United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 16, 2021
Lyle W. Cayce
Clerk

No. 19-11389

JESUS RETANA; ANDREW MOSS,

Plaintiffs—Appellants,

versus

TWITTER, INCORPORATED; GOOGLE, L.L.C.; FACEBOOK, INCORPORATED,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-359

Before WIENER, COSTA, and WILLETT, *Circuit Judges*.

WIENER, *Circuit Judge*:

The issue in this case is whether Internet services and social media providers may be held secondarily liable under the Anti-Terrorism Act ("ATA") for aiding and abetting a foreign terrorist organization—here, Hamas—based only on acts committed by a sole individual entirely within the United States. We conclude that they cannot, and therefore affirm the judgment of the district court.

* * *

Plaintiff-Appellant Jesus Retana was a police officer when, in July 2016, he and thirteen other police officers were shot and either injured or killed during a tragic mass-shooting committed by Micah Johnson in Dallas, Texas. Retana survived his wounds but had to have surgery to remove a bullet from his left arm.

Retana and his husband, Andrew Moss ("Plaintiffs"), sued Defendants-Appellees Twitter, Google, and Facebook ("Defendants"), all Internet services and social media providers, in federal court. Plaintiffs allege that Defendants are liable because they provided material support to Hamas, a foreign terrorist organization that used Internet services and social media platforms to radicalize Johnson to carry out the Dallas shooting. Plaintiffs claimed, *inter alia*, that Defendants were liable for Retana's injuries under (1) 18 U.S.C. § 2333(a), which provides a cause of action for victims of acts of international terrorism, and (2) 18 U.S.C. § 2333(d), which extends liability to "any person who aids and abets, by knowingly providing substantial assistance" to a person who commits an act of international terrorism. The district court dismissed all claims with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). Plaintiffs have appealed only the dismissal of their ATA secondary liability claim.[1]

At the Rule 12(b)(6) stage, we review the district court's order *de novo*, construing the facts in Plaintiffs' second amended complaint as true and in the light most favorable to them.[2]

---

[1] *See* 18 U.S.C. § 2333(d)(2).

[2] *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 582 (5th Cir. 2020) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *Budhathoki v. Nielson*, 898 F.3d 504, 507 (5th Cir. 2018); *Rosenblatt v. United Way of Greater Hous.*, 607 F.3d 413, 417 (5th Cir. 2010).

I.

Hamas is a Specially Designated Global Terrorist organization.[3] An offshoot of the Muslim Brotherhood, Hamas is responsible for thousands of terrorist attacks in Israel, the West Bank, and Gaza, murdering Israeli citizens and citizens of other countries, including the United States. Hamas maintains accounts on Twitter, YouTube,[4] and Facebook to contact potential recruits and encourage them to commit terrorist attacks. Plaintiffs alleged that YouTube shares revenue with Hamas from advertising Hamas videos.

In the summer of 2014, Johnson met with a "witness" referred to in the second amended complaint as "Ms. X." Johnson told Ms. X that he sympathized with the Palestinian efforts—allegedly controlled by Hamas—to destroy Israel. Plaintiffs alleged that Hamas has met with "black separatist hate groups" which call for the murder of American police officers.[5] Plaintiffs alleged that Johnson was radicalized by reviewing Hamas posts and those of these hate groups, including the African American Defense League, because he "liked" some of their Facebook pages.

---

[3] Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997); Designations of Terrorist and Terrorist Organizations Pursuant to Executive Order 13224 of September 23, 2001, 67 Fed. Reg. 12,633 (March 19, 2002). To qualify as a Specially Designated Global Terrorist organization, three requirements must be met: "(A) the organization is a foreign organization, (B) the organization engages in terrorist activity . . ., or retains the capability and intent to engage in terrorist activity or terrorism, and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189.

[4] The second amended complaint refers to YouTube and Google interchangeably.

[5] The second amended complaint uses racially insensitive terms such as "black separatist hate groups." It also states that Hamas is synonymous with the Palestinian movement against Israel. Regardless whether we approve or disapprove of the use of these stereotypes, we must construe the facts as true at the Rule 12(b)(6) stage. *See Rosenblatt*, 607 F.3d at 417.

Five days prior to the Dallas shooting, Johnson posted a "rant" against white people on Facebook. Four days after Johnson's post and one day before the Dallas shooting, the African American Defense League said that it was "time to act." These allegations form the basis of Plaintiffs' secondary liability claim under the ATA.

