

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

DENISE E. FINKEL,
Plaintiff,

Index No.: 102578/09

Motion Date: 06/02/09

- v -

Motion Seq. No.: 01

FACEBOOK, INC., MICHAEL DAUBER, JEFFREY
SCHWARTZ, MELINDA DANOWITZ, LEAH HERZ,
RICHARD DAUBER, AMY SCHWARTZ, ELLIOT
SCHWARTZ, MARTIN DANOWITZ, BARI DANOWITZ,
ALAN HERZ and ELLEN HERZ,

Motion Cal. No.: 7

Defendants.

The following papers, numbered 1 to 5 were read on this motion to dismiss.

- Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
- Answering Affidavits - Exhibits _____
- Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

3

4, 5

FILED

SEP 16 2009

Cross-Motion: Yes No

**COUNTY CLERK'S OFFICE
NEW YORK**

Upon the foregoing papers,

The court shall grant defendant Facebook's motion to dismiss this defamation action against it because Facebook is immune from liability under the Communications Decency Act of 1996 as an interactive computer service.

According to the movant, Facebook is a "social networking" internet website that is open to the public. The website allows members to communicate with each other via "group pages" and to set up and post content to profiles and groups.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

Plaintiff in opposition to the motion states that she was a member of the Facebook website while attending high school in January 2007. Four of the defendants in this suit, Michael Dauber, Jeffrey Schwartz, Melinda Danowitz and Leah Herz, were classmates of plaintiff and also members of the Facebook website. The complaint alleges that the four classmates-defendants created a group on the website and posted defamatory statements with negative sexual and medical connotations.

Facebook seeks dismissal based upon the Communications Decency Act of 1996 (47 USC 230 et seq) that provides immunity to interactive computer services from civil liability for defamatory content.

Section 230 provides that "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," id. §230 (c) (1), and that "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," id. §230 (e) (3). Section 230(c) thus immunizes internet service providers from defamation and other, non-intellectual property, state law claims arising from third-party content. See Gucci Am., Inc. v Hall & Assocs., 135 F Supp 2d 409, 417 (SD NY 2001) (citing legislative history of the CDA); see also Zeran v Am. Online, Inc., 129 F 3d 327, 330 (4th Cir 1997) (holding that 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content-are barred' by the CDA); Barrett v Rosenthal, 40 Cal 4th 33, 51 Cal Rptr 3d 55, 146 P 3d 510, 518 n 9 (2006) (collecting cases)."

Murawski v Pataki, 514 F Supp 2d 577, 591 (SD NY 2007).

Plaintiff's opposition to the motion does not dispute that Facebook qualifies as an interactive computer service under 47 USC 230 (f) (2) but plaintiff argues that because it is alleged that Facebook's Terms of Use grant the movant an ownership interest in the alleged defamatory content, the immunity granted by 47 USC 230 (c) is unavailable. Plaintiff's argument is meritless.

"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, withdraw, postpone or alter content—are barred. . . . Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." Zeran v America Online, Inc., 129 F 3d 327, 330 (4th Cir 1997).

"Ownership" of content plays no role in the Act's statutory scheme. The only issue is whether the party sought to be held liable is an "interactive computer service" and if that hurdle is

surmounted the immunity granted by 42 USC 230 (c) (1) is triggered if the content was provided by another party.

"Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted." Blumenthal v. Drudge, 992 F Supp 44, 52 (D DC 1998).

The allegations in the complaint establish that Facebook is entitled to the liability shield conferred by the Communications Decency Act and therefore the court shall dismiss this action against the movant as there is no claim Facebook had any hand in creating the content. The court shall deny movant's application for sanctions as the plaintiff's argument as to liability based upon the ownership of defamatory content court is not contrary to any prior precedent nor does the movant cite any precedent that renders such an argument frivolous.

Accordingly, it is

ORDERED that the motion of FACEBOOK, INC., seeking to dismiss the complaint against it is GRANTED; and it is further

ORDERED that the Clerk is directed to enter judgment DISMISSING the action against FACEBOOK, INC., and upon service of this Order with notice of entry upon all parties and the Clerk of the County and the Clerk of the Trial Support Office (Room 158, 60 Centre Street), the Clerks are directed to amend their records by amending the caption in this action to reflect the dismissal against FACEBOOK, INC., by removing said defendant from the amended caption; and it is further

ORDERED that the remaining parties shall appear at a preliminary conference on October 6, 2009, at 9:30 A.M, in Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: September 15, 2009

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.
 J.S.C.

FILED
 SEP 16 2009
 COUNTY CLERK'S OFFICE
 NEW YORK