UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and FACEBOOK, INC.

Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF DISCOVERY ON DEFENDANTS' RULE 12(c) MOTION

1:10-cv-00569-RJA

I. INTRODUCTION

On March 26, 2012, Defendants filed (1) a Motion for Judgment on the Pleadings, pursuant to Federal Rule of Civil Procedure 12(c) [Dkt. Nos. 320-21]; (2) a Motion to Dismiss based on Defendants' contention that Plaintiff has committed a fraud on the Court (which Plaintiff vigorously denies) [Dkt. Nos. 318-19]; and (3) a Motion to Stay Discovery [Dkt. Nos. 322-23]. In connection with the expedited schedule ordered by the Court on the Motion to Stay [Dkt. No. 337], Plaintiff submitted an opposition thereto on April 1, 2012 [Dkt. No. 345], and Defendants submitted their reply on April 3, 2012 [Dkt. No. 346]. In particular, Plaintiff argued that because Defendants' dispositive motions were based in part on the one-sided discovery that the Court previously ordered Plaintiff to produce, Plaintiff would be prejudiced without obtaining reciprocal discovery from Defendants on the issues raised in their dispositive motions.

On April 4, 2012, the parties appeared before the Court to address scheduling on Defendants' dispositive motions and to present argument on whether discovery should be stayed. On April 6, 2012, the Court granted in part Defendants' Motion to Stay, ordering the parties to conduct limited expert discovery. *See* Orders [Dkt. No. 348]. In addition, the Court directed

Plaintiff to submit, within seven days, "argument why discovery is necessary for a Rule 12(c) motion." *Id*.

As discussed below, Defendants' Rule 12(c) Motion raises matters outside the pleadings regarding which Plaintiff is entitled to discovery.

II. ARGUMENT

Defendants' Rule 12(c) Motion Must Be Converted Into a Motion for Summary Judgment Because It Presents Matters Outside the Pleadings

"On a motion to dismiss or for judgment on the pleadings, [the court] must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *LaFaro v. New York Cardiothoracic Group, PLLC*, 570 F.3d 471, 475 (2d Cir.2009) (quoting *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir.2003). "If, on a motion under Rule 12(b)(6) or Rule 12(c), matters outside the pleadings are presented to and not excluded by the court, *the motion must be treated as one for summary judgment* under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d) (emphasis added); *see also Sira v. Morton*, 380 F.3d 57, 66–67 (2d Cir.2004) (observing that where moving party submits material outside the pleadings in support of motion for judgment on the pleadings, the motion should be converted to a motion for summary judgment).

"A complaint is deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint." *Sira*, 380 F.3d at 67; *see also* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). Where, however, a movant relies on papers outside the pleadings that have not been incorporated by reference, the motion must be converted to one for summary judgment.

Hernandez v. Coffey, 582 F.3d 303, 307 (2d Cir.2009) ("[A] district court acts properly in converting a motion for judgment on the pleadings into a motion for summary judgment when the motion presents matters outside the pleadings . . . .").

The Defendants attempt to persuade the court that it can also consider matters in the record of the case, meaning its claims contrary to the allegations in the complaint. Rule 12(c) MOL at 14 (citing *Yip v. Bd. of Trs.,* No. 03-00959, 2004 U.S. Dist. LEXIS 28366 (W.D.N.Y. Sept. 29, 2004)). However, in *Yip* the court held that the statute of limitations defense was "properly raised by a Rule 12(b)(6) motion where the complaint on its face shows noncompliance with the limitations period." *Yip* at *9 (W.D.N.Y. Sept. 29, 2004). Here, Defendants' purported statute of limitations defense is not apparent on the face of the Amended Complaint, but instead requires the Court to consider matters outside the pleadings. Logically, if a court considering a 12(c) motion could consider the entire record of the case, such a rule of procedure engulfs summary judgment motions. A "motion to dismiss **on the pleadings**" that can properly consider the entire record of the case would be glaringly misnamed.

As to what is "integral" to the complaint, Second Circuit case law defines it this way:

"[A] document 'upon which [the complaint] **solely relies** and which is integral to the complaint' may be considered by the court in ruling on such a motion.'" *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir.1991). This notion of "integral to the complaint" does not extend to documents alleged to be integral *to the defense* of the complaint.

Defendants' Rule 12(c) Motion relied heavily upon facts not alleged in the Amended Complaint. These facts are listed below:

- "This is an...opportunistic, and fraudulent lawsuit." Rule 12(c) MOL at 1 [Dkt. No. 321].
- "[T]his entire lawsuit is a lie." *Id.*

- "The purported contract is a forgery…." *Id.*
- "[T]he so-called 'emails' that Ceglia quotes in his Amended Complaint are fabrications . . . ." *Id.*
- "Ceglia is a...well-known scam artist." *Id.*
- Ceglia is "seek[ing] to wrest an enormous stake in [Facebook] from the man who created and devoted his life to building it . . . ." *Id.* at 2.
- "Zuckerberg transformed 'The Facebook' poject into a new commercial entity months earlier, in April 2004, when he and others organized Thefacebook LLC. *Id*. at 8.

The foregoing quotes indicate that Defendants' Rule 12(c) Motion is based on matters outside the pleadings, namely: (1) Defendants' unproven allegations that Ceglia's claims are fraudulent; and (2) Defendants' contention that Zuckerberg formed Thefacebook LLC in April 2004, purportedly beyond the six-year limitations period and (3) that the formation of Thefacebook LLC in April 2004 somehow divested or signaled the divesting of Plaintiff's contractual interest in the "software, programming language and business interests" listed in the contract as consideration for Plaintiff's financial contribution to the business.

Second Circuit case law is clear that "[o]nce the District Court [is] presented with matters outside the pleadings, Rule 12(b) afford[s] two options. The court [can] exclude[] the extrinsic documents or…the court [is] obligated to convert the motion to one for summary judgment and **give the parties an opportunity to conduct appropriate discovery and submit the additional supporting material contemplated by Rule 56**. *Chambers v. Time Warner, Inc*. (2d Cir. 2002), 282 F.3d 147, 154. See also *Carter v. Stanton*, 405 U.S. 669, 671, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972) (per curiam); *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir.2000); *Morelli v. Cedel*, 141 F.3d 39, 45-46 (2d Cir.1998). (Emphasis added).

This conversion requirement is "strictly enforced" whenever a district court considers extra-pleading material in ruling on a motion to dismiss. *Friedl*, 210 F.3d at 83 (quoting *Amaker v. Weiner*, 179 F.3d 48, 50 (2d Cir.1999)).

Plaintiff is entitled to obtain discovery necessary to address these arguments. As a point of clarification, the Ceglia-Zuckerberg contract provided that Ceglia would obtain a 50% interest "in the software, programming language and business interests derived from the expansion of that service to a larger audience." *See* Amended Complaint. Contrary to Defendants' argument, Plaintiff's claims are not reliant on when Zuckerberg chose to form Thefacebook LLC or any other Facebook-related business entity. However, even if Plaintiff's claims were reliant on those facts, Zuckerberg has acknowledged that "[t]he Florida LLC was more or less an empty shell, and what it actually owned was unclear. Zuckerberg and Moskovitz signed over their portion of the LLC, plus the critical [Intellectual Property], to the new Delaware corporation." DAVID KIRKPATRICK, THE FACEBOOK EFFECT 61-62 (2010).

THE FACEBOOK EFFECT was written by David Kirkpatrick, a respected technology reporter, with the cooperation of Zuckerberg and other Facebook executives. As to any doubt that Defendant Zuckerberg subscribes to the book's contents, the author gave profuse thanks to Zuckerberg for his "cooperation and encouragement to write the book." Id. at p. 336. "Had [Defendant Zuckerberg] not encouraged me to write this book, and cooperated as I did so, it would likely not have happened." Id.

Kirkpatrick described that "Facebook cooperated extensively in the preparation of *The Facebook Effect,* as did CEO Mark Zuckerberg. Almost nobody connected to the company refused to talk to me." *Id.* at.338. In fact, "[s]ome people submitted to multiple interviews. First among these is Mark Zuckerberg himself." *Id.* Kirkpatrick also described that Zuckerberg had

previously hacked Harvard's email servers, and "the fact that he was doing something slightly illicit gave Zuckerberg little pause." *Id*. at 23. As for rules that governed other people's behavior, "he just doesn't pay much attention to them." *Id.* at 24.

Plaintiff is not required to accept at face value Defendants' argument that the purported formation of Thefacebook LLC in 2004 somehow time-bars Plaintiff's claims. Rather, Plaintiff is entitled to discovery to understand the significance of the creation of this entity with respect to other Facebook-related entities and operations, whether Thefacebook LLC was in fact something more than a "shell corporation" as his distilled words claimed in his biography and that of Facebook itself. Plaintiff is entitled to discovery regarding what other Facebook-related entities exist and when they were formed, whether and when any ownership interests were transferred, whether documents exist discussing Zuckerberg's decision to exclude Ceglia; and when information regarding Thefacebook LLC became publicly available.[1]

In short, Defendants' claims as to the significance of the formation of Thefacebook LLC must be assessed in context. Defendants cannot "cherry pick" what documents they present to the Court on a dispositive motion raising matters outside the pleadings.