II.

The ATA authorizes civil actions for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism."[6] The ATA initially provided a civil cause of action against only the perpetrator of the terrorist act.[7] There was no cause of action against a person or organization that assisted the person or persons who committed the act of international terrorism, *i.e.*, no "secondary liability."[8] But, Congress enacted the Justice Against Sponsors of Terrorism Act ("JASTA")[9] in September 2016, expanding ATA civil liability to include secondary liability.[10]

Since JASTA was enacted, a plaintiff injured by (1) an "act of international terrorism" that is (2) "committed, planned, or authorized" by a designated foreign terrorist organization (3) may assert "liability . . . as to any person who aids and abets, by knowingly providing substantial assistance,

---

[6] 18 U.S.C. § 2333(a); *see also Linde v. Arab Bank, PLC*, 882 F.3d 314, 325 (2d Cir. 2018) ("The ATA affords a civil remedy to persons injured 'by reason of an act of international terrorism.'" (quoting 18 U.S.C. § 2333(a))).

[7] *Linde*, 882 F.3d at 319 (citing *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (noting that ATA's "statutory silence on the subject of secondary liability means there is none"); *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 123-24 (2d Cir. 2013)).

[8] *Linde*, 822 F.3d at 319–20.

[9] Pub. L. No. 144-222, 130 Stat. 854 (Sept. 28, 2016) (codified at 8 U.S.C. § 1189).

[10] *See* 18 U.S.C. § 2333(d)(2); *Linde*, 882 F.3d at 319–20.

or who conspires with the person who committed such an act of international terrorism."[11]

Plaintiffs argue that the Dallas shooting was an act of international terrorism committed, planned, or authorized by a foreign terrorist organization because Hamas allegedly used Defendants' social media platforms from outside the United States to radicalize and recruit Johnson to commit the Dallas shooting. Defendants argue that they cannot be held liable for Retana's injuries for two reasons: First, Johnson's mass shooting was not an "act of international terrorism," as required to maintain a cause of action under 18 U.S.C. § 2333(a), (d); second, Plaintiffs have failed to allege sufficiently that Defendants knowingly provided substantial assistance to Hamas, as required to hold Defendants secondarily liable under 18 U.S.C. § 2333(d)(2). Essentially, Defendants counter that Hamas was not involved in the Dallas shooting; rather, that Johnson acted by himself.

A.

An act of international terrorism is one that "occur[s] primarily outside the territorial jurisdiction of the United States, or transcend[s] national boundaries."[12] We cannot conclude that the Dallas shooting transcended national boundaries. We sympathize with Plaintiffs, but this shooting was committed by a lone shooter entirely within the United States.

---

[11] 18 U.S.C. § 2333(d)(2); *see Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 (6th Cir. 2019) ("Section 2333(d)(2) imposes liability for aiding and abetting an act of international terrorism."); *see also* 8 U.S.C. § 1189 (establishing the requirements and process for designating a foreign terrorist organization). Hamas is a foreign terrorist organization. *See Linde*, 882 F.3d at 319 ("For more than two decades, the United States has formally identified Hamas as a foreign terrorist organization.") (citing 18 U.S.C. § 2339B(g)(6); 8 U.S.C. § 1189(a)(1), (d)(4); Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997)).

[12] 18 U.S.C. § 2331(1)(C).

He might have been radicalized in part by Hamas,[13] but Hamas did not plan the shooting or even take credit for it.

In *Crosby v. Twitter, Inc.*, by contrast, the Islamic State of Iraq and Syria ("ISIS") did take credit for a mass shooting, but the Sixth Circuit still held that Twitter was not secondarily liable under the ATA.[14] Plaintiffs' assertions are even more attenuated than the facts in *Crosby*. Here, Hamas did not claim credit for the shooting after it occurred. Neither did it order the shooting according to Plaintiffs' second amended complaint. Johnson was a self-radicalized shooter who merely "liked" the Facebook pages of "black separatist hate groups" that had communicated with Hamas. And, while Johnson met with Ms. X and indicated that he sympathized with Hamas's objectives, that occurred two years prior to the Dallas shooting. Even considering this weak temporal proximity, we cannot infer that Hamas knew about or was responsible for the Dallas attack.

