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WILLIAM T WALSH, CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CLOSED

John Green,

Plaintiff,

v.

America Online, Inc. and John Does 1 and 2,

Defendants.

Civ. No. 00-3367 (JAG)
ORDER

GREENAWAY, JR., District Judge

This matter having come before the Court on the motion of Defendant America Online, Inc. ("AOL") to dismiss all counts of Plaintiff's Complaint against AOL for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6); and good cause appearing,

IT IS on this 20th day of December, 2000,

ORDERED that AOL's motion to dismiss counts II, IV, VIII, X, XI, XII, XIII, and XIV is GRANTED;

IT IS FURTHER ORDERED that counts I, III, V, VI, VII, and IX are REMANDED to the Superior Court of New Jersey, Middlesex County;

IT IS FURTHER ORDERED that Defendant's motion for a change of venue is DENIED as moot; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
(973) 622-4828

CHAMBERS OF
JOSEPH A. GREENAWAY, JR.
JUDGE

Martin Luther King Jr. Courthouse
P.O. Box 999
Newark, New Jersey 07101-0999

LETTER OPINION ADDRESSING MOTION TO DISMISS

December 20, 2000

John Green
69 Duclos Lane
Edison, NJ 08817

Michael J. Canavan, Esq.
Jamieson, Moore, Peskin & Spicer
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Re: Green v. America Online, Inc. and John Does 1 and 2, Civ. No. 00-3367

Dear Litigants and Counsel:

This matter comes before the Court on Defendant America Online's ("AOL") motion to dismiss pro se Plaintiff John Green's ("Green") complaint, pursuant to Fed. R. Civ. P. 12(b)(6).

BACKGROUND

Plaintiff originally filed a complaint in the Superior Court of New Jersey, Middlesex County, to which Defendant AOL responded with a motion to dismiss. Before the motion could be decided, Green amended his complaint, adding a claim that AOL violated his First Amendment rights. AOL then removed this case to federal court based on that constitutional claim, and subsequently filed a motion to dismiss. Green then filed a motion to remand his case back to state court. This Court denied Green's motion on October 23, 2000.

Green subscribed to AOL, using the screen name "Lawyerkill." A subscriber to AOL must agree to the terms of its Member Agreement, which includes a Terms of Service agreement and AOL's "Community Guidelines."[1] The Member Agreement outlines the conduct to which its members must conform, as well as the protections that AOL offers to them. Green makes the following allegations. At a time when he was visiting the "Romance-New Jersey Over 30" chat room, John Doe 1, a.k.a. "LegendaryPOLCIA," sent a computer program (called a "punter") to Green which locked up his computer, which caused Green to lose five hours of work valued at $400. John Doe 1 sent punters to Green's computer on five subsequent occasions. That same evening, John Doe 2, a.k.a. "Lawyerkiii" also visited that same chat room. Apparently, when capitalized, the letter 'I' appears as "l," thus, "Lawyerkiii" appeared as "Lawyerkill." John Doe 2, knowing the similarities between the two names, impersonated Green and sent messages to the other men in the chat room, asking them for gay sex. Additionally, John Doe 2 sent messages to the women in the chat room and told them that Green was bi-sexual. Allegedly, this ruined Green's chances of meeting women. Green believes that John Does 1 and 2 are the same party. Green alleges that he provided AOL with evidence of John Doe 1's activity, but AOL took no action to stop it. Although Green also alleges that "this problem continues," he does not explain how it is continuing or what damage he is now suffering.

While AOL did not specify under which rule it brought its motion to dismiss, a review of

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[1]Since Plaintiff specifically cites to and relies on this Agreement in his Amended Complaint (see, e.g., Am. Comp. ¶¶ 20, 40, 52, 76), the document is not a "matter[] outside the pleading" under Fed. R. Civ. P. 12 and may therefore be considered by this Court on a motion to dismiss. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) (holding that a document integral to or explicitly relied upon in the complaint may be considered on a motion to dismiss).

AOL's briefs makes it apparent that the motion has been brought under Fed. R. Civ. P. 12(b)(6).

LEGAL STANDARD

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) may be granted only, if accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). The Court may not dismiss the complaint unless plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Graves v. Lowery, 117 F.3d 723, 726 (3d Cir. 1997). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In setting forth a valid claim, a party is required only to plead "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Thus, the "complaint must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." District of Columbia v. Air Florida, 750 F.2d 1077, 1078 (D.C. Cir. 1984).

DISCUSSION

Although Green's Amended Complaint is not especially clear, it appears that his claims against AOL fall into four general categories: (1) tort; (2) breach of contract; (3) violation of the First Amendment; and (4) consumer fraud.

