SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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VO GROUP, LLC,

Plaintiff, Decision and order

- against - Index No. 8758/11

OPINION CORP. d/b/a PISSEDCONSUMER.COM,
MICHAEL PODOLSKY, ALEX SYROV
AND JOHN DOE,

Defendants, May 22, 2012

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PRESENT: HON. LEON RUCHELSMAN

Plaintiff, Vo Group, a business engaged in timeshare consulting services, brings these actions against Opinion Corp. and its officers, who own and operate the pissedconsumer website. The pissedconsumer website operates in the way a typical "gripe site" would in that it allows for anonymous individuals to post complaints and critique the various businesses they have patronized.

Plaintiff alleges that anonymous users posted certain false and defamatory statements on the pissedconsumer website with the intent to discourage and dissuade others from doing business with the plaintiff.

Pissedconsumer, in addition to acting as a gripe platform, also advertises itself as "offering premium reputation management services." Plaintiff contacted Pissedconsumer to discuss the "reputation services" whereupon the defendant demanded payment of $5,000 from the plaintiff in order to remove the defamatory statements from the website. Furthermore, the defendant

threatened that negative content regarding the plaintiff would continue to be prominently displayed if the plaintiff did not pay the demanded sum. Plaintiff did not pay the money.

After this action was commenced, defendant continued to post content regarding plaintiff Vo Group. ("Additional Defamatory Content"). These posts include comments that Vo Group's services include "resale, financing and debt management associated with v[a]cational properties." Plaintiff's maintain that both sets of defamatory posts have negatively effected its business.

Additionally, plaintiff alleges that they have been harmed by pissedconsumers extensive and unauthorized use of plaintiff's trademarks on the pissedconsmer website. Through an elaborate use of Internet domain names and sub domains, the defendants have created confusion and directed visitors of the pissedconsumer website seeking to find a link to Vo Group, to websites maintained by Vo Groups direct competitors in the timeshare business. The use of the trademarks have been used on the pissedconsumer website, its metadata, texts and sub domains.

Plaintiff alleges nine causes of action: (1) Defamation of posts made before this civil action (i.e. initial defamatory posts; (2) Defamatory posts made after this civil action (i.e. additional defamatory posts); (3) Substantive RICO claims under 18 U.S.C. §1962(c); (4) RICO conspiracy under 18 U.S.C. §1962(d); (5) Common Law Trademark; (6) Lanham Act violations; (7) trade

libel; (8) tortious interference with potential economic advantage; and (9) violations of NY Gen. Bus. Law §349. This motion to dismiss has been filed and papers submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Conclusions of Law

To succeed on a motion to dismiss for failure to state a cause of action (CPLR § 3211 (a)(7)) the moving party must demonstrate that the complaint is devoid of any factual allegations which underlie wrongful conduct. (Kamhi v. Tay, 244 AD2d 266, 664 NYS2d 288 [1st Dept., 1997]). As such, "the pleading must be afforded liberal construction. The facts as alleged in the complaint are accepted as true, with the plaintiff accorded the benefit of every favorable inference. Whether a plaintiff can ultimately establish its allegation is not part of the calculus in determining a motion to dismiss" (Ginsburg Development Cos., LLC v. Carbone, 85 AD3d 1110, 926 NYS2d 156 [2d Dept., 2011]).

Concerning the initial defamatory remarks, the elements of a defamation claim are "(1) a false and defamatory statement concerning [the plaintiff], (2) publication . . . of such statement to a third party, and (3) injury to [the plaintiff]." (Constantin Associates v. Kapetas, 17 Misc3d 1137(A), 851 NYS2d

68 [Supreme Court, New York County 2007]). The defendants do not dispute that regarding the initial defamatory remarks the plaintiffs have sufficiently pled these elements. The defendants' sole argument is that regardless of the sufficiency of the complaint, they are immune from liability under Section §230 of the Communications Decency Act (47 U.S.C. § 230, hereinafter 'CDA').

Under common-law defamation principles, a publisher of defamatory content will be held liable to the same extent as the author of the content himself. However, Congress has carved out an exception for website content under the CDA. With relevance to this lawsuit, the CDA provides immunity for website owners when defamatory content authored by third-party users is published on the site. "Congress declined to extend traditional defamation law, as applied to classical information providers such as newspapers, magazines, television, and radio stations to the Internet . . . [T]he CDA, shields a "provider" or "user" of an "interactive computer service" from liability when either of them publish material provided by a third-party" (Ascentive, LLC v. Opinion Corp., 2011 WL 6181452 [E.D.N.Y. December 13, 2011]). There are however, exceptions to the CDA's immunity. If the website holder would create the defamatory content itself or "develop" the material, there will be no finding of immunity. "Under the statutory scheme, an 'interactive computer service'

qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue" (id). Section §230(f)(3) defines "information content provider" 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." Thus, the defendant's will not be entitled to immunity if they either created or developed the defamatory content.

