IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

WESTLAKE LEGAL GROUP for THOMAS K. PLOFCHAN, JR., PLLC, *Plaintiff*,	
v.	Case No. 1:14-cv-564
CHRISTOPHER SCHUMACHER and YELP, *Defendants*.	

ORDER

This matter comes before the Court on the Defendant Yelp's Motion to Set Aside the Default Judgment, Dismiss for Failure to State a Claim, or, in the alternative, Dismiss for Improper Venue (Dkt. No. 5). Also before the Court is the Plaintiff's Motion for Reconsideration of the Court's order denying his request for remand (Dkt. No. 21). For the reasons stated below, and for good cause shown, the Defendant's motion is granted and the Plaintiff's motion is denied.

BACKGROUND

Defendant Yelp is a popular website that allows consumers to review local businesses. On May 11, 2012, the Plaintiff, Westlake Legal Group, on behalf of Thomas K. Plofchan, filed a defamation suit against the Defendants in the Circuit Court of Loudoun County. The complaint arose out of an allegedly defamatory review written by Christopher Schumacher about Plofchan's legal services, which was posted on Yelp's website on July 7, 2009.

National Registered Agents, Inc. ("NRAI") is Yelp's registered agent for service of process. On May 17, 2012, Plofchan purported to serve NRAI with the Complaint and Summons issued by the Loudoun County Circuit Court. NRAI shares the location where it receives process

on behalf of its clients with two other registered agent services, one of which is CT Corporation Systems ("CT Systems"). The sheriff responsible for serving Yelp delivered the process to CT Ssytems's Corporate Operating Manager, Lisa Uttech. Uttech, on behalf of CT Systems, rejected service of process that same day and sent Plofchan a letter returning the Summons and Complaint. Mr. Plofchan did not inform Yelp, NRAI, or the Circuit Court that CT Systems had rejected and returned the service.[1]

Despite the above, Plofchan filed a motion for default judgment in the Loudoun County Circuit Court on June 29, 2012. The court granted the motion and default judgment was entered against the Defendants on October 2, 2012. Over a year later, on January 31, 2014, Plofchan moved the Circuit Court to correct the default judgment *nunc pro tunc* because of an error that prevented it from being recorded as a lien. The Circuit Court again granted the motion and entered default judgment on February 7, 2014.

In April of 2014, NRAI received a summons to answer interrogatories and a subpoena *duces tecum* concerning collection proceedings that had been initiated in light of the default judgment. On April 15, 2014, NRAI forwarded Yelp this summons. This was the first time Yelp received notice of the action. Yelp immediately emailed Westlake Legal Group requesting a copy of the complaint, which it received the following day.

Less than two weeks after first learning of Plofchan's complaint, Yelp filed a motion to vacate the default judgment in Circuit Court. Eventually, on May 15, 2014, Yelp removed the action to this Court. Plofchan submitted a motion to remand, which was denied. Plofchan now requests the Court reconsider the denial of his motion to remand. Yelp maintains that removal was appropriate and requests the Court dismiss Plofchan's complaint in its entirety.

[1] It also appears that Mr. Schumacher did not receive notice of Plofchan's complaint, as the process sent to him in Nevada was returned as undeliverable.

DISCUSSION

I. Plaintiff's Motion to Reconsider

Plofchan urges the Court to reconsider its June 17, 2014 order denying his motion to remand back to state court. Plofchan's arguments either repeat those he initially made or are in error. Therefore, upon careful review of its earlier decision as well as the arguments advanced in Plofchan's current motion, the Court finds that its original decision denying remand was correct.

II. Defendant's Motion to Set Aside the Default Judgment

Pursuant to Fed. R. Civ. P. 60(b), Yelp moves to set aside the state court's default judgment. For this motion to be successful, Yelp must first show that (i) its motion is timely, (ii) it has a meritorious defense, and (iii) Plofchan will not be unfairly prejudiced by setting aside the judgment. *See Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 264-65 (4th Cir. 1993). While the Court exercises its sound discretion when ruling on a Rule 60(b) motion, the Fourth Circuit has taken an "increasingly liberal view of Rule 60(b)" when default judgments are at issue. *Id.* Furthermore, courts generally favor resolving a case on the merits and a default judgment should ordinarily be set aside when the moving party is blameless. *See August Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988). Yelp easily makes the required threshold showing.

