IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Robert M. Cox,	)	C/A 2:18-2573-DCN-BM
	)	
Plaintiff,	)	
	)	
v.	)	**REPORT AND RECOMMENDATION**
	)	
Twitter, Inc.,	)	
	)	
Defendant.	)	
_____	)	

This action was originally filed by the Plaintiff, pro se, in State Summary Court (Dorchester County). The case was subsequently removed to this United States District Court by the Defendant on the basis of diversity of citizenship. 28 U.S.C. § 1332. Following removal of the case, the Defendant filed a Rule 12 motion to dismiss for failure to state a claim.

As the Plaintiff is proceeding pro se, a Roseboro order was entered by the Court on September 27, 2018, advising Plaintiff of the importance of a dispositive motion and of the need for him to file an adequate response. Plaintiff was specifically advised that if he failed to adequately respond to the Defendant's motion, his case could be dismissed. Plaintiff thereafter filed a response in opposition to the Defendant's motion, to which the Defendant filed a reply. Defendant's motion is now before the Court for disposition.[1]

[1]This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local (continued...)

Discussion

Plaintiff alleges in his pro se Complaint that on or about June 17, 2018, the Defendant suspended his Twitter account, citing a violation of Twitter's "Hate Speech" policy but without including the specific section or clause that Plaintiff had allegedly violated. Plaintiff alleges that he thereafter sought clarification and a proper citation from the Defendant "numerous" times, but that Twitter Support has failed to ever provide him with any information regarding the specifics of the alleged violation. Plaintiff further alleges that the Defendant is requiring him to delete the flagged content in order to regain access to his Twitter account, in violation of the Terms of Service Agreement entered into between Plaintiff and the Defendant on or about February 2012. Plaintiff has attached to his Complaint as an exhibit a copy of what purports to be the tweet that led to the suspension of his Twitter account.[2] Plaintiff seeks monetary damages as well as certain specified declaratory and/or injunctive relief.

In its motion to dismiss, Defendant argues that it is entitled to dismissal of this case because Plaintiff's claims are barred by the Communications Decency Act (CDA) 47 U.S.C. § 230(c), by the First Amendment to the United States Constitution, and because the Complaint fails to allege that Plaintiff has suffered any damages as a result of any actions by the Defendant. When considering a Rule 12 motion to dismiss, the Court is required to accept the allegations in the

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[1](...continued)
Rule 19.02(B)(2)(c), D.S.C. The Defendant has filed a motion to dismiss. As this is a dispositive motion, this Report and Recommendation is entered for review by the Court.

[2]This tweet (as represented in Plaintiff's exhibit) reads as follows: "Islam is a Philosophy of Conquests wrapped in Religious Fantasy & uses Racism, Misogyny, Pedophilia, Mutilation, Torture, Authoritarianism, Homicide, Rape . . . Peaceful Muslims are Marginal Muslims who are Heretics & Hypocrites to Islam. Islam is . . ."

pleading as true, and draw all reasonable factual inferences in favor of the party opposing the motion. The motion can be granted only if the party opposing the motion has failed to set forth sufficient factual matters to state a plausible claim for relief "on its face". Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009); see also Vogt v. Greenmarine Holding, LLC, 318 F.Supp. 2d 136, 144 (S.D.N.Y. 2004) ["[O]n a motion to dismiss, the Court does not weigh the strength of the evidence, and simply considers whether the [claim] alleges sufficient facts which, if true, would permit a reasonable fact finder to find [the party seeking dismissal of the claim] liable."]. Further, Federal Courts are also charged with liberally construing a complaint filed by a pro se litigant (such as the Plaintiff here) to allow for the development of a potentially meritorious case. See Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972).

However, the requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleadings to allege facts which set forth a Federal claim, nor can the Court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Social Services, 901 F.2d 387 (4th Cir. 1990). Here, after careful review and consideration of the allegations of the Complaint in conjunction with the applicable standards and caselaw, the undersigned finds for the reasons set forth hereinbelow that the Defendant is entitled to dismissal of this case.

The Defendant is an online news and social networking service on which users post and interact with messages known as "tweets". The Defendant requires users of its networking service to abide by its "Terms of Service" and "Hate Speech" policy, both of which are contained

in the Defendant's User Agreement.[3] The Terms of Service agreement in effect at the time of the suspension of Plaintiff's Twitter account specifically provides that it governs user's access to and use of the Defendant's services, and that users (such as the Plaintiff) "may use these Services only if you agree to form a binding contract with [the Defendant] . . . .". This document further provides that "[a]ll Content is the sole responsibility of the person who originated such Content. We may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content. We reserve the right to remove Content that violates the User Agreement, including, for example . . . unlawful conduct, or harassment". This document further provides that users may use these Services only in compliance with these Terms and all applicable laws, rules and regulations, and that the Defendant "may also remove or refuse to distribute any Content on the Services, suspend or terminate users, and reclaim user names without liability to users". The Agreement also provides that the Defendant "may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason, including, but not limited to, if we reasonably believe [that] you have violated these Terms or the Twitter Rules . . . .". Finally, the Agreement also contains a Limitation of Liability provision which provides that to the maximum extent permitted