Thus, at this stage of the litigation before any discovery has been conducted there are certainly allegations whether the initial defamatory content posted on the pissedconsumer website was attributed to the defendants themselves (see, ¶18 of the complaint). Therefore, the motion seeking to dismiss the initial statements is denied. Consequently, the motion to dismiss the claim for tortious interference with economic advantage is likewise denied as well.

Concerning the additional defamatory remarks, plaintiff claims to have been defamed by defendant's statements concerning plaintiff's involvement in "resale, financing, and debt management associated with v[a]cational properties." In any business or profession, involvement in certain activities outside the scope of that business's main operations has potential to be defamatory. Consider a well respected retail store such as

Tiffany's and Co. being "accused" of operating an, albeit legitimate, dry cleaning business in addition to selling crystal, china and jewely. Surely such statements, if untrue, would be considered defamatory. Here, however, plaintiffs have failed to show even on the slightest level, how such statements are defamatory. Plaintiffs argue, that in a complaint they are not obliged to flesh out and prove how such defamatory statements are indeed harmful. While that is true, there must be some level of implication of harm in the words spoken in order to avoid a motion to dismiss. Otherwise, any litigant can simply allege defamation with any words spoken about them. Consequently, the additional defamatory remarks are dismissed as well.

Concerning claims based upon Civil RICO (§1962(c)) to succeed on a RICO claim, the moving party must show three elements: (1) a violation of the RICO statute, 18 U.S.C. §1962; (2) an injury to business or property; and (3) the injury was caused by the violation of section 1962 (Spool v. World Child Int'l Adoption Agency, 520 F.3d 178 [2d. Cir. 2008]). Under 18 U.S.C. §1962(c) it is unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...

Thus, to show a violation of section §1962(c), a plaintiff must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" (Defalco v. Bernas, 244 F.3d 286 [2d Cir. 2001]). Here, the plaintiff claims that defendants have engaged in racketeering activity through violations of New York commercial bribery laws as well as extortion under the federal Hobbes Act.

Concerning New York Commercial bribery laws, plaintiff relies on New York Penal Laws §§180.05 and 180.08, which read, respectively, as follows:

"An employee, agent or fiduciary is guilty of commercial bribe receiving in the second degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs. . . ." In addition:

"An employee, agent or fiduciary is guilty of commercial bribe receiving in the first degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit solicited, accepted or agreed to be accepted exceed one

thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars . . . ."

The plaintiffs attempt to establish the defendants violation of theses statutes by explaining in ¶110 of the complaint that the defendants committed commercial bribery when an employee, agent or fiduciary of PissedConsumer, without the consent of his employer or principal, solicited from the plaintiff $5,000 to remove the defamatory content from the website. However, under §§180.05 and 180.08 a commercial bribe must be made by an employee "without the consent of his employer. . ." Here, however, both defendant's *are* the employer. The defendants are respectively CEO and president of the defendant corporation and are hence authorized to give any consent regarding the corporation's operations. As the defendants point out in their brief (Pg. 12-13) ¶110 of the complaint is both "incoherent" and a "logical conundrum." The plaintiffs can therefore not establish "racketeering activity" through violations of the New York Penal Laws of commercial bribery.

Plaintiffs also try to establish the requisite racketeering activity under the federal Hobbes Act (18 U.S.C. § 1951(a)). The Hobbes Act provides that "Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to

any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

The elements for a claim for extortion under this act are that the defendant "(1) induced the [victim] with [the victim's] consent, to part with property, (2) through the wrongful use of actual or threatened force, violence or fear (including fear of economic loss), (3) in such a way as to adversely effect interstate commerce" United States v. Int'l Longshoremen's Ass'n, 518 F.Supp.2d 422 [E.D.N.Y. 2007]) (quoting McLaughlin v. Anderson, 962 F.2d 187 [2d Cir. 1992]). Lastly, the Act itself defines extortion as "the obtaining of property from one another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under the color of official right" (18 U.S.C. §1951(2)).