Simply put, Hamas did not commit the Dallas shooting; Johnson did. The shooting did not "occur primarily outside" the United States or "transcend national boundaries," so it was not an "act of international

[13] Even this point is doubtful. Plaintiffs have included a conclusional statement in their second amended complaint that Hamas radicalized Johnson. The only facts that suggest that Johnson was radicalized by Hamas, however, involve a tenuous causal connection: Johnson "liked" the Facebook pages of "black separatist hate groups," which had communicated with, and been radicalized by, Hamas.

[14] 921 F.3d at 626–27; *see id.* at 622 n.2 (refusing to reach the element of "an act of international terrorism" but noting that this element "would be a substantial hurdle" for the plaintiffs); *see also Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 571–72 (E.D. Mich.) (holding that the "plaintiffs have not alleged facts establishing" the element of "an act of international terrorism"), *aff'd*, 921 F.3d at 628.

terrorism."[15] There is no qualifying "act of international terrorism," so Plaintiffs do not have a cause of action under § 2333(a).

B.

For the same reasons, Plaintiffs have not sufficiently alleged that Defendants "knowingly" and "substantial[ly]" assisted Johnson or even Hamas.[16] Aiding and abetting liability under § 2333(d) "focuses on the relationship between the act of international terrorism and the secondary actor's alleged supportive conduct."[17] The causal-connection requirement was articulated in *Halberstam v. Welch*, a D.C. Circuit case that Congress identified as providing "the proper legal framework" for secondary liability.[18]

Halberstam identified three factors for determining secondary liability:

> (1) [T]he party whom the defendant aids must perform a wrongful act that *causes* an injury; (2) the defendant must be *generally aware* of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; and (3) the defendant must *knowingly* and *substantially* assist the principal violation.[19]

The *Halberstam* court then identified six factors of "how much encouragement or assistance is substantial enough" to satisfy the third

---

[15] 18 U.S.C. § 2331(1)(C).

[16] *Id.* § 2333(d)(2).

[17] *Linde*, 882 F.3d at 331.

[18] 705 F.2d 472, 487 (D.C. Cir. 1983); *see* JASTA, Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852 (2016) ("The decision of the United States Court of Appeals for the District Columbia in *Halberstam* . . . provides the proper legal framework for how such liability should function . . . ."); *accord Crosby*, 921 F.3d at 627 n.6; *Linde*, 882 F.3d at 331. This case presents the first opportunity for our court to apply the *Halberstam* factors.

[19] *Halberstam*, 705 F.2d at 477 (emphasis added).

factor: (1) the nature of the act encouraged; (2) the amount of assistance given by the defendant; (3) the defendant's presence or absence at the time of the tort; (4) the defendant's relation to the principal; (5) the defendant's state of mind; and (6) the period of the defendant's assistance.[20]

The Second Circuit analyzed these factors in *Linde v. Arab Bank, PLC*.[21] The plaintiffs in *Linde* were survivors or relatives of victims of three terrorist attacks perpetrated by Hamas in Israel.[22] They sued Arab Bank, claiming that it was liable under the ATA for aiding and abetting an act of international terrorism.[23] The court held that secondary liability could not be concluded as a matter of law because there was sufficient evidence for the jury to decide that issue.[24]

The court in *Linde* did, however, analyze the *Halberstam* factors related to whether the defendant "knowingly" and "substantial[ly]" assisted Hamas in committing the attack.[25] It noted that "aiding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*"; it requires "awareness."[26] The court noted that

---

[20] *Id.* at 483-84 (citing RESTATEMENT (SECOND) OF TORTS § 876(b), cmt. d (1979)); *see Linde*, 882 F.3d at 329 (discussing factors).

[21] 882 F.3d at 329.

[22] *Id.* at 317.

[23] *Id.* at 317–18. This lawsuit occurred prior to the enactment of JASTA. *Id.* at 318. The Second Circuit remanded for a jury determination of secondary liability, however, because JASTA was enacted during the pendency of appeal. *Id.* at 328, 333.

[24] *Id.* at 328–29.

[25] *Id.* at 329.