[3]As Plaintiff's Complaint references and relies on the Defendant's Terms of Service Agreement and Hate Speech policy, this Court may properly consider these documents without converting the Defendant's motion to a motion for summary judgment. Epstein v. World Acceptance Corp., 203 F.Supp. 3d 655, 662 (D.S.C. 2016) [The court may consider any documents referenced in the complaint and matters of which the court may take judicial notice in deciding a motion to dismiss]; cf. E.I. duPont deNemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 448 (4th Cir. 2011); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) [Court may consider "documents incorporated into the complaint by reference"]; Philips v. Pitt County Memorial Hospital, 572 F.3d 176, 180 (4th Cir. 2009) [In deciding a motion to dismiss, court may consider documents that are integral to or explicitly relied upon in the complaint and/or where the authenticity of such documents is not disputed].

by applicable law, the Defendant shall not be liable for any indirect, incidental, special, consequential, or punitive damages or other intangible losses resulting from a user's access to or use of or inability to access or use the Defendant's services. These liability limitations specifically apply to any theory of liability, whether based on warranty, contract, statute, tort (including negligence) or otherwise. See https://twitter.com/en/tos [effective May 25, 2018].

The Defendant's hate speech policy is contained in its "Twitter Rules", which are part of the Twitter User Agreement which includes the Defendant's Terms of Service. The Twitter Rules specifically provide that all individuals accessing or using the Defendant's services must adhere to the policies set forth in the Twitter Rules, and that failure to do so may result in various enforcement actions, including the suspension of the user's account. The Twitter Rules provide that "[i]n order to ensure that people feel safe expressing diverse opinions and beliefs, we prohibit behavior that crosses the line into abuse, including behavior that harasses, intimidates, or uses fear to silence another user's voice". Such abusive behavior is defined as including, but not limited to, abusive behavior that is targeted at an individual or group of people, including targeted harassment or expressing hate towards a person, group, or protected activity based on race, ethnicity, national origin, or religious affiliation (among others). See https://help.twitter.com/en/rules-and-policies/twitter-rules [Twitter Rules].

First, the undersigned agrees with the Defendant's contention that it is immune from Plaintiff's claims to the extent Plaintiff seeks to impose liability on the Defendant for declining to publish content created by the Plaintiff, as such claims are barred by Section 230(c) of the CDA. Specifically, Section 230(c)(2)(A) sets forth that no provider of an interactive computer service (such

as the Defendant) shall be held liable on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be . . . excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . .". Moreover, courts have held that interactive computer services (such as the Defendant here) act in the role of "publishers" when screening or deleting content. Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008)["[D]ecisions relating to the monitoring, screening, and deletion of content [are] actions quintessentially related to a publisher's role"] (internal quotation marks omitted). Where the violation alleged by a Plaintiff derives from the Defendant's status or conduct as a publisher, § 230(c)(1) of the CDA prohibits liability.[4] Fields, et al. v. Twitter, Inc., 217 F.Supp. 3d 1116, 1121 (N.D.Ca. 2016), citing Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101-1102 (9th Cir. 2009); see also Fair Housing Counsel of San Fernando Valley v. RoomMates.com, LLC, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) [Noting that § 230(c)(1) applies to "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online," and that "determine[ing] whether or not to prevent [the] posting of material by third parties is "precisely the kind of activity" covered by the statute].

Plaintiff's contention in his response brief that the CDA does not protect the Defendant here because the Defendant is neither a publisher nor an editor with respect to the Plaintiff, but is nothing more than a platform upon which Plaintiff publishes and edits his own

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[4]Section 230(c)(1) provides:

> 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.

content, is without merit. RoomMates, 521 F.3d at 1170-1171; see also Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003) ["The exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material"]; Fields, 217 F.Supp.3d at 1123 [Noting that a decision to decline to furnish an account to a user based on the user's conduct or content of their postings would be a publishing decision to prohibit the public dissemination of these ideas]; Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 20-21 (1st Cir. 2016) [Decisions about the structure and operation of a website are content-based decisions]. Thus, contrary to Plaintiff's assertion, "the decision to furnish an account, or prohibit a particular user from obtaining an account, is itself publishing activity". Fields, 217 F.Supp.3d at 1124-1125. Therefore, to the extent Plaintiff seeks to hold the Defendant liable for exercising its editorial judgment to delete or suspend his account as a publisher, his claims are barred by § 230(c) of the CDA. Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) [Holding that an internet service provider covered by the traditional definition of publisher is protected by § 230(c)(1)].

Liberally construing Plaintiff's allegations, he may instead be considered to be asserting a breech of contract claim, as he alleges that the Defendant requiring him to delete the flagged content in order to regain access to his Twitter account is a violation of the Terms of Service Agreement entered into between the Plaintiff and the Defendant on or about February 2012.[5] Indeed,

[5]The Terms of Service Agreement previously discussed herein was effective May 25, 2018, and is an updated version of the Terms of Service Agreement in effect in February 2012. However, both versions of the Terms of Service Agreement allow for the unilateral termination or suspension of user accounts for any or no reason. Moreover, these Agreements specifically provide that users are bound by updates to the Agreements. Cf. https://twitter.com/en/tos/previous/version/underscore5 (Terms of Service Agreement effective June 1, 2011), with https://twitter.com/en/tos (Terms of Service Agreement effective May 25, 2018).

the plain language of the Defendant's Terms of Service Agreement states that by using the Defendant's services, Plaintiff has agreed to "form a binding contract with [the Defendant]". Notwithstanding the provisions of § 230(c), if Plaintiff and the Defendant have entered into a contract generating a legal duty distinct from the Defendant's conduct as a publisher, the provisions of such a contract may be enforceable at law and thereby support a breech of contract claim by the Plaintiff. Cf. Barnes, 570 F.3d 1096, 1107-1108.

However, even assuming Plaintiff's theory of liability is based on breech of contract, he has still failed to state a claim, as the "contract" Plaintiff had with the Defendant clearly provides that the Defendant reserves the right to remove content that it deems to have violated the User Agreement, including content constituting unlawful conduct or harassment, as well as that the Defendant reserves the right to suspend or even terminate a user's account or cease providing the user with all or part of its Services "at any time for any or no reason, including, but not limited to, if we reasonably believe [that] you have violated these Terms or the Twitter Rules . . . ." The Twitter Rules, which are part of the User Agreement and are therefore part of any "contract" Plaintiff had with the Defendant, prohibit postings that are intended to or may harass, intimidate, or use fear to silence another user's voice, including but not limited to harassment or expressing hate towards a person, group, or protected activity based on religious affiliation. The Twitter Rules further specifically provide that a user's failure to adhere to these policies may result in various enforcement actions, including the suspension of the user's account. See discussion, supra.

Plaintiff's own exhibit (attached to his Complaint) targets Islam with disparaging comments, and based on the "contract" language previously cited, Plaintiff has failed to set forth a "plausible" claim that the Defendant requiring him to delete the flagged content in order to regain

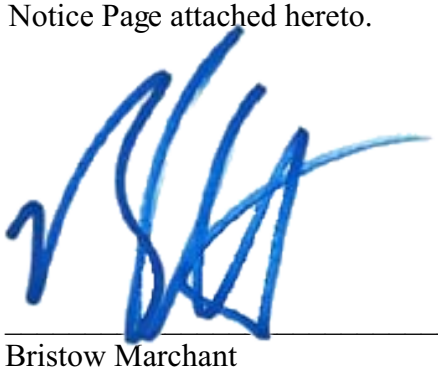
access to his Twitter account was a violation of the Terms of Service Agreement he had with the Defendant. Iqbal, 129 S.Ct. at 1949 [in order to avoid dismissal, allegations of complaint must set forth a "plausible" claim for relief]. To the contrary, the Defendant's actions are clearly, and specifically, allowed by the terms of the "contract" between Plaintiff and the Defendant. Philips, 572 F.3d at 180 [In deciding a motion to dismiss, court may consider documents that are integral to or explicitly relied upon in the complaint]. Therefore, Plaintiff has failed to state a breech of contract claim in his Complaint. Harper v. United States, 423 F.Supp. 192, 196 (D.S.C. 1976)["[W]here the claims in a complaint are insufficiently supported by factual allegations, these claims may be properly dismissed by summary dismissal"]; Frey v. City of Herculaneum, 44 F.3d at 671 ["Complaint must contain facts which state a claim as a matter of law and must not be conclusory"]; House v. New Castle County, 824 F.Supp. 477, 485 (D.Md. 1993) [Conclusory allegations insufficient to maintain claim]; see also Dickson v. Microsoft Corp., 309 F.3d 193, 213 (4th Cir. 2002)[Plaintiff has burden of alleging facts sufficient to state all the elements of a claim].

Conclusion

Based on the foregoing, it is recommended that the Defendant's motion to dismiss be **granted,**[6] and that this case be **dismissed**.

[6]Based on the findings and discussion set forth hereinabove, it was not necessary to analyze the Defendant's other asserted grounds for dismissal of this case.

The parties are referred to the Notice Page attached hereto.



Bristow Marchant
United States Magistrate Judge

February 8, 2019
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).