

JANE DOE, Individually and as Next Friend of JULIE DOE, a minor,

v.

MYSPACE, INC., and NEWS CORPORATION

474 F. Supp. 2d 843 (W.D. Tex. 2007)

SUBSEQUENT HISTORY: Affirmed by *Doe v. MySpace Inc., 2008 U.S. App. LEXIS 10612 (5th Cir. Tex., May 16, 2008)*

JUDGES: SAM SPARKS, UNITED STATES DISTRICT JUDGE.

BE IT REMEMBERED on the 1st day of February 2007, the Court held a hearing in the above-styled cause, to consider Defendants MySpace, Inc. and News Corporation's ("MySpace") Motion to Dismiss [# 6, [**2] 7, 15, 16, 36], Plaintiffs' responses thereto [# 13, 14, 38], and Defendants' reply thereto [# 20]. Having considered the motion, the responses, the replies, the arguments of counsel at the hearing, the relevant case law, and the case file as a whole, the Court now enters the following opinion and orders.

Background

MySpace.com is the most visited web site in the United States, and it is owned by Defendant MySpace, Inc. ² MySpace.com is a "social networking web site" that allows its members to create online "profiles," which are individual web pages on which members post photographs, videos, and information about their lives and interests. The idea of online social networking [**846] is that members will [**3] use their online profiles to become part of an online community of people with common interests. Once a member has created a profile, she can extend "friend invitations" to other members and communicate with her friends over the MySpace.com platform via e-mail, instant messaging, or blogs.

2 Defendant MySpace, Inc. is wholly owned by Fox Interactive Media, Inc., a subsidiary of Defendant News Corporation.

MySpace.com is free to users who agree to the MySpace Terms of Use Agreement. Every new member of MySpace.com, including Julie Doe, agrees to be bound by the MySpace.com Terms of Service, by clicking a check box on the website. MySpace's Terms of Service provide that MySpace cannot verify the age or identity of MySpace.com members and cautions members not to provide "telephone numbers, street addresses, last names, URLs or email addresses" to other members.

According to Plaintiffs' Verified Complaint, Julie Doe created a MySpace profile when she was 13 years old. At the hearing, Plaintiffs' counsel admitted [**4] that Julie'Doe lied about her age and represented that she was 18 years old when she joined MySpace.com ³ Plaintiffs allege Pete. Solis, a nineteen-year-old, initiated contact with Julie Doe, then fourteen years old, through MySpace.com on April 6, 2006. Subsequently, Julie Doe provided Pete Solis with her telephone

number and the two communicated over the phone for several weeks. At some point, Julie Doe and Pete Solis arranged to meet for a date on May 12, 2006. Plaintiffs allege that during that meeting Pete Solis sexually assaulted Julie Doe. On May 13, 2006, Jane Doe, Julie's mother, called the Austin Police Department to report the sexual assault of her daughter. Pete Solis was subsequently arrested and indicted by the Travis County District Attorney's Office for Sexual Assault, a second degree felony.

3 MySpace.com requires that a user be at least fourteen years old to use their services.

This case was filed in Bronx County, New York, on September 26, 2006, and subsequently removed to the United States [**5] District Court for the Southern District of New York on September 29, 2006. The Honorable Miriam Goldman Cedarbaum of the United States District Court for the Southern District of New York transferred the case to this Court, pursuant to 28 U.S.C. § 1404(a), on December 1, 2006. Plaintiffs' Verified Complaint, the live pleading in this case filed in Bronx County, New York, asserts the following causes of action against Defendants: negligence, gross negligence, fraud, and negligent misrepresentation.

I. Defendants' Motion to Dismiss

MySpace moves to dismiss this case with prejudice pursuant to *Federal Rule of Civil Procedure 12(b)(6)* and *9(b)*. Defendants assert they are immune from this suit under the Communications Decency Act of 1996. Defendants also assert Plaintiffs' negligence claims fail under the common law and Plaintiffs' fraud and negligent misrepresentation claims do not satisfy the heightened pleading standard of *Federal Rule of Civil Procedure 9(b)*.

A. Communications Decency Act of 1996

The Communications Decency [**6] Act of 1996, 47 U.S.C. § 230 (the "CDA" or the "Act"), states 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). Neither party contests that MySpace is an "interactive computer service" as defined by the CDA, and it is clear that MySpace meets the statutory definition of such a service. See 47 U.S.C. § 230(f)(2). The term "information content [**847] provider" means "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." 47 U.S.C. § 230(f)(3). It is also clear that both Julie Doe and Pete Solis qualify as "information content providers" with respect to their communications through MySpace. . . .

Despite Plaintiffs' arguments to the contrary, the Court finds *Zeran* and its rationale to be applicable to the case at hand. Here, Plaintiffs seek to impose tort liability on MySpace, a company that functions as an intermediary by providing a forum for the exchange of information between third party users. Plaintiffs' allegations that MySpace knew sexual predators were using the service to communicate with minors and failed to react appropriately can be analogized to *Zeran's* claims that AOL failed to act quickly enough to remove the ads and to prevent the posting of additional ads after AOL was on notice that the content was false.