[26] *Id.*

> [t]here is some record evidence that might permit a jury . . . to infer the requisite awareness. For example, certain communications dating from as early as 2001, *i.e.*, before the attacks here at issue, could have alerted the bank that the transfers being requested therein were payments for suicide bombings.[27]

But, on remand, the court in *Linde* left that decision to the jury.[28]

The *Linde* court "reach[ed] the same conclusion as to the substantial assistance element of aiding and abetting."[29] It did note, however, that "the substantiality inquiry for causation is not identical to the substantiality inquiry for aiding and abetting": "[A]iding and abetting focuses on the *relationship* between the act of international terrorism and the secondary actor's alleged supportive conduct."[30]

Here, there was no relationship between Hamas (vis-à-vis Johnson's actions) and Defendants as there arguably was in *Linde*. Neither was there a relationship between Johnson's actions and Hamas. Neither Hamas nor Defendants can be tied to Johnson's act of shooting: He merely "liked" "black separatist hate groups'" online Facebook posts and met with Ms. X to express his commitment to Hamas's goals in Palestine.

Neither is there any indication in Plaintiffs' second amended complaint, other than conclusional statements, that Defendants were "generally aware" of the role that Hamas allegedly played in the Dallas

---

[27] *Id.* at 330.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 330–31 (emphasis added).

shooting.[31] The shooting was committed by a self-radicalized "lone wolf," *viz.*, Johnson, not by Hamas.[32] The district court was thus correct in concluding that Defendants were not secondarily liable for aiding and abetting an act of international terrorism.

Plaintiffs next assert that the district court erred in using the "direct relationship" test for secondary liability. The district court relied on the Ninth Circuit's *Fields v. Twitter* decision when it analyzed Plaintiffs' secondary liability claim.[33] But the district court also held that Plaintiffs did not demonstrate secondary liability by using their preferred standard of proximate cause.

We agree with the district court. As that court correctly held, "Plaintiffs fail[ed] to establish a proper connection between Hamas and the shooting." To Plaintiffs, the correct test for secondary liability is proximate cause, which would only require that the "alleged injuries proximately flow from the principal's terrorist attack, not the secondary actor's supportive conduct." But this standard still requires that Hamas play a role in the attack.[34] Hamas did not violate the ATA by assisting Johnson in committing the Dallas shooting. In fact, Hamas provided no assistance to Johnson whatsoever. Further, Defendants could not have been aware of Hamas's role

---

[31] *See Linde*, 882 F.3d at 329 (holding that "awareness" is the *mens rea* for secondary liability).

[32] *See Crosby*, 921 F.3d at 626 (noting that the attack was committed by a "lone wolf," not by ISIS).

[33] 881 F.3d 739 (9th Cir. 2018).

[34] *See Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 277 (D.C. Cir. 2018) ("Instead, BNPP would be liable for al Qaeda's act of international terrorism, so long as BNPP 'knowingly and substantially assist[ed] the principal violation' of the ATA by al Qaeda and was 'generally aware' of its role as part of al Qaeda's illegal activities when providing that assistance." (alteration in original)).

in the Dallas shooting because Hamas *played no role* in that shooting. Neither did Defendants. We reject Plaintiffs' proximate cause argument.[35]

In sum, at the Rule 12(b)(6) stage, Plaintiffs did not sufficiently allege that Defendants "knowingly" and "substantial[ly]" assisted either Johnson or Hamas in carrying out the Dallas shooting.[36] Defendants are not secondarily liable for the Dallas shooting or for Retana's injuries.

III.

We hold, based on Plaintiffs' allegations, that the Dallas shooting was committed solely by Johnson, not by Hamas's use of Defendants' Internet services and social media platforms to radicalize Johnson. It was therefore not an "act of international terrorism . . . committed, planned or authorized" by a foreign terrorist organization.[37] We also hold that Defendants did not "knowingly" and "substantial[ly]" assist Hamas in the Dallas shooting, again because the shooting was committed by Johnson alone and not by Hamas either alone or in conjunction with Johnson. The district court was correct in concluding that Defendants are not secondarily liable under the ATA.

* * *

The district court's judgment is AFFIRMED.

---

[35] In fact, causation in the context of aiding and abetting liability "focuses on the relationship between the act of international terrorism and the secondary actor's alleged supportive conduct." *Linde*, 882 F.3d at 331 (citing *Halberstam*, 705 F.2d at 488).

[36] 18 U.S.C. § 2333(d)(2).

[37] *Id.*; *see Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888 (N.D. Cal. 2017) (holding that the same defendants were not secondarily liable for Johnson's Dallas shooting because the complaint did not establish a "meaningful connection between Hamas and the attack").