Mayhew v. Dunn, et al., No 580-11-07 Wmcv (Howard, J., Mar. 18, 2008)

STATE OF VERMONT
WINDHAM COUNTY, SS.

EFFIE MAYHEW,
Plaintiff,

v.

WINDHAM SUPERIOR COURT
DOCKET NO. 580-11-07 Wmcv

DAVID DUNN, and
LISA LEPAGE & CHRISTOPHER GROTKE, d/b/a MUSEARTS INC.,
Defendants.

ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

This is an action for defamation and intentional infliction of emotional distress. Defendants LePage and Grotke are the incorporators of MuseArts Inc. which, in turn, owns and operates the internet website known as iBrattleboro.com. Plaintiff Mayhew alleges that Defendant Dunn twice posted libellous statements on the iBrattleboro website and that these postings have lead to harassing telephone calls, the spread of false information and the loss of her reputation and employment. Citing immunity granted under the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230, the MuseArts Defendants move for judgment on the pleadings.[1] Plaintiff has not responded. For reasons set out below, the motion is **GRANTED**.

[1] Any reference to "Defendants" in this Order, unless otherwise specified, should be construed as a reference to Defendants LePage, Grotke and MuseArts.

Under the Vermont Rules of Civil Procedure, a defendant may raise an affirmative defense in their answer and may move thereafter for judgment on the pleadings. V.R.C.P. 12(c). When considering the motion, the court must assume as true all well-pleaded factual allegations in the complaint and all reasonable inferences which can be drawn from them, and must take as false any contravening assertions in Defendants' answer. *Knight v. Rower*, 170 Vt. 96, 98 (1999). Judgement may be granted if Plaintiff has made no claim that, if proved, would permit recovery. *Id.*

To establish a claim for written defamation, Plaintiff must allege and be able to prove the following elements:(1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages. *Russin v. Wesson*, 2008 VT 22, ¶ 5; *Lent v. Huntoon*, 143 Vt. 539, 546-47 (1983). Defendants' motion focuses on the element of publication and its interplay with a federal law enacted in response to the rapid growth of the Internet and other interactive computer services. 47 U.S.C. § 230(a).[2]

In relevant part, § 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Additionally, § 230

[2] The purposes of the CDA include preserving the vibrancy of the Internet and its competitive free market as well as addressing concerns over Internet pornography by encouraging the development of technologies which maximize user control over what information the users receive in their homes and schools and by ensuring vigorous enforcement of federal laws to deter and punish internet obscenity, stalking and harassment. 47 U.S.A. § 230 (b). For the most part, the anti-obscenity components of the CDA were found unconstitutional. See e.g. *Reno v. A.C.L.U.*, 521 U.S. 844(1997).

provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

One of the first, and certainly the best known, of the decisions to consider these provisions is *Zeran v. America Online, Inc*., 129 F. 3d 327(4th Cir. 1997), cert. denied 524 U.S. 937(1998). Kenneth Zeran sued after an anonymous person or persons posted a series of messages on an America Online, Inc. ("AOL") bulletin board advertising t-shirts and other products with an offensive slogan referring to the Oklahoma City bombings and advising would-be purchasers to call Zeran's home number. Zeran complained to AOL officials after the first such incident, and the posting was eventually removed. However, as a result of repeated postings and the decision of an Oklahoma radio station to air the contents of those postings, Zeran's home phone was bombarded with calls, he was inundated with death threats and police protection was necessary. *Id*. at 329.

Zeran sued seeking to hold AOL accountable for the defamatory speech initiated by the unknown third party and contending that AOL had a duty to remove the posting promptly once he notified them of its nature, a duty to notify its subscribers that the message was false, and a duty to provide effective screening for future defamatory material. *Id*. at 330. Reasoning that, by its plain language, § 230 prevents courts from assessing liability against a computer service provider under any cause of action for information provided by a third party, the Fourth Circuit concluded that the lawsuit was barred. *Id*. In reaching this result, the court determined there was no liability against AOL either for its role as a traditional publisher who exercises decisions on whether to publish, withdraw, postpone or alter content, or for its role as a distributor- something

akin to a traditional news vendor or bookseller. *Id*. at 332.[3] The court found, in essence, that every repetition of a defamatory statement is an instance of publishing that falls within the scope of immunity provided by the CDA. *Id*. (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 113, at 799(5th ed. 1984).