I. Tort Claims (Counts II, IV, VIII, and XII)

Green's tort claims basically allege that AOL negligently failed to live up to its contractual obligations to Green, by refusing to take the necessary action against John Does 1 and 2 that would prevent them from further harming and defaming him. These counts should be

dismissed because AOL is immune from liability, pursuant to 47 U.S.C. § 230.[2]

The two circuit cases that address § 230 immunity both held that the defendant, who coincidentally was AOL, was immune from liability as a result of the actions of a third party using AOL's service.[3] See Ben Ezra, Weinstein & Co. v. America Online, Inc., 206 F.3d 980 (10th Cir. 2000) (holding that AOL was immune from liability for posting incorrect information regarding plaintiff's stock, pursuant to § 230, since AOL received its information from third parties); Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997) (holding that AOL was immune from liability for not removing postings attributing offensive materials to plaintiff, pursuant to § 230, since a third party, not AOL, posted this information).

"Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions." Ben Ezra, Weinstein & Co., 206 F.3d at 984-85. Furthermore,

> [b]y its plain language, § 230 creates a federal immunity to any cause of action

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[2]This section provides, in pertinent part 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). Interactive computer service means:

> any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. § 230(f)(2).

[3]There are only seven other reported federal cases and four state cases that have addressed § 230 immunity in this context. These cases all had holdings similar to Ben Ezra, Weinstein & Co. and Zeran. Additionally, there was a criminal case that touched on § 230 immunity, but it did not focus on the issues presented in this case.

> that would make service providers liable for information originating with a third-party user of the service. . . . Thus, 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.

Zeran, 129 F.3d at 330.

Green argues that AOL is equitably estopped from relying on § 230 because AOL waived its immunity in its contract with Green. Green is incorrect. Paragraph 3 of the Member Agreement provides that: "AOL does not assume any responsibility or liability for content that is provided by others. AOL does reserve the right to remove content that, in AOL's judgment, does not meet its standards or does not comply with AOL's current Community Guidelines, but AOL is not responsible for any failure or delay in removing such material." Thus, the Member Agreement clearly states that rather than waiving its immunity, AOL virtually tracked the provisions of § 230 by indicating that it did not accept responsibility for the actions of third parties.

As for Green's equitable estoppel argument, this too must fail. The doctrine of equitable estoppel requires that a plaintiff prove that he was harmed due to the detrimental reliance upon a false representation of material fact. Mein v. Federal Deposit Insurance Corp., 88 F.3d 210, 221 (3d Cir. 1996). It is clear from a plain reading of the Member Agreement, that AOL did not make a false representation; in actuality, it complied with its agreement. Thus, the Member Agreement is in conformity with § 230.

Green next argues that John Doe 1's communication falls outside the reach of § 230 because the "punter" was a harmful "signal," which he claims is not information. Webster's New International Dictionary 1160 (3d ed. 1976), however, includes "a signal" as one of its

definitions for information. By its very nature, the use of the Internet entails using or sending a great many signals. A narrow interpretation of the term "information," would thus make interactive service providers, such as AOL, liable only for items that are written, and not the potentially more dangerous transmissions such as computer viruses. Such a construction would run afoul of the protection Congress intended to give interactive service providers by enacting § 230.

Green's next argument, that § 230 is unconstitutional, is rather vague. Green asks the Court not to "interpret 47 U.S.C. § 230 to mean that AOL or any [Internet service provider] can unreasonably restrict Green's free speech on the Internet, or what he can view on the Internet." (Pl's Br. at 17.) "Congress considered the weight of the speech interests implicated [in screening the millions of postings on the Internet] and chose to immunize service providers to avoid any such restrictive effect" on free speech. Zeran, 129 F.3d at 331. Thus, rather than hindering free speech activities, § 230 was enacted to promote free speech.

Accordingly, the tort claims of Counts II, IV, VIII, and XI of Green's Amended Complaint are DISMISSED.

II. **Breach of Contract Claims (Counts II, IV, VIII, and X)**

Green has not identified the specific provisions of the Member Agreement that AOL allegedly breached. It appears, however, that Green's claim is premised on AOL's failure to stop John Does 1 and 2 from violating AOL's "community guidelines." Counts 2, 4, 8, and 10 should be dismissed because AOL has not breached its contract.

Membership as an AOL member is contingent upon accepting the terms of its Member Agreement. (Member Agreement at 1.) The Member Agreement provides, among other things,

that:

> AOL does not assume any responsibility or liability for content that is provided by others. AOL does reserve the right to remove content that, in AOL's judgment, does not meet its standards or does not comply with AOL's current Community Guidelines, but AOL is not responsible for any failure or delay in removing such material.

(Member Agreement ¶ 3.) The Member Agreement also stated that AOL would not be liable for damages arising from use of AOL or the Internet, and that the Community Guidelines and the enforcement of those policies, were not intended to confer any rights or remedies to the user. (Member Agreement ¶¶ 5, 8.) It is thus clear that AOL did not promise to protect Green from the acts of other subscribers.