Plaintiffs claim that when PissedConsumer demanded $5,000 to remove the posts, that such a demand constituted extortion. However, it is certainly true that not all demands for money in exchange for morally questionable services are considered extortion. Thus, "where a victim receives something of value in return for capitulating to fear of economic loss, the exchange of property may be the product of lawful "hard-bargaining" or unlawful extortion. The distinction, therefore, between lawful and unlawful conduct in such a circumstance is drawn by

examining whether the victim has a pre-existing right to pursue his business interests free of the fear he is quelling. . . .When a party does not have the right to pursue its business interests unchecked and receives a benefit, it cannot be the victim of extortion" (Cintas Corp. v. United Here, 601 F. Supp. 2d 571 [S.D.N.Y. 2009], see, also, Viacom Int'l Inc. V. Ichan, 747 F.Supp. 205 [S.D.N.Y. 1990], Brokerage Concepts, Inc. v. U.S. Healthcare. Inc., 140 F.3d 494 [3d Cir. 1998]). In other words, if PissedConsumer had the legal right to engage in the activities it was doing, then to request money in return from desisting from such activities cannot be considered extortion. Since it has already been determined that some of PissedConsumer's posts were possibly defamatory and hence fully unlawful, the $5,000 request cannot be viewed as merely nothing more than "hard-bargaining" and not within the grasp of the Hobbes Act. Rather, since there are questions whether defamation occurred there are likewise questions whether there was a violation of the Hobbes Act. Consequently, all the motions seeking to dismiss the RICO conspiracy claim pursuant to §1962(d) as well as the substantive RICO claims are all denied.

Concerning the trademark causes of action, the elements of common law trademark and Lanham Act claims are essentially identical and thus the discussion will center on both of them together (see, ESPN Inc., v. Quicksilver Inc., 586 F.Supp2d 219

[SDNY 2008]). To succeed on a trademark claim the plaintiff in this case must demonstrate that the defendant's use of the plaintiff's trademark would cause consumer confusion (Starbucks Corp., v. Wolfe's Borough Coffee Inc., 588 F3d 97 {2d Cir., 2009]). Thus, "[t]he crucial issue ... is whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question" (id). Again, Ascentive, (supra) is instructive. In that case the court dismissed the trademark claims finding that the defendant's use of any marks could not possibly lead to customer confusion. First, the court noted that the possibility of customer confusion is greatly diminished when the plaintiff and the defendant engage in different businesses. As noted, the defendant is engaged in rehabilitation services while the plaintiff is involved in vacation timeshares. More importantly, the court explained that there can hardly be any consumer confusion that the plaintiff has approved or sponsored the defendant's use of its trademark considering the critical nature of the use of the mark. "It strains credulity that an Internet user would believe that plaintiffs would sponsor or otherwise approve of a site that contains such criticisms. Instead, after a brief inspection of the content of PissedConsumer's website, the user would realize that they were visiting a third-party gripe site for "pissed"

consumers" (Ascentive, supra). The Court therefore, concluded that "PissedConsumer's use of plaintiffs' marks in domain names and in the text of the site itself is not likely to cause confusion as to whether PissedConsumer was the source of plaintiffs' products or whether plaintiffs approved of or otherwise endorsed the use of their marks" (id).

Likewise, in this case, there is no reasonable view of the facts of this case that can lead a reasonable consumer to believe that the defendant's website was somehow a platform for plaintiff's business as to create confusion as to its source. Consequently, all the trademark and Lanham act claims are dismissed.

Concerning trade libel, it is well settled that trade libel requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment (Waste Distillation Tech. v. Blasland & Bouch Engrs., P.C., 136 AD2d 633, 523 NYS2d 875 [2d Dept., 2008]). In this case there is no dispute that the plaintiff did not knowingly publish any false statements at all. As already explained the mere platform cannot give rise to any action against them. Therefore, this cause of action is dismissed as well.

Lastly, concerning General Business Law §349, it is well settled that to state a claim under this statute a pleader must

allege (1) acts or practices that are "consumer oriented," (2) that such acts or practices are misleading in a material way, and (3) that the pleader has suffered actual harm by reason of those acts (see, Gaidon v. Guardian Life Ins Co of America, 94 NY2d 330, 704 NYS2d 177 [1999]). Therefore, the alleged improper practice allegedly committed by the defendant might impact consumers at large. It cannot be conclusively determined at this time that this matter is really a private contractual dispute unique to the parties involved "not involving a wrong directed at the public" (see, Gomez v. Fidelity National Title Insurance Company of New York, 34 Misc3d 1233 (A) [Supreme Court Queens County 2012]). Thus, the motion to dismiss General Business Law §349 is denied.

So ordered.

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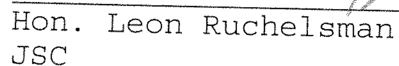

DATED: May 22, 2012
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC