

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

HEATHER POOLE, :
plaintiff, :
 :
v. : Civil no. 3:18cv00859(AVC)
 :
TUMBLR, INC., :
defendant. :

RULING ON THE DEFENDANTS' MOTION TO DISMISS

This is an action for damage s in which the plaintiff, Heather Poole, alleges that the defendant, Tumblr, Inc., unlawfully displayed photographs of Poole and failed to remove them from their website. Poole brings her claims pursuant to common law tenets concerning invasion of privacy and negligent infliction of emotional distress.¹ Tumblr has filed the within motion to dismiss arguing that the complaint fails to state a claim. The issue to be determined is whether Tumblr is entitled to immunity under section 230(c)(1) of the Communications Decency Act (hereinafter "CDA"). For the reasons that follow, the motion is granted.

FACTS

The complaint states the following facts.

Poole is a resident of Bristol, Connecticut.

¹ The June 14, 2018 amended complaint also seeks relief pursuant to copyright law and the Digital Millennium Copyright Act, 17 U.S.C. § § 512, 1201-1205. However, on September 9, 2018, the court granted the plaintiff's motion to withdraw those claims.

Tumblr, Inc. "operates the internet website URL www.tumblr.com which is available in the United States and throughout the world. Tumblr allows its subscribers to post images, music and videos on Tumblr servers. Tumblr copies and stores such materials, and displays and distributes them to the public."

In May 2017, Poole "began dating Tomak Paluch of Bristol CT. The parties were involved in an intimate relationship." The complaint alleges that on August 12, 2017 and on other dates, "the parties exchanged intimate naked photographs of each other."

On "September 5, 2017, the parties separated, and the plaintiff deleted any photographs she had of Mr. Paluch and blocked his telephone number, Facebook and all other means of communications."

"On September 13, 2017[,] Mr. Paluch posted on Facebook a public status about [Poole] which was taken down after a complaint made to Facebook. Thereafter Mr. Paluch continued to harass [Poole]."

"On January 5, 2018[,] Mr. Paluch posted five (5) nude photos of [Poole] to myex.com. . . . These photos were also posted on Facebook and after the plaintiff made a complaint to the local police department, the photos were removed."

"On January 6, 2018[,] although myex.com removed the photos they were then uploaded to Tumblr using the plaintiff's name, links to Facebook and LinkedIn, and added other personal information. Other users re-blogged her photos to other sites with links to her social media accounts. Various messages were sent to the plaintiff either threatening her or alerting her to the nude photos on Tumblr."

From January 7, 2018 to January 15, 2018, twenty three "posts reported to Tumblr using their 'report' link."

"Notwithstanding the fact that users often report the plaintiff's photos daily after Tumblr removes them, Tumblr continues to post the same. On numerous and diverse dates, the plaintiff has requested that Tumblr take down her unauthorized intimate photographs but such photographs, even though [sic] the date of [the] complaint, continue to appear on Tumblr."

The complaint states that "[t]he foregoing acts of contributory infringement by Tumblr have been willful, intentional and purposeful, in disregard of and with indifference to the rights of plaintiff."

STANDARD

A court must grant a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) if a plaintiff fails to establish a claim upon which relief may be granted. Such a motion "asses(es) the legal feasibility of the complaint, [it

does] not . . . assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When ruling on a 12(b)(6) motion, the court must "accept the facts alleged in the complaint as true, and draw all reasonable inferences in favor of the plaintiff." Broder v. Cablevision Sys. Corp., 418 F.3d 187, 196 (2d Cir. 2005). In order to survive a motion to dismiss, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The complaint must allege more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The court may consider only those "facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

DISCUSSION

Tumblr argues that it is entitled to immunity from liability with respect to Poole's invasion of privacy claim. Specifically, Tumblr argues that section 230 of the CDA, 47 U.S.C. §§ 230(c)(1), 230(e)(3), provides Tumblr with such immunity. According to Tumblr, "Poole has brought this

copyright and invasion of privacy action against the wrong defendant. Accepting all of the allegations in her Complaint as true, Plaintiff may have a legitimate grievance against an ex-boyfriend and third parties who published . . . photographs of her But whatever those claims may be, Plaintiff does not, and cannot, allege any viable claims against Tumblr."

Poole argues in opposition that "Tumblr misunderstands the gravamen of [her] complaint; the complaint is not that Tumblr published her nude photographs which were sent from a third party: her complaint is that Tumblr continued to do so after receiving notice from [Poole] at least 7 times to take down her photographs." According to Poole, Congress enacted the Communications Decency Act in order "to protect Internet Service Providers (ISP) from litigation when they act as a 'Good Samaritan' blocking or editing offensive postings." Tumblr's alleged conduct in this case does not, according to Poole, fall within that purpose. Poole also notes that section 230's immunity "is not absolute" and requires a showing of good faith. Poole states that in this case there is an issue as to "whether or not the good faith issue was involved by the ISP's conduct in ignoring the electronic fingerprint of [Poole's] photographs."

Tumblr replies that Poole's attempt to read a good faith requirement into section 230 is not legally supported and not factually pled. Specifically, Tumblr argues that "[f]ederal

courts have specifically and consistently rejected the argument that § 230(c)(1)'s immunity is conditioned on good faith or preemptive blocking of offensive conduct." Tumblr notes that the purpose of the Common Decency Act is to provide broad immunity to any claim that would make providers liable for third-party user information and prevents claims that put a provider, like Tumblr, in a "publisher's role." Tumblr states that section 230(c)(1) does not require that it "preemptively block publication" of Poole's photographs and notes that Congress recognized "speech interests" when enacting these broad provisions for service provider immunity. According to Tumblr, none of the cases that Poole cites provide authority to the contrary. Even if there is a good faith requirement in section 230(c)(1), Tumblr notes that Poole has failed to plead facts that Tumblr had the technology to identify Poole's "electronic fingerprint" but "chose not to deploy it." Finally, Tumblr reiterates that it meets the 230(c)(1) requirements for immunity because it is undisputed that it is a provider of an interactive computer service, the information at issue was provided by a third party user and the claim at issue seeks to treat Tumblr as a publisher. Therefore, Tumblr states that its immunity is "evident from the face of the complaint."

Section 230 provides that "[n]o 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." 47 U.S.C. § 230(c)(1). "Preemption is express: '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.'" Ricci v. Teamsters Union Local 456, 781 F.3d 25, 27 (2d Cir 2015) (quoting 47 U.S.C. § 230(e)(3)). "The statute defines 'interactive computer service' expansively, to include 'any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.'" Id. at 27-28 (quoting § 230(f)(2)). The second circuit has recognized that "this wording has been construed broadly to effectuate the statute's speech-protective purpose" Id. at 28. Specifically, the court recognized that

Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.... Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.... None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability.... 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.

Id. (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997)). As a result, "a plaintiff defamed on the internet can sue the original speaker, but typically 'cannot sue

the messenger.'" Id. (quoting Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008)).

"In applying the statute, courts have 'broken [it] down into three component parts,' finding that '[i]t shields conduct if the defendant (1) 'is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information.'" Federal Trade Commission v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016) (quoting Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (1st Cir. 2016) (quoting Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007))). "Although "[p]reemption under the Communications Decency Act is an affirmative defense, ... it can still support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint." Ricci v. Teamsters Union Local 456, 781 F.3d 25, 28 (2d Cir 2015) (quoting Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (citing McKenna v. Wright, 386 F.3d 432, 436 (2d Cir.2004))).

There is no dispute that Tumblr has satisfied the three statutory requirements for immunity pursuant to section 230(c)(1). Specifically, Tumblr "is a provider or user of an

interactive computer service," the claim here involves information provided by a third party and Poole's claims for invasion of privacy and infliction of emotional distress "treat [Tumblr] as the publisher or speaker of that information." Federal Trade Commission v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016) (internal quotation marks and citations omitted). Therefore, the only issue to be determined is whether section 230 contains a good faith requirement and, as a result, an issue of fact exists with respect to Tumblr's alleged conduct.

In Levitt v. Yelp! Inc., 2011WL5079526 (N.D. Cal. Oct. 26, 2011), aff'd, 765 F.3d 1123 (9th Cir. 2014), the court addressed the issue of whether section 230(c)(1) contains a good faith or intent requirement. Id. at *7. The court held that the fact "[t]hat § 230(c)(2)² expressly provides for a good faith element" and such requirement is "omitted from § 230(c)(1) indicates that Congress intended not to import a subjective intent/good faith limitation into § 230(c)(1)." Id. at *7. The Levitt court

² Section 230(c)(2) provides, in relevant part, as follows:

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 of 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; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C. § 230(c)(2) (emphasis added).

recognized that “[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Id. (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993)). Therefore, the court concluded that “the text of the two subsections of § 230(c) indicates that (c)(1)'s immunity applies regardless of whether the publisher acts in good faith.” Levitt at *7.

In Zeran v. AOL, 129 F.3d 327, 329 (4th Cir. 1997), the fourth circuit held that section 230(c)(1) provided immunity to the defendant, AOL, where it took down third parties’ allegedly defamatory statements, but it did not prevent the statements from being republished. The court recognized 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.” Id. at 330; see Federal Trade Commission v. LeadClick Media, LLC, 838 F.3d 158, 174 (2^d Cir. 2016). Further, in Universal Commc’n Sys, Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007), the first circuit held that “[i]t is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider’s own speech.” Id. at 420. The court confirmed that

other courts have recognized “that Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content.” Id.

Poole has failed to provide authority for the proposition that section 230(c)(1) includes a requirement of good faith. The facts of this case amount to state law claims “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” Zeran v. AOL, 129 F.3d 327, 330 (4th Cir. 1997); see Federal Trade Commission v. LeadClick Media, LLC, 838 F.3d 158, 174 (2d Cir. 2016). As the second circuit has recognized, by enacting section 230(c)(1) “Congress made a policy choice . . . 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.” Ricci v. Teamsters Union Local 456, 781 F.3d 25, 28 (2d Cir 2015) (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997)). Although immunity pursuant to section 230(c)(1) is an affirmative defense, in this case “the statute’s barrier to suit is evident from the face of the complaint.” Ricci v. Teamsters Union Local 456, 781 F.3d 25, 28 (2d Cir 2015).³ As

³As previously stated, Tumblr “is a provider or user of an interactive computer service,” the claim here involves information provided by a third party and Poole’s claims for invasion of privacy and infliction of emotional

the facts of this case satisfy the requirements for immunity under section 230(c)(1), Tumblr's motion to dismiss is granted.

CONCLUSION

For the foregoing reasons, Tumblr's motion to dismiss (document no. 12) is granted.

So ordered this 4th day of March, 2019, at Hartford, Connecticut.

/s/
Alfred V. Covello
United States District Judge

distress "treat [Tumblr] as the publisher or speaker of that information." Federal Trade Commission v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016) (internal quotation marks and citations omitted). The allegations in the complaint support this conclusion and the plaintiff has not provided arguments to the contrary.