

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/28/03

DEPT. 23

HONORABLE Thomas L. Willhite, Jr. JUDGE

E.T. ESPINOZA

DEPUTY CLERK

HONORABLE JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

G. YOUNG, CRT ASST Deputy Sheriff

C GARROD,

Reporter

8:31 am BC288836

ROGER M GRACE

VS

TIM NEELEY

Plaintiff ROGER M. GRACE (X)
Counsel LISA GRACE-KELLOGG (X)

Defendant MICHAEL RHODES (X)
Counsel ANDREA BITAR (X)

NATURE OF PROCEEDINGS:

HEARING ON DEMURRER OF DEFENDANT EBAY INC., TO
PLAINTIFF'S COMPLAINT;

The demurrer is argued and taken under submission
this date.

Later, the court rules as follows:

The court sustains the demurrer without leave to
amend..

The ruling is more fully reflected in the Court Ruling
which is filed this date and incorporated herein by
reference.

A true copy of this minute order and Court Ruling is
sent to counsel via U.S. Mail this date as follows:

Lisa Grace-Kellogg
210 S. Spring Street
Los Angeles, CA 90012

Roger M. Grace
210 S. Spring Street
Los Angeles, CA 90012

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/28/03

DEPT. 23

HONORABLE Thomas L. Willhite, Jr. JUDGE

E.T. ESPINOZA

DEPUTY CLERK

HONORABLE JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

G. YOUNG, CRT ASST Deputy Sheriff

C GARROD,

Reporter

8:31 am BC288836

ROGER M GRACE

VS

TIM NEELEY

Plaintiff ROGER M. GRACE (X)
Counsel LISA GRACE-KELLOGG (X)

Defendant MICHAEL RHODES (X)
Counsel ANDREA BITAR (X)

NATURE OF PROCEEDINGS:

✓ Michael Rhodes
Cooley, Godward, LLP
4401 Eastgate Mall
San Diego, CA 92121

Andrea Bitar
Cooley, Godward, LLP
4401 Eastgate Mall
San Diego, CA 92121

MINUTES ENTERED
04/28/03
COUNTY CLERK

FILE STAMP

ORIGINAL FILED

APR 28 2003

**LOS ANGELES
SUPERIOR COURT**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

ROGER M. GRACE

CASE NUMBER
BC288836

PLAINTIFF(S)

COURT RULING ON SUBMITTED MATTER

VS.

TIM NEELEY

DEFENDANT(S)

The court having taken DEMURRER OF DEFENDANT EBAY, INC. TO PLAINTIFF'S COMPLAINT under submission on April 28, 2003, now rules as follows:

//

//

//

//

//

I. Introduction

Defendant eBay, Inc, demurrers to the complaint filed by plaintiff Roger M. Grace. As relevant to the demurrer, the complaint alleges two causes of action: the first, for libel, and the third, for unfair business practices under Business and Professions Code section 17200.¹ The court grants eBay's request for judicial notice. The court sustains the demurrer without leave to amend.

The complaint alleges that eBay conducts online auctions through its internet website. (¶ 2.) Defendant Tim Neely is a merchant who regularly offers Hollywood memorabilia for sale through eBay. (¶ 3.)² In December 2002 plaintiff was the winning bidder in six auctions of goods Neely offered for sale over eBay. (¶ 10.) eBay encourages buyers and sellers to leave feedback on their transactions. (¶ 4.) In connection with three of his purchases of Neely's goods, plaintiff left negative feedback about Neely. In response, Neely posted a negative comment about plaintiff in plaintiff's feedback file under each of the six transactions. The comment stated: "Complaint: SHOULD BE BANNED FROM EBAY!!!! DISHONEST ALL THE WAY!!!!" (¶ 10.)

In his first cause of action, plaintiff sues eBay for libel based on its publication of Neely's charge. (¶¶ 12-15.) In his third cause of action, plaintiff seeks an injunction under Business and Professions Code section 17200 to enjoin e-Bay's policy of not removing libel from its website. (¶¶ 24, 25.) He further seeks to enjoin eBay from two additional activities: 1) maintaining a check-out system that entails collecting payments from California buyers without exacting the state sales tax; and, 2) requiring that California users adopt fictitious names in selling on eBay while making no effort to ensure compliance with the California fictitious name registration law. (¶¶ 27, 28.)

II. The First Cause of Action for Libel

In part, eBay demurrers to the first cause of action for libel on the ground that eBay is immune under 47 U.S.C. section 230, a provision of the federal Communications Decency Act (and the Telecommunications Act) of 1996.³ The court agrees, and sustains the demurrer to the first cause of action without leave to amend.

Section 230, subdivision (c)(1), states: "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*." (Italics added.) Subdivision (f)(2) of section 230 provides a comprehensive definition of an "interactive computer service," as follows: "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Similarly, subdivision (f)(3) states a broad definition of "information content provider": "any person or entity that is responsible, in whole or in part, for the creation or development of information provided

¹ The complaint also alleges, as the second cause of action, a claim against eBay for breach of contract. In his opposition to the demurrer, plaintiff acknowledges that this claim is moot. Although eBay did not demurrer on the ground of mootness, plaintiff assents to an amendment of the complaint omitting the breach of contract claim. (Opp. p. 12.) Therefore, court will not discuss the second cause of action, and deems it withdrawn.

