDERED that the motion for an open commission is denied; and it is further

ORDERED that the complaint is dismissed.

This reflects the decision and order of the court.

Dated: 10/14/08

MARILYN SHAFER

J.S.C.

Check one: [ ] FINAL DISPOSITION [x] NON-FINAL DISPOSITION

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