Whitney Information, et al v. Xcentric Ventures, et al Doc. 163

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

WHITNEY INFORMATION NETWORK, INC.; a Colorado corporation, Plaintiffs, v. XCENTRIC VENTURES, LLC, an Arizona limited liability company; BADBUSINESSBUREAU.ORG, an Arizona limited liability company; and ED MAGEDSON, an individual, Defendants.	Case No: 2:04-CV-47-ftm-29 **DEFENDANTS' *CONSOLIDATED* RESPONSE TO: 1.) PLAINTIFF'S "SUPPLEMENT" TO PLAINTIFF'S MOTION FOR SANCTIONS FOR IMPROPER DEPOSITION CONDUCT; AND 2.) PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT ADDITIONAL DISCOVERY AND TO THEREAFTER SUPPLEMENT ITS RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Xcentric Ventures, LLC, ("Xcentric"), and Ed Magedson ("Magedson") (collectively, the "Defendants") respectfully submit the following Consolidated Response to the following pleadings filed by Plaintiff WHITNEY INFORMATION NETWORK, INC. ("WIN" or "Plaintiff"): 1.) Plaintiff's Supplement to Plaintiff's Motion for Sanctions for Improper Deposition Conduct (Doc. #158; filed 10/31/2007), and, 2.) Plaintiff's Motion For Leave of Court to Conduct Additional Discovery … (Doc. # 159; filed 10/31/2007).

Both of WIN's motions lack merit and should be denied.

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IV. ARGUMENT

A. Doc. # 158 — "Supplement" to Motion for Sanctions

As the Court is already aware, on 10/19/2007, WIN filed a motion (Doc. #154) seeking sanctions against Defendants based on a note that was passed from defense counsel to Mr. Magedson during Mr. Magedson's deposition at a time when no question was pending. On 11/05/2007, Defendants filed a substantive response (Doc. #161) to WIN's sanctions motion.

As indicated in WIN's present "Supplement" (which is nothing more than an improper Reply brief filed without leave of Court as required by Local Rule 3.01(c)), WIN seeks leave to re-depose Mr. Magedson because on 10/24/2007, Mr. Magedson corrected part of his prior deposition testimony relating to an email which Mr. Magedson wrote in 2003 about a *different* company called ENERGY AUTOMATION SYSTEMS, INC. or "EASI" (not WIN) relating to an entirely *different* case.

In short, as noted in WIN's motion, Mr. Magedson originally testified that he did not believe he wrote the 2003 email at issue concerning EASI. Later, Mr. Magedson researched his files and determined that he had, in fact, written the email, and he corrected his deposition testimony to reflect this. Based on this, WIN argues that "Mr. Magedson altered his deposition testimony on a material issue[]" (Doc. 158 at 1), thus entitling WIN to both re-depose Mr. Magedson and to receive harsh sanctions (withdrawal of defense counsel's *pro hac vice* admission).

Again, to be absolutely clear—the change at issue pertained to an email about a <u>different</u> company, <u>not about WIN</u>. In this email, written years and years ago, Mr. Magedson suggested that a user of the Ripoff Report website convert the contents of an email into an actual report on the website.

Nevertheless, WIN argues that this change is material here because, "Such solicitation precludes defendants from utilizing immunity pursuant to the Communications Decency Act, 47 U.S.C. § 230(c)(1)." (Doc. 158 at 2) (citing, *inter alia*, *Fair Housing Council v. Roommates.com, L.L.C.*, 489 F.3d 921 (9th Cir. 2007).

This argument is simply wrong both factually and legally.

Legally, WIN's citation to *Fair Housing Council v. Roommates.com* is manifestly improper because on October 12, 2007, pursuant to an order which is attached hereto as **Exhibit A**, the Ninth Circuit granted rehearing *en banc* in the *Roommates.com* case and ordered the prior opinion depublished. Pursuant to the Ninth Circuit's order, "The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit." (emphasis added). Thus, the *Roommates.com* "authority" cited by WIN as demonstrating the "materiality" of the change at issue is simply no longer valid.

Similarly, the *MCW* ruling cited by WIN was a different posture (*denial* of a 12(b)(6) Motion to Dismiss) based on different facts which have no bearing whatsoever on this case. As explained in detail in Defendants' Motion for Leave to File Reply in Support of Defendants' Motion for Summary Judgment (Doc. #144), the fact that the *MCW* Court denied Defendants' Motion to Dismiss based on unproven allegation in an unpublished, non-final decision is not dispositive of, or relevant to, any issues in this case.

Factually, WIN's argument—that if Defendants "solicited" the filing of a complaint about *a different company* (EASI) years ago, the CDA does not apply to any/all statements about WIN at issue in this case—is directly contrary to existing law; "Under the statutory scheme, an 'interactive computer service' qualifies for [CDA] immunity so long as it does not also function as an "information content provider" for the portion of the statement or publication at issue." *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (emphasis added). Here, the "new" information WIN seeks to explore—Mr. Magedson's alleged solicitation of a report about a different company; EASI—is not material to any issue in this case because in order to avoid the CDA's effects, WIN must prove that Defendants are "information content providers" for the portion of the statement or publication at issue. That analysis is wholly unrelated to the question of whether Mr. Magedson was, or was not, an "information content provider" with respect to *other statements* about a different company; EASI.