² Neely has not been served with the complaint. Plaintiff is proceeding to serve him by publication.

³ All further section references in part II of the court's ruling are to 47 U.S.C. section 230.

through the Internet or any other interactive computer service.” Finally, subdivision (e)(3) preempts state law causes of action that are inconsistent with section 230. Subdivision (e)(3) provides: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. *No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.*” (Italics added.)

Plaintiff seeks to limit the breadth of immunity provided by section 230. He posits a distinction between interactive “websites” (which he contends do not enjoy immunity) and “internet service providers” (which he concedes do). He argues that Congress intended only to provide protection to internet service providers, such as America Online, which merely provide access to websites. Conceptually, service providers are not the “publishers” of any defamatory comments by a user. Rather, the service provider simply gives the user access to the website where the publication occurs. In plaintiff’s view, the websites themselves on which the user posts the comments *are* the “publishers” of the comments, and should be deemed outside the intended scope of Congress’ grant of immunity to “interactive computer service[s]” (*id.*, subd. (c)(1)). Plaintiff concludes that eBay is a website, not an internet service provider, and is not immune from plaintiff’s libel suit. (Opp., pp. 1-4.) Plaintiff also argues that a contrary interpretation of the statute would be against public policy and would have absurd consequences. (Opp. pp. 4-7.)

Though well-articulated, plaintiff’s arguments are unpersuasive. The distinction plaintiff draws between websites and internet service providers appears nowhere in the express statutory language. Nor does it arise by reasonable implication from that language. Indeed, the language of the statute, though broad, is quite clear, at least as applied to the instant case. There is no need to debate Congressional intent, or speculate on absurd results in other cases. “[C]ourts should start ... with the actual language of the statute, and if the text is clear as applied to a given case, and it does not fall into any of the exceptions, stop there. [Citations.] As Oliver Wendell Holmes said, ‘we do not inquire what the legislature meant; we ask only what the statute means.’ [Citation.]” *J.A. Jones Construction Co. v. Superior Court* (27 Cal.App.4th 1568, 1575.)

According to the allegations of the complaint, eBay permits users to buy and sell merchandise through its website, and permits the posting of “feedback” concerning the transactions and other users. (¶¶ 4, 5.) eBay is thus an “interactive computer service,” that is, an “information service, system, or access software provider that provides or enables computer access by multiple users to a computer service ...” (§ 230, subd. (c)(2).) In his first cause of action for libel, plaintiff seeks to hold eBay liable for information provided by Neely, who is an “information content provider,” i.e., a “person ... that is responsible, in whole or in part, for the creation ... of information provided through the Internet ...” (*Id.*, subd. (f)(3).) However, section 230, subdivision (c)(1), forbids treating eBay as the publisher of Neely’s accusation, and subdivision (e)(3) precludes any cause of action on that basis.

In *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 831, fn. 7, the court of appeal also concluded that eBay is an “interactive computer service.” Plaintiff argues that *Gentry*’s conclusion is “ill-considered” dictum, “founded on an infirm decision from another state [*Schnieder v. Amazon.com, Inc.* (Wash. App. 2001) 31 P.2d 37].” (Opp. p. 10.) Dictum or not, this court has independently examined the statute and relevant

authorities, and finds *Gentry's* observation sound. Indeed, the reasoning is consistent with the great weight of authority. (See *Gentry, supra*, 99 Cal.App.4th at p. 830, and cases there cited.)

Thus, the court finds that under section 230 eBay is immune from plaintiff's libel suit. Plaintiff's request for leave to amend to mount a federal constitutional challenge to section 230 is denied. (Opp. 10-12.) Plaintiff fails to show any reasonable possibility that the statute is unconstitutional, and hence fails to show that his complaint can be amended to state a cause of action. (See generally Weil & Brown, California Practice Guide: Civil Procedure Before Trial (Rutter Group 2003) §§ 7:129.1, pp. 7-47.) The demurrer to the first cause of action is sustained without leave to amend.

III. The Third Cause of Action for Unfair Business Practices

Insofar as the third cause of action is based on eBay's publishing of user comments (¶¶ 24, 25, 26), it is barred for the same reasons as the first cause of action.

However, plaintiff alleges two other potential bases of unfair business practices under Business and Professions Code section 17200:1) facilitating violations of California's fictitious business name statute, and 2) facilitating avoidance of California sales tax. The court sustains the demurrer as to these allegations as well. At the hearing on the demurrer, the court advised that it would grant leave to amend the third cause of action with respect to the fictitious business name and sales tax allegations. Plaintiff advised the court that in light of the court's sustaining of the demurrer to the first cause of action without leave to amend, he would not seek to amend the third cause of action, and would accede to the court's denying leave to amend. Therefore, the court denies leave to amend the third cause of action.

