Tentative Rulings for Department 503

(29)

Tentative Ruling

Re: ***Johnson v. Twitter, Inc.***
Superior Court Case No. 18CECG00078

Hearing Date: June 6, 2018 (Dept. 503)

Motions: Defendant's Special Motion to Strike and Demurrer

Tentative Ruling:

To grant the special motion to strike the complaint on the ground it is a strategic lawsuit against public participation (SLAPP) action. (Code of Civ. Proc. §425.16.) To find the demurrer moot.

Explanation:

First Amended Complaint

As a preliminary matter, the Court notes that Plaintiff filed his complaint on January 8, 2018. Defendant filed its special motion to strike and demurrer on March 8, 2018. Plaintiff then filed a first amended complaint on April 16, 2018. It is improper to file an amended pleading pending a special motion to strike. (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1263; *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc*. (2004) 122 Cal.App.4th 1049, 1055.) As the parties have stipulated to a modified schedule for Defendant's response to the first amended complaint, the Court addresses the instant motions as directed to the original complaint, rather than striking the first amended complaint, *sua sponte*.

Special Motion to Strike Pursuant to Anti-SLAPP Statute

Courts engage in a two-step process in determining whether an action is subject to the anti-SLAPP statute. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, by demonstrating that the facts underlying the plaintiff's complaint fit one of the categories set forth in Code of Civil Procedure section 425.16, subdivision (e). Second, if the court finds that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (Code Civ. Proc. §425.16; *Cross v. Facebook, Inc*. (2017) 14 Cal.App.5th 190, 198.) The anti-SLAPP statute is to be broadly construed. (Code Civ. Proc. §425.16(e); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120.)

The meaning of "arising from" in section 425.16, subdivision (b)(1) has been interpreted to mean that the act underlying the plaintiff's cause of action or the act

which forms the basis of the cause of action "must have been an act in furtherance of the right of petition or free speech." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001; see also *Optional Capital, Inc. v. Das Corporation* (2014) 222 Cal.App.4th 1388, 1398-1399 ["In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech."].) The court thus "examine[s] the specific acts of wrongdoing" alleged in the challenged pleading to determine whether they constitute protected activity. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 671.) Whether the "arising from" requirement is satisfied depends upon the "gravamen or principal thrust" of the claim. (*Martinez v. Metabolife Intern., Inc*. (2003) 113 Cal.App.4th 181, 193.)

Communications Decency Act (CDA)

The express language of the CDA "indicates . . . Congress intended to extend immunity to all civil claims: 'This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material.' (142 Cong. Rec. H1130 (Jan. 31, 1996).)" (*Doe II v. MySpace Inc*. (2009) 175 Cal.App.4th 561, 568; see 47 U.S.C. §230.) An "important purpose" of the CDA was to encourage internet service providers "to self-regulate the dissemination of offensive materials over their services." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 802.) To this end, the objectives specifically set forth in the CDA include "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." (47 U.S.C. §230(b); see *Zeran v. America Online, Inc*. (4th Cir. 1997) 129 F.3d 327, 330 [lawsuits seeking to hold service provider liable for exercise of publisher's traditional editorial functions, such as deciding whether to publish/withdraw/postpone/alter content, "are barred"].)

In evaluating whether a claim is barred by the CDA, a court "must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, [47 U.S.C.] section 230(c)(1) precludes liability. [Citation.]" (*Cross*, *supra*, 14 Cal.App.5th at p. 207; see *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1170–1171 ["[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."]; *Jane Doe No. 1 v. Backpage.com, LLC* (1st Cir. 2016) 817 F.3d 12, 21 ["Those claims challenge features that are part and parcel of the overall design and operation of the website . . . . Features such as these, which reflect choices about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions."]; *Klayman v. Zuckerberg* (D.C. Cir. 2014) 753 F.3d 1354, 1359 ["very essence of publishing is making the decision whether to print or retract a given piece of content"]; *Doe v. MySpace, Inc*. (5th Cir. 2008) 528 F.3d 413,

420 ["decisions relating to the monitoring, screening, and deletion of content [are] actions quintessentially related to a publisher's role"]; *Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44, 50 [47 U.S.C. §230 precludes courts from entertaining claims that would place computer service provider in publisher's role; accordingly, lawsuits seeking to hold service provider liable for decision whether to publish, withdraw, postpone or alter content are barred]; *Fields v. Twitter, Inc*. (N.D. Cal. 2016) 200 F.Supp.3d 964, 969 [courts must ask whether duty that plaintiff alleges defendant violated derives from defendant's status or conduct as publisher or speaker; if yes, then 47 U.S.C. §230 (c)(1) precludes liability].)