Plaintiffs contend the CDA is inapplicable to their claims, so Defendants should not be granted immunity under the CDA. Plaintiffs assert *Section 230(c)(1)* is inapplicable here because Plaintiffs have not sued MySpace for the publication of third-party content but rather for failing to implement basic safety measures to prevent sexual predators from communicating with minors on MySpace. Plaintiffs attempt to distinguish *Carafano, Zeran, and Prickett v. Info USA, Inc., No. 4:05-CV-10, 2006 U.S. Dist. LEXIS 21867, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006)*, from the case at hand, by pointing out that each of these cases was based on the listing of third-party content without taking into account its defamatory or inaccurate nature. Plaintiffs assert their case is not based on MySpace's posting of third-party content, but rather on MySpace's failure to institute safety measures to protect minors.

Plaintiffs seek to limit CDA immunity to cases involving defamation or related actions and assert that their claims against MySpace have nothing to do with the content of the information provided. Plaintiffs contend that neither the plain language of the CDA nor the cases interpreting it contemplate the extension of the CDA's immunity provision to MySpace in this case.

Nothing on the face of the statute supports Plaintiffs' narrow interpretation that the CDA's immunity applies only to cases involving defamation and defamation-related claims. *47 U.S.C. § 230*. The Eastern District of Texas recently addressed the application of CDA immunity in a case involving claims of negligence, negligence per se, intentional infliction of emotional distress, invasion of privacy, civil conspiracy, and distribution of child pornography. *Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006)*. This case dealt with a lawsuit against Yahoo! Inc., which arose from an e-group hosted by Yahoo! on which illegal child pornography pictures were posted by a third party. Among the photos were sexually explicit photos of Johnny Doe, a minor. The district court determined that *Section 230(c)(1)* applied to immunize Yahoo! because Plaintiffs' claims sought to treat Defendant as the "publisher or speaker" of the third-party content (the photos). *2006 U.S. Dist. LEXIS 93348, [WL] at * 2-4*. It is important to note that in *Bates*, as here, the Plaintiffs did not allege that there was anything defamatory or inaccurate about the posted content, but the court still applied the CDA to immunize Yahoo! from suit.

Defendants have presented numerous cases in which the CDA has been applied to bar non-defamation claims. *See, e.g., Ben Ezra, Weinstein & Co. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000)* (negligence claim); *Zeran, 129 F.3d at 330* (negligence claims); *Bates, 2006 U.S. Dist. LEXIS 93348, 2006 WL 3813758 at *5* (negligence, negligence per se, intentional infliction of emotional distress, invasion of privacy, civil conspiracy and distribution of child pornography); *Beyond Sys., Inc. v. Keynetics, Inc., 422 F. Supp. 2d 523, 536 (D. Md. 2006) [**15]* (claim under Maryland Commercial Electronic Mail Act); *Barnes v. Yahoo!, Inc., No. Civ. 05-926-AA, 2005 U.S. Dist. LEXIS 28061, 2005 WL 3005602, at *4 (D. Or. Nov. 8, 2005)* (negligence claim resulting in personal injury). All of these cases involved attempts to hold an interactive computer service liable for its publication of third-party content or harms flowing from the dissemination of that content.

Plaintiffs argue the CDA does not bar their claims against MySpace because their claims are not directed toward MySpace in its capacity as a publisher. Plaintiffs argue this suit is based on MySpace's negligent failure to take reasonable safety measures to keep young children off of its site and not based, on MySpace's editorial acts. The Court, however, finds this artful pleading to be disingenuous. It is quite obvious the underlying basis of Plaintiffs' claims is that, through postings on MySpace, Pete Solis and Julie Doe met and exchanged personal information which eventually led to an in-person meeting and the sexual assault of Julie Doe. If MySpace had not published communications between Julie Doe and Solis, including personal contact information, Plaintiffs assert they never would have met and the sexual assault never would have occurred. No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities. Therefore, in accordance with the cases cited above, Defendants are entitled to immunity under the CDA, and the Court dismisses Plaintiffs' negligence and gross negligence claims with prejudice under *rule 12(c) of the Federal Rules of Civil Procedure*.

i. Self-Regulation

In addition to the protection afforded to interactive computer services in their publishing capacity, the CDA also immunizes such services from liability [**17] based on efforts to self-regulate material. Specifically, "[n]o provider or user of an interactive computer service shall be held liable on account of--(A) any action voluntarily taken in good fath 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" *47 U.S.C. § 230(c)(2)(A)*. This section reflects Congress's recognition that the potential for liability attendant to implementing safety features and policies created a disincentive for interactive computer services to implement any safety features or policies at all. To the extent Plaintiffs seek to hold MySpace liable for ineffective security measures and/or policies relating to age verification,⁶ the Court alternately finds such claims are barred under *§ 230(c)(2)(A)*. . . .

⁶ The Court finds Plaintiffs' claims particularly unwarranted here given that Julie Doe lied about her actual age to bypass the age requirement and then violated MySpace's express rules by giving out her personal information.