Zeran also focused on the specific Congressional purpose which explained the broad scope of § 230 immunity as follows:

> Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id. at 331(citations omitted). The court also noted that §230 leaves plaintiffs with an undisturbed cause of action for defamation against the original culpable "content provider" party. *Id*. at 330.

Zeran's holding is widely adopted. *Barrett v. Rosenthal*, 146 P. 3d 510, 518(Cal. 2006)(noting decision's broad acceptance and listing federal and state authorities); *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 688-89(N.D. Ill. 2006)(describing *Zeran* as a fountainhead of near-unanimous authority and listing concurring decisions); see also Olivera Medenic, *The Immutable Tort of Cyber-Defamation*, 11 No. 7 J. Internet L. (2008)(noting Zeran legacy currently reaches vast array of online activities including listserves, blogging, and online retailing, regardless of whether statements at issue were the result of contractual

[3] While traditional publishers may be liable for defamatory statements based on negligence, distributors cannot be liable absent actual knowledge of the defamatory statement. *Id*. at 331.

relationships, whether or not they were reviewed by human intelligence, or were a violation of the Internet content provider's own statement of services). [4] Persuaded that *Zeran* offers a reasoned and justified interpretation, this Court also adopts its plain reading of 47 U.S.C. § 230 and concludes that interactive computer services are immunized from defamation suits whenever they function as publishers of third party content.

Under the CDA, an "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). Noting that Plaintiff did not allege expressly that iBrattleboro is an internet computer service, nevertheless, it is clear from the pleadings and the Court is of the opinion that the fact is not subject to reasonable dispute. Accordingly, pursuant to V.R.E. 201, the Court takes judicial notice of the fact that iBrattleboro.com is an interactive computer service as defined by the CDA.[5] See *Fine Foods, inc. v. Dahlin*, 147 Vt. 599, 604 (1986) (matter of common knowledge, such as distance of one restaurant from another appropriate for judicial notice); *Jarvis v. Koss*, 139 Vt. 254, 255 (1981) (trial court may take notice of matters of common knowledge, as for example, the habits and qualities of common animals).

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[4] A few courts have raised questions about *Zeran*'s logic or distinguished its application. See e.g., *Barrett*, 146 P. 3d at 529(identifying concern about broad scope of immunity but noting change must come from legislature); *Chicago Lawyers' Committee*, 461 F. Supp. 2d. at 695-98(objecting to *Zeran*'s breadth, but still holding that § 230 immunizes interactive computer services against liability for third party content if the cause of action, like defamation or housing discrimination, treats them as publishers).

[5] Pursuant to V.R.E. 201(e), if Plaintiff objects to this fact, she may promptly request an opportunity to be heard on the matter.

The gravamen of Plaintiff's complaint is that Defendant Dunn posted statements of his own making on the iBrattleboro website. Therefore, the Court also finds that Defendant Dunn, as alleged, is an "information content provider" because he is a "person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). The situation is remarkably similar to that of *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. A.D. 2005), which involved a community bulletin website which posted critical and personal defamatory postings from residents about borough council members. Most were anonymous. The council members sued the site and operator. The court found that the operator was protected by § 230 as he was not the "provider" of any of the remarks, even though he additionally did edit some postings. 865 A.2d at 720. See also *Barrett v. Rosenthal*, 146 P.3d at 515 (website operator had immunity under § 230 for postings by others about doctors alleging they were "quacks" and for re-distributing e-mail accusing one of stalking women); but see *Batzel v. Smith*, 333 F.3d 1018, 1035 (9th cir. 2003) (operator of site has immunity only if the e-mail he posted by another was intended by that person to be published on website). The above results may be troubling to some, but as has been explained:

> Whether wisely or not, [Congress] made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others. In recognition of the speed with which information may be disseminated and the near impossibility of regulating information content, Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others. While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to

offensive material disseminated through their medium. *Blumenthal v. Drudge*, 992 F.Supp. 44, 49 (D.D.C. 1998)

Because Plaintiff herein seeks to impose liability for defamation on Defendants for publishing information on their site admittedly provided by Defendant Dunn, the Court concludes that Defendants are immune and the claim barred under the CDA. Accordingly, Defendants' motion for judgment on the pleadings is granted.

ORDER

The motion for judgment on the pleadings is **GRANTED** as to defendants LePage, Grotke and Musearts, Inc.

Dated at Newfane, Vermont, this _____ day of March 2008.

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David Howard
Presiding Judge