2012 IL App (3d) 110594-U

Order filed July 3, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

RYAN GAINS and RAYMOND GOOSENS,	)	
	)	Appeal from the Circuit Court
Plaintiffs-Appellants,	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois
v.	)	
	)	Appeal No. 11-0594
	)	Circuit No. 11–L–057
MICHAEL ROMKEY, QUAD CITIES ONLINE,	)	
and THE SMALL NEWSPAPER GROUP,	)	
	)	Honorable Frank R. Fuhr,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ *1* *Held:* The trial court properly dismissed plaintiffs' complaint with prejudice after finding the federal Communications Decency Act provided immunity for defendants who did not qualify as the "publishers" of anonymous comments posted to a website associated with the news service.

¶ 2 Plaintiffs, two Cordova police officers, filed a complaint against defendants Michael

Romkey, Quad Cities Online, and the Small Newspaper Group, although Moline Dispatch Publishing Company, LLC, the publisher of two newspapers, the Dispatch and the Rock Island Argus, was the provider of the website, "Quad Cities Online Website," which invited website comments to be posted by the general public about recent news articles appearing in print. Plaintiffs alleged Michael Romkey, an associate editor, Quad Cities Online, and the Small Newspaper Group, allowed false and defamatory statements to be published about the officers by third parties on an interactive website without insuring the truth of any comments posted on their website.

¶ 3 The trial court granted defendants' 2-619 motion to dismiss, with prejudice, finding the Communications Decency Act (Act) (CDA) gave them immunity from state defamation charges. Plaintiffs appeal the circuit court's granting of defendants' motion to dismiss with prejudice. We affirm.

¶ 4 BACKGROUND

¶ 5 On April 25, 2011, plaintiffs Ryan Gains and Raymond Goosens, police officers for the Cordova Police Department, filed a complaint against defendants alleging defendants operated the online websites Quad Cities Online and The Small Newspaper Group, which improperly allowed anonymous individuals to post defamatory comments concerning recent events reported in various newspaper articles. The complaint alleged defendants published a newspaper article, on January 12, 2011, regarding plaintiffs' arrest of John Hager, which described the officers' sworn statements in court in addition to the contents of Gains' police report regarding this arrest. According to the complaint, after publishing the newspaper article, defendants allowed anonymous "wholly false and defamatory statements" to be published on their websites with "full

knowledge that [the statements] were not true, or in reckless disregard as to the truth or falsity thereof." The complaint alleged defendants had a duty of care to refrain from allowing the posting of false statements about the officers and claimed defendants "maliciously and intentionally caused publication of said false statements in an online publication of wide and general circulation, injuring [p]laintiff's [*sic*] good name and reputation and professional standing." The complaint requested "special and compensatory damages" in the amount of $100,000 plus punitive damages.

¶ 6 On May 25, 2011, defendants jointly filed a section 2-619 motion to dismiss asking the circuit court to dismiss the complaint with prejudice on two grounds. First, defendants asserted federal law rendered them immune from liability in this state court action. Second, defendants' motion argued that the entities named in the complaint did not exist as separate legal entities and could not be sued as a matter of law.

¶ 7 In support of the 2-619 motion to dismiss, defendants submitted the affidavits of Michael Romkey and Gerald J. Taylor. These affidavits described the procedures of the interactive online web service at issue and the role of employees, such as Romkey, who simply "moderate" comments submitted by the public. According to the affidavits, a member of the public must first register to post a comment on the website by providing a valid email address, user name, and password. Then, the registered user must "log in" using that user name and password, and submit their own comments about a particular news story for posting on the website. This submission is held in a queue until reviewed by an editor, such as Romkey, who checks to make certain the registered user's comment is not abusive, obscene, profane, or otherwise offensive as defined by the website's "Notice of Use" terms. If the comment does not fall under one of those

categories, the editors assigned as moderators did not edit or review the comments for any other purpose, and the comments were posted online.

