

Braverman v Yelp, Inc.
2013 NY Slip Op 31407(U)
June 28, 2013
Sup Ct, NY County
Docket Number: 155629/12
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 155629/2012
BRAVERMAN, MAL
vs.
YELP, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____


Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 6/28/13
which disposes of motion sequence(s) no. 001

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/28/13


_____, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
MAL BRAVERMAN,

Plaintiff,

Index Number: 155629/12

Submission Date: 2/27/13

- against -

DECISION and ORDER

YELP, INC.,

Defendant.
----- X

For Plaintiff:

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For Defendant:

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Papers considered in review of this motion for summary judgment:

Notice of Motion/Affirm. of Counsel/Memo of Law.....	1
Memo. in Opp. to Defendant's Mot.....	2
Reply Memo of Law.....	3

HON SALIANN SCARPULLA, J.:

In this defamation action, defendant Yelp, Inc. ("Yelp") moves to dismiss plaintiff Mal Braverman's ("Braverman") complaint pursuant to CPLR §§ 3211(a)(1), 3211(a)(7), and 501.

Braverman is a licensed dentist practicing at 30 Central Park South, New York, NY. Yelp is the owner and operator of a website called Yelp.com, which allows members of the public to review local businesses, including dentists such as Braverman.

In his complaint, Braverman alleges three causes of action against Yelp: (1) defamation in the form of libel and slander; (2) tortious interference with business relations; and (3) tortious interference with contractual relations. On February 27, 2013, I heard oral argument on this motion to dismiss, and on the record, I dismissed the second and third causes of action based on failure to state a cause of action. However, I dismissed the second and third causes of action without prejudice to replead.

Braverman's first cause of action for defamation remains. Braverman alleges that Yelp published two defamatory reviews about his dental practice that were written by Yelp users. Braverman also alleges that Yelp removes or "filters out" any positive reviews of his practice, and that Yelp does not investigate reviews and never contacted him for comments on the negative reviews.

Yelp now moves to dismiss the first cause of action for defamation on two grounds: (1) it is immune from liability under the federal Communications Decency Act § 230 ("Section 230" or "CDA") because it cannot be held liable as the publisher or speaker of the two allegedly defamatory reviews; and (2) improper venue based on the forum selection clause in Yelp's terms of service agreement.

In opposition, Braverman argues that Yelp is not immune to his defamation action under Section 230 because Yelp acted as the "author" of the alleged defamatory content by: (1) filtering out any positive reviews of Braverman; and (2) placing a list of other dentists entitled "Best of Yelp: New York - Cosmetic Dentists" ("Best of Yelp list") on the same web page and encouraging users to use those dentists instead of Braverman.

Braverman submits an exhibit with his opposition, which shows that the Best of Yelp list appears at the bottom of the same web page as the alleged defamatory reviews. The Best of Yelp list consists of the heading “Best of Yelp: New York - Cosmetic Dentists” and lists five dentists with their names, photographs, and ratings. Braverman claims that the dentists in the Best of Yelp list are paid advertisers.

Braverman further argues that his complaint should not be dismissed because the forum selection clause is invalid. Braverman claims that Yelp extorted him into becoming a member of Yelp, and that this action arose when he was not a Yelp member.

In reply, Yelp argues that its alleged acts of filtering out positive reviews and adding the Best of Yelp list are editorial acts immune under Section 230.

Discussion

CPLR § 3211(a)(7) provides that a defendant may move for judgment dismissing the complaint on the grounds that “the pleading fails to state a cause of action.” In determining whether to grant a motion to dismiss under CPLR § 3211(a)(7), the “court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep’t 2002).

The Communications Decency Act § 230 grants immunity to providers of interactive computer services against certain liability arising from content created by third parties. 47 U.S.C. § 230(c); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008).

Under Section 230, a defendant is immune from liability if: (1) the defendant is a provider of an interactive computer service; (2) the complaint seeks to hold the defendant liable as a “publisher or speaker”; and (3) the action is based on information provided by another information content provider. *Shiamili v. The Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 287 (2011).

In its motion to dismiss, Yelp argues that it is immune from this action under Section 230. It is undisputed by the parties that Yelp meets the first and second conditions for immunity. Indeed, Yelp is a provider of interactive computer services, and Braverman’s defamation action seeks to hold Yelp liable as a publisher or speaker of the two alleged defamatory reviews. *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 411 (1st Dep’t 2009); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009).

The remaining issue is whether Yelp meets the third condition for immunity – i.e., whether Braverman’s defamation action is based on information provided by another content provider, rather than content provided by Yelp. Under Section 230, a provider of interactive computer services is only entitled to immunity where the content at issue is provided by another information content provider. *Shiamili*, 17 N.Y.3d at 289.

Section 230 defines an “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided.” 47 U.S.C. § 230(f)(3). When an interactive computer service provider exercises a publisher’s “traditional editorial functions” such as deciding whether to publish, withdraw, postpone, or alter information provided by others, the interactive computer service provider is entitled to immunity under Section 230. *Shiamili*, 17 N.Y.3d at 289.

Braverman argues that Yelp is not entitled to immunity because his defamation action is based on information that Yelp itself created or developed – the two allegedly defamatory reviews. Although Braverman admits that the two reviews were written by Yelp users, he claims that Yelp became the author of the reviews by filtering out positive reviews and placing a Best of Yelp list on the same web page.

Based on the allegations in the complaint, I find that Yelp is immune to the defamation action pursuant to Section 230. Yelp is entitled to immunity because this action is based on reviews written by other content providers – Yelp users – and not based on any content that Yelp itself created or developed.

Yelp’s alleged act of filtering out positive reviews does not make Yelp the creator or developer of the alleged defamatory reviews. Yelp’s choice to publish certain reviews – whether positive or negative – is an exercise of a publisher’s traditional editorial function protected by the CDA. *Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003) (finding that it is an editorial function to “choose among proffered material”); *Barnes v.*

Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009) (finding that it is an editorial function to decide “whether to publish or to withdraw from publication third-party content”). Moreover, Section 230 does not distinguish between neutral and selective publishers in its grant of immunity. *Shiamili*, 17 N.Y.3d at 289.

In addition, Yelp’s placement of a Best of Yelp list on the same web page as the reviews does not make Yelp the creator or developer of the reviews. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (an interactive computer service provider maintains immunity so long as it is not a content provider for the “portion of the statement” at issue). Yelp’s choice to insert a Best of Yelp list on the web page is an editorial choice as to what content to display on the page, and it is a separate section from the user reviews.

Further, Braverman’s allegation that the dentists appearing on the Best of Yelp list are paid advertisers does not deprive Yelp of immunity under Section 230. *Jurin v. Google Inc.*, 695 F. Supp.2d 1117, 1123 (E.D. Ca. 2010) (finding that defendant’s act of providing a space and service on its website for paid advertisers is “tantamount to the editorial process protected by the CDA”).

For the reasons stated above, I find that Yelp is immune from the defamation action under Section 230. Accordingly, I grant Yelp’s motion to dismiss the first cause of action for defamation in the form of libel and slander.

In accordance with the foregoing, it is

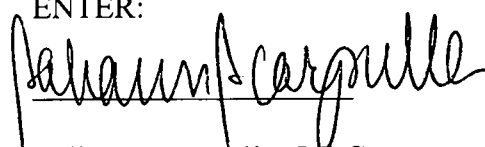
ORDERED that defendant Yelp, Inc.'s motion to dismiss the complaint pursuant to CPLR §§ 3211(a)(1), 3211(a)(7), and 501 is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: New York, New York
June 18, 2013

ENTER:


Saliann Scarpulla, J.S.C.