There is no declaration from Defendant Zuckerberg saying that his or Ceglia's 50% interest in the "software, programming language or business interests…" were transferred into the shell company created in April 2004 in Florida. It would be ironic indeed for him to declare that the same LLC that played a role in the fraud allegations by another early stage investor, Eduardo Saverin, would serve his defense to Ceglia's early stage investor claim. Even if such a declaration was provided now, it is wholly outside the pleadings.

[1] Plaintiff understands that information relating to the formation of Thefacebook LLC was produced in another lawsuit filed against Zuckerberg relating to the ownership of Facebook. *See ConnectU, Inc. v. Facebook, Inc.*, No. 07-10593 (D. Mass.). However, that information is under

No Defendant has publicly or otherwise disputed their distilled words in The Facebook Effect and any repudiation of them now is opportunistic.

Perhaps in further discovery Defendants will produce corporate documents, hopefully not forged as Defendant Zuckerberg has a habit of doing, (See Exhibit B to Doc. No. 199), to explain what the April 2004 formation of the LLC represented. As of now, the Defendants have offered no forged or authentic documents to support it. For Plaintiff to properly rebut Defendants' contention about the "shell company" of April 2004, he is entitled to fact discovery on this issue. That discovery lies, primarily, but not exclusively, in the sealed testimony of the two previous cases in which Zuckerberg was sued for fraud by early stage investors and co-founders of Facebook.

Much like their non-committal Motion to Dismiss, Defendants here deny the truth of the allegations in the complaint. They do so while urging the court to grant a motion, without discovery, that requires Defendants acknowledge the truth of the allegations in the complaint. Both cannot be performed in the context of their motion to dismiss on the pleadings. By so arguing Defendants' invite this court to grant Plaintiff discovery to properly rebut their outside the pleadings assertions, some of which are so obviously false as to need little effort to rebut. The falsity of other unsupported, subjective assertions is obscured behind Defendants' significant one-sided discovery to this point. Still other outside the pleadings assertions are likely contradicted by corporate records that Defendants retain exclusive control over and have a habit of forging to benefit themselves during litigation. Id.

It is important to emphasize that Mr. Zuckerberg's reputation precedes him. In recounting his "illicit" hacking of various servers in the Harvard computer system, "the fact that he was doing something slightly illicit gave Zuckerberg little pause." The Facebook Effect at 23.

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seal.

As for rules that governed other people's behavior, "he just doesn't pay much attention to them." Id. at 24. In short, Defendants claims of what was and was not covered by any incorporation has to be seen in context. That context includes the cunning of Defendant Zuckerberg in forging corporate documents and regarding the rules as inapplicable to him.

DOCUMENTS IN THE RECORD OF THIS CASE

Virtually every portion of every expert report and other declaration offered in support of Defendants defense is contested or will be. Plaintiff has had only since March 26, 2012 to analyze all of Defendants' expert reports. Those reports were compiled after nine months of analysis, conversation and collaboration with each other. Those reports, in total more than 200 hundred pages of dense analysis and supposed scientific support, have been available to Plaintiff since March 26, 2012. During just that brief period Plaintiff and his experts have exposed and continue to expose vital, central and amazingly brazen errors, misstatements, scientifically unsupportable conclusions, manipulated exhibits, altered digital images, Defendants' experts' contamination of the authentic contract, mathematical chicanery, overlooked facts favorable to Plaintiff and harmful to the Defense, and undisclosed facts fracturing every single report. The Defendants' arguments represent the optical illusion of an avalanche that turns out to be a few disconnected snowflakes when viewed in full light. Therefore, relying on the disputed and disputable record of this case to decide Defendants' motion to dismiss on the pleadings, without providing Mr. Ceglia discovery, again prejudices him.

Defendants' motion entitles Plaintiff to significant discovery to be given a fair, unprejudiced opportunity to respond to a case-ending motion that they argue reliant on significant materials outside the pleadings. In the alternative, the court should strike their motion

in its entirety and direct them to file a motion that does not rely in any way to materials not properly considered by a court in a motion to dismiss confined to the pleadings.

III. CONCLUSION

Based on the foregoing, Plaintiff requests that the Court convert Defendants' Rule 12(c) Motion into a motion for summary judgment and award Plaintiff discovery necessary to respond thereto. Fed. R. Civ. P. 12(d).

Dated: April 11, 2012

Respectfully submitted,

s/Dean Boland

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