First Amendment

It is well established that the constitutional right of free speech includes the right *not* to speak. (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 574 ["Nor is [the First Amendment's] benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."]; *Kronemyer v. Internet Movie Data Base, Inc*. (2007) 150 Cal.App.4th 941, 947 [website defendant's SLAPP granted, as defendant's choice *not* to list plaintiff's name on site was exercise of free speech]; see *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc*. (9th Cir. 2014) 742 F.3d 414, 424–425 [defendant's choice *not* to provide closed captioning was protected by First Amendment, and thus subject to special motion to strike]; *La'Tiejira v. Facebook, Inc*. (S.D. Tex. 2017) 272 F.Supp.3d 981, 991 [Facebook has a First Amendment right to decide what to publish and what *not* to publish on its platform])

In the instant case, the parties appear to agree that (1) Twitter is a public forum for purposes of the anti-SLAPP statute (see *ComputerXpress, Inc*., *supra*, 93 Cal.App.4th at p. 1007); and (2) Defendant's control of its platform, by allowing or preventing users' tweets, is an issue of public interest (see *Cross*, *supra*, 14 Cal.App.5th at p. 199). Defendant brings its anti-SLAPP motion on the ground that the action as a whole attempts to premise liability on Defendant's performance of traditional editorial functions, i.e., Defendant's self-regulating act of terminating Plaintiff's Twitter account after Plaintiff posted a tweet that could reasonably be interpreted as threatening. Defendant argues that the complaint bases its claims on Defendant's exercise of its First Amendment right to free speech. Defendant maintains that the complaint is barred by the CDA because Defendant is an interactive computer service and Plaintiff seeks to hold Defendant liable for its decision to exclude material that Plaintiff, a third party, seeks to post online. Defendant sufficiently meets its burden of showing that Plaintiff's complaint arises from protected activity. Accordingly, the burden shifts to Plaintiff to establish a likelihood of prevailing on the merits of his claims.

Plaintiff asserts that social media, including Defendant, are the modern version of the old public square; accordingly, parties should be able to freely express their views, without social media companies monopolizing what types of speech may be expressed on their platforms. Plaintiff argues that the immunity provided in the CDA permits interactive computer services, like Defendant, to exclude a narrow set of speech: "illicit

speech such as obscenity, offensive speech, harassment, and similar speech of the same kind." (Compl., 1:14-15.) Plaintiff asserts that Defendant suspended Plaintiff's accounts because Defendant disagrees with Plaintiff's political viewpoint, effectively abrogating Defendant's stated purpose of, in part, providing a public, free speech forum. In sum, Plaintiff argues that Defendant disapproves of Plaintiff's conservative political ideology, and thus discriminated against Plaintiff's free speech on Defendant's platform.

Plaintiff further argues that Defendant is not entitled to the protection of the CDA because Defendant seeks to be treated both as a neutral content provider pursuant to the CDA, but at the same time asks for First Amendment protection for its editorial decision to terminate Plaintiff's accounts. But this is not the standard for immunity under the CDA. (See 47 U.S.C. §230.) Plaintiff cites to 47 U.S.C. §230(c)(2), which requires a showing of good faith in order to be protected from civil liability by the CDA. Defendant, however, relies on subdivision (c)(1), which 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." The heading of subdivision (c) is "Protection for 'Good Samaritan' *blocking and screening* of offensive material." (Italics added.) Plaintiff fails to establish that Defendant is not entitled to protection under the CDA, i.e., Plaintiff fails to show that his claims are not barred by the CDA.

Plaintiff also fails to show that his claims can survive Defendant's challenge based on Defendant's First Amendment right. Defendant is a private sector company. Although it does invite the public to use its service, Defendant also limits this invitation by requiring users to agree to and abide by its User Rules, in an exercise of Defendant's First Amendment right. The rules clearly state that users may not post threatening tweets, and also that Defendant may unilaterally, for any reason, terminate a user's account. The rules reflect Defendant's exercise of free speech. (See *Hurley*, *supra*, 515 U.S. at p. 574.) Plaintiff fails to show that his claims are not barred by Defendant's First Amendment right to exercise independent editorial control over the content of its platform. Defendant's choice to close Plaintiff's account on the ground that Plaintiff's tweet was threatening and harassing is an editorial decision regarding how to present content, i.e., an act in furtherance of Defendant's free speech right. Defendant's choice not to allow certain speech is a right protected by the First Amendment.

Plaintiff's reliance on *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 is misplaced and fails to defeat Defendant's CDA and First Amendment protections. In *Robins*, the California Supreme Court held that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution. The Court specifically noted that "[b]y no means do we imply that those who wish to disseminate ideas have free rein." The Court reasoned: "A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations . . . would not markedly dilute defendant's property rights." (*Id*. at pp. 910-911.) The case is distinguishable from the instant action, where Plaintiff's tweet could reasonably be, and in fact was, interpreted as threatening and harassing, unlike activity that "would not markedly dilute

defendant's property rights." (See Sprankling Decl. at Ex. D.) Moreover, Defendant's rules were adopted to ensure that Defendant is able to maintain control over its site and to protect the experience and safety of its users. (See Sprankling Decl. at Ex. A.)

Defendant states that it chose to close Plaintiff's accounts after Plaintiff posted a tweet inviting Plaintiff's followers to go to one of Plaintiff's websites to donate to "taking out" DeRay McKesson, a high profile civil rights activist. Defendant points out that a common meaning of "taking out" is murder, and such harassing and threatening tweets are barred by Defendant's rules. Defendant sufficiently shows that it is protected from liability by both the CDA and the First Amendment. Plaintiff's opposition fails to establish a likelihood of prevailing on the merits, as Plaintiff is unable to show that Defendant is not entitled to the protections it invokes. Accordingly, Defendant's special motion to strike is granted.

Demurrer

In light of the ruling on Defendant's special motion to strike, the demurrer is moot.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 06/05/18
(Judge's initials) (Date)