It is 100% irrelevant whether or not Mr. Magedson "solicited" the filing of a report against a different company in a different context in a different case. The relevant question is—does WIN possess a single shred of proof to support its claim that Defendants actually created reports about WIN in this case. WIN has had every fair opportunity to obtain and submit its proof on this issue, and no further questioning of Mr. Magedson will help WIN to create evidence which simply does not exist.[1] Thus, WIN's Motion for Sanctions should be denied.

B. Doc. # 159 — Motion for Leave For Additional Discovery

In conjunction with its "Supplement" (Reply) brief regarding sanctions, WIN also seeks leave of Court to re-depose Mr. Magedson due to the correction he made to his prior testimony as described above. The Court should deny this request (which is simply a second request by WIN for relief under Rule 56(f)).

First, as explained above, WIN argues that the correction made by Mr. Magedson (as specifically authorized by Fed. R. Civ. P. 30(e)) affected a "material issue" in the case; namely, whether or not Defendants are protected under the CDA with respect to the allegedly defamatory statement(s) about WIN posted on the Ripoff Report website. As also explained above, this argument is wrong because the corrected testimony concerned statements about a company other than WIN. Even assuming *arguendo* that Mr. Magedson did solicit a report in the EASI case,[2] this is irrelevant to any issue here because it would not establish that Defendants were responsible for the creation of the content at issue in this case. *See Carafano*, 339 F.3d at 1123.

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[1] It is also worth noting that, at best, the fact that Mr. Magedson corrected his prior testimony about an unrelated corporation might arguably be relevant to impeach his credibility should this case ever proceed to trial. But impeachment of Mr. Magedson's credibility is entirely unnecessary at this time because pursuant to Fed. R. Civ. P. 56, the Court is required to draw all inferences in favor of the non-moving party (WIN) anyway. As such, there is no basis for WIN to argue that it should be permitted to re-depose Mr. Magedson on an immaterial, irrelevant, and purely collateral issue.

[2] There has been no such finding in the litigation relating to that third party.

Second, under virtually identical facts, the California Supreme Court recently held that immunity under the CDA was not lost where the defendant "republished" an allegedly defamatory email on a website; this is basically what WIN claims Mr. Magedson admitted to doing in another case. Specifically, in *Barrett v. Rosenthal*, 40 Cal.4th 33, 146 P.3d 510 (Cal. 2006), the defendant Rosenthal received an allegedly defamatory article about the plaintiff via email which Rosenthal then unilaterally re-published on two websites. Because the actual statement originated from a third party, the California Supreme Court found that the CDA applied to protect Rosenthal even though Rosenthal actively expanded the reach of the statement by re-publishing it twice on different websites. *See Barrett*, 40 Cal.4th at 77–78, 146 P.3d at 529 (holding, "Plaintiffs are free under section 230 [of the CDA] to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await Congressional action.") (emphasis added). This was true even though Rosenthal was merely a "user" of the websites where she re-published the offensive article, and even though the article itself was not intended to be re-published.

This outcome is analogous to the "new" information which WIN seeks to discuss with Mr. Magedson wherein a user of the Ripoff Report website sent an email to Mr. Magedson in 2003 containing various remarks about an unrelated business (EASI), and Mr. Magedson then told the user the information about EASI would make a good report and it should be submitted for publication on Ripoff Report. Citing the now-depublished opinion in *Roommates.com*, WIN suggests this conduct relating to EASI is sufficient to cause Defendants to lose CDA protection with respect to *different* non-solicited statements about WIN because it represents "solicitation" of content, thus causing Defendants to become "information content providers" with respect to *the material at issue in this case.*

Of course, this position is not supported by *Roommates* since the case is not valid law and has been depublished, and the argument is also directly contrary to the California Supreme Court's holding in *Barrett*. As an illustration, recall that in *Barrett* the

defendant took an email and unilaterally re-published its contents on two websites without the original author's knowledge or consent, but the Court still held the CDA applied because the email was authored by a third party, thus the defendant could not be liable for re-publishing it. If that conduct was insufficient to result in a loss of CDA protection, then clearly Mr. Magedson's encouragement for an original author to re-publish his own email would likewise require the same result. In other words, if Mr. Magedson would not have been liable for unilaterally deciding to re-publish the email himself, then he could not be liable for suggesting that the original author republish it.

For these reasons, WIN's argument is devoid of merit and should be rejected.

As a final point, it should also be noted that on October 18, 2007, WIN filed a *Motion to Strike* (Doc. #151) certain discovery requests propounded by Defendants on the basis that they were untimely pursuant to this Court's 4/16/2007 scheduling order (Doc. #104). Over Defendants' objections, on 11/06/2007, this Court accepted WIN's arguments and granted (Doc. #162) the Motion to Strike on the basis that discovery was now closed.

WIN cannot have it both ways. Having successfully used this Court's scheduling order to avoid responding to discovery, the same standard should apply to WIN's request to take a second deposition of Mr. Magedson. Because discovery is now closed, and because WIN only seeks to reopen discovery with respect to an irrelevant, immaterial, and collateral issue, WIN's request for leave to perform additional discovery should be denied.

V. CONCLUSION

One thing is clear here—despite the fact that the litigation has been pending for nearly four (4) years, WIN is desperate to avoid an examination of this case on its merits. Its efforts to needlessly prolong this case must be seen for what they are; much ado about nothing.

This Court should deny both WIN's request for sanctions and its request for leave to perform additional discovery so that the Court may resolve the pending Motion for Summary Judgment on its merits.

DATED this 14th day of November, 2007.

JABURG & WILK, P.C.

s/Maria Crimi Speth
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November 2007, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

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