NO. 10-16992

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY BLACK AND HOLLI BEAM-BLACK

Plaintiffs/Appellants,

v.

GOOGLE INC.

Defendant/Appellee.

On Appeal from the United States District Court for the
Northern District of California
Case No. 4:10-cv-02381-CW
The Honorable Claudia Wilken

DEFENDANT-APPELLEE GOOGLE INC.'S RESPONSE TO APPELLANTS' MOTION TO STAY

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CORPORORATE DISCLOSURE STATEMENT

Defendant-Appellee Google Inc., by and through its undersigned counsel, states the following pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure: Google Inc. does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Dated: September 23, 2010

WILSON SONSINI GOODRICH & ROSATI
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By: /s/ Bart E. Volkmer
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RESPONSE TO MOTION TO STAY

I. INTRODUCTION

Gary Black and Holli Beam-Black brought suit against Google Inc. ("Google") based on an anonymous Internet post that could be found using the Google Places online service. The district court dismissed their Complaint with prejudice (the "Dismissal Order") because Google is immune from suit under the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c). The Blacks appealed and now ask this Court to stay the Dismissal Order. There is no reason for a stay. The Dismissal Order did not alter the status quo or impose any obligations on the Blacks from which they need relief. And the Blacks cannot demonstrate the likelihood of success on the merits, irreparable injury, or any other consideration that would justify a stay. Their motion should be denied.

II. BACKGROUND

On May 28, 2010, the Blacks filed suit against Google based on the content of an anonymous review of their roofing business that could be found using the Google Places service. Volkmer Decl., Ex. A (Compl. ¶¶ 1, 16, 19). They sought $20,575,000 in damages. *See* Docket No. 2 at 1. The district court dismissed their Complaint with prejudice under Rule 12(b)(6) on August 13, 2010. Volkmer Decl., Ex. B. On August 25, 2010, the Blacks filed in the district court a paper entitled "Objection." Volkmer Decl. ¶ 3.

On September 10, 2010, the Blacks noticed this appeal. *See* Docket No. 1. Also on that date, the Blacks filed in the district court a motion to stay the Dismissal Order. Volkmer Decl., Ex. C. On September 13, 2010, the Blacks filed a Civil Appeals Docketing Statement ("CADS"). *See* Docket No. 2. They appended a twenty-page pleading to that document that purports to be a motion to stay. *Id*. On September 15, 2010, this Court docketed the CADS and its attachments as a motion to stay. *See* Docket No. 3.

On September 17, 2010, this Court deemed the Blacks' "Objection" a tolling motion under Fed. R. App. P. 4(a)(4) and ordered the appeal held in abeyance until the district court ruled on the objection. On September 20, 2010, the district court denied the Blacks' motion to stay, construed their "Objection" as a motion for reconsideration and denied it. Volkmer Decl., Ex. D.

III. ANALYSIS

The Blacks' motion to stay should be denied because it is procedurally improper. A party moving to stay a district court order in the Court of Appeals must either show that "moving first in the district court would be impracticable" or that a stay motion was filed in the district court without success. Fed. R. App. P. 8(a)(2)(A). The Blacks ignored this rule. They moved for a stay in the district court on September 10, 2010 and then filed a nearly identical motion in this Court on the next business day without waiting for a ruling from the district court. *See*

Volkmer Decl., Ex. C; Docket No. 2. The Blacks have offered no grounds for why they should be excused from Rule 8's requirements. That is reason enough to deny their motion.

But even assuming that the district court's subsequent denial of the Blacks' motion to stay retroactively cures the Rule 8 problem, the Blacks' stay request should be denied because it is nonsensical: the Dismissal Order did not impose any obligations on the Blacks or change the status quo in any way. It is difficult to imagine a legitimate basis to stay a defense judgment in a civil action for damages. And this case provides none.

That conclusion is confirmed by evaluating the considerations that courts use to decide whether to issue a stay on appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).[1]

First, the Blacks are unlikely to prevail on appeal. The Complaint says that their lawsuit "arises from" an anonymous, online comment posted to Google's website. Volkmer Decl., Ex. A (Compl. ¶¶ 1, 19). Section 230(c) bars lawsuits

[1] The first two factors are "the most critical." *Nken v Holder*, 129 S.Ct. 1749, 1761 (2009).

like that. It is not a close question. *See Carafano v. Metrosplash.com. Inc.*, 339 F. 3d 1119, 1120-21 (9th Cir. 2003) (website statutorily immune from claims based on content provided by a third party); *Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc) ("section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles."); *Goddard v. Google, Inc.*, Case No. 08-cv-2738-JF, 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008), at *2 ("Courts consistently have held that § 230 provides a robust immunity, and that all doubts must be resolved in favor of immunity.") (quotations and citations omitted).

Second, the Blacks have failed to show irreparable injury. That is not surprising given that their claims are based on the alleged presence of a third-party review of their roofing business that has long since been removed from the Google Places service. *See* Appellants' Motion to Stay at 3 (stating that Google removed the allegedly defamatory review after the Blacks filed suit).

Third, a stay would cause injury to Google by unnecessarily calling into question the broad protections of Section 230(c) that the Dismissal Order recognized. The district court's unequivocal ruling deters others from bringing similar meritless lawsuits. It should not be disturbed while this appeal is pending.

Fourth, the public interest cuts against a stay because providers and users of interactive computer services are entitled to know with certainty that lawsuits seeking to hold them liable for third-party content will be dispatched swiftly, on the pleadings. *See* 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."); *Roommates.Com*, 521 F.3d at 1175.

The Blacks' motion is procedurally improper, defies common sense, and satisfies none of the requirements for a stay. It should be denied.

CONCLUSION

Google respectfully requests that the Court deny Appellants' Motion to Stay.

Dated: September 23, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 23, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Gary Black
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s/ Deborah Grubbs