For the purposes of Rule 60(b)(4)-(6), Yelp's motion "must be made within a reasonable time." *See* Rule 60(c). Yelp first received notice of the default judgment on April 15, 2014, and first saw Plofchan's complaint the next day. Yelp removed the case to this Court four weeks later, simultaneously filing the current motion. The Court considers this timely.[2]

Second, as the Court's analysis of its motion to dismiss below indicates, Yelp has meritorious defenses.

[2] Yelp had also filed a motion to set aside the default judgment in Circuit Court prior to seeking removal.

The final prejudice factor is "of lesser importance." *See Gray*, 1 F.3d at 265 (citing *Compton v. Alton Steamship Co.*, 608 F.2d 96, 102 (4th Cir. 1979)). Plofchan apparently had notice that Yelp had not been properly served yet took no steps to notify Yelp of his complaint against it. The Court is therefore hard-pressed to find any prejudice that might result to Plofchan as a result of setting aside the default judgment. Incurring additional time and costs defending this action would be the only conceivable prejudice to Plofchan. This, however, is "the inevitable result whenever a judgment is vacated." *Id.* (citing *Randall v. Merrill Lynch*, 820 F.2d 1317, 1231 (D.C. Cir. 1987) (citing *Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir. 1983))).

In addition to meeting the threshold burden, Yelp must satisfy one of the six enumerated grounds for relief under Rule 60(b). Yelp primarily relies on Rule 60(b)(4), which allows the Court to vacate the Circuit Court's order if it finds the judgment was void. In support, Yelp argues the Circuit Court entry of default is void because there was no proper service. The Court agrees.

Under Rule 60(b)(4) a judgment is void if "the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *See Schwartz v. United States*, 976 F.2d 213, 217 (4th Cir. 1992) (citing 11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2862 at 198-200 (1973)). Since valid service of process is a prerequisite for a court's assertion of personal jurisdiction, the default judgment would be void if Yelp was not properly served. *See Choice Hotels Inter'l, Inc. v. Bonham*, 125 F.3d 847 (4th Cir. 1997) (citations omitted). Contrary to Plofchan's claims, Yelp was not properly served. Accordingly, the default judgment was void.

The record makes clear that CT Systems refused the service of process since it was not Yelp's registered agent. The record also indicates that Plofchan received a letter from CT

Systems refusing process. Plofchan does not debate that it was not until April 15, 2014 that Yelp received actual notice of the action. Plofchan maintains, however, that service was proper because CT Systems is the registered agent for NRAI. This argument is unavailing. Nowhere can Plofchan find support for the legal proposition that a party is properly served if its registered agent's registered agent is the entity who received process on the party's behalf. Put more simply, NRAI is the registered agent for Yelp, not CT Systems. By serving CT Systems, and not NRAI, service on Yelp was improper. This of course is why CT Systems rejected service.

The Fourth Circuit's decision in *Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.* is highly instructive. In *Colleton* it was found that a district court had abused its discretion by failing to set aside a default judgment when a defendant's registered agent had failed to notify it of the action. *See* 616 F.3d 413, 419 (4th Cir. 2010). The Fourth Circuit found that the defendant-company's registered agent was "clearly at fault," and that "in the face of our time-worn commitment to the resolution of disputes on their merits," the default judgment should have been vacated. *Id.* at 420. The same logic and principles guide this Court and mandate setting aside the Circuit Court's default judgment against Yelp. In fact, this case presents an even stronger argument for setting aside the default judgment than *Colleton*. Unlike *Colleton*, there is no claim that the defendant's registered agent made a mistake. Rather, Yelp's registered agent (NRAI) never received notice of the action in the first place.[3]

The Court is confident that Plofchan's failure to properly serve Yelp alone is grounds for vacating the default judgment. Importantly, any alternative finding would raise serious constitutional concerns. Yelp had no notice of this action prior to this year and it is well-settled

[3] The Court is aware that *Colleton* dealt with a Rule 55(c) motion, which is more forgiving of defaulting parties. *See Colleton*, 616 F.3d at 420. Given that the facts of this case present an even starker argument in favor of setting aside the default judgment, however, the Court finds *Colleton* to be persuasive – even under the more "onerous" standards under Rule 60(b).

that "failure to give notice violates the most rudimentary demands of due process of law." *See e.g. Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988) (internal quotations and citations omitted). The Court refuses to overlook such important due process requirements, particularly in a case such as this where the parties agree the Defendant had no notice of the action, the defaulting party has meritorious defenses, and it appears the Plaintiff may have known that service was improper when default judgment was requested.[4]