Green next argues that the Court should ignore the entire Member Agreement and rely solely on the Community Guidelines, because the Member Agreement is "so oppressive, unreasonable, unconscionable and . . . one sided." (Pl.'s Br. at 3.) The basis for his argument appears to be that the Member Agreement does not guaranty that its members will always have or will always be able to access the service. (Id.) Again, a plain reading of the Member Agreement indicates that AOL is simply disclosing to its users the possibility that unavoidable events, such as computer crashes, problems with telephone connections, and other technical difficulties, may occur.

AOL has used the Community Guidelines to tell its subscribers what they can expect from AOL, as well as the kind of online behavior they expect in return. (Community Guidelines at 1, 2.) AOL also warns its subscribers that it cannot "possibly monitor all of [the contents on its service], and [does] not attempt to do so. Therefore, [a subscriber] might occasionally encounter something [he does not] want to see." (Id.) Additionally, AOL warns that "[u]se of

the Internet is at [a subscriber's] own risk, and AOL cannot be responsible for the content and conduct [he] may encounter." (Id. at 3.) Rather than being unconscionable, it is clear that AOL has attempted to inform its subscribers of potentially offensive situations that may occur.

The plain language of the Member Agreement forecloses any claims by Plaintiff that AOL breached its obligations. Hence, no analysis of the elements of a breach of contract claim is necessary and Counts II, IV, VIII, and X of Green's Amended Complaint are DISMISSED accordingly.

III. First Amendment Claim (Count XII)

Green alleges that the Community Guidelines impinge on his First Amendment right to freedom of speech, and seeks injunctive relief. "As a general principle, the federal constitutional guarantees of personal rights are enforceable as against federal or state governments only, and not as against private individuals." Hoagburg v. Harrah's Marina Hotel Casino, 585 F. Supp. 1167, 1171. (D.N.J. 1984); see Lugar v. Edmonson Oil Co., 457 U.S. 922, 936 ("most rights secured by the Constitution are protected only against infringement by governments"). Green attempts to sidestep this issue by arguing that the Internet is like a traditional public forum, which would thus require AOL to allow all free speech activities. This argument fails because AOL's service is not devoted to public use. Rather, to use AOL's network, parties must subscribe and pay for that privilege.

Thus, Green's First Amendment claim of Count XII must be dismissed because AOL is not a public party.

IV. Consumer Fraud Claims (Counts XIII and XIV)

Green's final allegation is that AOL has committed consumer fraud because after

promising its users unlimited Internet access and e-mail, AOL then sued certain outside companies to block them from sending objectionable or unlawful e-mails. The New Jersey Consumer Fraud Act ("NJCFA") 56:8-2 states that deception, fraud, or any unconscionable commercial practice are among the practices declared to be unlawful. "The NJCFA allows private plaintiffs to bring suit if they are harmed by an unconscionable commercial practice." Suber v. Chrysler Corp., 104 F.3d 578, 586 (3d Cir. 1997). "The standard of conduct that the term 'unconscionable' implies is a lack of good faith, honesty in fact and observance of fair dealing." Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 533 (App. Div. 1996).

AOL has not acted unconscionably, nor was its Member Agreement dishonest or entered into in bad faith. The Member Agreement specifically provides that AOL has the right to "take any and all legal and technical remedies to prevent unsolicited bulk e-mail from entering, utilizing, or remaining within the AOL Network." (Member Agreement ¶ 3.) AOL exercised this right on several occasions in order to protect its members from materials that it considered to be objectionable to its subscribers—hardly unconscionable actions. In addition, § 230(c)(2) provides AOL with immunity for this alleged activity since an interactive computer service shall not be held liable on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . objectionable."

Counts XIII and XIV of Green's Amended Complaint must be dismissed because he has failed to state a claim upon which relief may be granted under the NJCFA, and § 230 provides AOL immunity for its alleged actions.

IV. Remaining Claims Against John Doe 1 and John Doe 2

If it appears that the federal claim is subject to dismissal under Fed. R. Civ. P. 12(b)(6) or

could be disposed of on a motion for summary judgment under Rule 56, then the court should ordinarily refrain from exercising pendent jurisdiction in the absence of extraordinary circumstances. Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 196 (3d Cir. 1976).

Since all of the counts against AOL have been dismissed by the Court, Counts I and III of Green's Amended Complaint remain against John Doe I, and Counts V, VI, VII, and IX remain against John Doe 2. None of these remaining claims assert First Amendment violations, nor can they, since it is conceded that John Does 1 and 2 are private individuals and therefore not state actors. While the ultimate merit of these claims is questionable, this Court refrains from exercising pendent jurisdiction over these remaining state claims. Accordingly, adjudication of these claims is remanded to state court.

Conclusion

Defendant's Motion to Dismiss Counts II, IV, VIII, X, XI, XII, XIII, and XIV is GRANTED, pursuant to Fed. R. Civ. P. 12(b)(6). Counts I, III, V, VI, VII, and IX are remanded to the Superior Court of New Jersey, Middlesex County. Defendant's motion for a change of venue is DENIED as moot.

Very truly yours,

JOSEPH A. GREENAWAY, JR., U.S.D.J.