¶ 8 On June 16, 2011, plaintiffs filed a motion entitled, "Resistance to Defendants' Motion to Dismiss," without any supporting affidavits. Plaintiffs' motion argued existing case law was not binding on the court to support defendants' position based on the CDA. Additionally, plaintiffs argued defendants' 2-619 motion to dismiss did not involve only a question of law but, instead, required the court to first resolve material disputed facts before considering the application of the CDA to their state court claim based on defamation. Thus, plaintiff argued the 2-619 motion to dismiss, as a matter of law, should be denied.

¶ 9 On July 26, 2011, the court issued a written order finding that, based on the undisputed facts set out in the pleadings, the CDA applied to and provided immunity for defendants. The court dismissed the complaint with prejudice. Plaintiffs appeal the trial court's dismissal.

¶ 10 ANALYSIS

¶ 11 On appeal, plaintiffs first argue the CDA does not provide a blanket immunity as a matter of law in this situation and assert the court decisions, relied on by defendants in support of the 2-619 motion to dismiss, are not binding on this court. Additionally, plaintiffs contend defendants' affirmative defense requires findings of material, disputed facts precluding the pretrial dismissal of the case.

¶ 12 Section 2-619(a)(9) of the Code of Civil Procedure (Code) permits an involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). Our supreme court has defined an affirmative matter, under a section 2-619(a)(9) motion, as

something in the nature of a defense which negates the cause of action completely. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Thus, proceeding on a motion to dismiss, the moving party admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim. *Id.* (citing *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). In *Van Meter*, the defense raised a claim of immunity under state law, and our supreme court determined an immunity claim was an affirmative matter properly raised in a section 2-619(a)(9) motion to dismiss. *Id.* (citing *Bubb v. Springfield School District 186*, 167 Ill.2d 372, 378 (1995)). This court reviews a ruling on a motion to dismiss under section 2-619 *de novo*. *Kedzie*, 156 Ill. 2d at 116.

¶ 13 In the case at bar, defendants claimed immunity as its affirmative defense, under the CDA (47 U.S.C. § 230). Section (c) of the Act provides, "No 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). The Act defines "interactive computer service" 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).

¶ 14 In the instant case, defendants assert they merely provided an interactive service for a third party to express their own personal comments regarding recent news events covered in the newspapers published by defendants. Consequently, defendants argue they do not qualify as the "publishers" of the registered users' comments posted on their website for purposes of a state cause of action based on defamation. Plaintiffs do not dispute that defendants qualify as the

providers of an interactive internet service under the Act but, rather, argue the cases relied on by defendants are federal cases interpreting the Act which do not create binding precedent on this court. Therefore, plaintiffs request this court to conclude the CDA should not apply to create immunity for defendants in this state court action.

¶ 15 Our supreme court, when interpreting the application the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (1994)), has held the decisions of the federal courts interpreting a federal statute are controlling upon Illinois courts " 'in order that the act be given uniform application.' " *Wilson v. Norfolk & Western Railway Company,* 187 Ill. 2d 369, 374 (1999) (quoting *Busch v. Graphic Color Corp.,* 169 Ill. 2d 325, 335 (1996) and *Bowman v. Illinois Central R.R. Co.,* 11 Ill. 2d 186, 200 (1957)). However, we acknowledge the rule does not apply when there is a split of authority among the federal circuits, and the United States Supreme Court has not ruled on the federal issue resulting in the split of authority in federal court. See *Weiland v. Teletronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 423 (1999). Under those circumstances, this court must analyze the decisions and make a determination as to how to apply the federal act. *Id.* Accordingly, we begin by reviewing federal case law to determine if the federal courts are in agreement regarding the application of the CDA under the undisputed facts involved in the operation of defendants' businesses.

¶ 16 The court in *Barrett v, Fonorow* provides very instructive guidance for this court when considering the application of the CDA as it relates to an Illinois defamation cause of action. *Barrett v, Fonorow,* 343 Ill. App. 3d 1184 (2003). The *Barrett* court carefully reviewed existing case law and found the federal court decisions were in agreement that the CDA (section 230) created a federal immunity to "any state law cause of action that would hold computer service

providers liable for information originating with a third party." *Id.* at 1189 (quoting *Ben Ezra, Weinstein, & Co., v. America Online, Inc.*, 206 F. 3d 980, 984-85 (2000)). In interpreting the CDA, the *Ben Ezra* court stated:

> "Congress clearly enacted § 230 [CDA] to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions. *See Zeran v. America Online,* 129 F.3d, 327, 331 (4th Cir.1997) (in enacting § 230, Congress sought "to encourage service providers to self-regulate the dissemination of offensive material over their services" and to remove disincentives to self-regulation); *Blumenthal v. Drudge,* 992 F.Supp. 44, 52 (D.D.C.1998) (§230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions)." *Ben Ezra*, 206 F. 3d at 986.