III. Defendant's Motion to Dismiss

In addition to moving to set aside the default judgment, Yelp moves to dismiss Plofchan's complaint in its entirety under Fed. R. Civ. P. 12(b)(6). Such a motion tests the legal sufficiency of the complaint. *See Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994). In reviewing a Rule 12(b)(6) motion to dismiss the Court must accept as true all well-pleaded allegations and read the factual allegations in the light most favorable to the plaintiff. *Id.* To survive the motion, the plaintiff's complaint "must contain sufficient factual matter [. . .] to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must not only allege but also "show" the plaintiff is entitled to relief. *Iqbal*, 556 U.S. at 679.

Yelp contends that the action must be dismissed because it violates Virginia's statute of limitations. A federal district court sitting in diversity looks to state law in order to determine the appropriate statute of limitations. *See Wade v. Danek Medical, Inc.*, 182 F.3d 281, 288-89 (4th Cir. 1999) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-112 (1945)). Under Virginia law, defamation claims are barred by a one-year statute of limitations. *See* Va. Code §8.01-

[4] For these same reasons, it is likely that even if it were inappropriate to set aside the default judgment pursuant to Rule 60(b)(4), such relief would still be appropriate under Rule 60(B)(6). *See Gray*, 1 F.3d at 266 (noting that Rule 60(b)(6) is a "catchall provision" which allows the Court to grant relief "upon a showing of exceptional circumstances.") (citations omitted).

247.1; *Jordan v. Shands*, 255 Va. 492, 497-98 (1998). A plaintiff's failure to meet this statute of limitations is grounds for dismissal. *See, e.g., Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F.Supp.2d 909, 918 (E.D. Va. 2004) (dismissing defamation case because it was time-barred by Virginia's statute of limitations). Schumacher's allegedly defamatory post was published in July of 2009. Plofchan filed this action almost three years later. This case is therefore time-barred and must be dismissed.[5]

Even if Plofchan's defamation claim against Yelp was not barred under Virginia's statute of limitations, it would still fail under the Communications Decency Act of 1996 (CDA). Provisions of the CDA "bar state-law plaintiffs from holding interactive computer service providers legally responsible for information created and developed by third parties." *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (citing *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008)). In particular, Section 230(c) of the CDA states 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." Contrary to Plofchan's assertions, it is clear Yelp is not the publisher of the allegedly defamatory post, but merely an "interactive computer service" as defined by the CDA. *See* 47 U.S.C. § 230(e); *Zeran v. America Online, Inc.*, 129 F.3d 327, 300 n.2 (4th Cir. 1997). Consequently, in addition to Virginia's statute of limitations, the CDA provides an alternative basis for dismissing Plofchan's defamation suit against Yelp.

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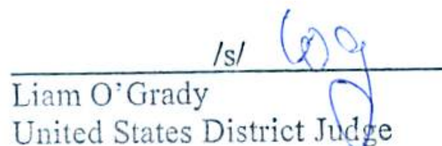
[5] Plofchan's attempt to rely on the "continuing publication rule" is without merit. Plofchan's entire defamation claim is based on Schumacher's single post. Even if that post was republished several times, as Plofchan argues, "repeated defamations do not constitute a continuing tort." *See Katz*, 332 F.Supp.2d at 917 (citing *Lewis v. Gupta*, 54 F.Supp.2d 611, 616 (E.D. Va. 1999) (citing cases)).

CONCLUSION

In keeping with important constitutional due process principles and the Court's equitable powers under the Federal Rules of Civil Procedure, the Circuit Court's entry of default judgment against Yelp is void and must be set aside. As for the merits of this action, Plofchan's suit is barred by Virginia's one-year statute of limitations for defamation claims. Even if the action was timely, section 230 of the CDA provides Yelp with immunity from Plofchan's defamation claim. Therefore, for the reasons stated above, and for good cause shown, it is hereby **ORDERED** that:

1. The Plaintiff's Motion to Reconsider (Dkt. No. 21) is **DENIED**;
2. The Defendant's Motion to Set Aside the Default Judgment (Dkt. No. 5) is **GRANTED**;
3. The Defendant's Motion to Dismiss (Dkt. No. 5) is **GRANTED**; and
4. The Plaintiff's Complaint as to Defendant Yelp shall be **DISMISSED WITH PREJUDICE**.

August 19, 2014
Alexandria, Virginia



/s/
Liam O'Grady
United States District Judge