A. The "Fictitious Business Name" Allegations (¶ 27)

Plaintiff seeks injunctive relief to enjoin eBay from "encouraging and causing violations of Business & Professions Code § 17910." (¶ 27.) That section provides: "Every person who regularly transacts business in this state for profit under a fictitious business name shall: [¶] (a) File a fictitious business name statement in accordance with this chapter not later than 40 days from the time he commences to transact such business; and [¶] (b) File a new statement in accordance with this chapter on or before the date of expiration of the statement on file." Plaintiff alleges that eBay requires buyers and sellers to utilize "user ID's" comprised of an e-mail address or alias. That practice "induces persons who regularly transact business in this state to adopt fictitious business names while providing no admonition or warning as to the need to comply with § 17910, in derogation of California's public interest in having its laws complied with and enforced." (¶ 27.)

Contrary to eBay's argument, the immunity provided by 47 U.S.C. section 230 does not apply to the fictitious business name allegations. The alleged actionable conduct does not "treat eBay as the publisher or speaker of the individual defendants' materials" (*Gentry, supra*, 99 Cal.App.4th at p. 834), and does not "seek to hold eBay liable for its exercise of a publisher's traditional editorial functions" (*id.* at p. 835; see also 47 U.S.C. § 230(c)(1)). Rather, the allegations accuse eBay *itself* of fostering violations of California law through its business practices. Those practices, as alleged, are unrelated to eBay's activities as a purported publisher or speaker of information.

Nonetheless, the court finds the allegations inadequate to state a claim under section 17200. As eBay notes, plaintiff has failed to provide a legal basis to impose on eBay the obligations he seeks to impose in his complaint. (Demurrer, p. 10.) Section 17910 imposes the obligation to file a fictitious business name statement on the individual seller, not eBay. Thus, it does not appear that eBay violates the statute by failing to admonish sellers that California law requires them to file fictitious business name statements if they regularly transact business in the state. Nor is it apparent that such an omission is an unfair business practice, even if not specifically proscribed by law. “The statutory language [of section 17200] referring to ‘any unlawful, unfair *or* fraudulent’ practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. ‘Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition – acts or practices which are unlawful, or unfair, or fraudulent. “In other words, a practice is prohibited as ‘unfair’ or ‘deceptive’ even if not ‘unlawful’ and vice versa.” [Citation.]” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) In the instant case, the complaint fails to adequately plead facts showing that eBay’s failure to advise sellers of their duty under section 17910 is unfair or deceptive within the meaning of section 17200. Therefore, the court sustains the demurrer as to the fictitious business name allegations (§ 27.)

B. The “Sales Tax” Allegations (§ 28)

Plaintiff alleges that eBay has a check-out service that facilitates the making of payments by the buyer to the seller. The item cost is listed, and the shipping charge and optional insurance can be entered. However, according to plaintiff, there is no blank for sales tax, and hence the total amount sent out will not include sales tax. Thus, eBay “promotes and effects an avoidance of the payment of sales tax by buyers in connection with sales by merchants.” Plaintiff seeks injunctive relief to enjoin eBay “under [Business and Professions Code] § 17203 from offering a check-out service which does not make provision for inclusion of sales tax, where appropriate.” (§ 28.)

As with the fictitious business name allegations, the court finds that 47 U.S.C. section 230 does not apply to the sales tax allegations. But, again, plaintiff has failed state a cause of action.

eBay has submitted a true and correct copy of the “Payment and Shipping” section of the “Sell Your Item” page, which is accessed by registered eBay sellers in setting up a sale. (Willoughby Dec., Exh. A.) The court takes judicial notice of the page under Evidence Code section 452, subdivision (h). Contrary to plaintiff’s allegation that “[t]here’s no blank for sales tax, and no way that it will be included (§ 28), the page includes options for the seller to charge sales tax, and to designate the state from which the sales tax will be charged. Thus, the unfair business practice pled in the sales tax allegations does not exist. (See Weil & Brown, *supra*, § 7:46, p. 7-21 [“The allegations of the complaint are not accepted as true if they contradict or are inconsistent with facts judicially noticed by the court”].) Paragraph 28 fails to state a cause of action.

In his opposition, plaintiff argues that merely giving the seller the option of charging sales tax does not “exonerate” eBay from facilitating and permitting “tax-free transactions between California merchants and California buyers.” (Opp. p. 13, fn. omitted.) Rather, according to plaintiff, eBay “enables California sellers to cheat the

government (and hence the public) in the form of non-collection, and presumably *non-payment* of sales taxes.” (Opp. p. 13, orig. italics.) However, the relief sought in the complaint is an injunction enjoining any “check-out service *which does not make provision for inclusion of sales tax, where appropriate.*” (§ 28.) As shown by the “Payment and Shipping” section, eBay *does* make provision for including sales tax where appropriate. Moreover, the complaint fails to plead adequate facts to show that eBay’s conduct is unlawful, or, if not unlawful, unfair or deceptive. Therefore, the court sustains the demurrer. As noted, plaintiff does not seek leave to amend the third cause of action. Therefore, the court denies leave to amend.