¶ 17 Plaintiffs do not direct this court to any federal cases which represent a divergent view of the application of the CDA to provide immunity against state court actions for interactive internet service providers as defined by that Act, but only argue why the current case law, cited by both parties, is not binding on this court. Upon reviewing *Barrett*, as well as several of the federal cases applying the CDA, the decisions reveal a consistent approach in the federal case law holding that Congress intended the CDA to prevent state causes of action where a provider of an interactive computer service disseminates information provided by a third party. *Barrett*, 343 Ill. App. 3d at 1193; see also: *Zeran*, 129 F. 3d at 332; *Blumenthal*, 992 F. Supp. at 52; *Ben Ezra*, 206 F. 3d at 985-6; *Chicago Lawyers' Committee for Civil Rights v. Craigslist*, 519 F. 3d 666, 669-71 (2008); *Doe v. GTE Corp.*, 347 F. 3d 655, 659-61 (2003); *Batzel v. Smith*, 333 F. 3d 1018, 1030 (2003). We conclude the CDA preempts and bars state causes of action for

defamation by granting immunity to internet online service providers, such as defendants in the instant case. See *Barrett*, 343 Ill. App. 3d at 1197.

¶ 18 Finally, plaintiffs argue that a motion to dismiss, filed pursuant to section 2-619, can only be granted when there are no genuine issues of material fact in dispute, thus entitling the moving party to dismissal as a matter of law. *Rochon v. Rodriguez*, 293 Ill. App. 3d 952, 958 (1997). The trial court may consider pleadings, affidavits, and deposition transcripts when ruling on a motion to dismiss. *Safeco Insurance Company v. Jelen*, 381 Ill. App. 3d 576, 583 (2011). If the facts asserted in an affidavit are not refuted by counter-affidavit, the court will take those facts as true regardless of any contrary unsupported allegations in the plaintiff's pleadings. *Id.* Plaintiffs contend that, upon review of the complaint and affidavits, there exists a genuine issue of disputed facts as to whether defendants, in the instant case, are a computer internet service provider or whether they are "information content providers," under the CDA.

¶ 19 Section 230(f)(2) of the CDA provides the definition for "interactive computer service" stating the term means 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). The CDA defines the term "information content provider" as any 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). There are several cases rejecting plaintiffs' notion that simply screening material supplied by another, without contributing any additional content, before dissemination causes the screening agent to qualify as the "information

content provider" of alleged defamatory material. See *Barrett*, 343 Ill. App. 3d at 1197; *Batzel*, 333 F. 3d at 1031; *Blumenthal*, 992 F. Supp. at 50; *Ben Ezra*, 206 F. 3d at 986.

¶ 20 Here, the undisputed facts show Moline Dispatch Publishing Company, LLC, provided online websites Quad Cities Online and The Small Newspaper Group, for the public to post their personal comments and views about particular news articles. The uncontested facts demonstrate that editors for the Moline Dispatch were assigned to moderate the comments submitted by others to the website in order to assure the comments were not abusive, obscene, profane, or otherwise offensive, as defined by the website's "Notice of Use" terms. However, other than screening these comments, the editors did not modify the comments prepared by third parties or contribute to the content whatsoever. Defendants merely disseminated the comments made by third parties. As such, under section (c) of the Act, defendants do not qualify as the speaker or publisher of information provided by a third party (47 U.S.C. § 230(c)(1)), but are merely the interactive computer service which enables access by multiple users, as defined under section (f)(2) of the Act (47 U.S.C. § 230(f)(2)). Thus, we conclude the trial court correctly found defendants were protected under the immunities provided in the CDA.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, we affirm the trial court's dismissal of plaintiffs' complaint with prejudice.

¶ 23 Affirmed.